# THE DIGEST

OF

# ENGLISH CASE LAW.

# THE DIGEST

OF

# ENGLISH CASE LAW

CONTAINING THE

## REPORTED DECISIONS

OF THE

## SUPERIOR COURTS,

AND

## A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

## 1897.


UNDER THE GENERAL EDITORSHIP OF

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| [1891] A. C. | Law Reports, Appeal Cases (1891 onwards). |
| A. & E. | Adolphus and Ellis. Q. B. |
| Addams Ecc. | Addams. Ecclesiastical. |
| Aleyn | Aleyn. K. B. |
| Amb. | Ambler. Ch. |
| Anderson | Anderson. C. P. |
| Andrews | Andrews. K. B. |
| Anst. | Anstruther. Ex. |
| App. Cas. | Law Reports, Appeal Cases (1876—1890). |
| Arn. | Arnold. C. P. |
| Arn. & H. | Arnold and Hodges. Q. B. |
| Asp. M. C. | Aspinall. Maritime Cases. |
| Atk. | Atkyns. Ch. |
| B. & Ad. | Barnewall and Adolphus. K. B. |
| B. & Ald. | Barnewall and Alderson. K. B. |
| B. & C. | Barnewall and Cresswell. K. B. |
| B. & S. | Best and Smith. Q. B. |
| B. C. C. | Lowndes and Maxwell. Bail Court. |
| B. C. Rep. | Saunders and Cole. Bail Court. |
| Ball & B. | Ball and Beatty. Ch. (Ireland). |
| Bar. & Arn. | Barron and Arnold. Election. |
| Bar. & Au. | Barron and Austin. Election. |
| Barnard. Ch. | Barnardiston. Ch. |
| Barnard. K. B. | Barnardiston. K. B. |
| Batty | Batty. K. B. (Ireland). |
| Beat. | Beatty. Ch. (Ireland). |
| Beav. | Beavan. Rolls Court. |
| Bell, C. C. | Bell. Crown Cases. |
| Bing. | Bingham. C. P. |
| Bing (N.C.) | Bingham. New Cases. C. P. |
| Bligh | Bligh. H. L. |
| Bos. & P. | Bosanquet and Puller. C. P. |
| Bos. & P. (N.R.) | Bosanquet and Puller. New Reports. C. P. |
| Bott P. L. | Bott's Poor Laws. |
| Br. & B. | Broderip and Bingham. C. P. |
| Br. & Lush. | Browning and Lushington. Adm. |
| Bro. C. C. | Brown. Ch. |
| Bro. P. C. | Brown. Cases in Parliament. |
| Buck | Buck. Bky. |
| Bull. N. P. | Buller's Law of Nisi Prius. |
| Bulst. | Bulstrode. K. B. |
| Bunb. | Bunbury. Ex. |
| Burr. | Burrows. K. B. |
| Burr. S. C. | Burrows. Settlement Cases. |

| | |
|---|---|
| [1891] Ch. | Law Reports, Chancery (1891 onwards). |
| C. B. | Common Bench Reports. |
| C. L. R. | Common Law Reports (1853—1855). |
| C. P. D. | Law Reports, Common Pleas Division (1875—1880). |
| Cab. & E. | Cababé and Ellis. Nisi Prius. |
| Cald. S. C. | Caldecott. Settlement Cases. |
| Camp. | Campbell. Nisi Prius. |
| Car. & K. | Carrington and Kirwan. Nisi Prius. |
| Car. & M. | Carrington and Marshman. Nisi Prius. |
| Car. & P. | Carrington and Payne. Nisi Prius. |
| Carter | Carter. C. P. |
| Carth. | Carthew. K. B. |
| Cary | Cary. Ch. |
| Cas. t. Hardwicke | Cases temp. Hardwicke. K. B. |
| Cas. t. Talbot | Cases temp. Talbot. Ch. |
| Ch. Cas. | Cases in Chancery. |
| Ch. Cas. Ch. | Choice Cases in Chancery. |
| Ch. D. | Law Reports, Chancery (1876—1890). |
| Ch. Pre. | Precedents in Chancery. |
| Ch. Rep. | Reports in Chancery. |
| Chit. | Chitty. Bail Court. |
| Cl. & F. | Clark and Finnelly. H. L. |
| Co. Rep. | Coke. K. B. |
| Coll. C. C. | Collyer. Ch. |
| Colles | Colles' Cases in Parliament. |
| Colt. | Coltman. Registration. |
| Comb. | Comberbach. K. B. |
| Comyns | Comyns. K. B. |
| Coop. t. Brough. | Cooper. Cases temp. Brougham. |
| Coop. t. Cott. | Cooper. Cases in Chancery temp. Cottenham. |
| G. Cooper | Ch. |
| C. P. Cooper | C. P. Cooper. Ch. |
| C. & J. | Crompton and Jervis. Ex. |
| C. & M. | Crompton and Meeson. Ex. |
| C. M. & R. | Crompton, Meeson and Roscoe. Ex. |
| Con. & L. | Connor and Lawson. Ch. (Ireland). |
| Cooper | Cooper. Ch. |
| Ct. of Sess. Cas. | Court of Session Cases (Scotland). |
| Cowp. | Cowper. K. B. |
| Cox | Cox. Ch. |
| Cox, C. C. | Cox. Crown Cases. |
| Cr. & Ph. | Craig and Phillips. Ch. |
| Craw. & D. | Crawford and Dix (Ireland). |
| Curt. | Curteis. Eccl. |
| D. P. C. | Dowling. Practice Cases. |
| D. (N.S.) | Dowling. Practice Cases, New Series. |
| D. & L. | Dowling and Lowndes. Practice Cases. |
| D. & R. | Dowling and Ryland. K. B. |
| Daniell | Daniell. Ex. Eq. |
| Dans. & Ll. | Danson and Lloyd. Mercantile. |
| Dav. & M. | Davison and Merivale. Q. B. |
| Deac. | Deacon. Bky. |
| Deac. & C. | Deacon and Chitty. Bky. |
| Dears. & B. | Dearsley and Bell. Crown Cases. |
| Dears. C. C. | Dearsley. Crown Cases. |
| De G. | De Gex. Bky. |
| De G. F. & J. | De Gex, Fisher, and Jones. Ch. App. |
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| De G. J. & S. | De Gex, Jones, and Smith. Ch. App. |
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| De G. & Sm. | De Gex and Smale. Ch. |

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El. Bl. & El. ..... Ellis, Blackburn and Ellis. Q. B.
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Esp. ..... Espinasse. Nisi Prius.
Ex. ..... Exchequer Reports (1848—1856).
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Fl. & K. ..... Flanagan and Kelly. Rolls (Ireland).
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H. & M. ..... Hemming and Miller. Ch.
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H. & W. ..... Harrison and Wollaston. Bail Court.
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Hag. Ecc. ..... Haggard. Eccl.
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Ir. C. L. R. .....Irish Com. Law (1850—1866).
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[1894] Ir. R. .....Irish Law Reports (1894 onwards).
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K. & G. .....Keane and Grant. Registration.
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,, Ex. .....Exchequer.
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,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

From 1831 onwards.

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| Lit. Rep. ..... | Littleton. C. P. |
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| M. & M. ..... | Moody and Malkin. Nisi Prius. |
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| M. & Rob. ..... | Moody and Robinson. Nisi Prius. |
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| M. & Sc. ..... | Moore and Scott. C. P. |
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| M'Cle. & Y. ..... | M'Cleland and Young. Ex. |
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Sm. & G. .....Smale and Giffard. Ch.
Smith .....Smith. K. B.
Smith .....Smith. Registration.

| | |
|---|---|
| Spinks | Adm. |
| St. Tri. | State Trials. |
| Stark. | Starkie. Nisi Prius. |
| Str. | Strange. K. B. |
| Styles | Styles. K. B. |
| Swabey | Swabey. Adm. |
| Sw. & Tr. | Swabey and Tristram. Probate. |
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| T. Raym. | Sir T. Raymond. K. B. |
| Tam. | Tamlyn. Rolls Court. |
| Taunt. | Taunton. C. P. |
| Term Rep. | Durnford and East. K. B. |
| Tothill | Tothill. Ch. |
| Turn. & R. | Turner and Russell. Ch. |
| Tyrw. | Tyrwhitt. Ex. |
| Tyrw. & G. | Tyrwhitt and Granger. Ex. |
| Vent. | Ventris. K. B. |
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| Ves. sen. | Vesey, sen. Ch. |
| Ves. | Vesey, jun. Ch. |
| V. & B. | Vesey and Beames. Ch. |
| W. Bl. | Sir Wm. Blackstone. K. B. |
| W. Jones | Sir W. Jones. K. B. |
| W. Kelynge | Sir W. Kelynge. Ch. |
| W. R. | Weekly Reporter. |
| W. W. & D. | Wilmore, Wollaston and Davison. K. B. |
| W. W. & H. | Wilmore, Wollaston and Hodges. K. B. |
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| Y. & C. | Younge and Collyer. Eq. Ex. |
| Y. & C. C. C. | Younge and Collyer. Ch. |
| Y. & J. | Younge and Jervis. Ex. |
| Yelv. | Yelverton. K. B. |
| Younge | Younge. Ex. Eq. |

# The Digest

OF

# ENGLISH CASE LAW.

## LIMITATIONS (STATUTES OF).

[By A. H. BITTLESTON.]

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## A. ACTIONS ON SIMPLE CONTRACT, ACTIONS OF TORT, AND OTHER PERSONAL ACTIONS AND PROCEEDINGS.

*By* 21 *Jac.* 1, *c.* 16, *s.* 3, *actions of account, and on the case (other than slander), actions of debt on lending, or contract without specialty, or for rent arrear, are to be brought within six years after the cause of action. By* 3 *&* 4 *Will.* 4, *c.* 42, *s.* 3, *actions of debt on an award (where the submission is not by specialty), or for copyhold fines, or an escape, or money levied on a fi. fa., are also to be brought within six years. By* 21 *Jac.* 1, *c.* 16, *s.* 3, *actions of assault, battery, wounding, or imprisonment, are to be brought within four years; and actions on the case for words within two years.*

### 1. CONSTRUCTION AND EFFECT OF STATUTES.

*See also* post, **B**, I., col. 148.

**Barring of Remedy, not Right.**]—In actions for debts, the statute bars the remedy only, not the debt. *Higgins* v. *Scott*, 2 B. & Ad. 413; 9 L. J. (o.s.) K. B. 262. *Wainford* v. *Barker*, 1 Ld. Raym. 232. *Spears* v. *Hartly*, 3 Esp. 81.

Where a foreign statute of limitations requires proceedings to be taken within a shorter period than that prescribed by the English statute, but like the English statute does not affect causes of action, but only the remedy in respect of them, a foreign judgment declaring that a claim is barred by the local statute of limitations is no bar to an action in this country for that same claim within the period prescribed by the English law. *Harris* v. *Quine*, 10 B. & S. 644; 38 L. J., Q. B. 331; L. R. 4 Q. B. 653; 20 L. T. 947; 17 W. R. 967.

A firm of attorneys in the Isle of Man was retained by the defendant, in 1858, to conduct a suit in one of the Manx courts in which he was defendant. The suit was dismissed in April, 1861; in September, 1861, the plaintiff in the suit appealed to a superior court, and the attorneys continued to act for the defendant, and conducted the appeal on his behalf up to the 1st of October, 1862. By the Manx statute law an action on a simple contract brought in the temporal courts of the island must be commenced within three years of the accrual of the cause of action. The attorneys brought an action in one of the Manx courts more than three years after October, 1862, and the court decided that the action was barred by the statute. They afterwards commenced an action in this country in January, 1868, to which the defendant pleaded, first, the judgment of the Manx court, and, secondly, the English Statute of Limitations:—Held, first, that, as the Manx statute barred the remedy only, and did not extinguish the debt, the judgment of the Manx court was no bar; and, secondly, that, under the circumstances, there was a continuous employment of the attorneys, and that therefore none of the items were barred by the statute. *Ib.*

**Open Account.**]—The Statute of Limitations is no plea in bar to an open account. *Scudamore* v. *White*, 1 Vern. 456.

**Equitable Assignee of Leaseholds.**] — The liability of, is by simple contract, and subject to the limitation of six years. *Sanders* v. *Benson*, 4 Beav. 350.

**When Statute Pleaded, Onus of Proof on Plaintiff to shew the Debt not within It.**]—See *Wilby* v. *Henman*, col. 147.

**"Actions upon the Case for Words," What are.**]—See *Saunders* v. *Edwards*, col. 17.

## II. COMPUTATION OF PERIOD OF LIMITATION.

### 1. Time when Statute begins to Run.

#### a. In Actions on Bills and Notes.

**Promissory Note—Payable "on Demand."**]—A promissory note payable on demand is payable immediately, and the Statute of Limitations runs from the date of the note, and not from the time of demand. *Christie* v. *Fonswick*, 1 Selw. N. P. 136, 361.

So, a note, payable on demand, with lawful interest, is payable immediately, and therefore the statute runs from the date of the note. *Norton* v. *Ellam*, 2 M. & W. 461; M. & H. 69; 6 L. J., Ex. 121; 1 Jur. 433.

—— **"Two Years after Demand."**]—But where a note is made payable "two years after demand," the statute does not begin to run until the two years after the demand have elapsed. *Thorpe* v. *Coombe*, 8 D. & R. 347; R. & M. 388; 29 R. R. 485.

—— **"Three Months after Demand."**] — In May, 1857, J. R. gave to R. R. a promissory note for payment of 150*l.* three months after demand, no interest being reserved. J. R. died in 1869, and R. R. in 1878. The note was in R. R.'s possession at his death, and he had indorsed upon it receipts in November, 1857, and August, 1858, each for half a year's interest. It appeared that no other interest had ever been paid. J. R.'s estate being administered by the court, R. R.'s executor claimed to prove on the promissory note: — Held, on appeal, that the admissions by the payee of the payment of interest were evidence of a demand having been made in 1857 so as to make the 150*l.* immediately payable, and that the Statute of Limitations was a bar to the claim. *Rutherford, In re, Brown* v. *Rutherford*, 49 L. J., Ch. 654; 14 Ch. D. 687; 43 L. T. 105; 28 W. R. 802—C. A.

Semble, that apart from the Statute of Limitations the claim ought to have been rejected as a stale demand. *Ib.*

—— **"Five Years after Date."**]—A promissory note given by a defendant to the plaintiff, payable five years after date, for value received, is evidence of an account stated, against which the statute does not commence running until the maturity of the note. *Fryer* v. *Roe*, 12 C. B. 437.

—— **"After Sight."**]—The statute is no bar to an action on a note payable after sight, unless a presentation for payment six years before the action is proved. *Holmes* v. *Kerrison*, 2 Taunt. 323; 11 R. R. 594.

Where a note was payable after sight, with interest thereon, and the interest was duly paid for several years:—Held, that the note must be taken to have been acted upon, according to its form and tenor, and, therefore, that the presentment for sight must have been made before the interest was paid, and that the payment became due upon the note at the prescribed date after such presentment, and that the statute would begin to run from the time the payment so became due. *Way* v. *Bassett*, 5 Hare, 55; 15 L. J., Ch. 1; 10 Jur. 891.

—— **On Conditions.**]—A note was made more than six years ago, and deposited with a banker, to be delivered to the payee on his producing a certain other note cancelled; the cause of action to the payee on the first note accrues on receiving it from the banker, and is not barred by the lapse of six years from the date. *Savage* v. *Aldren*, 2 Stark. 232; 19 R. R. 707.

—— **Falling Due on Sunday — Mercantile Usage — Ord. LXIV. r. 3.**]—The plaintiff in the action sued on a promissory note at three months, dated the 11th March, 1874; the note was therefore primâ facie due on the 14th June of the same year. The 14th of June was a Sunday. The writ in the action bore date 14th June, 1880, which was a Monday. It was contended that the right of action was barred by the Statute of Limitations:—Held, that the action was barred, as the mercantile usage in the matter of days of grace had the effect of law, and that Ord. LXIV. r. 3, did not extend the time fixed by the Statute of Limitations. *Morris* v. *Richards*, 45 L. T. 210; 46 J. P. 37.

**On Note given as Security for Banking Account.**]—See *Hartland* v. *Jukes*, col. 9.

**Against Right of Party to Note as against Co-Surety and Principal.**]—See *Davies* v. *Humphries*, col. 10.

**Bill of Exchange—Days of Grace.**]—The three days' grace allowed by the custom of merchants is allowable on bills drawn and payable in Scotland. The limitation of an action on such a bill, therefore, only begins to run from the third or last day of grace. *Ferguson* v. *Douglas*, 6 Bro. P. C. 276.

—— **Payable at Future Period.**]—Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money, although six years have elapsed since the time when the loan was advanced; the statute beginning to operate only from the time when the money was to be repaid, i.e. when the bill became due. *Wittersheim* v. *Carlisle* (*Countess*), 1 H. Bl. 631.

—— **Non-Acceptance.**]—A holder of a bill of exchange, on non-acceptance, and protest, and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the nonpayment of the bill when due, and the statute, therefore, runs against him from the former, and not from the

latter period. *Whitehead* v. *Walker*, 9 M. & W. 506; 11 L. J., Ex. 168.

—— **Blank Bill.**]—A defendant, in 1840, gave A. for value his acceptance in blank on a 5*s.* stamp. A., in 1852, filled in his own name as drawer for 200*l.*, at five months. The defendant being sued on the bill by an innocent indorsee for value, pleaded the statute:—Held, that the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank, and that the plaintiff was entitled to recover. *Montague* v. *Perkins*, 22 L. J., C. P. 187; 17 Jur. 557; 1 W. R. 437.

—— **Dishonour of.**]—K. being indebted to the plaintiff and to the defendant, and also to a banking company, it was agreed between all the parties that, to secure K.'s debt to the company, the defendant should draw upon K. three bills of exchange, payable to the plaintiff, and that the plaintiff should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiff on the bills, and the plaintiff, in 1851, paid the amount:—Held, that the plaintiff was barred by the statute from suing the defendant as drawer. *Webster* v. *Kirk*, 17 Q. B. 944; 21 L. J., Q. B. 159; 16 Jur. 247.

—— **Presentment and Dishonour of—Delay.**]—B. was possessed of considerable funds invested in consols. In consequence of doubts having arisen as to whether B. was married or not, her bankers refused to receive and pay the dividends on those funds to her until they were satisfied of the fact of her not being married. In August, 1872, in order to raise money, B., who was living in France, drew a document purporting to be a bill of exchange, payable on demand, for 7,000*l.* in the Bank of England "on account of the dividends and interest due on the capital and dividends registered in the books of" the Bank of England. B. had no account with the bank. The document was in April, 1873, indorsed to G., with whom B. was living, and by him was indorsed in August, 1876, to the claimant. These indorsements purported to be for value, and the claimant, who was not cross-examined, deposed that the indorsement to him had been made to guarantee the payment of loans and advances made by him. B. died intestate in France in 1878. On the 2nd February, 1884, the document was presented on behalf of the claimant to the Bank of England, and on payment being refused it was duly protested. A claim in respect of the amount due under the document was made upon B.'s estate, which was being administered by the court:—Held, that the claim was not barred by the Statute of Limitations, as the time only began to run from the presentment and dishonour, but that G. had no right to deal with the bill, and that the lapse of time between the indorsement to G. and that to the claimant, and before presentment, and other circumstances of suspicion, were such as to affect the claimant with the equities between B. and G., and to disentitle him to receive payment. *Boyse, In re, Crofton* v. *Crofton*, 56 L. J., Ch. 135; 33 Ch. D. 612; 55 L. T. 391; 35 W. R. 247.

—— **Action against Administrator of Acceptor.**]—Where the bill prayed an account on foot of two bills of exchange, accepted by A., deceased, and due and unpaid at the time of his death; and of the costs and expenses incurred by the plaintiff as administrator of A. down to the time when the grant of administration was revoked; and that the amount of the bills due to the plaintiff as a creditor of A., and of the plaintiff's expenses as administrator, might be paid out of A.'s personal estate. It appeared that A. had no real estate. The expenses, &c., consisted nearly altogether of the plaintiff's costs in a cause instituted by him as administrator in 1838, for discovery of assets, which, after issue joined and publication passed, was frustrated by the present defendants, who were also defendants in that cause, and who, being A.'s next of kin, and in possession of his assets, for the purpose of avoiding a decree, lodged in the Prerogative Court the will of A., which they had previously suppressed, and procured a revocation of the grant of administration to the plaintiff, and a new grant to themselves cum testamento annexo. They now pleaded the Statute of Limitations as to the bills of exchange:—Held, that the plea should be allowed, as the plaintiff did not appear to have been under disability, and had not proceeded for his demand within six years after the right of action accrued. *Howlett* v. *Lambert*, 2 Ir. Eq. R. 254.

—— **In case of Bill accepted after Death of Payee, Time runs only after Letters of Administration granted.**]—See *Murray* v. *E. India Co.*, col. 49.

—— **Action for not Accepting.**]—The Statute of Limitations, in an action by drawer against drawee for not accepting, does not begin to run from the time of refusal to accept or pay the bill, but from the time when the plaintiff sustains any damage from the breach of the implied promise to indemnify him. *Huntley* v. *Sanderson*, 1 C. & M. 489; 3 Tyr. 469; 2 L. J., Ex. 204.

—— **On Contract to indemnify Accommodation Acceptor.**]—See *Reynolds* v. *Doyle*, col. 9.

—— **When Acceptor of Foreign Bill is here when Bill due, Time runs from then.**]—See *Don* v. *Lippmann*, col. 38.

**Undated Cheque.**]—An undated cheque was given by C. B. to A. J. P. in March, 1878, and accepted by the latter in discharge of a larger sum. C. B. went abroad in March, 1878, and died there in 1884. At the time of drawing the cheque C. B. had not sufficient moneys at his bank to meet it, and was negotiating a loan, which he expected shortly to complete, out of which the cheque would be paid. The loan was not completed. A. J. P. was informed of that fact. The cheque remained undated, and was never presented for payment. In 1885 A. J. P. commenced proceedings upon the cheque:—Held, that the Statute of Limitations barred the claim, as the six years began to run when the letter was received stating that the loan would not be completed, and had long since elapsed. *Bethell, In re, Bethell* v. *Bethell*, 56 L. J., Ch. 334; 34 Ch. D. 561; 56 L. T. 92; 35 W. R. 330.

**Money Lent in Form of Cheque.**]—The plaintiff, in pursuance of an agreement to lend money to the defendant, sent him a cheque on the 14th

June, 1861, which was received by him on the following day, and presented for payment and paid on the 21st June, 1861. On the 21st June, 1867, an action was commenced to recover the amount of the cheque:—Held, that the cheque not having been given in payment of any pre-existing debt, the cause of action did not arise till it was actually paid, and that the action was not barred by the statute. *Garden* v. *Bruce*, 37 L. J., C. P. 112; L. R. 3 C. P. 300; 17 L. T. 544; 16 W. R. 366.

**b. In Actions on Contracts of Indemnity or Guarantee.**

**Indemnity.**]—A right to sue upon a contract of indemnity against the costs of an action is first vested, when the party to whom the indemnity is given pays the bill of costs, and not when it is delivered to him, and the statute therefore does not begin to run against his right of action until after such payment. *Collinge* v. *Heywood*, 1 P. & D. 502; 9 A. & E. 633; 2 W. W. & H. 107; 8 L. J., Q. B. 98.

Upon a contract to indemnify an accommodation acceptor, the statute begins to run from the time at which the plaintiff is damnified by actual payment, and not from the day when the bill became payable. *Reynolds* v. *Doyle*, 2 Scott (N.R.) 45; 1 Man. & G. 753; 1 Drink. 1; 4 Jur. 992.

A note being given by A. and a surety to a banker, and a contemporaneous memorandum of agreement, shewing the note to be given as security for the banking account to be kept by A. with the bank:—Held, that the statute did not run from the time when A. became indebted to the bank, but from the time when the balance was struck. *Hartland* v. *Jukes*, 1 H. & C. 667; 3 F. & F. 149; 32 L. J., Ex. 162; 9 Jur. (N.S.) 180; 7 L. T. 792; 11 W. R. 519.

When a party is called upon to pay the debt of another, his remedy over against such other runs from the time of actual payment by him, and not from the time when he became merely liable to pay. *Angrove* v. *Tippett*, 11 L. T. 708.

—— **Action by Drawer of Bill against Drawee for not accepting.**]—See *Huntley* v. *Sanderson*, col. 8.

—— **Debtor and Co-Debtor.**]—As between co-debtors the Statute of Limitations commences to run, not from the accrual of the joint debt to the creditor, but from the time when one of the co-debtors is damnified by being compelled to pay more than his just share of the common debt. Sect. 14 of the Mercantile Law Amendment Act, 1856, is intended only to give protection against the common creditor, and does not affect the rights and liabilities of the co-contractors inter se. *Wolmershausen* v. *Gullick* (62 L. J., Ch. 773; [1893] 2 Ch. 514) approved. *Gardner* v. *Brooke*, [1897] 2 Ir. R. 6—C. A.

—— **Surety and Co-Surety.**]—The Statute of Limitations does not begin to run as against a surety claiming contribution until his own liability is ascertained. *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753. See also *Robinson* v. *Harkin*, col. 45.

—— **When Paid by Instalments.**]—H., and plaintiff and D., as his sureties, joined in making a promissory note. The amount of the principal and interest due on the promissory note was paid by the plaintiff more than six years before the commencement of the suit, with the exception of 30*l.*, which was paid by him during that period. The plaintiff having brought an action for contribution against D.:—Held, that the plaintiff was entitled to recover only to the extent of 30*l.*, which had been paid within the six years, and that the statute was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion. *Davies* v. *Humphries*, 6 M. & W. 153; 9 L. J., Ex. 263; 4 Jur. 250.

Held, also, in an action on the same note against the principal, that the statute was a bar to all except 30*l.*, as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use. *Ib.*

—— **Guarantee.**]—A., in consideration of B.'s supplying C. with goods, guaranteed to B. the payment of the price. B. having supplied C. with goods, and C. having neglected to pay the price, A. in consideration of B.'s extending to C. a period of two years and upwards for the liquidation of his debt, agreed to reserve to B. all right and claim which B. might then have against him, A., by virtue of the security previously entered into on C.'s behalf, and to be bound by it, if, at the expiration of such period, B.'s demand should not have been fully discharged:—Held, that A.'s liability attached upon default made by C. after the expiration of two years and a few days; that B.'s right of action then accrued; and that, therefore, the statute then began to run. *Holl* v. *Hadley*, 4 N. & M. 515; 2 A. & E. 758; 4 L. J., K. B. 126.

**Payment on Demand—Present Debt—Collateral Sum—Condition Precedent.**]—Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action. Secus, where there is a promise to pay a collateral sum on demand. *Birks* v. *Trippet* (1 Wms. Saund. 32) followed. *Brown's Estate, In re, Brown* v. *Brown*, 62 L. J., Ch. 695; [1893] 2 Ch. 300; 3 R. 463; 69 L. T. 12; 41 W. R. 440.

In 1816 G. shipped goods on board a vessel, chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co. in London, who were to reimburse themselves their charges and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.*, they and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guarantee:—"Messrs. B. & Co., you having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.*, in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you or from any other circumstances." B. & Co. therefore accepted and paid a bill for 850*l.*, drawn by G. on them in favour of the

defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner, (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay) not to deliver any part of the cargo without his authority; they thereupon sold the cargo and paid the owner's demand for freight, and in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the parties, under legal advice, up to 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the 850*l.* due by the guarantee, with interest, and their share of the expenses incurred by the law proceedings, and, on their refusing to pay, brought an action against them on the guarantee:—Held, that the statute began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendant's legal liability depended, and therefore it was a bar to the action. *Colvin* v. *Buckle*, 8 M. & W. 680; 11 L. J., Ex. 33.

**Construction—Mortgage Debt.**]—In January, 1881, A. executed a mortgage to secure an advance of 2,000*l.* and interest which contained the usual covenants for payment of the principal and interest. On 9th May, 1882, B. executed a document in which he was expressed to "guarantee" to the mortgagee "repayment of the sum of 2,000*l.* and interest for the same." A. paid off 600*l.* of the mortgage debt and also the interest down to July, 1891. The mortgagee in October, 1891, called upon B. to pay the balance remaining due with interest under his guarantee, and upon his refusal to do so the mortgagee in May, 1892, brought an action against him to recover the same:—Held, upon the construction of the document of 9th May, 1882, that B. made himself answerable for the repayment of the 2,000*l.* and interest in accordance with the terms of the mortgage; that as the mortgagee did not bind himself not to sue A., he must be treated as having agreed to abstain from suing for a reasonable time; that such time expired long before the commencement of six years before the action was brought, and that therefore the mortgagee's claim against B. was barred by the Statute of Limitations (21 Jac. 1, c. 16). *Henton* v. *Paddison*, 3 R. 450; 68 L. T. 405.

### c. In Actions on Solicitors' Bills.

**From Completion of Work.**]—The cause of action in respect of work done by a solicitor arises upon the completion of the work, and not at the expiration of one month from the delivery of a bill of costs, and therefore the Statute of Limitations runs from the completion of the work. *Coburn* v. *Colledge*, 66 L. J., Q. B. 462; [1897] 1 Q. B. 702; 76 L. T. 608; 45 W. R. 488—C. A.

**Conduct of Case—Items prior to Six Years.**]—Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, and determinable only on reasonable notice; and where no such notice has been given, the statute is no bar to that part of the demand which is for business done more than six years before the commencement of an action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action. *Harris* v. *Osbourn*, 2 C. & M. 629; 4 Tyr. 445; 3 L. J., Ex. 182.

Where costs are incurred in a suit, the statute does not begin to run against the earlier items, until the suit is terminated. *Martindale* v. *Falkner*, 2 C. B. 706.

—— **Effect of Appeal.**]—Two attorneys in partnership having been retained to defend an action, it was decided in favour of the defendant, upon which the plaintiffs appealed. While the appeal was pending, the partnership was dissolved, and the proceedings were continued by one of the partners separately:—Held, that the partners were not entitled to sue for their costs till the appeal was decided, so that the statute did not until then begin to run as against their claim. *Harris* v. *Quine*, 10 B. & S. 644; 38 L. J., Q. B. 331; L. R. 4 Q. B. 653; 20 L. T. 947; 17 W. R. 967.

**Case never Concluded.**]—A solicitor was retained in a chancery suit in which his client was a defendant, and an order was made that a supplemental bill should be filed, to make the next of kin parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made the solicitor's client died:—Held, in an action by the solicitor, against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the statute. *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239.

**Addition of Item within Six Years.**]—A proctor sued for the amount of his bill, which was chiefly for work done in prosecuting an appeal to judgment: after the judgment a communication had been made by the adverse party to the proctor, and attended to by him, respecting the costs, and an item in respect of this transaction was added to his bill. No previous part of the demand accrued within six years:—Held, that the latter item did not take the rest out of the statute. *Rothery* v. *Munnings*, 1 B. & Ad. 15; 8 L. J. (o.s.) K. B. 386.

A. employed an attorney in procuring him money to pay off a mortgage. In an action against A. for the bill of costs, it appeared by items in the bill that the attorney had made applications in several quarters for this purpose, but without success, after which he wrote to A. informing him what he had done and requesting to know his wishes. This item bore date more than six years before action. The next, dated within six years, was, "Paid the postage of your answer." By subsequent items it appeared that further endeavours were made by the attorney to raise the money. Ultimately it was obtained:—Held, that the transaction was not one in which the attorney's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take these out of the statute. *Phillips* v. *Broadley*, 9 Q. B. 744; 16 L. J., Q. B. 72; 11 Jur. 264.

**From last Item in Bill, where Employment Continuous.**]—See *Harris* v. *Quine*, col. 4.

### d. In Trover.

**From Time of Conversion.**]—The statute is a bar to an action of trover commenced more than six years after the conversion, though the plaintiff was ignorant of the conversion till within six years; the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. *Granger* v. *George*, 7 D. & R. 729; 5 B. & C. 149; 29 R. R. 196. And see *Compton* v. *Chandless*, 4 Esp. 20.

In trover the statute runs from the time of conversion, and not from the time of sale. *Denys* v. *Shuckburgh*, 4 Y. & C. 42; 5 Jur. 21.

A.'s furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A.'s friends afterwards purchased it from the judgment creditor, and the sheriff's officers then returned and left the goods in A.'s possession, who remained in undisturbed enjoyment for more than six years. After his death the furniture was claimed by his friends, who had purchased it, and, adversely, by his administratrix:—Held, that the rights of the former were not barred by the statute, and that as A.'s possession was rightful, the statute could only apply from six years from a conversion. *Edwards* v. *Clay*, 28 Beav. 145.

A mortgagor of boats, permitted by the mortgagee to remain in possession, sold them. They were subsequently seized by a canal company for rates due from the purchaser, and sold:—Held, in an action of trover by the mortgagee against the company, that the sale, and not the seizure, was the fact committed from which the time of limitation prescribed by the company's act began to run. *Fraser* v. *Swansea Canal Navigation Co.*, 1 Ad. & E. 354; 3 N. & M. 391; 3 L. J., K. B. 153.

**From Seizure of Goods as Smuggled, not from Order of the Exchequer for Re-delivery.**]—See *Saunders* v. *Saunders*, col. 74.

**From Refusal of Title Deeds.**]—The plaintiff's son, without his father's knowledge in 1881, wrongfully obtained possession of a lease of certain premises of which his father was in possession, and deposited it with B. to secure a loan from B. to him. In 1889 B. became bankrupt, and his trustee in bankruptcy transferred the lease to the defendant. The plaintiff, having subsequently discovered his loss, demanded the return of the lease from the defendant, and, being refused, brought an action for conversion, to which the defendant pleaded the Statute of Limitations:—Held, that the plaintiff's cause of action against the defendant did not accrue until the demand and refusal to give up the lease, and that the Statute of Limitations was therefore no bar to the action. *Wilkinson* v. *Verity* (L. R. 6 C. P. 206) explained. *Miller* v. *Dell*, 60 L. J., Q. B. 404; [1891] 1 Q. B. 468; 63 L. T. 693; 39 W. R. 342—C. A.

### e. In Detinue.

**Demand and Refusal.**]—Goods having been bailed by the plaintiffs to the defendant for safe custody, he wrongfully sold them; and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which he refused:—Held, in an action of detinue for the goods that the statute ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course by the refusal to deliver up on request. *Wilkinson* v. *Verity*, 40 L. J., C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604.

Title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs, on discovering the loss of the deeds in 1882, demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations:—Held, that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run. *Spackman* v. *Foster*, 52 L. J., Q. B. 418; 11 Q. B. D. 99; 48 L. T. 670; 31 W. R. 548; 47 J. P. 455.

**—— Title Deeds—After Bankruptcy.**]—Under 5 Geo. 2, c. 30, a commission of bankruptcy issued against a person entitled in remainder to real property, and no assignee was appointed; but neither under that act nor under 6 Geo. 4, c. 16, was any bargain and sale of the future real estate executed by the commissioners. In 1844, after the death of the assignee, the estate vested in the bankrupt in possession, and he afterwards (before the 12 & 13 Vict. c. 106) conveyed it to the defendant. In 1853 the bankrupt, without having obtained his certificate, died. No assignee had been reappointed since the estate came to him until 1859, when assignees were appointed, and they having recovered the property in ejectment, demanded the deeds, and on refusal brought detinue against the defendant, who pleaded, denying the assignees' property, and also the Statute of Limitations:—Held, that the action was maintainable, and that there was no defence under the statute. *Plant* v. *Cotterill*, 5 H. & N. 430; 29 L. J., Ex. 198; 2 L. T. 20; 8 W. R. 281.

### f. In Actions on the Case for Acts causing Damage.

**Where Cause of Action is not Act done but resulting Damage, Time runs from Damage.**]—See *Whitehouse* v. *Fellowes*, and *Gillon* v. *Beddington*, col. 68.

**Subsidence of Soil due to Mines.**]—A. was owner of houses standing on land which was surrounded by the lands of B., C. and D. E. was owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C. and D. sank in; and after more than six years' interval the sinking occasioned an injury to the houses of A.:—Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the statute. *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur. (N.S.) 809; 4 L. T. 754; 9 W. R. 769.

Lessees of coal under the respondent's land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868. For the injuries thus caused the lessees made

compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsistence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land:—Held (Lord Blackburn dissenting), that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees. *Nicklin* v. *Williams* (10 Ex. 259), and *Backhouse* v. *Bonomi* (9 H. L. Cas. 503; supra), discussed. *Lamb* v. *Walker* (3 Q. B. D. 389), overruled. *Darley Main Colliery Co.* v. *Mitchell*, 55 L. J., Q. B. 529; 11 App. Cas. 127; 54 L. T. 882; 51 J. P. 148—H. L. (E.) Affirming 32 W. R. 947—C. A.

See *Spoor* v. *Green*, col. 231.

**Subsidence of Houses through Excavations for Sewer.**]—Where a local board, in excavating a street for a sewer, sets up a gradual subsidence of the houses fronting the street, an action need not be commenced, under s. 264 of the Public Health Act, 1875, till within six months from the damage for which it is brought occurring, not from the completion of the work. *Crumbie* v. *Wallsend Local Board*, 60 L. J., Q. B. 392; [1891] 1 Q. B. 503; 64 L. T. 490. *Fairbrother* v. *Bury Sanitary Authority*, 37 W. R. 544. See *Lloyd* v. *Wigney*, col. 68.

**From Time of Wall falling, not from Time of Its being undermined.**]—See *Roberts* v. *Read*, col. 67.

**Fresh Damage.**]—When the continuance of a wrongful act causes fresh damage, it constitutes a new cause of action. A canal company in 1866 wrongfully obstructed a stream flowing by the plaintiff's lands and continued the obstruction down to 1873, when it caused the flooding of his lands:—Held, that the continuance of the wrongful obstruction in 1873 was a fresh cause for action in that year, and therefore the Statute of Limitations began to run from the time of damage in 1873. *Devery* v. *Grand Canal Co.*, Ir. R. 9 C. L. 194—Ex. Ch.

**From Date of Discovery.**]—Questions having arisen in 1862 between the lessees of two adjoining collieries, one of such lessees being the West Hartlepool Railway Company, as to the boundaries of their respective collieries, new boundary maps were prepared, and in 1864 it was by an agreement mutually agreed between the parties that all claims on account of damage of every kind, whether by trespass or otherwise, should be condoned. Pending that agreement, an act of parliament was passed in 1863, under which the West Hartlepool Company were to sell their collieries within a period of five years, and in 1865 another act was passed whereby the West Hartlepool Company became amalgamated with, and all their assets, debts, liabilities and engagements were transfered to, the defendant railway company. In 1870 the plaintiffs for the first time discovered, and the evidence distinctly shewed, that in 1863, after the boundaries had been settled, the West Hartlepool Company had broken through the barrier between the collieries and worked out the plaintiff's coal. Upon a bill filed for an account of the coal worked by the West Hartlepool Company, and for damages in respect of the injury sustained by the breaking down of the barrier:—Held, that the working of the colliery by the West Hartlepool Company was not ultra vires, as the power to work for a period of five years must be implied from the authority to sell, and that whatever liability they were under at the time of their amalgamation with the railway company was transferred to the defendant company by the act of 1865. *Ecclesiastical Commissioners* v. *North Eastern Ry.*, 47 L. J., Ch. 20; 4 Ch. D. 845; 36 L. T. 174.

Held, also, that the agreement of 1864 did not operate as a release of the injury then done, as the plaintiffs did not then know and had no means of knowing that the injury had been committed. *Ib.*

Held, also, that there being no laches on the part of the plaintiffs in not discovering the injury at an earlier period, the statute commenced to run only from the time of such discovery. *Ib.*

**Action for Coal wrongfully taken—Reply of Fraudulent Concealment to Plea of Statute disallowed.**]—See *Hunter* v. *Gibbons*, col. 123.

**Illegal Abstraction of Water—No Continuance of Damage, though Cause of Injury continuing.**]—See *Blakemore* v. *Glamorganshire Canal Co.*, col. 70.

**From Time of Sale in Actions for Illegal Distress.**]—See *Jenkins* v. *Cooke*, and *Collins* v. *Rose*, col. 71; and *Frazer* v. *Swansea Canal Co.*, col. 69.

**Company obtaining Land by Misrepresentation — Continuance of Damage — Statute runs from Taking of Land.**]—See *Oakley* v. *Kensington Canal Co.*, col. 71.

### g. In Actions for Negligence.

**Against Solicitors.**] — Trust property was transferred to new trustees in July, 1875. The solicitor employed in the transaction did not give certain notices necessary to perfect the title of the new trustees; and in April, 1879, a subsequent mortgagee of the property obtained priority over the trustees by giving notice of his charge:—Held, that there was no complete cause of action against the solicitor in respect of negligence till April, 1879, from which date the Statute of Limitations therefore ran. *Bean* v. *Wade*, 1 Cab. & E. 519.

In an action on the case against an attorney for negligence, the court held that the cause of action arose at the time the negligence occurred, and not at the time the negligence was discovered, or the consequential damages ensued. *Smith* v. *Fox*, 6 Hare, 386; 17 L. J., Ch. 170; 12 Jur. 130.

In an action for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty, and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrued. *Howell* v. *Young*, 8 D. & R. 14; 5 B. & C. 259; 2 Car. & P. 238; 4 L. J. (o.s.) K. B. 160; 29 R. R. 237.

Where a client claimed against her solicitor for negligence in having advised an investment on a mortgage (which proved insufficient) without disclosing that there had been no independent

valuation on behalf of the mortgagee:—Held, that the client's right of action arose when the negligent act was committed, and not when it was discovered by the client, it not being a duty on the part of the solicitor continuing day by day to disclose his negligent act. *Wood* v. *Jones*, 61 L. T. 551.

So, where a declaration against an attorney assigned for breach that he did not make diligent inquiry at the bank, to ascertain whether stock was standing in the name of certain persons there:—Held, that the cause of action arose on the breach of duty by the attorney, and not on its discovery by the client. *Short* v. *M'Carthy*, 3 B. & Ald. 626; 22 R. R. 503.

### h. In Actions for Libel and Slander.

**Libel—Publication—Purchase of Copy.**]—A count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action, the statute being pleaded:—Held, that the plea was negatived by proof that a single copy had been purchased from the defendant for the plaintiff by his agent within the six years. *Brunswick (Duke)* v. *Harmer*, 14 Q. B. 185; 19 L. J., Q. B. 20; 14 Jur. 110.

Other counts were, in respect of other libels, alleged to impute to the plaintiff the libellous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves in those other counts did not refer to the libel in the first count. The statute was pleaded to so much of these counts as related to the matter in the first count:—Held, that the plea was negatived as to those counts also. *Ib.*

**Slander.**]—In the case of words spoken that are actionable without special damage, the period of limitation is two years, and runs from the speaking of the words. In the case of words actionable only by reason of a subsequent loss, the period of limitation is six years, and runs from the happening of the damage. *Saunders* v. *Edwards*, 1 Sid. 95; Raym. 61.

### i. In Actions for False Imprisonment.

If in an action for false imprisonment the statute is pleaded to part, the plaintiff may reply that it was one continued duress. *Coventry* v. *Apsly*, 2 Salk. 420.

**Action against Justice within Six Months of End of Imprisonment.**]—See *Massey* v. *Johnson*; *Pickersgill* v. *Palmer*; and *Hardy* v. *Ryle*, col. 72.

**Action for Maliciously procuring Debtor's Discharge from Prison to be opposed, not commenced within Six Years from Date of the Opposition.**]—See *Violett* v. *Sympson*, col. 59.

### k. In Actions for Waste.

**Time Runs from Acts of Waste.**]—If a tenant for life cuts timber which is ripe for cutting, but not decaying or overcrowding, the act is tortious, and the right of the remainderman accrues, and the Statute of Limitations begins to run immediately. *Seagram* v. *Knight*, 36 L. J., Ch. 918; 17 L. T. 47; 15 W. R. 1152.

A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber:—Held, that the Statute of Limitations began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life. *Higginbotham* v. *Hawkins*, 41 L. J., Ch. 828; L. R. 7 Ch. 676; 27 L. T. 328; 20 W. R. 955.

Held, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life. *Ib.*

When after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. *Ib.* See also *Simpson* v. *Simpson*, B. II. 3.

**Time begins to run against Tenant in Tail's Claim for Equitable Waste on Death of Tenant for Life.**]—See *Leeds* v. *Amherst*, post, col. 167.

### l. In other Cases.

**As soon as there was in England a Plaintiff capable of Suing.**]—See *Rhodes* v. *Smethurst*, col. 25; *Smith* v. *Hill*; *Townsend* v. *Deacon*; *Douglas* v. *Forrest*; *Fergusson* v. *Fyffe*, col. 48; and *Le Veux* v. *Berkeley*, col. 61. *But see now* 19 & 20 Vict. c. 97, s. 10, and *Pardo* v. *Bingham*, col. 60.

**Against Foreigner as soon as He comes to England.**]—See *Pardo* v. *Bingham*, col. 60.

**In Action on Special Contract for Payment of Loan.**]—A. lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out by the society, except on production, by the lender personally or by some one with his written authority, of a loan pass-book given to him when the loan was made:—Held, that the condition as to the production of the book was a condition precedent to the liability of the society to repay the money, so that, until that condition had been complied with, the Statute of Limitations did not begin to run against the lender. *Atkinson* v. *Bradford Building Society*, 59 L. J., Q. B. 360; 25 Q. B. D. 377; 62 L. T. 857; 38 W. R. 630—C. A.

—— **Mortgage of Bonds.**]—Where on a loan bonds are mortgaged by way of collateral security for repayment on a fixed day, and the mortgagee is authorised in the event of the loan remaining unpaid after it becomes due to realise the securities, an undertaking in the same instrument by the mortgagor to pay any difference between the nett proceeds of the securities and the amount due does not create a new and independent obligation, so as to postpone the operation of the Statute of Limitations until such realisation, but the statute begins to run as from the date fixed for repayment of the loan. *McHenry, In re, McDermott* v. *Boyd, Barker, Ex parte*, 63 L. J., Ch. 741; [1894] 3 Ch. 290; 7 R. 527; 71 L. T. 146; 43 W. R. 20—C. A.

**Against Administrator of Creditor.**]—If a creditor dies intestate on the day when a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against his

administrator until letters of administration have been taken out.—By Lord Esher, M.R., and Lindley, L.J. *Atkinson* v. *Bradford Building Society*, supra.

**In favour of Executor or Administrator of Debtor dying Abroad.**]—In the case of a debtor going abroad before the right of action accrues and dying there, the statute begins to run only from the time of probate or administration being taken out. *Story* v. *Fry*, 1 Y. & Coll. C. C. 603; 11 L. J., Ch. 373; 6 Jur. 1029.

A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, and before the bill arrived at its maturity went to India, whence he never returned. As soon as circumstances would permit after his death in India his will was proved by his executors in England, and within six years after his death a creditors' bill was filed against the executors:—Held, that the plaintiff was not barred by the Statute of Limitations. *Ib.*

Quære, whether when a debtor dies abroad, and the cause of action or suit has not accrued in his lifetime, a suit may not be instituted for the administration of his effects at any time within six years after probate of his will. *Ib.*

A testator, indebted on promissory notes, resided in Jersey and died there. By his will he appointed his wife executrix. She continued to reside in Jersey, and proved the will there. She did not prove the will in England, though she received money due to her husband. No interest was paid upon the debt from 1849 to 1860, but a writ of summons was issued in England, and kept on foot till 1858. Upon a bill filed for the administration of the personal estate of the testator:—Held, that the 19 & 20 Vict. c. 97, s. 12, was not retrospective; that the widow had not done any act which made her executrix in England; that there was no person whom the creditor could sue; and, consequently, that the debt was not barred by the Statute of Limitations. *Flood* v. *Patterson*, 29 Beav. 295; 30 L. J., Ch. 486; 7 Jur. (N.S.) 324; 4 L. T. 78; 9 W. R. 327.

**From Discovery of Fraud.**]—In cases of fraud, time runs in bar of relief from that period only at which the party injured became cognisant of his rights and injuries. *Trevelyan* v. *Charter*, 4 L. J., Ch. 209. Affirmed, sub nom. *Charter* v. *Trevelyan*, 11 Cl. & F. 714; 8 Jur. 1015.

In cases of fraud, time in order to bar the remedy will not begin to run till the party acquires a knowledge of the facts constituting the fraud. *Blennerhassett* v. *Day*, 2 Ball & B. 129.

—— **Of One Partner.**]—A sum was received from a client's solicitor by a partnership firm, to be invested in mortgage, which went off, but was represented by one of the firm to the client to have been executed. The interest was duly paid, and the fraudulent representation was not discovered until after dissolution of the partnership and bankruptcy of the fraudulent partner:—Held, that although the remedy as for a debt, by the receipt of the money by the firm, was barred by the statute at law, yet the solvent partner, having constructive notice of the fraud, was affected by the act of his co-partner within the scope of the joint duty undertaken; and the time running only from the discovery of the fraud, the remedy was not barred in equity, and was recoverable by the client against the solvent partner. *Blair* v. *Bromley*, 5 Hare, 542; 16 L. J., Ch. 105; 11 Jur. 115. Affirmed, 2 Ph. 354; 16 L. J., Ch. 495; 11 Jur. 617.

—— **During Bankruptcy.**]—A debtor who has made an arrangement with his creditors under s. 28 of the Bankruptcy Act, 1869, remains liable under s. 15 of the Debtors Act for a debt incurred by fraud, e.g. in selling as broker his customer's securities without authority. Where the fraud was not discovered until after the adjudication in bankruptcy:—Held, that the Statute of Limitations did not begin to run till the bankruptcy had been annulled. *Crossley, In re, Munns* v. *Burn*, 35 Ch. D. 266; 57 L. T. 298; 35 W. R. 790—C. A.

**Composition Deed—Default—Fresh Promise to pay original Debts.**]—On default made by a debtor in the payment of a composition under a composition deed the court implies a fresh promise on his part to pay the original debts, and the Statute of Limitations does not commence to run until such default. *Irving* v. *Veitch* (7 L. J., Ex. 25; 3 M. & W. 90) followed. *Stock, In re, Amos, Ex parte*, 66 L. J., Q. B. 146; 75 L. T. 422; 45 W. R. 480; 3 Manson, 324.

**From Promise to sufficiently secure Money, not from Discovery that Security invalid.**]—In an action for not laying out the plaintiff's money in an annuity on a good and sufficient security, which the defendant promised to do:—Held, that the statute was a bar to the recovery, as the promise of the defendant was the gist of the action, although it was commenced within the period of six years from the time it was discovered that the security was invalid, and he knew it to be so at the time the annuity was granted. *Brown* v. *Howard*, 4 Moore, 508; 2 Br. & B. 73.

**From Discovery of Mistake.**]—In cases of mistake, the time of limitation, which, by analogy to that prescribed by the 21 Jac. 1, c. 16, is held to bar the remedy in courts of equity, begins to run from the time of the discovery of the mistake. *Brookshank* v. *Smith*, 2 Y. & C. 58; 6 L. J., Ex. Eq. 34.

**From Time of Work done for Turnpike Trustees, though no Fund then available for Payment.**]—By a turnpike act the trustees were to pay first the expenses of obtaining the act, and next the expenses of erecting tollhouses, and a builder who brought an action for work and labour in so doing more than six years after the work done, but within six years of the time when the trustees had funds in hand by having paid off the expenses of the act:—Held, that he was too late, as the action was maintainable immediately after the work was done, though the execution would have been postponed. *Emery* v. *Day*, 1 C., M. & R. 245; 4 Tyr. 695; 3 L. J., Ex. 307.

**Not in Favour of Company until Assets.**]—A. and B. expended moneys in procuring a railway act in 1859. The railway was not constructed. The company had no assets till 1872. In 1872 the company obtained assets and A. and B. put in their claims:—Held, that these claims were not barred, as the statute did not begin to run in favour of the company until the company

had assets to meet their claims. *Kensington Station Act, In re*, L. R. 20 Eq. 197; 32 L. T. 183; 23 W. R. 463.

**Against Debt for Work and Money Lent, although Amount not adjusted.**]—See *Nash* v. *Hill*, col. 120.

**From Breach, not from Refusal to perform.**]—In an action on promises, the breach of a contract is the cause of action, and the statute runs from the time of the breach, and not from the time of the refusal to perform the contract. *East India Co.* v. *Paul*, 7 Moore, P. C. 85; 14 Jur. 253.

**From Breach, not from Damage.**]—Where A., under a contract to deliver spring wheat to B., had delivered winter wheat, and B. having again sold the same as spring wheat, had in consequence been compelled to pay damages to the purchaser; and afterwards B. brought an action of assumpsit against A. for his breach of contract, alleging as special damage the damages so recovered:—Held, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of contract having occurred and become known to B. more than six years before that period, actio non accrevit infra sex annos was a good plea in bar to the action. *Battley* v. *Faulkner*, 3 B. & Ald. 288; 22 R. R. 390.

**Against Debts payable on Demand.**]—Where money was advanced to a firm to be repaid on demand with compound interest:—Held, that the Statute of Limitations ran from the date of the advance. *Jackson* v. *Ogg*, 1 Johns. 397; 5 Jur. (N.S.) 976; 7 W. R. 730.

In 1845 A. lent money to B., a trader, upon an agreement that interest was to be allowed at 10*l.* per cent., such interest to be left to accumulate by way of compound interest at that rate. B. carried the money to the account of A. in his books, and interest was from time to time duly credited in such account at the rate and in the manner specified. No communication whatever took place on the subject of the debt until 1857, and no payment of interest or principal was made:—Held, that the Statute of Limitations commenced running immediately on the advance being made, that the entry of interest did not take the case out of the statute, and that the debt was consequently barred. *Ib.*

In 1851 the plaintiff advanced money to the defendant to assist a certain undertaking. The plaintiff was to be paid out of profits, and the defendant was not to be personally liable. The undertaking was brought to an end in 1856, a similar undertaking forthwith started by the defendant being held by the court to be a distinct undertaking. In 1864 the plaintiff filed a bill for an account:—Held, that the plaintiff's claim was the proper subject for a suit in equity. *Knox* v. *Gye*, 16 L. T., 76; 15 W. R. 628.

Held, also, that the advance, having been made to aid the undertaking carried on by the defendant, was not to be considered, with reference to the Statute of Limitations, as a debt payable on demand, and that until the plaintiff made a demand the defendant was under no obligation to pay, and consequently that the statute did not begin to run until after the plaintiff's first demand. *Ib.*

A partner with the defendant in the undertaking died in 1854, having bequeathed a moiety of his share to the plaintiff, who also became his executor:—Held, that the plaintiff's right to an account in respect of this share was barred by the Statute of Limitations, and that an acknowledgment of the indebtedness to the concern given in 1867 to the defendant by a debtor upon the occasion of a compromise of the debt, did not call into existence any new interest which prevented the statute from running. *Ib.*

**Against Action for not accounting—Necessity of Demand.**]—As an action does not lie for not accounting till after a demand made of an account, the statute runs only from the time of a demand made. After a reasonable time has elapsed, a jury may presume that the consignor had made a demand, and that the factor had accounted. And fourteen years would be a sufficient time for such a presumption, if not rebutted by circumstances. *Topham* v. *Braddick*, 1 Taunt. 572; 10 R. R. 610.

**Against Depositor with Bank.**]—Money deposited with a banker in the usual way by a customer is money lent to the banker, with a superadded obligation that it is to be paid when called for; and consequently, if not noticed for six years, will be affected by the statute. *Pott* v. *Cleg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

**Action by Customer against Bank for Account—No Item within Six Years.**]—See *Foley* v. *Hill*, col. 76.

**Against Depositor for Safe Custody.**]—Where money is deposited with a person for safe custody, and not by way of loan, no right of action arises until demand made, and therefore the Statute of Limitations does not begin to run until such demand. *Tidd, In re, Tidd* v. *Overall*, 62 L. J., Ch. 915; [1893] 3 Ch. 154; 3 R. 657; 69 L. T. 255; 42 W. R. 25.

**Warrant to enter up Judgment for Debt on Failure to pay any Instalment—Statute runs against whole Debt from first Default.**]—In 1832 the defendant, being indebted to the plaintiff, gave a warrant of attorney for the amount of his debt, subject to a defeasance, stating that the warrant was given to secure payment of the debt by instalments, the last of which was payable in 1835; and that, in case default should be made in payment of any of the instalments, the plaintiff should be at liberty to enter up judgment and issue execution for all or so much of the debt as should be unpaid at the time, the same as if all the periods for payment had expired by effluxion of time. To an action brought to recover some of these instalments, the defendant pleaded the statute, and, at the trial, it appeared that the first default in payment of an instalment was made more than six years before the action:—Held, that the plaintiff might have sued on the first default for the whole amount remaining unpaid, and that, therefore, the statute was a bar as to all the instalments. *Hemp* v. *Garland*, 3 G. & D. 402; 4 Q. B. 519; 12 L. J., Q. B. 134; 7 Jur. 302.

**Loan for Five Years, but Principal to be due on any Default in Payment of Interest—Statute runs from first Default.**]—Money was advanced

under an agreement whereby the borrower agreed to pay interest regularly on the sum advanced by quarterly payments, and the lender agreed not to call in the principal sum for five years so long as the borrower should regularly pay the interest, provided that, in case the borrower should make default in any quarterly payment of interest for twenty-one days, it should be lawful for the lender to call in the principal sum and interest. The lender sued the borrower on this agreement more than six years after the defendant had made default in payment of interest, but less than six years from the expiration of the period of five years mentioned in the agreement:—Held, that the claim was barred. *Hemp* v. *Garland* (4 Q. B. 519; supra) followed and approved. *Reeves* v. *Butcher*, 60 L. J., Q. B. 619; [1891] 2 Q. B. 509; 65 L. T. 329; 39 W. R. 626—C. A.

**Against Action to recover Consideration for voidable Annuity — Statute only runs from Avoidance.**]—Action to recover the consideration-money paid for an annuity in 1826, one of the securities given being a warrant of attorney on which judgment was entered up. The warrant and judgment were set aside in 1842; it did not appear on what grounds:—Held, that the statute, inasmuch as the annuity might be voidable only, and not void, was no bar, and would not begin to run until the annuity was avoided in 1842. *Huggins* v. *Coates*, D. & M. 433; 5 Q. B. 432; 13 L. J., Q. B. 46; 8 Jur. 434.

In an action to recover the consideration-money of a void annuity, when the annuity was granted more than six years before action, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance:—Held, that the statute did not begin to run until the annuity had been avoided. *Cowper* v. *Godmond*, 3 M. & Scott, 219; 9 Bing. 748; 2 L. J., C. P. 162.

**Upon a Sale on Credit.**]—On a sale of goods on credit the statute begins to run from the time of credit expired. *Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L. J. (o.s.) K. B. 258.

**In Favour of Ambassador.**]—A writ of summons in an action cannot be issued against, and, therefore, the Statute of Limitations does not commence to run in favour of, the ambassador of a foreign state whilst he is accredited to this country or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country. *Musurus Bey* v. *Gadban*, 63 L. J., Q. B. 621; [1894] 2 Q. B. 352; 9 R. 519; 71 L. T. 51; 42 W. R. 545—C. A.

**In Action against Company for Rectification of Register.**]—Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor, a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred more than six years before the action was brought:—Held, that the cause of action was the refusal by the company, when the forgeries were made known to them, to treat the plaintiffs as owners of the stock, and that, therefore, time under the Statute of Limitations would not begin to run against the plaintiffs until such refusal. *Barton* v. *North Staffordshire Ry.*, 57 L. J., Ch. 800; 38 Ch. D. 458; 58 L. T. 549; 36 W. R. 754.

**In Action against Husband for Wife's Ante-nuptial Debts.**]—The Statute of Limitations runs in favour of a husband who is sued for the ante-nuptial debts of his wife from the time when such debts accrued against her, and not from the date of the marriage. *Beck* v. *Pierce*, 58 L. J., Q. B. 516; 23 Q. B. D. 316; 61 L. T. 448; 38 W. R. 29; 54 J. P. 198—C. A.

**Against Action on Policy of Marine Insurance—Barratry.**]—If a captain of a ship insured barratrously carries her out of the course of her voyage, and, procuring her to be condemned in a vice-admiralty court, sells and delivers her up to the purchaser, the statute as between the assured and the underwriter begins to run only from the delivery. *Hibbert* v. *Martin*, 1 Camp. 539.

**Contingencies.**]—The Statute of Limitations in a case of contingency runs from the time when the contingency happens. *Fenton* v. *Imblers*, 1 W. Bl. 354; 3 Burr. 1278.

**Not in Favour of Devisee of Estate, charged with Salary of Schoolmaster to be appointed by Devisee, until Appointment.**]—When testator by his will, in 1812, devised a rent-charge as a salary for a schoolmaster to be appointed by the owner for the time being of the estate upon which it was charged. No schoolmaster was ever appointed:—Held, that the Statute of Limitations could not commence to run until the appointment of a schoolmaster. *Att.-Gen.* v. *Perse*, 2 Dr. & War. 67.

**Against Compensation in case of Election.**]—An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made. *Spread* v. *Morgan*, 11 H. L. Cas. 588; 13 L. T. 164; 6 N. R. 269.

**Scire facias.**]—Where a judgment was revived by scire facias:—Held, that the scire facias created new rights, and the statute only ran from its date. *Farrell* v. *Gleeson*, 11 Cl. & F. 702.

**In Action against Director to replace Dividends paid out of Capital, Time runs only from His ceasing to be Director.**]—See *Masonic and General Life Assurance Co.* v. *Sharpe*, col. 43.

**Action for Penalties for obstructing Canal—Statute runs from Obstruction ceasing, not from Demand of Penalties.**]—See *Kennet and Avon Canal Co.* v. *G. W. Ry.*, col. 75.

**Encroachment on Carriage Way—Unauthorised Buildings—Non-Continuing Offence—11 & 12 Vict. c. 43, s. 11.**]—See *Coggins* v. *Bennett*, col. 65; and *Reay* v. *Gateshead*, col. 66.

**Extraordinary Expenses under Highways and Locomotives Act—Time runs from Surveyor's**

**Certificate—11 & 12 Vict. c. 43, s. 11.**]—See *Pool and Forden Highway Board* v. *Gunning*; and *White* v. *Colson*, col. 66.

**Surveyor adding Part of private Close to Highway—Statute runs as soon as complete Separation of Part taken from Residue—13 Geo. 3, c. 78, s. 81.**]—See *Wordsworth* v. *Harley*, col. 67.

**In Case of Illegal Seizure of Ship, from Day of first Boarding Her.**]—See *Crook* v. *M'Tavish*, col. 74.

**On Promise to Pay when able, not till Debtor is able.**]—See *Hammond* v. *Smith*, col. 109.

**Covenant in Settlement to transfer Stock to Trustees—Statute begins to run against Debt from Execution of Settlement.**]—See *Spickernell* v. *Hotham*, col. 199.

**Against Mortgagee of Reversion only after It has fallen into Possession.**]—See *Hancock, In re*, col. 222.

**Against Charge by Local Board on Premises in respect of Paving Expenses from Time of Completion of Work.**]—See *Hornsey Local Board* v. *Monarch Investment Building Society*, col. 280.

**Against the Right to Customary Heriots.**]—See *Zouche* v. *Dalbiac*, col. 303.

**Against Person wrongfully in Possession, receiving Rents of Mines in Specie, from the Time of the Receipt, not of the Sale.**]—See *Denys* v. *Shuckburgh*, col. 325.

**Not against Landlord's Right to Rent till Tenancy at an End.**]—See *Archbold* v. *Scully*, col. 324.

2. TIME DURING WHICH STATUTE RUNS.

**Subsequent Disability.**]—When the statute once begins to run, it continues to do so, notwithstanding any subsequent disability. *Cotterell* v. *Dutton*, 4 Taunt. 826; 14 R. R. 675; S. P., *Doe* d. *Duroure* v. *Jones*, 4 Term Rep. 300; *Doe* d. *Griggs* v. *Shane*, 4 Term Rep. 306, n. (b).

In computing the time under 3 Jac. 1, c. 16, s. 17, it is not necessary to the operation of the statute that there must be continued laches on the part of the plaintiff during the full period of six years; but the rule is, that the statute begins to run so soon as there is in existence in England a plaintiff capable of suing; and having once begun to run, no subsequent interruption to the right of suing, even from causes beyond his control, will stop it. *Rhodes* v. *Smethurst*, 4 M. & W. 42; 1 H. & H. 237; 7 L. J., Ex. 273; 2 Jur. 893. Affirmed in error, 6 M. & W. 351; 9 L. J., Ex. 330; 4 Jur. 702—Ex. Ch.

If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. *Freake* v. *Cranefeldt*, 3 Myl. & C. 499; 8 L. J., Ch. 61; 4 Jur. 1080. S. P., *Howlet* v. *Lambert*, 2 Ir. Eq. R. 254.

Where a creditor who has been abroad returns, the time will run, and his going abroad again will give him no privilege, for that was gone by his having once returned after the cause of action accrued. *Stuart* v. *Mellish*, 2 Atk. 614.

*And see now* 19 & 20 Vict. c. 97, s. 10.

**If Statute begins to run, Incapacities do not affect It.**]—See *Raffety* v. *King*, col. 210; *Goodall* v. *Skerratt*, col. 247; and *Nevarre* v. *Rutton*, col. 250.

**Time continues to run against Legatee during Lunacy of Executrix.**]—See *Boldero* v. *Halpin, Hawes, Ex parte*, col. 235.

**Merger of Right and Liability.**]—But if, after the statute has begun to run, the right to sue and the liability to be sued meet by act of law in the same person, the running of the statute is suspended. *Seagram* v. *Knight*, 36 L. J., Ch. 918; 15 W. R. 1152.

**Effect of Licence.**]—A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute. *Fuller* v. *Redman*, 26 Beav. 614.

**Assertion of Claim—Effect of.**]—The continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

**Action commenced, but abandoned, does not stay Statute.**]—See *Dixon* v. *Gayfere*, col. 256.

**Statute continues to run in Favour of false Claimant in Possession as Heir, notwithstanding concealed Fraud subsequent to wrongful Entry.**]—See *Willis* v. *Howe*, col. 308.

3. WHEN STATUTE CEASES TO RUN.

**Not on Demand, or Assertion or Notice of Claim.**]—Mere demand, without process or acknowledgment, not sufficient against Statute of Limitations. *Hodle* v. *Healy*, 1 Ves. & B. 540; 6 Madd. 181; 22 R. R. 270.

The continual assertion of a claim, unaccompanied by any act to give effect to it, will not keep alive a right which would otherwise be precluded. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

Notice by a creditor of his claim in answer to advertisement by an executor under 22 & 23 Vict. c. 35, s. 29, does not prevent the Statute of Limitations from running. *Stephens, In re*; *Warburton* v. *Stephens*, 59 L. J., Ch. 109; 43 Ch. D. 39; 61 L. T. 609.

A testator, by his will, gave all his property to the plaintiff, his executor, in trust to sell and convert, and after payment thereout of his debts to divide the residue as therein mentioned. The testator died in 1882, possessed of real estate. The defendant, who claimed to be a creditor of the testator, in 1883 sent in his claim in answer to the plaintiff's advertisements, under 22 & 23 Vict. c. 35, s. 29, but took no other steps. The plaintiff in 1887, when more than six years, but less than twelve years, had elapsed since the alleged debt was incurred, took out an originating summons to have the defendant's claim adjudicated on, and set up the Statute of Limitations: —Held, that the alleged claim was barred as against the personal estate, but not as against the real estate. *Ib.*

**Not on Letter of Licence.**]—A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute. *Fuller* v. *Redman*, 26 Beav. 614.

**On Issue, not Return, of Writ.**]—Where an action must be brought within three months, it is sufficient for the plaintiff to prove a writ sued out within such time, and his declaration within a year afterwards, without shewing such writ returned. *Parsons* v. *King*, 7 Term Rep. 6.

**On Return of Writ not served.**]—Under 2 & 3 Will. 4, c. 39, s. 10, it was not necessary to serve or endeavour to serve a writ which was issued to avoid the effect of the statute; it was sufficient to return it non est inventus, and enter it of record. *Williams* v. *Roberts*, 1 C. M. & R. 676; 3 D. P. C. 513; 5 Tyr. 421; 1 Gale, 56; 4 L. J., Ex. 78.

**Against Crown for Forfeitures, on Issue of Process.**]—The commencement of a suit by information by the attorney-general on the part of the Crown, for the recovery of forfeitures under a penal act, must, with reference to the Statute of Limitations, be taken to the issuing of process, and not the actual filing of the information. *Att.-Gen.* v. *Hall*, 11 Price, 760.

**From Filing of Bill, not from Service of Subpœna.**]—The commencement of a suit is reckoned, for the purposes of preventing the operation of the Statute of Limitations, from the filing of the bill and not from the service of the subpœna; and it was so held, in a case where the subpœna had not been served till two years after the filing of the bill. *Coppin* v. *Gray*, 1 Y. & Coll. C. C. 205; 11 L. J., Ch. 105; 6 Jur. 512.

A bill filed in time will take the case out of the operation of the Statute of Limitations as against the parties to it, though they have not been served with the subpœna within the time. *Purcell* v. *Blennerhasset*, 3 Jo. & Lat. 24; 9 Ir. Eq. R. 108.

**On Proceeding against Defendant out of the Jurisdiction.**]—When a defendant is out of the jurisdiction, and a bill in equity prays process against him when he shall come within it, the operation of the Statute of Limitations is suspended, though he has neither been served nor appeared in the suit. *Hele* v. *Bexley* (*Lord*), 20 Beav. 127.

When a bill was filed in 1819, and the plaintiff having died in 1825, a bill of revivor was filed in 1828, and the defendants being and continuing during all that time out of the jurisdiction, no subpœna had or could have been served on either bill, and one of the defendants having died in 1835, a bill of revivor was filed in 1838, and the service of subpœna effected under 2 Will. 4, c. 33:—Held, that the bill of 1828 prevented the bar of the Statute of Limitations. *Forster* v. *Thompson*, 2 Con. & L. 568; 4 Dr. & War. 303; 6 Ir. Eq. R. 168.

Semble, the bill of 1819 would of itself have had that effect. *Ib.*

The court would not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the statute. *Frith* v. *Donegal* (*Lord*), 2 D. P. C. 527.

**Evidence of Commencement of Proceedings.**]—Before s. 12 of 15 & 16 Vict. c. 76, the nisi prius record, shewing that the writ of summons issued within six years of the accrual of the cause of action, was not conclusive evidence to prevent the operation of the statute. *Pritchard* v. *Bagshawe*, 11 C. B. 459; 2 L. M. & P. 323; 20 L. J., C. P. 161; 15 Jur. 730.

In order to save the statute, a second or a subsequent writ of summons must, at the time a copy was served, have contained the indorsement required by 2 Will. 4, c. 39, s. 10, and such indorsements must have been made by the plaintiff or his attorney, and the roll was no evidence of these facts. *Walker* v. *Collick*, 4 Ex. 171: 7 D. & L. 225; 18 L. J., Ex. 387. See also *Morris* v. *Richards*, 45 L. T. 210; 46 J. P. 37.

The issue, as set out in a writ of trial, stated the suing out of a former writ of summons to meet a plea of the statute. The plaintiff having obtained a verdict upon an issue taken on the accrual of the action within six years, the court refused to grant a new trial upon an affidavit that no such writ had ever been returned, and that no continuances had been entered upon the roll, and that the issue delivered contained no notice of a former writ. *Harper* v. *Phillips*, 7 Man. & G. 397; 8 Scott (N.R.) 115.

**Demurrer to Allegation as to Return of Writ.**]—To a plea of the statute, the plaintiff replied that a writ issued under 2 Will. 4, c. 39, s. 10, and alleged that the writ was returned "by Henry Weeks and William Gilbertson":—Held, no ground of demurrer. *Williams* v. *Williams*, 2 D. (N.S.) 209; 10 M. & W. 174; 11 L. J., Ex. 386.

**Defendant's Appearance stays Statute.**]—It was not necessary, in order to prevent the operation of the statute, that the writ of summons, should, after an appearance entered by the defendant subsequently to the issuing of a distringas, have been served on the defendant in person, or returned non est inventus, or entered of record in compliance with 2 Will. 4, c. 39, s. 10. *Jones* v. *Boxer*, 6 D. & L. 574; 7 C. B. 58; 18 L. J., C. P. 185; 13 Jur. 960.

**Writ issued, but not entered on Record.**]—A declaration stated that the plaintiff retained the defendant as an attorney to prosecute and conduct an action, for the recovery of a debt, and it became his duty, as such attorney, to use due care and diligence in prosecuting and conducting the action. Breach, that he did not use due care and diligence; but, on the contrary thereof, prosecuted and conducted the action in a careless and an unskilful manner, in this, to wit, that he, having sued out writs for the purpose of preventing the action from being barred, "did not duly file the writs with the proper officer of the court, according to the necessary and accustomed practice of the court":—Held, after verdict, and after judgment for the plaintiff, that the word "filing" might be understood of bringing the writ into the office for the purpose of its being entered on the record; and that the duty of the defendant was properly laid, and the breach of that duty properly assigned in the declaration. *Hunter* v. *Caldwell*, 10 Q. B. 69; 12 Jur. 285—Ex. Ch.

**Issue of Process need not be specially replied.**]—A plea of the statute stated that the cause of action did not accrue within six years next before the commencement of the suit. The plaintiff replied, that the cause of action did accrue within

six years:—Held, that without specially replying process issued, the plaintiff might on this replication prove a quo minus to have issued within the six years, and produce the roll to shew the continuances regularly entered up accordingly. *Dickenson* v. *Teague*, 1 C. M. & R. 241; 4 Tyr. 450; 3 L. J., Ex. 266.

**Non-continuance of Writ need not be specially pleaded.**]—Where a writ, issued within six years after the cause of action accrued, had not been continued pursuant to 2 Will. 4, c. 39, s. 10, the defendant was not bound to plead such non-continuance specially, but might take advantage of it under the plea that the cause of action did not accrue within six years next before the suit; since for this purpose the last writ which was served was the commencement of the suit. *Pratt* v. *Hawkins*, 15 M. & W. 399.

**Effect of re-sealing Writ.**]—Where a writ of summons, tested in time to save the statute, was re-sealed in consequence of an alteration in the description of the defendant and the county in which he resided, and was not served until after the six years had expired:—Held, that the re-sealing did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to shew when the re-sealing took place. *Braithwaite* v. *Montford* (*Lord*), 2 C. & M. 408; 4 Tyr. 276; 3 L. J., Ex. 91.

A writ of right was issued before the expiration of the time limited by the act 3 & 4 Will. 4, c. 27, for bringing such writs. After that time had expired, the return day of the writ was altered, and the writ was re-sealed:—Held, that the writ must be considered as having been brought after the time limited by the act, and it was therefore superseded. *Foot* v. *Collins*, 1 Myl. & C. 250; 5 L. J., Ch. 225.

**No Renewal of, or Sealing of, Writ, or Extension of Time, nunc pro tunc, when Statute has run.**]—It is a rule of practice that the court will not extend the time for renewing a writ of summons after the expiration of twelve months from the day of the date of the writ, where the claim would, in the absence of such renewal, be barred by the statute. *Hewett* v. *Barr*, 60 L. J., Q. B. 268; [1891] 1 Q. B. 98; 39 W. R. 394. *Magee* v. *Hastings*, 28 L. R., Ir. 288.

The court has no power under Ord. LXIV. r. 7, to extend the time for renewing a writ of summons, where the claim would, in the absence of such renewal, be barred by the statute. *Doyle* v. *Kaufman*, 47 L. J., Q. B. 26; 3 Q. B. D. 7; 26 W. R. 98. Affirmed, 3 Q. B. D. 340—C. A.

The six months during which a writ continues in force after its renewal are to be computed inclusively of the day of renewal. The court refused to direct the writ to be renewed nunc pro tunc. *Anon.*, 1 H. & C. 664; 32 L. J., Ex. 88; 7 L. T. 718; 11 W. R. 293.

A writ of summons was issued dated Nov. 7, 1853, with a view to save the statute. It was renewed on the 6th of May, 1854. On November 6th following, the plaintiff applied to the officer of the court to renew it again, but the latter refused, considering it too late, and that the six calendar months had expired. The court, without deciding whether the renewal would be valid, directed that the writ should be renewed nunc pro tunc, as the dates would appear on the record. *Anon.*, 3 C. L. R. 78; 24 L. J., Q. B. 23; 18 Jur. 1104; 3 W. R. 74. S. P., *Black* v. *Green*, 15 C. B. 262; 3 C. L. R. 38; 24 L. J., C. P. 1; 18 Jur. 1017.

Within six months of issuing a writ, the plaintiff's attorney paid the proper fees at the office for its renewal, but he inadvertently neglected to get the seal of the court impressed upon it; after the lapse of the six months the omission was discovered. There having been no default in their officer, the court refused to order the seal to be impressed nunc pro tunc, in order to prevent the running of the statute. *Nazer* v. *Wade*, 1 B. & S. 728; 31 L. J., Q. B. 5; 8 Jur. (N.S.) 134; 5 L. T. 604. S. P., *Bailey* v. *Owen*, 9 W. R. 128.

The last day for re-sealing a writ, so as to save the statute, expired on Saturday, the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose, found it shut, and the officer having refused to re-seal the writ on the following Monday, the court refused to order him to do it afterwards nunc pro tunc. *Evans* v. *Jones*, 2 B. & S. 45; 8 Jur. (N.S.) 641; 5 L. T. 693.

Order LXIV. r. 3, does not apply to extensions of time which prevent the operation of the Statute of Limitations. *Morris* v. *Richards*, 45 L. T. 210; 46 J. P. 37.

**Amendment of Writ or Bill after Statute has run.**]—The court will allow a writ of summons to be amended where the statute would otherwise operate as a bar. *Green* v. *Kettleby*, 8 D. P. C. 783.

The court refused to allow the dates of writs of summons to be altered, for the purpose of preventing the plaintiff's claim from being barred by the statute. *Campbell* v. *Smart*, 5 C. B. 196; 5 D. & L. 335; 17 L. J., C. P. 63.

A bill for an account of tithes was filed against five defendants, before the expiration of the time limited by the act 2 & 3 Will. 4, c. 100, s. 3; and after the expiration of that time was amended under orders of the court, and four other persons were introduced as defendants:—Held, that the suit as against these latter defendants must be taken to have commenced at the date at which they were actually introduced into the bill; that they could not, by relation backwards, be treated as defendants to the original bill, and that they were consequently entitled to the protection of the provisions of the statute. A decree against these defendants for an account was therefore reversed, and the bill, as to them, ordered to be dismissed with costs. *Byron* v. *Cooper*, 11 Cl. & F. 556.

A bill for tithes having been filed within the period limited by the statute 3 & 4 Will. 4, and amended after that period for the purpose of adding another party:—Held, sufficient as against the last party, inasmuch as the bill and amended bill formed but one record. *Thorpe* v. *Mattingley*, 2 Y. & Coll. 421; 8 L. J., Ex. Eq. 9. Doubted in *Plowden* v. *Thorpe*, 1 West, 42; 7 Cl. & F. 137.

The testator died in 1811. S. H. entered, &c., and, in 1825, died without having paid the legacies. T. P. H., who took a quasi estate tail under the will, sold part of the lands; and, having devised the remainder, died in 1833, leaving the legacies unpaid. On 31st of December, 1833, the legatees filed a bill for payment by sale of J. A.'s real estate, against the heir-at-law of J. A., and the devisees of T. P. H., and the persons who purchased from him, with notice of the legacies. No subpœna to appear

and answer that bill was ever served. On the 24th of December, 1841, the legatees filed another bill, stating the filing and purport of the bill of December, 1833, "as by said original bill of record will appear"; and relying on the filing of that bill as a bar to the Statute of Limitations, prayed that J. A.'s will might be established, &c.; that the legacies might be decreed well charged on his real estate; and for the usual accounts, and, if necessary, for a sale, &c. On general demurrer to this bill, which was not described in any part of it as an amended bill, but was filed and marked as such by the proper officer:—Held, that the bill of 1841 should be considered as an amended bill; that the suit was pending from the date of the filing of the original bill in 1833; and that the filing of that bill, without service of subpœnas, was sufficient to save the plaintiff's demand from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40. *Boyd* v. *Higginson*, 5 Ir. Eq. R. 97; Fl. & K. 603.

Semble, if a bill were filed as an illusory proceeding, to evade the provisions of the Statute of Limitations, the court might, on a proper application, order it to be taken off the file. *Ib.*

Where the time for suit or action allowed by the Statute of Limitations had elapsed between the filing the original bill and the argument of the demurrer, leave to amend was refused. *Allison* v. *Herring*, 8 L. J., Ch. 223.

A bill filed by a widow to raise the arrears of her jointure, charged upon certain lands by settlement. Defendant by his answer denied the husband's power to jointure, as he had at the time of the settlement only an estate tail, which had not subsequently been barred. An amended bill was then filed, praying for dower in case plaintiff was not considered entitled to jointure. Defendant neither answered amended bill nor appeared at the hearing, and the court decreed plaintiff entitled to dower, and directed an account of the arrears:—Held, that the amended bill was a continuation of the original suit, and that in taking the account the defendant could not set up in the office the 3 & 4 Will. 4, c. 27, s. 40, limiting the recovery of arrears of dower to a period of six years, although the amended bill was not filed until after the act came into operation (31st December, 1833), the original bill having been filed previously thereto. *Smith* v. *Walsh*, 1 Ir. Eq. R. 167.

**Renewal of Writ stays Statute as to all the Defendants.**]—Where any one of several defendants named in a writ of summons has not been served, and there are others, upon whom service might have been, but is not, effected, a renewal of the writ, on the ground of the nonservice of such one, will prevent the operation of the statute in favour of such others. *Dickson* v. *Capes*, 11 Ir. C. L. R. 334.

**No Stay of Statute if Action fails.**]—An ejectment bill, filed in 1842, stated that the plaintiff's alleged right to the land accrued in 1812, that a bill had been filed, in 1824, to recover the property, and that an ejectment had been brought in 1832, which was stayed until the plaintiff had paid the costs of a former ejectment, but it did not state the result of the suit or action:—Held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations. *Bampton* v. *Birchall*, 5 Beav. 67; 6 Jur. 815. *And see* 11 L. J., Ch. 200.

A suit, dismissed as against the principal defendant, and which, though pending as against the others, has yet been practically abandoned, does not prevent the operation of the Statute of Limitations. *Dixon* v. *Gayfere*, 17 Beav. 421; 23 L. J., Ch. 60.

**—— Or if not proceeded with.**]—Bill depending six years in chancery not sufficient to take case out of statute. *Anon.*, 2 Atk. 1.

A bill in chancery depending almost six years ought not to be considered a sufficient demand of a debt, so as to take it out of the Statute of Limitations. *Lake* v. *Hayes*, 1 Atk. 282.

Though an original bill be filed at law, yet if there has been no proceeding upon it for six years, it will not prevent the Statute of Limitations from running. *Lacon* v. *Lacon*, 2 Atk. 395.

A bill was filed in 1828 by the representatives of the cestui que trust, against those of the trustee under a deed of which the trust expired in 1810; the answer was filed in 1829, but no further proceedings were taken till 1839:—Held, that as to the lapse of time, the case stood as it did when the bill was filed, and that there was not such laches as to bar the claim. *Dickinson* v. *Holland* (*Lord*), 2 Beav. 310.

**Stay of Statute at Law on Commencement of Proceedings in Equity.**]—A suit in a court of equity, properly instituted, will prevent time from running, and a court of law ought to act upon this principle, the same rule being prescribed by the statute for both courts. This court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at law who has an equitable right to sue for the land, and has filed his bill within the limits allowed, and duly pursued his remedy. *Wrixon* v. *Vize*, 3 Dr. & War. 104; 2 Con. & L. 138. Affirming 1 Con. & L. 298; 2 Dr. & War. 192.

Where the Statute of Limitations attaches to a demand pending the retention of the bill in equity, the validity of the debt being directed to be tried at law, the court restrained the debtor from insisting at law on the benefit of the statute. *Sirdefield* v. *Price*, 2 Y. & J. 73. S. P., *Anon.*, Vern. 74.

**Not in Equity, though Proceedings commenced at Law.**]—A creditor issued a writ of summons in the Common Pleas against an administrator for a debt not then barred by statute. Within six months after issuing this writ (which was never served), at which time the debt was barred unless saved by the writ, the creditor took out an administration summons:—Held, that the writ only saved the bar for six months in the court of Common Pleas, and that the statute was a bar to the administration suit. *Manby, In re, Fievet* v. *Manby*, 3 Ch. D. 101; 35 L. T. 307; 24 W. R. 699.

**Action that has failed stays Statute, if Order for New Trial obtained.**]—In 1846 H. executed certain works for a railway company, for the payment of his claim, for which he brought an action against one of the acting committee of the company. A verdict on the 1st April, 1848, was found for the defendant. Subsequently a rule for a new trial was obtained by H., but before it was proceeded with, a winding-up order was, on the 28th May, 1849, obtained

against the company. Afterwards a notice was served by H.'s attorney that the new trial would be commenced. On the 1st August, 1851, a judge made an order that all proceedings at law should be stayed until such proof should have been made or exhibited as required by the Winding-up Acts, the defendant being sued as a partner in or contributory to a company. H. died, and on the 7th October, 1852, his executrix brought a claim into the Master's office, which the Master disallowed, on the ground that it was barred by the Statute of Limitations:—Held, on motion to reverse or vary his decision, that the executrix was not barred by the Statute of Limitations from having a new trial to determine whether she was or was not a creditor. The question being purely a legal one, the executrix would have leave to bring such action as she might be advised, with liberty to the official manager to defend the action; and any judgment which might be recovered would be dealt with as the court should direct. *Higgins, Ex parte*, 2 Jur. (N.S.) 178.

**Statute ceases to run against Set-off when Action brought.**]—In cases under 21 Jac. 1, c. 16, s. 3, the statute is not a bar to a set-off, unless the six years have expired before the action is brought. *Walker* v. *Clements*, 15 Q. B. 1046.

Where there are cross demands between parties, which accrued at nearly the same time, for which bills are given, both of which would be barred by the statute, but the plaintiff has saved his limitation by suing out process, and the defendant has not, such process operates upon the set-off, and prevents the plaintiff from availing himself of the statute to defeat it. *Ord* v. *Ruspini*, 2 Esp. 570.

**Against Debt, on Debtor's Bankruptcy.**]—After a commission issued, the Statute of Limitations does not run against a creditor of the bankrupt. *Ross, Ex parte*, 2 Glyn & J. 46. Affirmed, *Id.* 330.

**On Carrying in Claim in Winding-up.**]—A creditor, within six years of the date of his debt, carried in his claim against a company ordered to be wound up; but the consideration of it was not then proceeded with. After the expiration of the six years, the Master proceeded with the consideration of the claim, but disallowed it as being barred by the Statute of Limitations. Upon appeal, the Master's decision was reversed, and it was referred to the Master to review his decision. *Great Western Extension Atmospheric Ry., In re, Wryghte's Case*, 5 De G. & Sm. 244; 16 Jur. 812.

**When Proceedings of Creditors stayed at Instance of Debtor.**]—By a decree in 1814, in a suit instituted by the heir-at-law of the debtor, the proceedings of the creditors under a decree in 1808 were stayed until a decree in 1836:—Held, that the defendant in the present suit, instituted in 1846, who was assignee of the insolvent heir, could not rely on the Statute of Limitations, the decree in 1808 being a proceeding that would, under the old statute, entitle the creditors to sue for twenty years previous to the expiration of which the suits were stayed until 1836, when under the new statute the creditors had a present right to receive their debts. A court of equity will not permit a party to rely on the interval of time during which he has himself stayed his creditor, in order to set up the Statute of Limitations. *Baylee* v. *Browne*, 10 Ir. Eq. R. 180.

**Death of Defendant after Issue of Writ—Fresh Writ after Statute run, but within Twelve Months of Probate.**]—A writ was issued, but before it was served the defendant died. Within a year from the proof of the will by the executors a fresh writ was issued against them for the same cause of action. In the meanwhile the period of statutory limitation had expired:—Held, that the executors could not rely on the statute as a defence to the action. *Swindell* v. *Bulkeley*, 56 L. J., Q. B. 613; 18 Q. B. D. 250; 56 L. T. 38.

**Not against Creditors, on Administration Action by one Creditor on behalf of himself alone.**]—A creditor of a person deceased filed a bill on behalf of himself alone against B., the personal representative of the debtor, and C., who had in his possession certain papers belonging to the debtor, on which he claimed a lien for a debt alleged to be due to him from the deceased. The bill prayed for the usual accounts of the deceased's estate, and that it might be applied in a due course of administration; that A. might have access to the papers; and that the amount of C.'s lien, if any, might be ascertained and paid. The decree in the cause directed an account to be taken of A.'s debt, and the amount to be paid out of a fund in court: and if the fund should be more than sufficient for that purpose, that what should be found due to the other incumbrancers should be paid to them; but it did not direct any account to be taken of those incumbrances; and accordingly the Master took an account of A.'s debt only. After it had been paid, C. presented a petition in the suit, praying an account of what was due to him, and for payment of it out of the remainder of the fund. The order made on that petition directed the Master to inquire and state who were the incumbrancers other than A. referred to by the decree:—Held, that neither the institution of the suit, nor any of the proceedings in it, prevented the Statute of Limitations from running against C.'s claim. *Watson* v. *Birch*, 15 Sim. 523; 16 L. J., Ch. 188; 11 Jur. 198.

**Not on Administration Action being commenced by another Creditor.**]—See *Humble* v. *Humble*, col. 224.

**After Decree in Creditors' Administration Action.**]—After a decree in a creditors' suit for administration, the Statute of Limitations cannot be set up to defeat the plaintiff's debt. *Adams* v. *Waller*, 35 L. J., Ch. 727; 14 W. R. 789.

Where debts of a testator had been paid out of the income of the estate of an infant in tail under his will, by the direction of the court, after decree in an administration suit, and the tenant in tail subsequently died an infant, and his administrators, more than six years after taking out administration to him, filed a bill to revive the administration suit, for the purpose of having such payments recouped out of the corpus of the estate, and for payment of the costs of the administration suit:—Held, first, that the payment on behalf of the infant having been made by the court, a merger of the charge could not be presumed; and, secondly, that the pendency of the suit prevented such claim being barred by lapse of time. *Alsop* v. *Bell*, 24 Beav. 451.

A bill filed by one creditor on behalf of himself and the others will prevent the Statute of Limitations from running against any of the creditors who come in under the decree. *Sterndale* v. *Hankinson*, 1 Sim. 393; 27 R. R. 210. And see *Bennett* v. *Barnard*, 12 Ir. Eq. R. 229; post, col. 312.

In an administration action commenced in December, 1878, by one executor of a testator, who was also a creditor of his testator, against his co-executor, the usual judgment in a creditors' action was pronounced in December, 1879, and some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of the testator, dated in November, 1873:—Held, that the claim was barred by the statute. *Sterndale* v. *Hankinson* (1 Sim. 393; supra) observed upon. *Greaves, In re, Bray* v. *Tofield*, 50 L. J., Ch. 817; 18 Ch. D. 551; 45 L. T. 464; 30 W. R. 55.

A creditor who, in the regular stage of the suit, proves his demand under the decree in it, is entitled to consider that suit as having been instituted for his benefit from the period when it was so framed, as that the decree to be pronounced in it would have authorised him to prove his demand under it; and if it were so framed before the 3 & 4 Will. 4, c. 27, his demand is not affected by the operation of that statute. *Brown* v. *Lynch*, 4 Ir. Eq. R. 316. And see *Ebbs' Estate, In re*, and *Finch* v. *Finch*, col. 82.

**On Claim made under Decree, though Action necessary.**]—A claim made under a decree, although not the proper mode of proceeding, a suit being necessary, stopped the running of the Statute of Limitations. *Congreve* v. *Power*, 1 Moll. 121.

**Where no Claim made under Decree.**]—The existence of a creditors' suit for the administration of the estate of a deceased debtor does not prevent the operation of the Statute of Limitations against a debt in respect of which no claim is made under the decree, semble. *Tatam* v. *Williams*, 3 Hare, 347.

A creditor who does not come in regularly to prove his demand under the decree to account in a creditors' suit, but obtains an order for liberty to file a charge and obtain a separate report at his own expense, upon an affidavit stating that he was ignorant of the existence of the suit until after the decree to account was pronounced, and the report thereunder made, cannot rely upon the suit as being his from the beginning, so as thereby to avoid the bar of the 3 & 4 Will. 4, c. 27, s. 42. *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 390.

**Statute does not run against Executors after Decree.**]—If, after a decree to account, an executor or administrator does not revive within six years, this is not within the Statute of Limitations. *Hollingshead's Case*, 1 P. W. 742.

**Statute runs, notwithstanding Petition in Lunacy by Committee of deceased Lunatic.**]—A petition in lunacy after the death of the lunatic, by his committee, and a reference to the Master thereon, followed by a report finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir of the lunatic, who was not a party to the application. *Wilkinson* v. *Wilkinson*, 9 Hare, 204.

**Stay of Action pending Lunacy Proceedings.**]—In 1823 the holder of a promissory note brought an action against the maker, who became lunatic; whereupon the lunatic and his committee filed a bill to restrain proceedings in the action, on the ground of alleged insufficiency of consideration for the note; and, upon the motion for an injunction, an order was made by consent, staying proceedings in the action and the suit, with liberty for the holder of the note to go in and establish his claim in the lunacy. He accordingly took proceedings to support his claim before the Master in lunacy, who, however, disallowed it, and in August, 1830, made his report, without including in it the name of the holder of the note as a creditor. The lunatic died in March, 1843; and in February, 1844, the holder of the note filed a creditor's bill against the representatives of the lunatic:—Held, that the plaintiff was not entitled to be relieved from the effect of the Statute of Limitations. *Rock* v. *Cooke*, 1 De G. & Sm. 675; 17 L. J., Ch. 93; 12 Jur. 5.

In 1823 an action was brought upon a promissory note, and the debtor was arrested. Soon afterwards the debtor was declared a lunatic, and in 1825 he by his committee filed a bill to restrain the action. In July, 1825, an arrangement was made, and carried into execution by an order of this court, whereby the action was stayed, and the creditor agreed to establish, and did proceed to establish, his debt under the lunacy; in 1843, however, and before the Master acting in the lunacy had made any report as to the creditor's claim, the lunatic died. The creditor then filed his bill against the lunatic's executors:—Held, upon demurrer, the court having no judicial knowledge of the effect of the death of the lunatic upon the proceedings in the lunacy, that the claim of the plaintiff was not barred by lapse of time. *Rock* v. *Cooke*, 1 Coll. 477; 8 Jur. 1005. *But see decision at the hearing, supra.*

**Effect of Appointment of Receiver.**]—Appointment of receiver does not affect the running of the Statute of Limitations. *Anon.*, 2 Atk. 15.

Though the appointment of a receiver does not prevent the bar of the statute from operating against a stranger, yet it will serve to prevent, at least in this court, time from running in favour of a stranger to the suit. *Wrixon* v. *Vize*, 2 Con. & L. 138; 3 Dr. & War. 104; 5 Ir. Eq. R. 173. Affirming 1 Con. & L. 298; 2 Dr. & War. 192; 4 Ir. Eq. R. 463.

The appointment of a receiver over an estate will not prevent the operation of the Statute of Limitations on demands against that estate. *Harrison* v. *Dignan*, 1 Con. & L. 376; 2 Dr. & War. 298; 4 Ir. Eq. R. 562.

The fact of the Master having reported the demand as an existing incumbrance will not take it out of the statute. *Ib.*

**Bill of Revivor.**] — Statute of Limitations cannot be pleaded in bar to a bill of revivor, after a decree to account. *Egremont* (*Earl*) v. *Hamilton*, 1 Ball & B. 531.

In 1822 a bill was filed by the tenant in tail to have a purchase made in 1808, by the testator of the defendant, set aside as fraudulent and void as against the plaintiff, and for an account

of mesne rates. In 1823 the defendant answered, and no further proceedings were had until 1839, when the present bill (of revivor and settlement) was filed :—Held, that the plaintiff was entitled to an account from 1839, the time of filing the bill of revivor, and that interest on certain sums of money, for which the defendant was declared entitled to credit, was to be computed from the same period only. *Thornhill* v. *Glover*, 3 Dr. & War. 195.

**Foreign Judgment does not stay Statute.**]—See *Don* v. *Lippmann*, col. 38.

**When Statute ceases to run as against Judgment Creditors.**]—See *Hamilton* v. *Houghton; Joyce* v. *Joyce;* and *Foster* v. *M'Mahon*, col. 312; *Hutchins* v. *O'Sullivan*, col. 311; *Busby* v. *Seymour;* and *Berrington* v. *Evans*, col. 322; and *Finch* v. *Finch*, col. 268.

**Statute ceases to run against Owner immediately Adverse Possession is discontinued.**]—See *Trustees and Agency Co.* v. *Short*, col. 268.

**Bill for Arrears of Tithe Rent-Charge saves Charge from being barred.**]—See *Irish Land Commission* v. *Junkin*, col. 276.

## III. PLACES WHERE STATUTE APPLICABLE.

**Lex fori.**]—The time of limitation for bringing an action is governed by the law of the country where the action is brought, and not by the lex loci contractus. *Huber* v. *Steiner*, 2 Scott, 304; 2 Bing. (N.C.) 202; 1 Hodges, 206.

The English Statute of Limitations binds every one who comes to sue in the Court of Chancery. *Pardo* v. *Bingham*, 39 L. J., Ch. 170; L. R. 4 Ch. 735; 20 L. T. 464; 17 W. R. 419.

The law of prescription, or of limitation, is a law relating to procedure, having reference only to the lex fori; and when a court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the court proceeds according to the prescription of the country in which it exercises jurisdiction. *Ruckmaboye* v. *Lulloobhoy Mottichund*, 5 Moore, Ind. App. 234; 8 Moore, P. C. 4.

In an action for a debt, it was averred, that before making the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that A. and the defendant were domiciled therein; and that by an instrument and obligation in writing, A. and the defendant became bound, and obliged themselves, conjointly and severally, to pay to the plaintiff 400*l.*, and that, by the law of Scotland, at the time of making such instrument, and thence hitherto in force, the time for bringing any suit or instituting any legal proceedings by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed; that is to say, by virtue of the said law, the plaintiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond. A plea, that the cause of action did not accrue within six years, is an answer to the action. *British Linen Co.* v. *Drummond*, 10 B. & C. 903; 9 L. J. (O.S.) K. B. 213.

Legal proceedings in England to recover a debt contracted in India are not barred by the Indian Statute of Limitations, Art. XIV. 1859. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235. S. P., *Alliance Bank of Simla* v. *Carey*, 49 L. J., C. P. 781; 5 C. P. D. 429; 29 W. R. 306; 44 J. P. 735.

Where a claim is made in an administration suit in England by an Indian creditor of the testator, the English Statute of Limitations must be applied as part of the lex fori. *Ib.*

The laws of the country where a contract is enforced govern all questions as to the remedy and mode of proceeding, including those applicable to lapse of time. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

As to contracts merely personal, it is a general rule that questions relating to the validity and to the interpretation of a contract, are to be governed by the law of the country where the contract was made; and if a remedy for non-performance of contract is sought in another country, the mode of suing, and the time within which the action must be brought, are to be governed by the law of the country in which the action is brought. *Cooper* v. *Waldegrave (Earl)*, 2 Beav. 282.

**Foreign Judgment.**]—Where bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death :—Held, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France, during the absence of the debtor, and had obtained judgment against him. *Don* v. *Lippmann*, 5 Cl. & F. 1.

If a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt on simple contract, and the Statute of Limitations will run upon it. *Dupleix* v. *De Roven*, 2 Vern. 540.

**India.**]—The 21 Jac. 1, c. 16, extends to India. *East India Co.* v. *Paul*, 7 Moore, P. C. 85; 14 Jur. 253.

And applies to Hindoos and Mahomedans as well as to Europeans, in civil actions in the supreme court. *Ruckmaboye* v. *Lulloobhoy Mottichund*, 5 Moore, Ind. App. 234; 8 Moore, P. C. 4.

**Scotland.**]—The Statute of Limitations extends to persons in Scotland. *Rex* v. *Walker*, 1 W. Bl. 286. And see *Campbell* v. *Stein*, 6 Dow, 116; *Surtees* v. *Allan*, 2 Dow, 254.

**Ireland.**]—A debtor in Ireland is beyond seas within the statute. *Lane* v. *Connell*, 5 L. J., Ex. 98; 1 M. & W. 701; 1 Tyr. & G. 441.

**Defendant beyond Seas — Writ for Service out of Jurisdiction—Foreign Embassy.**]—See *Musurus Bey* v. *Gadban*, cols. 23 and 61.

**Statute stayed on filing of Bill, though Defendant out of the Jurisdiction.**]—See *Hele* v. *Bexley*, and *Forster* v. *Thompson*, col. 27.

**Plaintiff beyond Seas.**]—*See* 19 & 20 Vict. c. 97, s. 10.

**Residence in Calcutta.**]—See *Williams* v. *Jones*, col. 62.

**Residence in Jersey.**]—See *Flood* v. *Patterson*, col. 60.

**Statute does not apply to Jamaica.**]—See *Pitt* v. *Dacre*, col. 152.

**Possessory Law of Jamaica.**]—See *Beckford* v. *Wade*, col. 152.

**Isle of Man.**]—See *Harris* v. *Quine*, col. 4; *Christian* v. *Gibson*, col. 152; and *Christian* v. *Goldie*, col. 208.

## IV. APPLICATION OF STATUTE TO PARTICULAR PERSONS.

### 1. Crown.

*See also* post, **A**, VI. 8 (col. 85), *and* **B**, II. 14 (col. 248).

**Generally.**]—The Crown not being mentioned in the 21 Jac. 1, c. 16, s. 3, is not within its operation. *Lambert* v. *Taylor*, 4 B. & C. 138; 6 D. & R. 188; 3 L. J. (o.s.) K. B. 160.

**Statute pleadable to Claim by Crown upon a Bill of Exchange.**]—The statute may be pleaded to a scire facias issued by the Crown against the drawer of a bill of exchange in the hands of the Crown debtor, and which has been seized by the sheriff under an inquisition on prerogative process. *Rex* v. *Morrall*, 9 Price, 24.

**Statute not applicable to Claim by Crown against Army Agent.**]—Moneys issued by the Crown to an army agent for the pay, subsistence, &c.; of officers, and carried in the books of the agent to the credit of the respective officers, but not paid over to them, and not made the subject of any private arrangement with them, continue the moneys of the Crown in the hands of the agent, for which he is accountable to the Crown; and may be called back by the attorney-general, as representing the Crown, even after a lapse of more than thirty years. *Brummell* v. *M'Pherson*, 5 Russ. 263; 7 L. J. (o.s.) Ch. 1.

**Suit by Crown for Penalties commences with Issue of Process, not on filing Information.**]—See *Att.-Gen.* v. *Hall*, col. 27.

**Crown not barred, though only Trustee for Subject.**]—See *Reg.* v. *Bayly*, col. 248.

### 2. Corporations.

Corporations are not less liable to the operation of prescription than private persons. *Dundee Harbour Trustees* v. *Dougall*, 1 Macq. H. L. 317.

A corporation shall have the benefit of the Statute of Limitations as well as any private person. *Wych* v. *East India Co.*, 3 P. W. 310.

**Statutory Debt or Action on Case—Contagious Diseases (Animals) Acts—County Council.**]—The justices of a county, as the local authority for the county, neglected between the years 1869 and 1878 to recoup to the plaintiffs, as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869, which they were bound to repay under s. 97 of that act. After the passing of the Local Government Act, 1888, the plaintiffs sued the defendants, as successors of the local authority for the county, to recover the sums which should have been recouped:—Held, that if any action would lie, it would be an action on the case and not action for debt on a statute, and therefore the Statute of Limitations was a bar to the claim. *Salford Corporation* v. *Lancashire County Council*, 59 L. J., Q. B. 576; 25 Q. B. D. 384; 63 L. T. 409; 38 W. R. 661; 55 J. P. 85—C. A.

**Dividends, a Debt from Company—Right of Action.**]—Dividends declared by a company are, when payable, debts due from the company to the shareholders, which the shareholders can recover in an action against the company; and the claims of the shareholders in respect thereof are liable to become barred under the Statutes of Limitations. *Severn and Wye and Severn Bridge Ry., In re*, 65 L. J., Ch. 400; [1896] 1 Ch. 559; 74 L. T. 219; 44 W. R. 347; 3 Manson, 90.

A declaration by the company that the dividends are payable does not make the company a trustee for the shareholders so as to prevent the application of the statutes; neither does an entry in the books of the company of its liability in respect of the unclaimed dividends, there being no special part of the assets set apart as representing them, and no notice of the entry given to the shareholders. An incorporated company and its shareholders are not in a position analogous to that of partners as regards each other. *Ib.*

**Action by Company for Calls.**]—See *Cork and Bandon Ry.* v. *Goode*, col. 321.

### 3. Trustee and Cestui que Trust.

*See also* post, **B**, II. 7 (col. 180).

*By the Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *the benefit of the statute is given to trustees, except in the case of an action for fraud, or to recover trust property still in the trustee's hands, or which he has converted to his own use.*

**Statute not applicable as between.**]—Where a party receives money in the character of a trustee, the statute will not run in his favour. *Bolton, Ex parte*, 1 Deac. & C. 556.

Although as between the cestui que trust and a stranger, the claim of the cestui que trust is barred by lapse of time operating against his trustee, lapse of time is no bar as between the cestui que trust and his trustee. *Cross, In re, Harston* v. *Tenison*, 51 L. J., Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376—C. A.

**Trustee for Infant neglecting to sue, Infant barred.**]—See *Wych* v. *E. India Co.*, col. 65.

**Moneys received virtute officii.**]—Plaintiff, who was made chief justice at Oxford during the differences between the King and his parliament, but never sat at Westminster, brought his bill against the prothonotaries for an account of the moneys received by them, by an implied trust, virtute officii, to which they pleaded the statute. Plea overruled, for the Statute of Limitations does not extend to a trust. *Sheldon* v. *Wildman* (1 Ch. Ca. 26; Freem. 156) followed. *Heath* v. *Henley*, 1 Ch. Ca. 21; 3 Ch. Rep. 8.

**Trustees of Funds for an Association.**]—A fund was established at Bombay by the covenanted civil servants of the East India Company serving in that presidency, for granting pensions and annuities to members, their widows and children. By the original articles certain persons were appointed managers, and they were declared to be "the trustees of the fund," and the property was vested in them:—Held, that they were not mere trustees for the association, but trustees properly so-called, and that the members of the fund were the beneficiaries, so that the defence of the Statute of Limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards* v. *Warden*, 45 L. J., Ch. 713; 1 App. Cas. 281; 35 L. T. 174.

**Testamentary Guardian.**]—A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward. *Mathew* v. *Brise*, 14 Beav. 341.

**Administration Suit—Claim against Manager of Estate.**]—B. had acted for the testator during the life of the latter, with full and unrestricted powers of management; the wife of B. was the testator's daughter and sole executrix. The testator's widow was entitled to a legacy of 1,500*l.* under her husband's will, and also to the furniture, effects, &c., of the testator. The testator's will was extremely brief and informal; and she on that ground filed a bill for the administration of the testator's estate, praying the usual account. The defendants in answer to an interrogatory of the plaintiff, furnished an account of all dealings with the testator's property up to the date of the suit from a date six years prior to his death, and claimed the benefit of the Statute of Limitations as to the period antecedent to these six years:—Held, that the defendant was a trustee, and could not avail himself of the Statute of Limitations. *Gray* v. *Bateman*, 21 W. R. 137.

**Executor cannot set up Statute to Breach of Trust by Testator.**]—See *Brittlebank* v. *Goodwin*, col. 52.

**Assets of deceased Trustee liable for more than Six Years.**]—See *Obee* v. *Bishop*, col. 83.

**Executors setting up Statute as Bar to Claim for Devastavit—Trustees for Creditors.**]—See *Hyatt, In re*; *Marsden, In re*; and *Gale, In re*, cols. 51, 52.

**Trusts for Payment of Debts.**]—*See* **B**, II. 7 (col. 180), and *Rendell* v. *Carpenter*, col. 95.

**Agent holding Money in Trust for Principal.**]—See *Burdick* v. *Garrick*, col. 64.

**Money received by Agents for the Sale of Goods.**]—See *Friend, In re*, col. 127.

**Mistake in distributing Trust Fund.**]—Trustees had, by mistake, paid to A. (one of the cestuis que trustent) a portion of the trust funds to which he was not entitled. In a suit by another party interested against A. to make him refund:—Held, that the Statute of Limitations was inapplicable; that he was bound to repay, though more than six years had elapsed, and that all his interest in the trust fund was liable to make good the amount. *Harris* v. *Harris*, 29 Beav. 110.

—— **Mistake in Payment of Dividends in Bankruptcy.**]—In 1806 P. proves a debt against the estate of B. & Co., bankrupts, on a bill of exchange, and dies in 1807, appointing G. his executor; G. becomes bankrupt in 1816, and obtains his certificate in 1817. But before that time, viz., in the years 1811, 1814, 1815, G. had, as executor, received three dividends on P.'s debt, and in 1817, 1822, and 1828, he receives three other dividends. It afterwards turns out that the bill of exchange was paid by another party in 1807, so that no dividend was ever due. On petition by B. & Co.'s assignees to expunge the proof, and that G. should refund the six dividends:—Held, first, that it being in the nature of a trust, the Statute of Limitations did not run in favour of G. But, second, that as the first three dividends were paid in error, and were a legal debt against G., and might have been proved under his bankruptcy, the claim as to them was barred by G.'s certificate. The other three, received since his bankruptcy, were ordered to be refunded. *Bolton, Ex parte, Baillie, In re*, 1 Deac. & C. 556; 1 Mont. & Ayr. 60; 3 L. J., Bk. 22. But see *S. C.*, nom. *Greenwood, Ex parte, Baillie, In re*, 3 Deac. & C. 398; 1 Mont. & Ayr. 65; 3 L. J., Bk. 6, 24.

**Receipt of Trust Property with Notice.**]—Where a trustee lends trust money in breach of the trust, and the borrower, with notice of the trust, applies the money to his own use, he cannot be permitted to separate the loan from the trust, and insist that the loan being barred by the statute, the trust is barred also. *Ernest* v. *Croysdill*, 6 Jur. (N.S.) 740; 2 L. T. 616; 8 W. R. 736.—L.JJ.

If property is delivered by a trustee to an auctioneer for sale, who retains the proceeds, and pays interest thereon to the cestuis que trustent, he is a constructive trustee; so that, on his bankruptcy, the statute is no bar to a proof. *Gowers, Ex parte*, 3 Mont. & Ayr. 172.

**Fraudulent Abstraction of Trust Property, Time no Bar against Parties to.**]—See *Rolfe* v. *Gregory*, col. 123.

**Statute no Bar as between Solicitors to Bankruptcy Commission and Creditors.**]—See *Gould, Ex parte, Robertson, In re*, col. 58.

**Claim by Cestui que Trust against Solicitor to Trustees for Trust Money received not barred by Statute.**]—See *Soar* v. *Ashwell*, col. 57.

**Express Trust, Statute not applicable in case of.**]—*See* Judicature Act, 1873, s. 25, sub-s. (2).

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity, the general rule is, that stale demands are not to be encouraged. *M'Donnel* v. *White*, 11 H. L. Cas. 271.

**Entry in Company's Books that Dividends due, not a Declaration of Trust.**]—See *Severn and Wye and Severn Bridge Ry., In re*, col. 40.

**Action by Company to recover Bribe from Directors—Person in Fiduciary Position—No Express Trust.**]—An action was brought by a

company in 1879 against a former director to recover 250*l.*, on the ground that the defendant had received it from a debtor to the company as a bribe, to induce him to use his influence to obtain favourable terms of compromise for the debtor. The allegations that this bribe had been given had in 1872 been brought before the directors at a board meeting, they had investigated it, and as it seemed came to the conclusion that the charge was unfounded, as no proceedings were taken, and it was not alleged that the other directors had been acting otherwise than bonâ fide in the matter:—Held, that the claim of the company was barred by the Statute of Limitations. Although where a trustee receives money upon an express trust and wastes it, the Statute of Limitations does not run against the claim of the cestui que trust, yet where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud. *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370—C. A.

**Statute no Bar to Claim against Directors in respect of a Payment of Dividends out of Capital.**]—The articles of association of a company provided that interest at the rate of 5 per cent. per annum should be payable half-yearly on all money paid on the shares until otherwise determined by the directors, and also that no dividend or bonus should be paid except out of the profits. Although the company never earned any profits, the directors, acting under a bonâ fide mistake of law, made half-yearly payments of interest to the shareholders from 1869 till 1878. In 1886 the company was ordered to be wound up. In June, 1889, the liquidator sued the representatives of a director, who died in December, 1883, to recover the moneys so misapplied:—Held, that the Statute of Limitations had no application; and, further, that time would not begin to run until the director ceased to hold office on his death in 1883. Held, also, that the circumstances did not justify the defence of staleness of demand. *Masonic and General Life Assurance Co.* v. *Sharpe*, 61 L. J., Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241. See also *Exchange Banking Co., In re, Flitcroft's Case*, col. 80.

**Effect of Trustee Act, 1888, s. 8.**]—Since the Trustee Act, 1888, s. 8, directors, who by mistake or carelessness misapply money under their control belonging to the company, can rely on the statute. *Lands Allotment Co., In re*, 63 L. J., Ch. 291; [1894] 1 Ch. 616; 70 L. T. 286; 42 W. R. 404.

A claim by an annuitant against a trustee for an account of moneys which ought to have been appropriated as a security for the payment of the annuity, but which were otherwise disposed of by the trustee in breach of trust more than six years before action brought, is barred by s. 8 of the Trustee Act, 1888. *Bowden, In re, Andrew* v. *Cooper* (59 L. J., Ch. 815; 45 Ch. D. 444) explained. *How* v. *Winterton (Earl)*, 65 L. J., Ch. 832; [1896] 2 Ch. 626; 75 L. T. 40; 45 W. R. 103—C. A.

An action brought by a newly-appointed trustee against the representative of a deceased trustee for a breach of trust in making improper investments is an action brought to recover money to which no existing statute of limitations applies within the Trustee Act, 1888, s. 8, and is, therefore, barred after six years from the breach of trust. *Bowden, In re, Andrew* v. *Cooper*, 59 L. J., Ch. 815; 45 Ch. D. 444; 39 W. R. 219.

So also an action by residuary legatees against an executor and trustee for breach of trust. *Swain, In re, Swain* v. *Bringeman*, 61 L. J., Ch. 20; [1891] 3 Ch. 233; 65 L. T. 296.

In 1878 first mortgagees employed the mortgagor's solicitor to sell the property under their power of sale. The solicitor received the sale moneys, and paid off the first mortgage, but kept the balance for himself instead of paying off the second mortgagee, continuing to pay interest on the second mortgage as if it were still subsisting. In 1892 the second mortgagee discovered the fraud, and brought an action against the first mortgagees for an account and payment of the amount due to him:—Held, that the action was barred by s. 8 of the Trustee Act, 1888. A trustee cannot be said to be party or privy to a breach of trust within the exception in s. 8, who derives no benefit from it, has no knowledge of it, and is not concerned in it in any way; nor to retain trust property, within the exception, unless he has control of it when the action is brought. *Thorne* v. *Heard*, 64 L. J., Ch. 652; [1895] A. C. 495; 11 R. 254; 73 L. T. 291; 44 W. R. 155—H. L.

A testatrix gave all her residuary estate to two trustees in trust for an infant, to be paid to him at twenty-one. He attained twenty-one in 1880. In 1892 he took out a summons against the two trustees for administration of testatrix's estate. One of the defendants, who had been acting trustee, alone appeared. There was no allegation of fraud, or any evidence that the defendant still retained any part of the trust funds, or had converted them to his own use. The defendant admitted that he had rendered no account to the plaintiff, but deposed that he had spent all the trust funds in maintaining the plaintiff during his infancy:—Held, that s. 8 of the Trustee Act, 1888, applied, and that the summons must be dismissed. *Page, In re, Jones* v. *Morgan*, 62 L. J., Ch. 592; [1893] 1 Ch. 304; 3 R. 171; 41 W. R. 357.

Where trust moneys are advanced on mortgage and are handed over by the mortgagor's directions to a bank, in which one of the trustees is a partner, in payment of a prior charge of the bank on the property mortgaged, this is not, in the absence of fraud, "trust property received by the trustee and converted to his use," within s. 8, sub-s. 1, of the Trustee Act, 1888, and consequently the trustee may rely on the Statute of Limitations as a defence to an action to recover the trust property. *Gurney, In re, Mason* v. *Mercer*, [1893] 1 Ch. 590; 3 R. 148; 68 L. T. 289; 41 W. R. 443.

A breach of trust had been committed by trustees in 1878 by investing trust money on mortgage upon property of insufficient value:—Held, that payment of interest to the tenant for life by the trustees from 1878 to 1890 was not an acknowledgment by the trustees of a liability to repay the principal, and that the action against the trustees by the tenant for life for breach of trust was barred by s. 8 of the Trustee Act, 1888. *Somerset, In re, Somerset* v. *Poulett*, 63 L. J., Ch. 41; [1894] 1 Ch. 231; 7 R. 34; 70 L. T. 541; 42 W. R. 274.

In 1876 a husband took from his wife by force a legacy bequeathed to her separate use, which she had, to his knowledge, just received on her separate receipt. The wife repeatedly demanded the money until the husband's death in 1894, and in 1895 she brought an action against his executors for the amount:—Held, that the husband had made himself a trustee for the wife of the legacy, and that as he had retained the money and not accounted for it, his executors could not, under the Trustee Act, 1888. s. 8, claim the benefit of the statute. *Wassell* v. *Leggatt*, 65 L. J., Ch. 240; [1896] 1 Ch. 554; 74 L. T. 99; 44 W. R. 298.

By a marriage settlement made in 1875, property of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself and her husband for her separate use without power of anticipation; and after her death, in case he should survive her, to pay the income to him during his life; and after the death of the survivor to hold the trust funds in trust for the children of the marriage. The husband died in April, 1885. The action was commenced in November, 1890:—Held, that the wife took by resulting trust a reversionary life interest, which was different from and could not coalesce with the interest during the joint lives limited to her by the settlement; that the second life interest did not become an "interest in possession" until the death of the husband, and that, consequently, the defence of the Statute of Limitations under s. 8, sub-s. 1 (*b*) of the Trustee Act, 1888, was not a bar to the action. *Mara* v. *Browne*, 64 L. J., Ch. 594; [1895] 2 Ch. 69; 72 L. T. 765. Reversed on another point, 65 L. J., Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638.

**When Time runs against Right to Contribution from Co-Trustee.**]—The law as stated in *Wolmershausen* v. *Gullick* (1893, 2 Ch. 514; ante, col. 9), that in a case of contribution between two co-sureties time does not begin to run under the statute until the liability of one of the sureties is ascertained, is applicable to the case of co-trustees. *Robinson* v. *Harkin*, 65 L. J., Ch. 773; [1896] 2 Ch. 415; 74 L. T. 777; 44 W. R. 702.

**As between First and Second Mortgagee.**]—The second mortgagee of a ship claimed an account against the first mortgagee, who had sold the vessel upon the mortgagor becoming bankrupt. Defendant offered to pay a specific amount. The action having been commenced more than six years after the sale, the defendant pleaded the Statute of Limitations. The plaintiff set up an express trust as a bar to the statute:—Held, that there was no express trust; that in case of an ascertained surplus the first mortgagee might be constructively a trustee of the surplus, but after six years evidence could not be adduced to prove a surplus. *Tanner* v. *Heard* (23 Beav. 555) explained. *Banner* v. *Berridge*, 50 L. J., Ch. 630; 18 Ch. D. 254; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

Semble, 3 & 4 Will. 4, c. 27, s. 25, is by the effect of the Judicature Act applicable to personal property as well as land. *Ib.*

Express trusts within that section are not confined to trusts expressed by deed, but cover a case where property wholly belonging to one party is put in the hands of another for the owner's benefit. *Ib.*

**As between Solicitor and Client.**]—See *Dooby* v. *Watson*, col. 58; *Watson* v. *Woodman*, col. 57; and *Crawford* v. *Crawford*, col. 56.

**Married Woman's Separate Estate.**] — See *Norton* v. *Turvill*, *Coppin* v. *Gray*, and *Barber*, *In re*, *Hodgson* v. *Williamson*, col. 63.

**Debt due from Cestui que Trust to Trustee—Retention of Trust Income a Part Payment avoiding Statute.**] — See *Stewart* v. *Connick*, col. 129.

### 4. Master and Servant.

**Wages of Servant.**]—Where it appeared that the course of dealing between master and steward had been to allow the steward to retain his salary from time to time out of money in his hands, the steward was allowed, after the master's death, to claim in account his salary for twenty years, the Statute of Limitations being held not to apply to such a claim. *Hawkins, In re, Hawkins* v. *Hawkins*, 28 W. R. 240.

A testator gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life, and at her death the property was to be divided as in the will mentioned. A farm servant of the testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest:—Held, in an administration suit, that the statute did not operate as a bar to arrears of interest upon the sum left by the servant in his master, the testator's hands. *Blower* v. *Blower*, 28 L. J., Ch. 181; 5 Jur. (N.S.) 33; 7 W. R. 101.

### 5. Partners.

**Partnership Accounts.**]—In 1858 the plaintiff and defendant entered into partnership transactions which came to a final termination in 1861, when the defendant admitted that 787*l.* was due to the plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The plaintiff brought an action for an account of the partnership dealings:—Held, that the Statute of Limitations was a good defence to a claim for partnership accounts. *Noyes* v. *Crawley*, 48 L. J., Ch. 112; 10 Ch. D. 31; 39 L. T. 267; 27 W. R. 109.

A., in 1799, purchased shares in a ship of G. R., who, also having shares in the same, was intrusted by A., and the other part owners, with the whole management of the ship, and to keep the accounts relating to it, from the time of the purchase until the ship was sold by G. R., with the consent of all the owners, in 1805. Upon the occasion of the sale G. R. stated and settled accounts with W., one of the part owners, and paid him the balance due upon the earnings of the ship and the proceeds of the sale. In 1824 G. R. died. Upon a bill filed by A., in March, 1826, for an account against the executors of G. R., it appeared by a ledger found in a room wholly disused by G. R., containing the accounts of the ship, that the credit and debit account between him and A. was not carried beyond 1805. On the debit side there were two items, one in 1811, and another in 1812. It appeared in evidence, that A. left England in 1820, and some time after his departure his brother-in-law (a witness for A.) called several times upon G. R.,

with messages from A., and on those occasions asked him to come to a settlement with A. respecting the ship; that G. R. evaded the subject, but never stated that he was not indebted to A. Under these circumstances, an account was decreed against the executors of A., and that decree affirmed on appeal. *Robinson* v. *Alexander*, 8 Bli. (N.S.) 352; 2 Cl. & F. 717.

To bill to dissolve partnership and take usual accounts, the defendant pleaded the statute on the ground that the partnership had been discontinued more than six years before bill; but the court granted the decree. *Miller* v. *Miller*, L. R. 8 Eq. 499.

The statute will not in general run as between the representatives of a deceased partner and the surviving partner, so long as there are any outstanding assets to be got in, or liabilities to be discharged; unless, possibly, where six years elapse without any assets being got in. *Millington* v. *Holland*, 18 W. R. 184.

**Right to Partnership Account saved by Acknowledgment of such Right, although no Debt admitted.**]—See *Prance* v. *Sympson*, col. 93.

**Relationship between Company and its Shareholders not Analogous to Partnership.**]—See *Severn and Wye and Severn Bridge Ry., In re*, col. 40.

**Action against Firm of Solicitors for Negligence of one Partner barred by Statute.**]—See *Hughes* v. *Twisden*, col. 59.

**Solicitors to Bankruptcy Commission—Statute no Bar as between former Partner and Creditors.**]—See *Gould, Ex parte, Robertson, In re*, col. 58.

**Bequest of Share of Debt due from Testator's Partner—Equity acting on Analogy to Statute.**]—See *Knox* v. *Gye*, col. 75.

**Misapplication by one Partner of Money entrusted by Client to Partnership—Statute a Bar to Action by Client against Firm.**]—See *Sims* v. *Brutton*, col. 57.

**Acknowledgment by.**]—See *Marten* v. *Bridges*, col. 120.

**As to when a Payment on Account will keep alive Debt as against Individual Partners and their Representatives.**]—See *Whitley* v. *Lowe*, col. 132; *Brown* v. *Gordon*; *Tucker* v. *Tucker*; *Goodwin* v. *Parton*; *Watson* v. *Woodman*; *Goddard* v. *Ingram*; and *Thompson* v. *Waithman*, col. 137.

**When Time begins to run in Cases of Concealed Fraud between Partners.**]—See *Betjemann* v. *Betjemann*, col. 122.

**Innocent Partner deprived of Benefit of Statute by Concealed Fraud of Firm.**]—See *Moore* v. *Knight*, col. 121.

6. EXECUTORS, ADMINISTRATORS, DEVISEES, LEGATEES AND HEIRS.

*See also* post, **A.** VI. 3 (col. 81), *and* **B.** II. 11 (col. 232).

**Death of Creditor Abroad.**]—If a plaintiff is in England at the time the cause of action accrues, the time of limitation begins to run; so that if he dies abroad, and his executor or administrator does not sue within six years, he is barred. *Smith* v. *Hill*, 1 Wils. 134.

But when a person dies abroad, to whom a right of action has accrued during his residence there, and he never returned to this country after the accrual thereof, his executors may sue for it, although more than six years have elapsed since it accrued. *Townsend* v. *Deacon*, 3 Ex. 706; 6 D. & L. 659; 18 L. J., Ex. 298; 13 Jur. 366.

When a creditor of a firm in India died there before his right of action was barred by lapse of time, and his personal representative in Scotland brought an action there against the partner of the firm, twenty-three years after the creditor's death:—Held, that the English Statute of Limitations did not take effect, the action having been brought within six years after English letters of administration were taken out to the deceased creditor. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

**Death of Debtor Abroad.**]—No one has a complete cause of action—that is, a right to prosecute an action with effect—until there is some one within the jurisdiction of the courts whom he can sue; and therefore, where a testator resided and died abroad:—Held, that his executor in England might be sued at any time within six years after taking out probate for a cause of action arising whilst the testator was abroad. *Douglas* v. *Forrest*, 4 Bing. 686; 1 M. & P. 663; 6 L. J. (O.S.) C. P. 157; 29 R. R. 695.

**Executors suing within Six Years from Testator's Death Abroad.**]—See *Townsend* v. *Deacon*, col. 60.

**Executrix in Jersey.**]—See *Flood* v. *Patterson*, col. 60.

**Statute continues to run between Death and Probate or Letters of Administration.**]—If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. *Freake* v. *Cranefeldt*, 3 Myl. & C. 499; 8 L. J., Ch. 61; 4 Jur. 1080. S. P., *Rhodes* v. *Smethurst*, 4 M. & W. 42; 1 H. & H. 237; 7 L. J., Ex. 273; 2 Jur. 893. *S. C.*, 6 M. & W. 351; 4 Jur. 702—Ex. Ch.

It is not competent to an executor to maintain an action for a debt which accrued to his testator more than six years before the issuing of the writ of summons. *Penny* v. *Brice*, 18 C. B. (N.S.) 393; 11 L. T. 632; 13 W. R. 342.

A. had a right of action against B. for a debt, in respect of which the statute began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved his will on the 12th of July, and commenced an action against B. on the 5th of November:—Held, that the statute was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the action within a reasonable time. *Ib.*

A testator being, at the time of his death in 1857, indebted to B. on simple contract, gave by his will his real and personal estate to his wife for life, and appointed executors. The will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the will was proved, and then B. filed a bill

on behalf of himself and other creditors against the widow and the executors:—Held, that the claim was barred by the Statute of Limitations, and that the bill must be dismissed with costs. *Boatwright* v. *Boatwright*, 43 L. J., Ch. 12; L. R. 17 Eq. 71; 29 L. T. 603; 22 W. R. 147.

**Fresh Action after Abatement.**]—Where an action by a creditor against his debtor, commenced within six years, abates by reason of the death of the debtor, the reasonable time allowed for commencing a fresh action against the personal representatives of the debtor, in order to prevent the operation of the statute, under the 21 Jac. 1, c. 16, s. 4, dates from the grant of the letters of administration; and the right of a creditor in this respect is not affected by delay or laches on the part of the next of kin of the debtor in obtaining administration. *Curlewis* v. *Mornington (Earl)*, 7 El. & Bl. 283; 26 L. J., Q. B. 181; 3 Jur. (N.S.) 660; 5 W. R. 266. Affirmed 27 L. J., Q. B. 439; 4 Jur. (N.S.) 1102; 6 W. R. 682—Ex. Ch.

**Bill accepted after Death of Testator.**]—In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, the statute begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party in a capacity to sue. *Murray* v. *East India Co.*, 5 B. & Ald. 204; 24 R. R. 325.

**Bequest of Share of Debt due from Testator's Partner—Statute runs from Testator's Death.**]—See *Knox* v. *Gye*, col. 75.

**Onus on Debtor to shew that Debt due before Creditor died so as to make Statute run before Administration.**]—See *Atkinson* v. *Bradford Building Society*, col. 18.

**Action against Administrators on Bill of Exchange.**]—Where the bill prayed an account on foot of two bills of exchange, accepted by L., deceased, and due and unpaid at the time of his death; and of the costs and expenses incurred by the plaintiff as administrator of L., down to the time when the grant of administration was revoked; and that the amount of the bills due to the plaintiff as a creditor of L., and of the plaintiff's expenses as administrator, might be paid out of L.'s personal estate. It appeared that L. had no real estate. The expenses, &c., consisted nearly altogether of the plaintiff's costs in a cause instituted by him as administrator in 1838, for discovery of assets, which after issue joined and publication passed, was frustrated by the present defendants, who were also defendants in that cause, and who being L.'s next of kin, and in possession of his assets, for the purpose of avoiding a decree, lodged in the Prerogative Court the will of L. which they had previously suppressed, and procured a revocation of the grant of administration to the plaintiff and a new grant, to themselves cum testamento annexo. They now pleaded the Statute of Limitations as to the bills of exchange, and demurred generally to so much of the bill as sought an account, &c., of the plaintiff's costs and expenses as administrator:—Held, first, that the plea should be allowed, as the plaintiff did not appear to have been under disability, and had not proceeded for his demand within six years after the right of action accrued. Secondly, that the demurrer should be overruled; as the costs claimed by the plaintiff were incurred by him not merely in his private right as a party in another cause, but in his official character of administrator; and as the grant of administration to him, though voidable, was not void, and conferred on him during its continuance the rights of a lawful administrator, entitled to be paid out of the personal estate of the deceased the expenses properly incurred in the duties of the office. Thirdly, that as the demurrer was overruled, the plaintiff was entitled to the costs of the hearing. *Howlett* v. *Lambert*, 2 Ir. Eq. R. 254.

**Action on Bill stayed against Lunatic pending Proof in Lunacy — Death of Lunatic — Action against Executor.**]—See *Rock* v. *Cooke*, col. 36.

**Executor de son tort.**]—Effect of length of time as a bar, as between executor de son tort, who afterwards obtains administration, and the next of kin. *Scott* v. *Knox*, 4 Ir. Eq. R. 397.

Plea of Statute of Limitations by an executor, the testator having died in 1786, the probate not taken till 1802, allowed; the allegation of the bill upon a fair construction being, that the defendant had possessed the personal estate, and therefore might have been sued as executor de son tort previously to 1792. *Webster* v. *Webster*, 10 Ves. 93; 7 R. R. 351.

**Revivor by personal Representative more than six years after Plaintiff's Death—Pleading.**]—A suit for an account of the rents and profits of real estate, having become abated by the plaintiff's death; after answer, but before decree, the plaintiff's personal representative, more than six years afterwards, filed a bill of revivor to which the personal representative of the original defendant, who had also died, pleaded the Statute of Limitations, but did not state in his plea that six years had elapsed since representation had been taken out to the original plaintiff: the plea was overruled. *Perry* v. *Jenkins*, 1 Myl. & C. 118; 5 L. J., Ch. 82.

**Executor or Administrator not bound to set up Statute.**]—Executor is not compellable to plead statute in aid of the residuary legatee. *Castleton (Lord)* v. *Fanshaw*, 1 Eq. Abr. 305. S. P., *Aplyn* v. *Brewer*, Pre. Ch. 173.

An executor is not compellable, either in law or equity, to take advantage of the Statute of Limitations against a demand otherwise well founded. *Norton* v. *Frecker*, 1 Atk. 526.

An administrator is not bound to set up the Statute of Limitations in respect of the payment of the balance of a sum of money promised by the deceased to be paid to his daughter on her marriage. *Garratt, In re*, 18 W. R. 684.

**As to effect of Administration Action and Decree, and as to setting up Statute in.**]—*See* A, VI. 3, post (col. 81).

**Residuary Legatee may set up Statute.**]—Upon the hearing of an originating summons, taken out by the executor, under Ord. LV. r. 3, to determine whether a defendant is a creditor or not, it is competent for the residuary legatee, also a defendant, to set up the objection of the

Statute of Limitations, notwithstanding the refusal of the executor to interfere. *Wenham, In re, Hunt* v. *Wenham*, 61 L. J., Ch. 565; [1892] 3 Ch. 59; 67 L. T. 648; 40 W. R. 636.

**Statute-barred Debt due from Legatee.**]—An executor is entitled to set off against a legacy a debt due from the legatee to the testator, though such debt may have been barred by the statute before the testator's death. *Courtnay* v. *Williams*, 13 L. J., Ch. 461; 15 L. J., Ch. 204; 3 Hare, 539. And see *Coates* v. *Coates*, 33 L. J., Ch. 448; 9 L. T. 795.

**Payment by Executor of Debt held to be statute-barred, a Devastavit.**] — An executor who pays a debt, after a judicial decision that it is not recoverable out of the testator's estate by reason of its being statute-barred, commits a devastavit; and the creditor who receives payment of such debt, with knowledge of the circumstances, is also liable to the testator's estate for its repayment. *Midgley* v. *Midgley*, 62 L. J., Ch. 905; [1893] 3 Ch. 282; 2 R. 561; 69 L. T. 241; 41 W. R. 659.

**Devastavit, Claims in Respect of.**]—A. executed a money bond, binding himself and his heirs, and died in 1794, leaving B. his heir and executor, to whom real and personal assets devolved sufficient to satisfy the bond. B. paid interest on the bond during his life. He died in 1813, leaving his widow, C., his executrix and general legatee and devisee. C. paid interest on the bond down to February, 1817. In May following she married D., who paid the interest and part of the principal due on the bond during the coverture, which was determined in June, 1834, by the death of C.; and he afterwards paid the interest down to his own death. C. by will, under a power of appointment, gave to D. a life interest in her real estate, and he took out administration to her with her will annexed. D. died in May, 1852, leaving E. his executor. Subsequently the bond creditor took out administration de bonis non to A., B. and C., and filed a bill against E. and the devisees of C., seeking to obtain payment out of the real and personal estate of C.:—Held, that the claim of the creditor against C. personally was a claim on simple contract only as for a devastavit, and was therefore barred by lapse of time. *Thorne* v. *Kerr*, 2 Kay & J. 54; 25 L. J., Ch. 57; 2 Jur. (N.S.) 322; 4 W. R. 131.

Testator mortgaged an estate to plaintiffs, and devised it to the three executors upon trusts in favour of his daughters, and after the death of all his children for sale. The executors distributed the whole personal estate without providing for the mortgage debt. After this one of the executors died. The daughters occupied the farm for twenty years after the distribution of the personal estate, paying rent to the executors, and, until 1880, paying the interest on the mortgage. The mortgagees then brought an action for foreclosure or sale, and claimed to have any deficiency made good by the two surviving executors and the executors of the deceased executor:—Held, that any claim founded on the devastavit in distributing the personal estate was barred after six years, but that the plaintiffs were entitled to foreclosure, and to an order for administration of the mortgagor's estate. *Gale, In re, Blake* v. *Gale*, 53 L. J., Ch. 694; 22 Ch. D. 820; 48 L. T. 101; 31 W. R. 538.

Testator mortgaged freeholds, and died in May, 1867, having devised all his real and personal estate to A. and B. upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, applied the whole of the personal estate in payments to simple contract creditors and beneficiaries. In 1869, A. died, and C. was appointed trustee in his place in 1871. The rents of the real estate were received by the trustees, and after payment of the interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgage property became an insufficient security, and, interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against B. and C., under which accounts of the testator's personal estate received by A. and B., or by B. alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits, against B. and C. Accounts were accordingly carried in, in which B. and C. claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and, further, that as to such of the payments as were made by A. and B. upwards of six years prior to the action, any claim on a devastavit was statute-barred, and that as to the rents and profits they were not liable to account for them at all:—Held, following *Marsden, In re* (26 Ch. D. 783; infra), on this point, and distinguishing *Gale, In re, Blake* v. *Gale* (22 Ch. D. 820; supra), that B. could not set up his own and A.'s wrongful payments by way of devastavit as a defence, in order to claim the benefit of the Statute of Limitations. *Hyatt, In re, Bowles* v. *Hyatt*, 57 L. J., Ch. 777; 38 Ch. D. 609; 59 L. T. 297.

A testator mortgaged leaseholds. On his death his executors took possession of his estate, including the leaseholds, and received the rents, and for a long time paid the interest on the mortgages, and applied the surplus of the rents for the benefit of the beneficiaries. The mortgaged property proved insufficient to pay the mortgaged debt, and in an action for the administration of the testator's estate the executors claimed to be credited with the payments made to the beneficiaries on the ground of acquiescence on the part of the mortgagees, and as to such of them as were made more than six years before the commencement of the action they relied on the Statute of Limitations:—Held, that acquiescence by the mortgagees had not been established, and that as the executors were trustees for the creditors, the Statute of Limitations furnished no bar to a claim in respect of a devastavit committed by them. *Marsden, In re, Bowden* v. *Layland*, 54 L. J., Ch. 640; 26 Ch. D. 783; 51 L. T. 417; 33 W. R. 28.

**Action against Executor for Testator's Breach of Trust.**]—The analogy of the Statute of Limitations cannot be set up by an executor in answer to a claim founded on a breach of trust by his testator. *Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545.

**Time runs in favour of Executors, notwithstanding Charge of Debts on Personalty.**]—A debt which, at the death of a testator, is not barred by the Statute of Limitations, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate, nor will

the operation of the statute be prevented though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it. *Scott* v. *Jones*, 4 Cl. & F. 382; 7 L. J., Ch. 242. S. P., *Freake* v. *Cranefeldt*, 3 Myl. & C. 499; 8 L. J., Ch. 61; 2 Jur. 1080; *Evans* v. *Tweedy*, 1 Beav. 55; 8 L. J., Ch. 46.

**Claim of simple contract Creditor against Testator's real Estate and residuary Legatees.**]—The testator devised certain estates to trustees for the payment of his debts, and appointed the same trustees his executors, and devised other estates in various portions, some to the same trustees for the separate use of married women for life with remainders over, others to devisees in fee, and others to devisees for life with remainders over in tail; and of some of which estates the testator created terms for raising specific sums of money, and others he charged with legacies and annuities. The testator died in January, 1843. On a bill filed in August, 1849, by the payee of a promissory note made by the testator (on which it was proved that interest had been paid by the executors up to 1847), for payment of the note out of the real as well as the personal estate, against the executors and trustees, some of whom were insolvent, against the residuary legatees who had received payments on account of their residuary shares, and against the parties beneficially interested in the real estate, of whom some set up the Statute of Limitations in bar of the demand, some omitted to do so, and others were out of the jurisdiction:—Held, that the creditor was entitled to a decree as against the parties beneficially interested in the real estate who had omitted to claim the benefit of the Statute of Limitations; that the heir or devisees of the real estate of a testator might themselves take proceedings for securing the due application of the personal estate in the payment of debts, and in exoneration of the real estate; and that they cannot, therefore, after a lapse of time, successfully resist the claim of a creditor as against the real estate, on the ground of his laches in not suing earlier for the recovery of the debt; that the demand of a simple contract creditor, as against the real estate of the testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to preclude the operation of the statute, by the effect of any right which might exist or might have existed among the parties, to have the assets of the testator marshalled; that payment by executors to residuary legatees, whilst the debts of the testator remained unpaid, was a breach of trust; and that, the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor, as against the residuary legatees, to the extent of their interest in the residue, and they must therefore refund the moneys they had received, on account of the estate. *Fordham* v. *Wallis*, 10 Hare, 217; 22 L. J., Ch. 548; 17 Jur. 228; 1 W. R. 118.

**Simple contract Debt, after six years, excluded from Devise of Realty.**]—Simple contract creditor, having suffered his demand by laches to become barred at law, will be held excluded from benefit of a trust of real estate, devised as an auxiliary fund for payment of debts; equity will not help the creditor to change the order of application of funds. *Magennis* v. *Fallon*, 2 Moll. 573.

The right of simple contract creditors to proceed against real estates devised by the debtor under the statute 3 & 4 Will. 4, c. 104, is barred by the Statute of Limitations in six years from the death of the debtor. *Dunne* v. *Doran*, 13 Ir. Eq. R. 545.

**Devise in Trust to pay Debts.**]—See *Hughes* v. *Wynne*; *Fergus* v. *Gore*; and *Dundas* v. *Blake*, col. 185; *Tulloch* v. *Simpson*; *Williamson* v. *Naylor*; and *Crallan* v. *Oulton*, cols. 186, 7; and *Moore* v. *Petchell*, col. 188.

**Liability of Executor taking Note from Debtor.**]—A testator died in 1829; part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the Statute of Limitations:—Held, that the taking the second note was equivalent to payment of the first, and the executor was charged with the 100*l.* *Sparkes* v. *Restal*, 22 Beav. 587.

**Money paid by Mistake by Executors.**]—Executors of obligor of bond having, by mistake, paid debt and interest without making deductions for property tax provided for by bond, though six years had elapsed:—Held, entitled to have it refunded. It would have been different had the obligor himself paid it. *Smith* v. *Alsop*, 1 M'Clel. 623; 13 Price, 823.

—— **Right to have Accounts taken.**]—The Statute of Limitations does not run in equity against the right of an executor, or of an executor of an executor, to have his accounts taken and his liability as an accounting party defined by inquiries under the direction of the court. *Smith* v. *O'Grady*, 7 Moore, P. C. (N.S.) 106; 39 L. J., P. C. 63; L. R. 3 P. C. 311; 23 L. T. 476; 19 W. R. 22.

The Statute of Limitations does not run in equity against the right of an executor, or of an executor of an executor, to sue the persons beneficially interested in the estate for recovery of payments made in excess of assets in hand. *Ib.*

An executor coming to the court after twelve years' delay, asking to have the accounts of his estate taken, is not disentitled. *Ib.*

A person bequeathed all his real and personal estate in Jamaica, after payment of debts and legacies, to his grandchildren, to be apportioned when they should attain twenty-one, and appointed R. executor of his will and guardian in respect of his real estate. The testator died in 1832, and R. entered into possession of the real and personal estate. R. died in 1850, and appointed S. his executor. The grandchildren attained their majority in 1865, and in that year S. filed a petition praying that an account might be taken of the real and personal estate of the testator:—Held, that he was entitled, notwithstanding the delay, as a matter of right to have an account taken of the personal estate of the testator, and inasmuch as R. had been appointed guardian in respect of the real estate, and had entered into possession of the same, accounts should also be taken of the rents and profits of the real estate of testator. *Ib.*

**Statute no Bar to Suit to recover Assets retained by Mistake by Administrator.**]—See *Reed* v. *Fenn*, col. 232.

**Statute no Bar to Claim to Assets left by Administrator in Bank.**]—A testator died in 1818; A., as his administrator, received assets and placed them in a bank to an account, "A.'s trustee," where they still remained. A. died in 1853, and to a suit, instituted by the administrator de bonis non of the original testator against the representatives of A. and the bankers, to recover the fund, the representatives of A. set up the Statute of Limitations, but the bankers were willing to pay the amount:—Held, that the statute was inapplicable, and a decree was made for the plaintiff. *Smith* v. *Acton*, 26 Beav. 210.

Held, also, that in such a suit the representatives of A. could not be charged with interest. *Ib.*

**Claim by Executor to be indemnified for unauthorised Advance, in pursuance of Family Arrangement, not barred.**]—Under a deed of indemnity of October, 1841, in the nature of a family arrangement, W. K. the younger and an executor of the testator was indemnified by the rest of the family from any claim in respect of having allowed the advancement of a considerable portion of the testator's estate to two of the sons, G. and C., on their promissory notes. These promissory notes had been barred by the Statute of Limitations, no interest having been demanded in respect of them, or any acknowledgment taken. A creditors' suit had been instituted to administer the estate of G., and a claim to be indemnified against any claim in that suit had been carried into chambers in respect of the money so advanced to the sons. This claim was disallowed:—Held, that such claim was not barred by the Statute of Limitations. *Tunstall* v. *Bartlett*, 14 L. T. 400.

**Statute does not run against Liability of Legatees to refund to Creditors.**]—The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had, if they had demanded it in time; they lie by for eleven years, and the estate is wasted; yet the legatees shall refund. *Hardwick* v. *Mynd*, 1 Anstr. 112; 3 R. R. 562.

**Action commenced in Time and pending against Administrator does not take Debt out of Statute in subsequent Administration Suit.**]—See *Fievet* v. *Manby*, *Manby*, *In re*, col. 32.

**Notice by Creditor of Claim in answer to Executor's Advertisement does not stop Statute running.**]—See *Stephens*, *In re*, *Warburton* v. *Stephens*, col. 26.

**Claim of Committee against Heir of Lunatic barred by Statute, notwithstanding Petition in Lunacy by Committee.**]—See *Wilkinson* v. *Wilkinson*, col. 36.

**Action by residuary Legatees against Executor and Trustee for Breach of Trust—Trustee Act, 1888, s. 8.**]—See *Swain*, *In re*, *Swain* v. *Bringeman*, col. 44.

**Executor or Administrator neglecting to sue, Infant barred.**]—See *Wych* v. *E. India Co.*, col. 65.

**As to Provisions in Wills for Payment of Debts not operating as Acknowledgments.**]—See *Burke* v. *Jones*; *Freake* v. *Cranefeldt*; *Scott* v. *Jones*; and *Rendell* v. *Carpenter*, col. 107.

**As to Acknowledgments by and to Executors, Administrators and Devisees.**]—See **A,** VII. 1, *e.* (col. 116), and **A,** VII. 3, *b.* (col. 131), post.

**Entries made by Executor by Direction of Testatrix of Payments of Interest to her, admissible.**]—See *Bradley* v. *James*, col. 140.

**Agreement between Executors to Waive Statute.**]—See *Lade* v. *Trill*, col. 143.

**Plea of Statute by Administrator to Claim for Arrears by Annuitant overruled.**]—See *Higgins* v. *Crawford*, col. 145.

**Action against Administrator by Next of Kin—Partial Intestacy—23 & 24 Vict. c. 38, s. 13.**]—See *Jennens*, *In re*, *Willis* v. *Howe*, col. 308.

### 7. Solicitor and Client.

*See also* post, **A,** VI. 4 (col. 84).

**Solicitor's Lien.**]—The statute does not run against a solicitor's lien. *Higgins* v. *Scott*, 9 L. J. (O.S.) K. B. 262; 2 B. & Ad. 413.

**Solicitor not a Trustee of Money deposited with him by Client.**]—A railway company, at various times in 1851 and 1852, deposited with C., who was their solicitor and confidential agent, certain sums of money, with directions to apply them in payment of each of several claims for compensation for lands taken by the company. A separate account was opened in C.'s books for each sum, shewing the amount received by him from the company, and the amount paid by him, on the foot of each claim. The entire sum received by C. was not in all cases applied by him as directed, and in January, 1855, his books shewed a balance of 428*l.* 8*s.* 5*d.* in favour of the company, on the foot of balances unapplied. C. died in 1861, intestate, and his administrator settled an account with the company, whereby a sum of 6,243*l.* 8*s.* was admitted to be due to C. This account included a judgment recovered against the company by C. in 1856.; but there was no evidence that it included the 428*l.* 8*s.* 5*d.*:—Held, that C. was not a trustee of the sums deposited with him, and that the Statute of Limitations was therefore a bar to the claim. *Crawford* v. *Crawford*, 16 W. R. 411.

**Whether Statute applies to Action by Client against Solicitor.**]—The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor. *Hindmarsh*, *In re*, 1 Dr. & Sm. 129; 1 L. T. 475; 8 W. R. 203.

After a dissolution of partnership, by which the continuing partner covenanted to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:—Held, that nonpayment of a debt by the continuing partner during the half-year could not be set up against the retiring partner as an answer to the Statute

of Limitations. *Watson* v. *Woodman*, 45 L. J., Ch. 57; L. R. 20 Eq. 721; 24 W. R. 47.

Held, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. *Ib.*

The ordinary relation of a solicitor to his client in questions of account is not of such a fiduciary character as to bar the Statute of Limitations, 21 Jac. 1, c. 16. *Ib.*

—— **Solicitor of Trustees in Possession of Trust Fund.**]—In 1876, a sum of money, which, under the will of S., was vested in trustees on trust for the plaintiff's father for life, and after his death for the plaintiff, was in the hands of A., the solicitor for the trustees. A. invested the money on mortgage, and in January, 1879, it was repaid by the mortgagor to A. In that month, and again in July, 1879, A. paid interest on the said sum to the plaintiff's father. In November, 1879, A. died. From that time till January, 1886, the plaintiff's father received half-yearly instalments of interest on the said sum from a person who had been a clerk of A., and was employed in winding up his business. In July, 1886, the plaintiff's father died. In February, 1891, the plaintiff, who was then the sole trustee of the will, brought an action against the executrix of A., claiming an account and payment of what might be found due:—Held, that A. was to be treated as an express trustee, and therefore the plaintiff's claim was not barred by the Statute of Limitations. *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165—C. A. See *Friend, In re*, col. 127.

—— **Action against Firm for Money received by one Partner.**]—In 1832, A. employed B. and C., then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D. subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid 500*l.* to C., who, however, did not inform either D., or his partner, or A. of such receipt; and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A., which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A. and his representatives, up to 1848, by C. In 1846 the 300*l.* was paid to C., and the mortgage deed was given up by C., but no conveyance was ever executed. Neither A. nor his representatives had any knowledge of these facts till 1848. Entries had been made by C. in the partnership books of the receipts and payments; but B. had no knowledge of the transaction subsequent to the original advance of 500*l.*:—Held, in an action by the executors of A. against B. and C., that the statute was a bar to the action. *Sims* v. *Brutton*, 5 Ex. 802; 20 L. J., Ex. 41.

—— **Court will not prevent Solicitor pleading Statute.**]—Action by an administratrix of A. for money received by the defendant, who was an attorney, to the use of A. in his lifetime. Plea, the statute. Replication, that A. was beyond the seas when the cause of action accrued, and did not return to England before his death, and that until the grant of administration there was no one to sue, and that the action was brought within three days after administration granted. Rejoinder, that before and at the time of his death, the plaintiff was his wife, and might, within a reasonable time after his death, have obtained administration of his effects; but that she suffered more than seven years to elapse after his death before she took out letters of administration:—Held, that if there were circumstances which, at law, prevented the defendant, being an attorney, from setting up the defence of the statute to a money demand at the suit of his client, the proper way for the plaintiff to avail herself of them was by a surrejoinder, and not by calling on the court to interpose its summary jurisdiction and prevent the defendant from pleading the statute. *Triston, In re*, 1 L. M. & P. 74.

**Bankruptcy—Solicitors to the Commission—Statute not a Bar as between Creditors and Solicitors.**]—A. and B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years, A. and B. (upon an agreement that A. should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ A. alone as the solicitor to the commission, and no attempt was made to charge B. with the moneys received by A. and B., till very lately, viz., when an official assignee was appointed; nor had B. ever acknowledged any liability to account:—Held, first, that, as between B. and the creditors, neither the Statute of Limitations, nor laches, nor other conduct of the assignee, would operate as a bar, A. and B. being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on B. to account. A. had become bankrupt. Semble, nevertheless, that he or his assignees were necessary parties. *Gould, Ex parte, Robertson, In re*, 4 Deac. & C. 547; 2 Mont. & Ayr. 48; 4 L. J., Bk. 7.

**Action for Negligence—Mortgage.**]—A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitor, the Statute of Limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and cestui que trust then existing between them. *Dooby* v. *Watson*, 57 L. J., Ch. 865; 39 Ch. D. 178; 58 L. T. 943; 36 W. R. 764.

—— **Action against Firm.**]—In 1869, P., a member of a firm of solicitors, by his advice induced the plaintiff to invest moneys upon the security of an equitable mortgage of a lease which he represented as renewable, and which had previously been renewed by custom every fourteen years, but the future renewal whereof was prohibited by a statute passed in 1868. In 1875 P. fraudulently, and without the knowledge of his partners, gave a legal mortgage of the lease to a third party without notice of the plaintiff's mortgage. The security proved insufficient, and P. having absconded, the plaintiff sought to make P.'s firm liable for the loss sustained by him:—

Held, that since the transaction of 1869 was within the ordinary limits of the partnership business, the firm was liable for negligence in respect thereof, but that the remedy against them was barred by the statute 21 Jac. 1, c. 16; that P.'s fraud of 1875, not being committed in the ordinary course of the business, the firm was not liable in respect thereof. *Hughes* v. *Twisden*, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498.

**Time runs from negligent Act of Solicitor, not from its Discovery.**]—See *Wood* v. *Jones*, col. 17.

**Negligence of Solicitor in not giving Notice of Title of new Trustees—Statute does not run in Solicitor's favour till Notice given by subsequent Mortgagee.**]—See *Bean* v. *Wade*, col. 16.

**Request for Delivery of Bill of Costs an Acknowledgment of Debt.**]—See *Curwen* v. *Milburn*, col. 95.

**Misappropriation of Client's Money—Innocent Partner deprived of Benefit of Statute by concealed Fraud of Firm.**]—See *Moore* v. *Knight*, col. 121.

**Claim for Costs by Solicitors to Company saved from Statute by undertaking to pay of Official Manager in Winding-up.**]—See *Gloucester, Aberystwith and Central Ry., In re*, col. 144.

**Solicitor selling for Mortgagee cannot set up Statute as a Bar to Claim by Mortgagee for Balance of Proceeds of Sale after Payment of Mortgage Debt.**]—See *Bell, In re, Lake* v. *Bell*, col. 205. Cf. *Thorne* v. *Heard*, col. 44.

**Statute not a Bar to Claim by Client against Administrator of Solicitor for Sum improperly invested.**]—See *Power* v. *Power*, col. 206.

### 8. Persons in Prison.

*By the Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 10, *the further time given by* 21 *Jac.* 1, *c.* 16, *s.* 7, *to a plaintiff who was in prison when the action accrued, is taken away.*

**19 & 20 Vict. c. 97, s. 10, retrospective.**]—Sect. 10 of 19 & 20 Vict. c. 97 applies to cases where the cause of action accrued before the act came into operation, and no action is commenced till after that period. *Cornill* v. *Hudson*, 8 El. & Bl. 429; 27 L. J., Q. B. 8; 3 Jur. (N.S.) 1257; 6 W. R. 37. See *Pardo* v. *Bingham*, col. 60.

**Action for maliciously opposing Plaintiff's Discharge from Debtors' Prison—Statute runs during Imprisonment.**]—Action for maliciously procuring the plaintiff's creditor to oppose the discharge of the plaintiff by the Insolvent Debtors Court, whereby the plaintiff was detained in prison longer than he otherwise would have been. The action was commenced more than six years from the order of the court and the lodging of a detainer by the defendant at the suit of the creditor, but within six years of the determination of the imprisonment:—Held, that the action was barred by the statute. *Violett* v. *Sympson*, 8 El. & Bl. 344; 27 L. J., Q. B. 138; 3 Jur. (N.S.) 1217; 6 W. R. 12.

**Before 19 & 20 Vict. c. 97, s. 10—Action for Damages.**]—An action of assumpsit for unliquidated damages was within the saving clause of the 21 Jac. 1, c. 16, s. 7, and therefore, such an action accruing whilst the plaintiff was in prison, might be brought at any time within six years from the first time of his being at large. Or it might be commenced whilst the plaintiff continued in prison, or before his enlargement, although more than six years after the cause of action accrued. *Piggott* v. *Rush*, 6 N. & M. 376; 4 A. & E. 912; 2 H. & W. 29; 6 L. J., K. B. 272.

### 9. Persons Beyond Seas.

*See also* post, **B**, II. 13.

*By* 4 & 5 *Anne, c.* 3, *s.* 19, *and* 3 & 4 *Will.* 4, *c.* 42, *s.* 4, *an action may be brought within six years from the return of a defendant who was beyond seas when the right to bring it accrued. By the Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 10, *the further time given to a plaintiff who was beyond seas when the action accrued by* 21 *Jac.* 1, *c.* 16, *s.* 7, *and* 3 & 4 *Will.* 4, *c.* 42, *s.* 4, *is taken away.*

**19 & 20 Vict. c. 97, s. 10, retrospective.**]—The 10th section of the 19 & 20 Vict. c. 97, is retrospective, and therefore, even where the cause of action has accrued before the statute was passed, no person is entitled to any time within which to commence an action beyond the time fixed by the statute, by reason of such person being beyond the seas when the cause of action accrued. *Pardo* v. *Bingham*, 39 L. J., Ch. 170; L. R. 4 Ch. 735; 20 L. T. 464; 17 W. R. 419. See *Cornill* v. *Hudson*, col. 59.

**Residence in Jersey.**]—A person resident in Jersey died in 1850 indebted to a person resident in England. He appointed his wife executrix, and she proved the will in Jersey alone. The executrix had in 1851 been in England for three weeks, and had, while in Jersey, received a sum due to her testator in this country:—Held, in 1860, that the 19 & 20 Vict. c. 97, s. 12, did not apply, the executrix not having been liable to be sued in this country, and having done no act here to constitute herself an English executrix. *Flood* v. *Patterson*, 29 Beav. 295; 30 L. J., Ch. 486; 7 Jur. (N.S.) 324; 4 L. T. 78; 9 W. R. 294.

**Out of the Realm.**]—The words in 21 Jac. 1, c. 16, s. 7, beyond the seas, are synonymous in legal import with the words out of the realm, or out of the land, or out of the territories, and are not to be construed literally. *Ruckmaboye* v. *Lulloobhoy Mottichund*, 5 Moore, Ind. App. 234; 8 Moore, P. C. 4.

A debtor in Ireland is beyond seas within the statutes. *Lane* v. *Connell*, 5 L. J., Ex. 98; 1 M. & W. 701; 1 Tyr. & G. 441.

But not a debtor in Scotland, *King v. Walker*, 1 W. Bl. 286.

**Residence Abroad until Death.**]—If a party is resident abroad at the accrual of a cause of action, and continues abroad until his death, his executors are entitled to sue within six years from his death, although more than six years had elapsed between the period of the accruing of the cause of action and of the testator's death. *Townsend* v. *Deacon*, 6 D. & L. 659; 3 Ex. 706; 18 L. J., Ex. 298; 13 Jur. 366. See *Smith* v. *Hill*; *Douglas* v. *Forrest*; and *Fergusson* v. *Fyffe*, col. 48.

**Defendant Abroad when Action accrued.**]—The statute does not apply to a defendant who was abroad when the cause of action accrued, and who has not since returned to this country; for, by 4 Anne, c. 16, s. 19, a plaintiff is not barred of his action, unless the defendant has returned, and six years have elapsed since his return. *Forbes* v. *Smith*, 11 Ex. 161; 24 L. J., Ex. 299; 1 Jur. (N.S.) 503. See also *Le Veux* v. *Berkeley*, 2 D. & L. 31; 5 Q. B. 836; 13 L. J., Q. B. 213; 8 Jur. 666.

—— **Writ for Service out of the Jurisdiction.**]—The Statute of Limitations does not commence to run in favour of a defendant whilst he is beyond seas, notwithstanding that the action is one in which leave to serve the writ out of the jurisdiction could have been obtained under R. S. C., 1883, Ord. XI. *Musurus Bey* v. *Gadban*, 63 L. J., Q. B. 621; [1894] 2 Q. B. 352; 9 R. 519.

—— **One of Joint Debtors Abroad.**]—Under 4 Anne, c. 16, s. 19, if a right of action accrued against several, one of whom was beyond seas, the statute did not run till his return or death, though the others had never been absent from the kingdom. *Townes* v. *Mead*, 16 C. B. 123; 3 C. L. R. 381; 24 L. J., C. P. 89; 1 Jur. (N.S.) 355. See *King* v. *Hoare*, 13 M. & W. 494; 2 D. & L. 383; 14 L. J., Ex. 29; and *Fannin* v. *Anderson*, 7 Q. B. 811; 14 L. J., Q. B. 282; 9 Jur. 969.

**Return—What is.**]—Where two partners were sued in 1812 for a debt, and, one of them being abroad, writs were issued against him, with a view to outlawry; but a commission of bankruptcy having been sued out against the other partner, resident in this country, the proceedings as to the outlawry were suspended; and the absent partner never returned to this country, except by touching at Deal, in 1814, for a mere temporary purpose, in his passage from one foreign port to another:—Held, that the touching at Deal was not a return to this country from beyond seas. *Gregory* v. *Hurrill*, 8 Moore 189; 1 Bing. 324; 4 L. J. (O.S.) K. B. 262; 1 L. J. (O.S.) C. P. 115.

The word "return" in 21 Jac. 1, c. 16, s. 7, means being in England at the time when the statute begins to run, although the person has never been in England before. *Pardo* v. *Bingham*, 39 L. J., Ch. 170; L. R. 4 Ch. 735; 20 L. T. 464; 17 W. R. 419.

Where, therefore, a creditor who was domiciled abroad, and had visited England in 1846, made no claim in this country against his debtor's estate for debts contracted abroad before the passing of that act, within the time fixed by the Statute of Limitations:—Held, that he was barred from recovering with regard to debts contracted both before and after he was in England. *Ib.*

A temporary sojourn in England by a foreigner is a return within s. 10. *Ib.*

—— **Evidence by One of Two Partners.**]—A. and B., bankers at Frankfort, sued C. on a bill of exchange, which became due on the 2nd of December, 1848. He pleaded the statute, to which they replied, that, at the time of the accruing of the debt they were beyond the seas, and that they did not, nor did either of them, come to this country until within six years before the commencement of the action. In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill and 1851; and that his partner B. had never been in England. Upon cross-examination he admitted that B. was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—Held, evidence to go to the jury, and that it was not necessary to call B. himself to negative his having been in England. *Koch* v. *Shepperd*, 18 C. B. 191; 4 W. R. 529.

—— **To England from place within English Jurisdiction.**]—Though the cause of action accrued within the jurisdiction of the Supreme Court at Calcutta while both the parties were resident there, and by the king's charter, granted in pursuance of the 13 Geo. 3, c. 63, that court is authorised to exercise the same jurisdiction in civil cases as is exercised by the Court of K. B. within England by the common law, and assuming that by such authority the provisions of the 21 Jac. 1, c. 16, s. 7, and 4 Anne, c. 16, s. 19, are transferred to India, as part of the law of England, auxiliary to the common law; yet, by the express terms of the savings in those statutes, as applicable to the courts here, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commenced such action within six years after the defendant's return home, though more than six years had elapsed in India after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the court in that country. *Williams* v. *Jones*, 13 East, 439; 12 R. R. 401.

—— **Foreigners.**]—A foreigner who always resides beyond sea is not bound by the Statute of Limitations. *Strithorst* v. *Græme*, 2 W. Bl. 723; 3 Wils. 145.

The proviso in favour of persons under disabilities in 21 Jac. 1, c. 16, s. 7, applied as well to foreigners who had never been in this country as to parties residing abroad at the time of the accruing of the cause of action, and returning afterwards to England. *Lafond* v. *Ruddock*, 13 C. B. 813; 1 C. L. R. 339; 22 L. J., C. P. 217; 17 Jur. 624; 1 W. R. 371.

**Before 19 & 20 Vict. c. 97, s. 10.**]—A person beyond sea, and so within the saving of the Statute of Limitations, need not have returned to enable him to commence a suit. *Gage* v. *Bulkeley*, Ridgw. 278.

**Statute ran against a Plaintiff beyond seas if he returned, though he went abroad again.**]—See *Stuart* v. *Mellish*, col. 25.

**Action on Bill accepted and payable abroad barred after six years' residence here of Acceptor.**]—See *Don* v. *Lippmann*, col. 38.

**Foreign Judgment.**]—See *Reimers* v. *Druce*, col. 89.

**Form of Reply that Defendant beyond seas when Cause of Action accrued.**]—See *Plummer* v. *Woodburn*, col. 144.

10. MARRIED WOMEN.

*See also* post, **B**, II. 13 (col. 243).

*By* 21 *Jac.* 1, *c.* 16, *s.* 7, *and* 3 *&* 4 *Will.* 4, *c.* 42, *s.* 4, *a plaintiff who is covert when the action accrues may bring it within six years after she is discovert.*

**Effect of Coverture.**]—In an action by payee against a maker of a note, he pleaded the statute. Replication, that when the cause of action accrued, the plaintiff was the wife of B., and that she continued to be so until B. died, and the plaintiff became discovert, and that she sued within six years after the death:—Held, good. *Scarpellini* v. *Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333.

**Debt due from Husband's to Wife's Estate.**]—Where the husband's debt has been satisfied out of the wife's estate:—Held, that her estate is entitled to be recouped out of the husband's; and a mortgage creditor of the husband having obtained payment out of the wife's estate in 1832, the estate of the husband having accumulated since his death in 1776, and the produce brought into court in 1782, a bill by a judgment creditor of the wife against the heir of the husband, who had obtained upon petition a reference to ascertain the incumbrances thereon, held not barred by the Statute of Limitations. *Lancaster* v. *Evors*, 10 Beav. 154; 16 L. J., Ch. 8.

**Wife's Separate Estate.**]—In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—Held, that the debt was barred by analogy to the Statute of Limitations. *Norton* v. *Turvill* (2 P. Wms. 144) explained. *Hastings (Lady), In re, Hallett* v. *Hastings*, 56 L. J., Ch. 631; 35 Ch. D. 94; 57 L. T. 126; 35 W. R. 584; 52 J. P. 100—C. A.

Feme covert, having a separate estate, borrows money, and gives a bond; the separate estate liable, and though six years pass, the demand not barred by the Statute of Limitations. *Norton* v. *Turvill*, 2 P. Wms. 144.

Quære, whether the Statute of Limitations can be pleaded in bar of a bill filed to enforce payment out of the separate estate of a married woman, on a bill of exchange given by her in her separate capacity. *Coppin* v. *Gray*, 1 Y. & Coll. C. C. 205; 11 L. J., Ch. 105; 6 Jur. 512.

Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; and, being debts payable out of funds held in trust for her separate use, are not barred by the Statute of Limitations. *Barber, In re, Hodgson* v. *Williamson*, 15 Ch. D. 87; 42 L. T. 676; 28 W. R. 944.

**Ante-nuptial Debts of Wife—Statute runs in favour of Husband from date of Debt.**]—See *Beck* v. *Pierce*, col. 24.

**Action by Wife in respect of Misapplication of Trust Funds—Statute only begins to run against separate Life Interest of Wife on Death of Husband.**]—See *Mara* v. *Browne*, col. 45.

**Action on Note by Administrator of Wife—Payment of Interest to Husband avoids Statute.**]—See *Hart* v. *Stephens*, col. 135.

**Note made by Wife before Coverture—Payment of Interest by Wife without Husband's Privity—Statute not avoided.**]—See *Neve* v. *Holland*, col. 135.

**Equity of Redemption, Wife's separate Estate—Legal Estate in Husband—Statute no bar to Wife's right to redeem.**]—See *Booth* v. *Purser*, col. 197.

*See* Trustee Act, 1888 (51 & 52 Vict. c. 69), s. 8.

11. Poor Law Guardians.

**Action against for Debt must be brought within three months from half-year in which it became due.**]—*See* 22 & 23 Vict. c. 49, s. 1; and *West Ham Union* v. *St. Matthew, Bethnal Green*, [1896] A. C. 477; *Reg.* v. *Stepney Union*, L. R. 9 Q. B. 383; *Baker* v. *Billericay Union*, 33 L. J., M. C. 40; post, col. 67.

*And see* Poor Law.

**But not for Debt incurred as Rural Sanitary Authority.**]—See *Dearle* v. *Petersfield Union*, col. 67.

12. Principal and Agent.

*See also* post, **B**, II. 8 (col. 204).

**Action against Agent for an Account.**]—An agent who stands in a fiduciary relation to his principal cannot set up the statute in bar of a suit for an account by his principal. *Burdick* v. *Garrick*, 39 L. J., Ch. 369; L. R. 5 Ch. 233; 18 W. R. 387.

An agent, who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power, and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account:—Held, that the agent held the money in trust for his principal, and, therefore, the statute was no bar to the suit. *Ib.*

There being no proof that the agent had made any interest or profit by the money in his hands, he was charged with simple interest at 5*l.* per cent. *Ib.*

**Moneys received by Agents for the Sale of Goods.**]—See *Friend, In re*, col. 127.

**Account between, kept open by annual Payment of Tax for Principal.**]—The bankrupt had been in the habit, for a long course of years, of making payments and receiving moneys for the petitioner, no account of which had been rendered by the bankrupt, but the account was extracted from his books after his bankruptcy; it did not appear, however, that for the last six years he had made any payment to the petitioner, or had received any money for him, but that the only transaction, during that period, was an annual payment made by him for the petitioner, of the drainage tax:—Held, that such payment was evidence of a running account between the parties, so as to take the case out of the Statute of Limitations. *Peachey, Ex parte, Seaber, In re*, 1 Deac. 551.

**Statute not applicable to Claim by Crown to recall Officer's Pay in hands of Army Agent.**]—See *Brummell* v. *M'Pherson*, col. 39.

**Where Agent a Trustee, Statute not applicable.**]—See *Gray* v. *Bateman*, col. 41.

**Letters of Agent expressing Readiness to go into the Account—Not sufficient to take Claim for Balance out of the Statute—Agent not a Trustee.**]—See *Crawford* v. *Crawford*, cols. 97, 56.

**Fraud of Agent.**]—See *Hardwicke* v. *Vernon*; *Walsham* v. *Stainton*; *Trevelyan* v. *Charter*; *Medlicott* v. *O'Donell*; *De Montmorency* v. *Devereux*; and *Gillett* v. *Peppercorne*, col. 124.

**Payment of Interest by Solicitor—Whether Agent for Party Liable.**]—See *Newbould* v. *Smith*, col. 288.

### 13. Infants.

*See also* post, **B,** II. 13 (col. 243).

*By* 21 *Jac.* 1, *c.* 16, *s.* 7, *and* 3 *&* 4 *Will.* 4, *c.* 42, *s.* 4, *a plaintiff who is an infant when the action accrues may bring it within six years after coming of age.*

**Trustee for, Neglecting to Sue.**]—An executor, administrator, or trustee for an infant neglects to sue within six years; the Statute of Limitations shall bind the infant. *Wych* v. *East India Co.*, 3 P. W. 309.

**Acknowledgment of Debt for Necessaries.**]—See *Willins* v. *Smith*, col. 120.

### 14. Pledgor and Pledgee.

A. borrows a sum of money from B., with whom he deposits government securities as a pledge, upon condition not to sell them until failure of payment at a certain day. This is such a transaction as may be affected by the Statute of Limitations. *Gage* v. *Bulkeley*, Ridgw. 278.

**Goods pledged by Bankrupt.**]—See *Kemp* v. *Westbrook*, col. 78.

## V. SPECIAL LIMITATIONS WITH REGARD TO ACTIONS FOR THINGS DONE UNDER PARTICULAR STATUTES.

*By the Public Authorities Protection Act*, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1, *any proceeding against any person for an act done in, or in respect of any alleged default in, execution of an act of parliament or of a public duty or authority must be commenced within six months after the act or default, or in case of continuance of damage within six months after the ceasing thereof.*

**11 & 12 Vict. c. 43, s. 11—Encroachment on Carriage Way.**]—Building within fifteen feet from the centre of any carriage-way, contrary to 27 & 28 Vict. c. 101, s. 51, is not a continuing offence, and the six months' limitation imposed by 11 & 12 Vict. c. 43, s. 11, runs from the completion of the building. *Coggins* v. *Bennett*, 2 C. P. D. 568.

—— **Proceedings to recover Extraordinary Expenses in repairing Highway.**]—The six months' period of limitation, provided by 11 & 12 Vict. c. 43, s. 11, within which a complaint must be preferred to recover extraordinary expenses under s. 23 of the Highways and Locomotives Amendment Act, 1878, must be reckoned from the date of the surveyor's certificate, and not from the time payment is demanded. *Pool and Forden Highway Board* v. *Gunning*, 51 L. J., M. C. 49; 46 L. T. 163.

Where the summons was taken out more than six months after the repairs were done, but within six months of the surveyor's certificate and of the demand of payment, it was held to be in time. *White* v. *Polson*, 46 J. P. 565.

—— **38 & 39 Vict. c. 55, s. 158—Continuing Offence—Building without Approval of Local Authority.**]—An information for commencing the execution of works that had not been approved by the local authority must be preferred within six months of the work being commenced under s. 11 of 11 & 12 Vict. c. 43. The period of limitation mentioned in s. 158 of the Public Health Act, 1875, applies only to the case of a continuing offence. *Reay* v. *Gateshead*, 55 L. T. 92; 34 W. R. 682.

**Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 109 (repealed).**]—The three months' limit under the Highway Act applies to local authorities for acts done by them as surveyors of highways. *Graham* v. *Newcastle Corporation*, 62 L. J., Q. B. 315; [1893] 1 Q. B. 643; 69 L. T. 6.

In an action against a corporation for negligence, as surveyors of highways, commenced more than three, but less than six, months after the cause of action accrued:—Held, that the defendants were entitled to rely on the limitation of three months provided by 5 & 6 Will. 4, c. 50, and therefore that the action could not be maintained. *Taylor* v. *Meltham Local Board* (infra) distinguished. *Burton* v. *Salford Corporation*, 52 L. J., Q. B. 668; 11 Q. B. D. 286; 49 L. T. 43.

H., late in the evening, was crossing a bridge, from which the handrail had fallen into the brook below. He stretched out his hand to hold it, believing it to be in its usual place, fell over the bridge, and sustained injuries for which he sued the highway board in the county court. Notice that the rail was unsafe had previously been given to the board, and it was repaired by them a few days after. The county court judge nonsuited the plaintiff on the ground that the action was not brought within three months, according to the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 109:—Held, that this omission to repair was something done in pursuance or under the authority of that act, and that the county court judge was right. *Holland* v. *Northwich Highway Board*, 34 L. T. 137.

—— **11 & 12 Vict. c. 63, s. 139.**]—By s. 109 of the Highway Act (5 & 6 Will. 4, c. 50), no action is to be brought against any person for anything done under that act after three months after the fact committed, for which such action was brought. The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 117, constitutes the local board of health surveyor of highways with all the powers of any such surveyor in England; and by s. 139, every action against any inspector, or any person acting under the general board of health, or the officer of health, clerk, surveyor, inspector of nuisances, or the officer acting under the direction of the local board, for anything done under the provisions of that act, is to be commenced within six months after the accrual of the cause of action, and not afterwards:—Held, that an action of trespass against a local board of health

for an act done by the board as surveyor of highways, which was commenced less than six months, though more than three months after the alleged trespass, was not too late. *Taylor* v. *Meltham Local Board*, 47 L. J., C. P. 12.

**22 & 23 Vict. c. 49, s. 1—Action against Guardians.**]—No action or other proceeding can be maintained against the guardians of a union or a parish for any debt, claim or demand due from them unless such action is commenced within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, or unless the time has been extended by the Poor Law Board, under 22 & 23 Vict. c. 49, s. 1. *Baker* v. *Billericay Union Guardians*, 2 H. & C. 642; 33 L. J., M. C. 40; 9 Jur. (N.S.) 1201; 9 L. T. 486; 13 W. R. 11. *Reg.* v. *Stepney Union*, 43 L. J., M. C. 145; L. R. 9 Q. B. 383; 30 L. T. 808.

The limit of time for payment of debts by guardians under 22 & 23 Vict. c. 49, s. 1, is not applicable to debts contracted by them when acting as rural sanitary authority under s. 9 of the Public Health Act, 1875. *Dearle* v. *Petersfield Union*, 57 L. J., Q. B. 640; 21 Q. B. D. 447; 60 L. T. 85; 37 W. R. 113.

**Leeds Improvement Act, 1877, s. 96.**]—A private act provided that summary proceedings before justices for the recovery of expenses must be brought within a year:—Held, that the limitation did not apply to an action of debt in the county court for the expenses. *Leeds* v. *Robshaw*, 51 J. P. 441.

**25 & 26 Vict. c. 102, s. 107.**]—A summons for laying out a new street of less than the required width must be brought within six months of notice being given to the district surveyor of the intended work, such notice, though not communicated to the board, being discovery by the board within 25 & 26 Vict. c. 102, s. 107. *Metropolitan Board of Works* v. *Lathey*, 49 J. P. 245.

**13 Geo. 3, c. 78, s. 81.**]—Though the 13 Geo. 3, c. 78, s. 81, directed that actions against any persons for anything done or acted in pursuance thereof should be commenced within three calendar months after the fact committed, and not afterwards; yet if surveyors of highways, in the execution of their office, undermined a wall adjoining to the highway, which did not fall till more than three months afterwards, they were subject to an action on the case for the consequential injury within three months after the falling of the wall. *Roberts* v. *Read*, 16 East, 215; 14 R. R. 335.

An action against a surveyor of highways for adding a portion of a close to the public road must be brought within three months from there being a complete separation between the part of the close taken and the residue, the fact being then committed within 13 Geo. 3, c. 78, s. 81. It is not sufficient to shew that the separating wall was raised and finished within the three months. *Wordsworth* v. *Harley*, 1 B. & Ad. 391; 9 L. J. (O.S.) M. C. 50.

**6 Geo. 4, c. 16, s. 44—Actions against Assignees.**]—Trover may be brought against the assignees of a bankrupt after the expiration of three months from the time of the alleged conversion, and, therefore, they are not within the protection of 6 Geo. 4, c. 16, s. 44. *Carruthers* v. *Payne*, 2 M. & P. 429; 5 Bing. 270.

Where assignees of a bankrupt entered the premises of a third person to seize goods which were the property of the bankrupt, it is not necessary that an action should be brought against them within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute," within 6 Geo. 4, c. 16, s. 44. *Edge* v. *Parker*, 8 B. & C. 697; 3 M. & Ry. 365; 7 L. J. (O.S.) K. B. 101.

**Local Drainage Act—Protection of Surveyor.**]—A surveyor under a local drainage act may take advantage of a clause limiting the commencement of actions to six months after the act done, where the injury happened to the plaintiff within six months of the action brought, although it does not appear that a compensation, as directed by the statute for the act complained of, has been made, or a certain course therein specified pursued, on the observance of which only he could have a right of entry on the lands of others. *Boothby* v. *Morton*, 7 Moore, 51; 3 Br. & B. 239.

A local improvement act enacted that actions against persons proceeding under the act shall be brought within six calendar months next after the matter or thing done. The treasurer, surveyor and contractors under the act dug a sewer near the plaintiff's house, in consequence of which the foundation was sunk and the walls were cracked:—Held, that the right of action was limited to six months from the day the cracks were occasioned. *Lloyd* v. *Wigney*, 4 M. & P. 222; 6 Bing. 489; 8 L. J. (O.S.) C. P. 161; 31 R. R. 474.

**Action for Resulting Damage.**]—By a statute, it was provided that no action should be brought "after six calendar months after the cause of such action should have arisen." A nuisance was caused on the 2nd April, and continued until the 2nd July, and the jury gave damages at the rate of 10*l.* per month; the action was not commenced until the 30th December:—Held, that damages for two days only could be recovered, the action being brought too late to sustain the previous damage. *Wilks* v. *Hungerford Market Co.*, 2 Scott, 446; 2 Bing. (N.C.) 281; 1 Hodges, 281; 5 L. J., C. P. 23.

Where a statute limits the period within which an action is to be brought for an act done or committed, if the cause of action is a single act, or one which amounts to a trespass (except it is a continuing trespass), the action must be brought within the prescribed period after the actual doing of the thing complained of; but if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury. *Whitehouse* v. *Fellowes*, 10 C. B. (N.S.) 765; 30 L. J., C. P. 305; 4 L. T. 177; 9 W. R. 557.

By a private act it was enacted, that a company should be sued within "six calendar months after the fact committed":—Held, that the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; the act itself not being tortious or injurious, except from those consequences which occurred some time after. *Gillon* v. *Boddington*, 1 Car. & P. 541; R. & M. 161.

A. was mortgagee from B. of leasehold coal-

mines and barges. B. afterwards demised the mines, and assigned the barges to C.:—Held, that A. might bring trover against a canal company, who tortiously seized and sold the barges and part of the produce of the mines for tolls claimed to be due. Held, also, that no injury resulted to A. until the sale; and that therefore an action brought within six months of the sale, but more than six months after the seizure, was not barred by a clause in the canal act, limiting the commencement of actions for anything done in pursuance of that act to within six months after the fact committed. *Frazer* v. *Swansea Canal Co.*, 3 N. & M. 391; 1 A. & E. 354; 3 L. J., K. B. 153.

And see *Oakley* v. *Kensington Canal Co.*, and *Jenkins* v. *Cooke*, col. 71; and *Blakemore* v. *Glamorganshire Canal Co.*, col. 70.

**Accrual of Cause of Action—Public Health Act, 1875, s. 264—Action against Local Board for Subsidence by Excavation—Within Six Months of Damage, not of Excavation.**]—See *Crumbie* v. *Wallsend Local Board*, col. 15.

**5 & 6 Vict. c. 97, s. 5—Local and Personal Act, What is.**]—An act which was printed as a local and personal act, and containing a clause enacting that it should be deemed a public act, and judicially noticed as such, gave jurisdiction to the commissioners appointed under it over debts wheresoever contracted, and any person might sue in this court, if the defendant happened to be in any of the places named in the act:—Held, a public local and personal act, within 5 & 6 Vict. c. 97, s. 5. *Cock* v. *Gent*, 1 D. & L. 413; 12 M. & W. 234; 13 L. J., Ex. 24.

But the Metropolitan Police Acts (2 & 3 Vict. c. 47; 2 & 3 Vict. c. 71; and 3 & 4 Vict. c. 84) are not. *Barnett* v. *Cox*, 2 New Sess. Cas. 487; 9 Q. B. 617; 16 L. J., M. C. 27; 11 Jur. 118.

—— **Harbour Acts.**]—The Ramsgate Harbour Acts (32 Geo. 3, c. lxxiv., and 55 Geo. 3, c. lxxxiv.) are acts of a local and personal nature. *Shepherd* v. *Sharp*, 1 H. & N. 115; 25 L. J., Ex. 254; 2 Jur. (N.S.) 617; 4 W. R. 570—Ex. Ch. S. P., *Moore* v. *Shepherd*, 10 Ex. 424; 24 L. J., Ex. 28.

—— **55 Geo. 3, c. 51, s. 23—Rating Act—Distress Warrant by Justices.**]—The 8 & 9 Vict. c. 21, empowers justices of the county of Lancaster to make rates on the division of Manchester for the purposes of the act; and s. 21 enacts, that all the provisions of any subsisting act, relating to the enforcing of county rates, shall be taken to apply to rates made under this act. The 55 Geo. 3, c. 51 (a County Rate Act), by s. 23, enacted, that all actions against any person, for anything done by virtue of that act, should be brought within three months after the fact committed:—Held, that an action against the justices, for issuing a warrant of distress against the goods of an overseer for not collecting and paying over a rate made under 8 & 9 Vict. c. 21, ought to have been brought within three months, as s. 21 of the latter act incorporated s. 23 of 55 Geo. 3, c. 51. *Boden* v. *Smith*, 18 L. J., C. P. 121; 13 Jur. 428.

Held, also, that even supposing the 8 & 9 Vict. c. 21, to be a local act, it repealed the 5 & 6 Vict. c. 97, so far as regarded the period of limitation for bringing this action. *Ib.*

**Whether Thing done in Execution of Powers given by Act—Abstraction of Water—Continuing Damage.**]—A., who was entitled by an act of parliament to all the surplus water and such as was not necessary for the purposes of a canal, brought an action against the canal company for an illegal abstraction of water, and alleged in his declaration continuing acts of commission and omission from an antecedent period, by which he was deprived of the water for nine weeks in 1825, and for seventeen weeks in 1826:—Held, that the company was within the protection of the limitation clause of the 30 Geo. c. 82, s. 79, which enacts, that any action for anything done in pursuance of the act shall be brought within six calendar months next after the fact committed, unless there was a continuation of damage; and also, that there was no continuation of damage, inasmuch as there was a cessation of injury, although the cause from which the injury proceeded was continuing. *Blakemore* v. *Glamorganshire Canal Co.*, 3 Y. & J. 60.

Where a canal company was empowered to supply the canal with water from all streams whatsoever within the distance of 2,000 yards, except as thereinafter mentioned, with a proviso that nothing should extend to authorise them to take water from certain specified streams, between 10th June and 10th September, except only that, if one of those streams should overflow, the same might be taken into the canal so long as such overflowing should continue, and that all actions should be brought for anything to be done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or, in case of a continuation of damages, within three calendar months after the committing such damages should have ceased:—Held, that the taking and continuing to take the water by the company from one of the specified streams, during the prohibited times, might, nevertheless, be so far a thing done in execution of the powers and authorities given them by the act, as to entitle the company to the protection of the act as to the time of commencing the action against them. *Gaby* v. *Wilts and Berks Canal Co.*, 3 M. & S. 580.

—— **Dock Company—Improper Directions of Dock Master.**]—An act authorised a company to make and maintain docks, and to appoint a dock master, who should have power to direct the mooring, unmooring, moving and removing of all vessels into or in the docks, and should have control over the space of 100 yards from the entrance into the docks, so far as related to the transporting of vessels in and out; the company to be sued in the name of their treasurer; and every action brought against any person for anything done in pursuance of the act, to be commenced within six calendar months after the fact committed. In an action brought against the treasurer for damage done to a vessel by means of improper directions given by the dock master in transporting her into the docks:—Held, that giving such directions was a thing done in pursuance of the act, and that the action should have been commenced within six calendar months after those directions were given. *Smith* v. *Shaw*, 5 M. & Ry. 225; 10 B. & C. 277; 8 L. J. (O.S.) K. B. 111.

—— **Taking of Land.**]—By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose, making satisfaction, it was provided, that the

company should not take any garden ground without the consent of the owners and occupiers, and that any action to be brought for anything done in pursuance of those acts should be commenced within six calendar months next after the facts should have been committed; or, if there should be a continuance of damage, then within six calendar months next after the committing of such damage should have ceased. The company, wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, a tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was thenceforth overflowed by the Thames at every high tide. For this damage the landlord sued the company, but not before more than six calendar months after the ground was taken and the tide let in:—Held, that the injury was one for which an action should have been brought within six calendar months after the taking away of the land; and that the company was within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose the company had been guilty of a misrepresentation amounting to bad faith towards the occupier. *Oakley (Lord)* v. *Kensington Canal Co.*, 5 B. & Ad. 138; 2 L. J., K. B. 208.

—— **Distress for Tolls.**]—A canal company was authorised by statute to demand and sue for tolls upon the carriage of goods, and to distrain any carriage or goods in respect of which such tolls ought to be paid, and to detain the same until payment made of such tolls and of all arrears of the same due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in the case of a distress for rent; they were not expressly authorised to levy any toll upon carriages. The statute enacted, that any action brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that a distress for nonpayment of tolls was a thing done in pursuance of the act. *Jenkins* v. *Cooke*, 1 A. & E. 372.

Held, secondly, that where the owner of trams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale on a count complaining of injury done to his reversionary interest by the seizure and sale. *Ib.* S. P., *Collins* v. *Rose*, 5 M. & W. 194; 8 L. J., Ex. 273.

**Actions against Justices of the Peace—2 & 3 Vict. c. 71, s. 53—10 Geo. 4, c. 44, s. 41—Three Months' Limitation—When Allowed.**]—A complaint having been made against a pawnbroker before a police magistrate, appointed under 2 & 3 Vict. c. 71, the pawnbroker called his assistant as a witness, and he was sworn and examined before the magistrate, who cautioned him against committing perjury. The case was subsequently dismissed from want of jurisdiction in the magistrate; but he, being dissatisfied with the evidence of the assistant, ordered him to be detained without any complaint being made, and afterwards took bail for his appearance, as on a charge of perjury, upon a subsequent day. Upon that day the parties attended, and the charge of perjury was gone into, and the magistrate subsequently took the recognizance of the assistant for his appearance to answer an indictment for perjury. A bill was preferred, but returned not found. The assistant afterwards brought an action for trespass and false imprisonment against the magistrate. The action was not commenced until more than three months after the commission of the alleged trespass, but within six months:—Held, that the magistrate was entitled to the statutory protection of s. 53 (repealed), which limits the time for commencing the action to three months after the fact committed, and that therefore the action was too late. *Haseldine* v. *Grove*, 3 G. & D. 210; 3 Q. B. 997; 12 L. J., M. C. 10; 7 Jur. 36.

—— **In Metropolis.**]—The time limited for bringing actions against justices of a metropolitan police district, in respect of a conviction under 2 & 3 Vict. c. 47, s. 18, made in exercise of the jurisdiction given them by 3 & 4 Vict. c. 84, s. 6, is three calendar months, the period prescribed by 2 & 3 Vict. c. 71, s. 53, and not six calendar months, the period given by 10 Geo. 4, c. 44, s. 41. *Barnett* v. *Cox*, 9 Q. B. 617; 2 New Sess. Cas. 486; 16 L. J., M. C. 27; 11 Jur. 118.

—— **11 & 12 Vict. c. 44, s. 8—Six Months' Limitation.**]—A magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. *Massey* v. *Johnson*, 12 East, 67.

An action brought within six months after the end of a long imprisonment by a justice's warrant is sufficient. *Pickersgill* v. *Palmer*, Bull. N. P. 24.

In an action against a justice of the peace, for false imprisonment, it appeared that the plaintiff was discharged from prison on the 14th December, and the writ issued on the 14th of June:—Held, that the action was commenced in time. *Hardy* v. *Ryle*, 9 B. & C. 603; 4 M. & R. 295; 7 L. J. (o.s.) M. C. 118.

In an action against magistrates for an act done by them ex officio, the plaintiff must shew at nisi prius that he proceeded upon a writ sued out within six months after notice to them of the action, although there is a continuing cause of action; and therefore he must shew a return and a continuance of the first writ, if the second is out of the time fixed by the notice. *Weston* v. *Fournier*, 14 East, 491.

**Actions against Constables—24 Geo. 2, c. 44, s. 8—Six Months' Limitation—In what Cases.**]—A constable who does an act bonâ fide, intending to do his duty, is within the protection of 24 Geo. 2, c. 44, s. 8 (repealed). *Gosden* v. *Elphick*, 4 Ex. 445; 7 D. & L. 194; 19 L. J., Ex. 9; 13 Jur. 989.

A constable, acting bonâ fide under a warrant commanding him to take the goods of one person, and by mistake taking those of another, is protected, and, therefore, an action must be brought against him within six calendar months. *Parton* v. *Williams*, 3 B. & Ald. 330; 22 R. R. 414.

So, where constables were directed under a warrant to search a house for black cloth, and took cloths of another description, and carried them before a magistrate, refusing at the time they took them to tell the owner of the house searched whether they had any warrant or not: —Held, within the protection of the statute, and that an action against them ought to have been commenced within six calendar months. *Smith* v. *Wiltshire*, 5 Moore, 322; 2 Br. & B. 619; 23 R. R. 521.

A constable acting colore, not virtute, officii, is not protected from actions not commenced within six months. *Alcock* v. *Andrews*, 2 Esp. 542, n.

So, if he acts without a warrant at all. *Postlethwaite* v. *Gibson*, 3 Esp. 226.

It seems that if a constable acts in his character as such, even without a warrant, he is within the statute. *Field* v. *Croft*, 5 Moore, 329, cited. And see *Graves* v. *Arnold*, 3 Camp. 242.

A. obtained a magistrate's warrant for the apprehension of B. upon a criminal charge which, on the hearing, was dismissed. This warrant was directed "To the constable of D." (a parish in the county of W.). A. delivered the warrant to a county constable of W., and directed him to execute it, which he did:—Held, that the warrant could not be executed by any other constable than by a constable of the parish of D., and consequently that the execution of it by the county constable was illegal, and that the action not having been brought within six months after the commission of the trespass, the constable was protected. *Freegard* or *Treegard* v. *Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.

**53 Geo. 3, c. 127, s. 12—Distress for Rates—Three Months' Limitation.**]—Where a constable having a magistrate's warrant of distress to levy a church rate, under 53 Geo. 3, c. 127, broke the door of and entered the plaintiff's dwelling-house:—Held, that although he thereby exceeded his authority, yet that no action could be maintained after the expiration of three calendar months. *Theobald* v. *Crichmore*, 1 B. & Ald. 227; 19 R. R. 297.

Under 53 Geo. 3, c. 127, s. 12 (repealed), which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months after the fact committed, an action for seizing, taking and carrying away and distraining and selling the plaintiff's goods, under a warrant of distress for arrears of a church rate, may be brought within three calendar months after the sale. *Collins* v. *Rose*, 5 M. & W. 194; 8 L. J., Ex. 273.

—— **Right of Overseer.**]—An overseer of the poor, who distrains for a poor-rate under a justice's warrant, is an officer within the protection of the act. *Nutting* v. *Jackson*, Bull. N. P. 24.

**Actions against Officers of Excise — 7 & 8 Geo. 4, c. 53, s. 115—28 Geo. 3, c. 37, s. 23—Seizure of Forfeited Goods.**]—By 7 & 8 Geo. 4, c. 53, s. 115, an action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless brought within three months after the actual seizure: notwithstanding a suit is instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. *Goding* v. *Ferris*, 2 H. Bl. 14; 3 R. R. 339.

Where the commander of one of the king's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant; the owner could not maintain trover for the remainder, if the action was brought after three months from the original seizure, though within three months from the order for redelivery. *Saunders* v. *Saunders*, 2 East, 254; 6 R. R. 424.

Where an officer in the preventive service boarded a ship, and left three men on board, and two days afterwards decided on seizing her; and the owner having sued him for such seizure: —Held, that the three months within which the action should have been commenced under 28 Geo. 3, c. 37, s. 23 (repealed), must be computed from the day of boarding the vessel. *Crook* v. *M'Tavish*, 8 Moore, 265; 1 Bing. 167; 1 L. J. (o.s.) C. P. 43.

**Penal Actions—31 Eliz. c. 5, s. 5.**]—The 31 Eliz. c. 5, s. 5, includes penal actions where the penalty is given to a common informer alone, and therefore he must sue within one year after the offence committed. *Dyer* v. *Best*, 4 H. & C. 189; 35 L. J., Ex. 105; L. R. 1 Ex. 152; 12 Jur. (N.S.) 142; 13 L. T. 753; 14 W. R. 336.

In a penal action the plaintiff is at liberty to shew the action commenced within a year, as well after as before the objection is made that it does not appear on the record. *Maugham* v. *Walker*, Peake, 164; 5 Term Rep. 98.

—— **Turnpike Act, 3 Geo. 4, c. 126.**]—The proviso in the 143rd section of the Turnpike Act (3 Geo. 4, c. 126) is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett* v. *Warner*, 1 H. & N. 388; 26 L. J., Ex. 11—Ex. Ch.

—— **3 & 4 Will. 4, c. 42, s. 3—Action by Officer of Goldsmiths' Company.**]—An action by an officer of one of the Company of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that act, is not an action by a common informer within 31 Eliz. c. 5, nor is it an action by a "party grieved" within 3 & 4 Will. 4, c. 42, s. 3, and consequently can be brought more than two years after the cause of action accrued. *Robinson* v. *Currey*, 50 L. J., Q. B. 561; 7 Q. B. D. 465; 45 L. T. 368; 30 W. R. 39; 46 J. P. 148—C. A.

*See further*, as to Penal Actions, col. 88.

—— **Railway Act—Obstruction of Canal—Six Months' Limitation runs from Obstruction ceasing, not from Demand of Penalties.**]—By a railway act it was provided that no action should be brought against any person for anything done, or omitted to be done, in pursuance of the act, unless such action should be commenced within six months next after the act committed, or in case of a continuation of damages, then within six months next after the committing such damages should have ceased. By a subsequent act the company was authorised to alter the course of a canal, provided that, if

in the execution of the works, the canal should be obstructed, the company should pay to the proprietors of the canal 10*l.* an hour as liquidated damages during the continuance of the obstruction, and in default of payment of such sum on demand, the proprietors might recover the same in an action. The company in the execution of their works obstructed the canal in 1840 and June, 1841. In May, 1842, the proprietors of the canal made a demand on the company for the penalties for the two obstructions, the last of which they described in their demand as having ceased on the 11th June, 1841. In June, 1842, they brought an action for the penalties: — Held, that the action was not brought in time, as the limitation of six months for bringing the action began to run from the ceasing of the obstruction, and not from the demand and nonpayment of the penalties. *Kennet and Avon Canal Co.* v. *G. W. Ry.*, 7 Q. B. 824; 4 Railw. Cas. 90; 14 L. J., Q. B. 325; 9 Jur. 788.

**Issue of Writ within Time limited by Act sufficient.**]—See *Parsons* v. *King*, col. 27.

**Claim under Allotment Act, brought within Time specified in Act, must, on Death of Defendant, be revived against Heir within same Time.**]—See *Knight* v. *Bate*, col. 302.

## VI. APPLICATION OF STATUTES IN PARTICULAR PROCEEDINGS.

### 1. In Equity.

See *Medlicott* v. *O'Donel*; *Hyde* v. *Price*; and *Bond* v. *Hopkins*, col. 150.

**Courts of Equity act either in Obedience or by Analogy to Statute.**]—Courts of equity, though not within the words of the Statute of Limitations (which apply to particular legal remedies), are within the spirit and meaning of them. *Hovenden* v. *Annesley* (*Lord*), 2 Sch. & Lef. 630; 9 R. R. 119.

Courts of equity act not by analogy, but in obedience to the Statute of Limitations. *Ib.*

Upon all legal titles and legal demands, courts of equity are bound by the Statute of Limitations. *Ib.*

Though the 21 Jac. I, c. 16, does not apply to any equitable demand, equity takes the same limitation in cases analogous to those at law. *Stackhouse* v. *Barnston*, 10 Ves. 466.

Length of time adopted in equity by analogy to Statute of Limitations. *Hodle* v. *Healey*, 1 Ves. & B. 539; 6 Madd. 181; 22 R. R. 270.

See also *Smith* v. *Clay*, 3 Bro. Ch. C. 639, n.; and *Greaves, In re*, 18 Ch. D. at p. 554.

—— **Bequest of Share of Sum advanced to Partnership—Bill for an Account.**]—When the remedy in equity is correspondent to a remedy at law, and the latter is subject to a limitation in point of time by the Statute of Limitations through being included within the words of the statute, a court of equity there acts in analogy to the statute, and adopts the enactment of the statute as its own rule of procedure. But if any proceeding in equity is included within the words of the statute, there a court of equity, like a court of law, acts in obedience to the statute. *Knox* v. *Gye*, 42 L. J., Ch. 234; L. R. 5 H. L. 656.

The phrase "comprised in the same account" in the 19 & 20 Vict. c. 97, s. 9, means that "would have been comprehended in." *Ib.*

T. advanced 12,000*l.* to G. on the terms of partnership. T. made a will, leaving this money equally between K. and G. T. died in December, 1854, before old Covent Garden Theatre was burned down, which event took place in March, 1856. There had been before December, 1854, negotiations between G. and H. to allow G. the use of Her Majesty's Theatre; but though 5,000*l.* (part of T.'s 12,000*l.*) had been paid to H. under these negotiations, he had never performed his contract. G. finally brought an action against H., and recovered judgment for 5,000*l.*, but ultimately (after the death of T., yet within six years of the date of a bill filed by K., for an account) consented to accept 2,500*l.* as a compromise. K., in December, 1864, filed a bill against G. for an account of profits in the partnership with T., and what was due to K. in respect thereof under T.'s will:—Held, that his right under T.'s will began in December, 1854, and was barred in equity by analogy to the Statute of Limitations, the bill not having been filed till 1864. *Ib.*

Held, also, that the surviving partner not being a trustee for the executors of his deceased partner, the payment of the 2,500*l.* from H. within six years from filing the bill did not take the case out of the statute. *Ib.*

—— **Claim by Customer against Bankers for an Account.**]—In the case of a legal demand, a court of equity acts in obedience, and not merely by analogy, to the Statute of Limitations. A banking firm who, on opening an account with a customer, had agreed to allow him interest at 3 per cent. on the balances which should from time to time be standing to his credit, set up the Statute of Limitations as a defence to a bill filed against them by the customer for an account. The account as it stood in the bankers' book showed a considerable balance due to the plaintiff, but there being no item in it, or evidence of any transaction connected with it, of a date within six years prior to the filing of the bill, nor any suggestion in the bill that the bankers were bound, by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail. *Foley* v. *Hill*, 1 Ph. 399; 8 Jur. 347. Affirmed, 2 H. L. Cas. 28.

**Claim for an Account of Coal wrongfully taken.**]—When by underground working a party had taken the coal of his neighbour, a court of equity limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the onus of proof would lie on the wrongdoer to shew that it was not taken within six years. *Dean* v. *Thwaite*, 21 Beav. 621.

**Restraining Defendant from pleading Statute at Law.**]—A woman, at the time of her marriage, was indebted on two promissory notes. After the marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit, the husband pleaded his infancy at the time of giving the bond. On a bill filed in this court for relief, the court ordered the notes to be returned to the plaintiff with directions that the defendant

should not plead Statute of Limitations to any action the plaintiff should bring on the notes or any other plea, which the defendant could not have pleaded at the time the bond was given; but this court will not order the immediate payment of the money. *Clarke* v. *Cobley*, 2 Cox, 173; 2 R. R. 25.

**Where Statute attached after Bill filed, Injunction against pleading it at Law.**]—See *Sirdefield* v. *Price*, col. 32.

**Time begins to run against Relief from Mistake from its Discovery.**]—See *Brooksbank* v. *Smith*, col. 20.

**Time ceases to run on filing Bill.**]—See *Wrixon* v. *Vize*, col. 32.

**Taking out Writ in Common Pleas not sufficient to keep alive Debt in Chancery.**]—See *Fievet* v. *Manby*, col. 32.

**Express Trusts.**]—See *McDonnell* v. *White*, col. 42.

**Statute does not run against an Executor's Right to an Account in Equity.**]—See *Smith* v. *O'Grady*, col. 54.

**Agreement by Married Woman to repay Loan out of Separate Estate—Debt barred in Six Years by Analogy to Statute.**]—See *Hastings, In re, Hallett* v. *Hastings*, col. 63.

**Administration in Equity of Deceased Debtor's Assets.**]—See *Barton* v. *Tattersall*, col. 78.

**Where Statute has barred Penalty, Right to Protection against Discovery gone.**]—See *Talbot* v. *Smith*, and *Williams* v. *Farrington*, col. 88.

**Equitable Replication to Plea of Statute.**]—See *Hunter* v. *Gibbons*, col. 123.

**Statute a Bar in Equity to Discovery as to original Debt, but not as to whether any subsequent Acknowledgment.**]—See *Baillie* v. *Sibbald*, col. 100; *Cork* v. *Wilcock*, col. 148; and *Burdett* v. *Twysden*, col. 145.

**—— Nor as to when Debt due.**]—See *Mackworth* v. *Clifton*, col. 148.

**Statute cannot be pleaded to Action for Specific Performance.**]—See *Talmarsh* v. *Muggleston*, col. 151.

**Provisions of Statute as to Arrears of Interest adopted in Equity.**]—See *Hyde* v. *Price*, col. 329.

2. In Bankruptcy and Winding-up of Companies.

**Actions by Bankrupt's Assignees.**]—Where the statute had begun to run against a petitioning creditor's debt, before the commission issued, it shall not be taken advantage of by a third person against the assignees. *Quantock* v. *England*, 2 W. Bl. 702; 5 Burr. 2628.

A debtor to a bankrupt, when sued by his assignees, cannot set up the statute as an objection to the petitioning creditor's debt. *Mayor* v. *Pyne*, 2 Car. & P. 91; 3 Bing. 285; 11 Moore, 2; 4 L. J. (o.s.) C. P. 36; 28 R. R. 625.

To an action by the assignees of an insolvent debtor to recover money owing to him before his insolvency, in which they declared that, in consideration of the money being due to the insolvent, the defendant promised to pay it to them as assignees, it is a bad plea to say "that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out the writ of the plaintiffs." *Kinder* v. *Paris*, 2 H. Bl. 561.

Bill lies by assignee for account and delivery of goods pledged by the bankrupt, notwithstanding the Statute of Limitations. *Kemp* v. *Westbrook*, 1 Ves. 278.

A motion by a trustee in a liquidation that rents of property of the debtor received by N. should be paid over to him, notice of which is given more than six years after the rents were received, is barred by the statute. *Norton, Ex parte, Mansel, In re*, 66 L. T. 245.

**Claims by Creditors.**]—The statute does not attach to a debt proved under a commission or a fiat of bankruptcy. A surviving assignee is, therefore, liable for the payment of dividends, if his co-assignee ever admitted proof of the debt, although the creditor has failed to apply for the dividends for many years. *Healey, Ex parte*, 1 Deac. & C. 361. Cf. *Clarkson, Ex parte, Clarkson, In re*, 3 Mont. & Ayr. 154; and *Brunger* or *Burgess, Ex parte, Tyrell, In re*, Mont. & Bli. 415; 2 L. J., Bk. 96.

A person who had taken the benefit of the Insolvent Act, for the relief of insolvent debtors, first in 1814, and again in 1823, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency:—Held, that the assets ought to be applied in payment, first, of those subsequent debts, and, secondly, of the debts scheduled under the second insolvency, and thirdly, of the debts scheduled under the first insolvency; that a court of equity had power so to administer the fund, and that the right of the creditors to that relief was not affected by the Statute of Limitations. *Barton* v. *Tattersall*, 1 Russ. & M. 237; Tam. 378.

The 25 Geo. 3, c. 165, s. 54, by which a right was reserved to creditors to obtain payment out of the future effects of the insolvent, did not prevent the operation of the statute. *Browning* v. *Paris*, 5 M. & W. 117; 7 D. P. C. 398; 2 H. & H. 65; 8 L. J., Ex. 222.

A debtor executed a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, s. 192, and which provided for payment of the debts by instalments, and the avoidance of the deed in certain contingencies, one of which happened, and for the revivor of the debts in that event, deducting dividends received under the deed. A certain creditor was mentioned as such in one of the schedules to the deed. The debt of this creditor was also mentioned in the statutory account of debts of the debtor, which was verified by his affidavit; and the creditor received a dividend on his debt from the inspectors under the inspectorship:—Held, that the debt, being otherwise barred by the Statute of Limitations, was not, by any of these circumstances, taken out of its operation. *Topping, Ex parte, Levy, In re*, 4 De G. J. & S. 551; 34 L. J., Bk. 44; 12 L. T. 787; 13 W. R. 1025.

—— **Trustee Act, 1888, s. 8.**]—The provisions of s. 8 of the Trustee Act, 1888, have no application to a trustee under a liquidation. *Cornish, In re*, 65 L. J., Q. B. 106 ; [1896] 1 Q. B. 99 ; 73 L. T. 602 ; 44 W. R. 161.

**Sale of Shares by Bankrupt's Assignee avoided after Fifteen Years.**]—When a mining concern, in which a bankrupt had more than one-third of the shares, was wound up, and a new company formed, who paid 18,000*l.* as the purchase-money for the mine, &c., which sum was to be applied in payment of the debts of the old concern ; and the property of the new company was divided into fifty-four shares, of which eleven were assigned to the assignee of the bankrupt for himself and friends ; and of these eleven, four were purchased by the trustees of the defendant, then a minor, and the purchase-money, which was exactly four fifty-fourths of the 18,000*l.*, was paid to the assignee :—Held, on a suit by a new assignee, fifteen years afterwards, that the four shares were to be considered as the property of the bankrupt, and the assignee as the agent of the defendant in the purchase, and that the shares still belonged to the bankrupt's estate, and an account of profits decreed. *Turner* v. *Trelawney*, 12 Sim. 49 ; 10 L. J., Ch. 249 ; 5 Jur. 698.

**Action for Detinue of Title Deeds by Assignees of, against Purchasers from, deceased Bankrupt.**]—See *Plant* v. *Cotterill*, col. 14.

**Statute does not run till Close of Bankruptcy against Debt discovered after Adjudication to have been incurred by Fraud.**]—See *Crossley, In re, Munns* v. *Burn*, col. 20.

**Statute does not run after Commencement of Bankruptcy.**]—See *Ross, Ex parte*, col. 33.

**Statute does not run against Right of Assignees to recover Dividends paid in Error.**]—See *Bolton, Ex parte, Baillie, In re*, col. 42.

**Statute no Bar to Proof in Case of Constructive Trust.**]—See *Gowers, Ex parte*, col. 42.

**Statute no Bar as between Solicitors to Bankruptcy Commission and Creditors.**]—See *Gould, Ex parte, Robertson, In re*, col. 58.

**6 Geo. 4, c. 16, s. 44, not applicable to Actions for Conversion against Assignees of Bankrupt.**]—See *Carruthers* v. *Payne ;* and *Edge* v. *Parker*, col. 68.

**Statute not applicable to Bill by Assignee for Administration of Estate of Deceased Bankrupt.**]—See *Byrne* v. *Byrne*, col. 84.

**Proof on Bill given for Debt more than Six Years Old.**]—See *Wilson, Ex parte, Bentley, In re*, col. 105.

**Payment with Intent to revive Statute-barred Debt not a fraudulent Preference.**]—See *Gaze, Ex parte, Lane, In re*, col. 131.

**Running Account between Petitioner in Bankruptcy and Debtor sufficient to save Petitioner's Debt.**]—See *Peachey, Ex parte, Seaber, In re*, col. 164.

**Statute runs in Favour of Agent continuing in Possession after Bankruptcy of Principal—Acknowledgment of Bankrupt Mortgagor's Title Inoperative.**]—See *Markwick* v. *Hardingham*, col. 227.

**Statute does not run against Assignee in Bankruptcy as to Property omitted from Bankrupt's Schedule.**]—See *Sturgis* v. *Morse*, col. 309.

**No Adjudication in Bankruptcy on Statute-barred Judgment Debt.**]—See *Tynte, In re*, col. 214.

**Winding-up of Company — Statute does not run against Creditors after Order for.**] — A company was ordered to be wound up in February, 1865. The certificate of debts and claims was made in December, 1870 ; and in January, 1871, a dividend was paid on the debts which had been established. In March, 1871, the holder of bills of exchange to a large amount, which had been accepted by the company and had become payable in February, 1865, gave the first notice of his claim and applied for leave to prove, not disturbing previous dividends :—Held, that by the Companies Act, 1862, the assets are made applicable to the payment of all liabilities of the company subsisting at the date of the winding-up order ; that from that time the Statute of Limitations does not run against a creditor, and that the claimants were entitled to prove, not disturbing former dividends. *General Rolling Stock Co., In re, Joint Stock Discount Co.'s Claim*, 41 L. J., Ch. 732 ; L. R. 7 Ch. 646 ; 27 L. T. 88 ; 20 W. R. 762.

—— **Claim of Liquidator against Directors—Payment of Dividends out of Capital.**] — The directors of a limited company for several years presented to the general meetings of shareholders reports and balance-sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shewn though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the company, the liquidator applied, under s. 165 of the Companies Act, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital :—Held, that the claim was for a breach of trust, and that the Statute of Limitations could not be set up. *Exchange Banking Co., In re, Flitcroft's Case*, 52 L. J., Ch. 217 ; 21 Ch. D. 519 ; 48 L. T. 86 ; 31 W. R. 174—C. A.

—— **Claim against Director for Misfeasance—When Statute begins to run—Disclosure to Board not to Company.**]—An application was made in the winding-up of a company, seeking to recover from a director the value of shares allotted to him under circumstances which amounted to a misfeasance. It appeared that the transaction in question had been disclosed at a board meeting of the directors in 1873, but that two of the directors then present had taken part in the transaction in question, and the third had received shares under the arrangement :—Held, that disclosure to the directors could not, under these circumstances, be considered as disclosure to the company, and that the claim, therefore, was not barred by the Statute of Limitations. *Fitzroy Bessemer Steel Co., In re*

50 L. T. 144; 32 W. R. 475—Kay, J. Compromised on appeal, 33 W. R. 312—C. A.

**Claim in Winding-up.**]—See *Higgins, Ex parte*, col. 33.

**—— Statute does not run against, after once carried in.**]—See *Great Western Extension Atmospheric Ry., Wryghte's Case*, col. 33.

**Claim for Costs by Solicitor to Company saved from Statute by Undertaking to pay off Official Manager in Winding-up.**]—See *Gloucester, Aberystwith and Central Ry., In re*, col. 144.

**Liability of Transferor of Shares in Winding-up.**]—See *Horsey, Ex parte*, col. 321.

3. In Administration Actions.

*See also* ante, **A**, IV. 6 (col. 47), *and* post, **B**, II. 11 (col. 232).

**As to Right of Creditors, Residuary Legatees and Devisees to set up Statute.**]—Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time, and the executors refusing to interfere, the plaintiff, a residuary legatee, insisted on setting up the objection of the statute:—Held, that it was competent for the plaintiff, or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executors. Whether the master himself is bound to take the objection, quære. *Shewen* v. *Vanderhorst*, 1 Russ. & M. 347; 1 L. J. (O.S.) Ch. 107.

In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by the Statute of Limitations; but, semble, that such an objection cannot be taken to the debt, which is the foundation of the decree. *Fuller* v. *Redman*, 26 Beav. 614.

A residuary legatee may set up the Statute of Limitations as against the creditors in an administration suit, though the executors do not take the objection. *Moodie* v. *Bannister*, 4 Drew. 432; 28 L. J., Ch. 881; 5 Jur. (N.S.) 402; 7 W. R. 278.

Where an executor has not in the pleadings set up the Statute of Limitations against the plaintiff's claim, it is not competent for a creditor to do so at chambers after the decree. *Adams* v. *Waller*, 14 L. T. 727.

Where an executor does not set up the Statute of Limitations on a creditor's administration summons, the residuary legatees cannot set it up against the plaintiff. *Briggs* v. *Wilson*, 5 De G. M. & G. 12; 2 Eq. R. 153.

Secus, as to cestuis que trustent of devised estates, who would have been necessary defendants but for the Chancery Amendment Act. *Ib.*

**Plaintiff, Residuary Legatee, estopped by Certificate and Order from setting up Statute against other Legatees.**]—See *Prowse* v. *Spurgin*, col. 239.

**Court not bound to notice Statute.**]—After decree in an administration suit, the court is not bound, on behalf of an absent party beneficially interested in the estate to disallow claims against the estate, barred by the Statute of Limitations, if the personal representative, and such of the persons beneficially interested as are parties to the suit or have come under the decree do not set up the statute. *Alston* v. *Trollope*, 35 Beav. 466; 35 L. J., Ch. 846; L. R. 2 Eq. 205; 14 L. T. 451; 14 W. R. 722.

**Nor Executors to set It up.**]—Where a judgment has been recovered against executors for a debt due from their testator, and they paid the debt, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up against the creditor who recovered the judgment. *Hunter* v. *Baxter, Frear's Estate, In re*, 3 Giff. 214; 31 L. J., Ch. 432; 5 L. T. 46.

**Administrator not bound to set up Statute.**]—See *Garratt, In re*, col. 50.

**After Administration Decree, Executor cannot acknowledge Statute-barred Debt.**]—See *Phillips* v. *Beal*, col. 118.

**Set-off of Barred Debt.**]—A debt due to an intestate's estate from one of the next of kin, barred by the Statute of Limitations, was set off against his share in the estate. *White* v. *Cordwell*, 44 L. J., Ch. 746; L. R. 20 Eq. 644; 23 W. R. 326.

**Time runs against Creditors from Decree.**]—An ordinary administration decree in a legatee's suit operates as a judgment in favour of creditors; so that time under the Statute of Limitations begins to run from the date of the decree. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235.

**Statute continues to run against Creditors generally till Decree.**]—In an administration action commenced in December, 1878, by one executor of a testator, who was also a creditor of his testator, against his co-executor, the usual judgment in a creditor's action was pronounced in December, 1879, and some time afterwards a claim was brought in by a creditor against the estate upon a promissory note of the testator, dated in November, 1873:—Held, that the claim was barred by the statute. *Sterndale* v. *Hankinson* (1 Sim. 393) observed upon. *Greaves, In re, Bray* v. *Tofield*, 50 L. J., Ch. 817; 18 Ch. D. 551; 45 L. T. 464; 30 W. R. 55.

**Statute ceasing to run against Incumbrancer from Commencement of Administration Action.**]—Where an incumbrancer who has proved his demand in an administration action, presents a petition for sale in pursuance of the judgment in that action, and carries on the proceedings to a sale, the Statute of Limitations does not run against his demand after the commencement of the administration action. *Ebbs' Estate, In re*, 31 L. R., Ir. 95.

**As to when an Administration Action stays the Statute.**]—*See* **A**, II. 3, ante (col. 34), and *Humble* v. *Humble*, col. 224.

**When Action not on Behalf of all Creditors, Statute not stayed as against Specialty Creditors.**]—See *Busby* v. *Seymour*, col. 322.

**Judgment Creditor barred, notwithstanding Administration Action.**]—See *Berrington* v. *Evans*, col. 322.

**Where Assets marshalled—Simple Contract Creditor's Right against Realty, when barred.**]—Simple contract creditors who have, in conse-

quence of the payment of specialty creditors out of the personal estate of the deceased debtor, acquired a right of marshalling his real estate, are not barred, under the Statute of Limitations, by the lapse of less than twenty years. *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

A simple contract creditor who has acquired a right of marshalling real estate is not barred by the lapse of less than twenty years. *Vickers* v. *Oliver*, 1 Y. & Coll. C. C. 211; 11 L. J., Ch. 112; 6 Jur. 273.

Upon the death of a testator who had devised his real estates for payment of his debts, a bill was filed on behalf of his creditors, both by specialty and simple contract, to have his assets administered and his real estates marshalled. In that suit a receiver was, in 1821, appointed of all his estates. It was afterwards discovered that the testator had died seised of an estate which had not passed by his will, but had descended to his heiress-at-law, M., upon whose death, in 1822, it descended to O. In 1840, eighteen years after M.'s death, a supplemental bill was filed against O. by one of the plaintiffs in the original suit, being a simple contract creditor of the testator, praying to have the benefit of that suit as against the descended estate:—Held, that as the original suit was treated as a suit for the administration of all the testator's real estates, and as the plaintiff sought to affect the descended estate by standing in the place of the specialty creditors, he was not, barred by the Statute of Limitations, but was entitled to have the descended estate marshalled in his favour. *Ib.*

**When a Breach of Trust or Misappropriation alleged, Statute no Bar.**]—G., by his will, bequeathed all his property to H., upon the trusts thereinafter mentioned. He then bequeathed his leaseholds to H. for life, and after her death he gave part of them to B. for life with remainder to G. the younger absolutely, and gave the residue of his property to G. absolutely, and appointed H. his executrix. G. the younger survived the testator and died intestate in March, 1838. H. took out administration to his estate in May, 1838, and died in 1841; appointed B. her executrix, who thus became the representative of the testator as well as of H. B. afterwards took out administration to G. the younger. One of the next of kin to G. the younger, in 1858, filed a bill against B. for the administration of the estate of G. the younger:—Held, that B. could not avail herself of any defence founded on the Statutes of Limitations, but that an account of the rents of the leaseholds received by B. which was not limited to six years before the filing of the bill, and an account of the personal estate of G. the younger, received by H. and B. respectively, had been rightly directed against her. *Obee* v. *Bishop*, 1 De G. F. & J. 137; 29 L. J., Ch. 148; 6 Jur. (N.S.) 132; 1 L. T. 151; 8 W. R. 102.

A demand against the assets of a deceased trustee or personal representative for a breach of trust or misappropriation committed by him is not barred by the lapse of six years after his death. *Ib.*

**Testator's Son-in-Law and Agent held to be a Trustee who must account for more than six Years.**]—See *Gray* v. *Bateman*, col. 41.

**Legacies barred by Statute in Absence of express Trust.**]—See *Barker, In re, Buxton* v. *Campbell*, col. 188.

**Statute not a Bar to Claim in Administration Action by Client against Personal Representative of Solicitor and Agent for Sum improperly Invested.**]—See *Power* v. *Power*, **B**, col. 206.

**Action by Assignee of deceased Bankrupt.**]—Upon demurrer to a bill by the assignee of a deceased insolvent discharged under the 53 Geo. 3, for the administration of the after-acquired property:—Held, that the Statute of Limitations was not a bar to such relief. *Byrne* v. *Byrne*, 1 Con. & L. 189; 2 Dr. & War. 71; 4 Ir. Eq. R. 621.

**Statute not applicable to Distribution of Estate of deceased Bankrupt among Creditors.**]—See *Barton* v. *Tattersall*, col. 78.

**Debt not barred, if no Executor in England of deceased Debtor.**]—See *Hood* v. *Patterson*, col. 19.

**Statute applies to Claim by Indian Creditor.**]—See *Finch* v. *Finch*, col. 38.

**Claim in Administration for Interest or Arrears of Wages not barred by Statute.**]—See *Blower* v. *Blower*, col. 46.

**Claim in Administration Action to be indemnified under Deed of Indemnity against any Claim in that Action—Not barred by Statute.**]—See *Tunstall* v. *Bartlett*, col. 55.

**Proof for Cash Advances—Specific Repayments—General Balance Statute-barred.**]—See *Rainforth, In re, Grogan* v. *Gwynn*, col. 128.

**Claim to mortgaged Legacy by Widow of Testator after Death of Legatee on Ground that Mortgagee Statute-barred.**]—See *Seager* v. *Aston*, col. 224.

**Claim for Administration of Intestate's Estate barred as to Assets received by Administrator twenty Years before Writ.**]—See *Johnson, In re, Sly* v. *Blake*, col. 233.

**Letter to Creditor, to be opened after Debtor's Death, directing that Debts should be paid.**]—See *Clinton* v. *Brophy*, col. 297.

**Arrears of Interest on Mortgage allowed in.**]—See *Edmunds* v. *Waugh*, col. 327.

4. In Proceedings against Solicitors.

*See also* ante, **A**, IV. 7 (col. 56).

**Applications for Payment over of Money in Solicitor's Hands.**]—Where a client has a claim upon an attorney for moneys recovered for the client in an action brought on his behalf:—Held, that the statute is no bar to the recovery of the money by an application to the summary jurisdiction of the court. *Sharpe, Ex parte*, W. W. & D. 354; 1 Jur. 405.

**Application to Court to prevent Solicitor pleading Statute to Money Demand of his Client, refused.**]—See *Triston, In re*, col. 58.

5. In Proceedings to Enforce Lien.

**Statute not Applicable to.**]—The lien of an attorney remains, although his claim against his

client is barred by the statute. *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355.

A person has a lien on goods for a debt, though his remedy for part is barred by the statute. *Spears* v. *Hartly*, 3 Esp. 81; 6 R. R. 814.

L., a partner in the firm of B. & Co., retired from it, and shortly afterwards borrowed from the plaintiffs 20,000*l.* on his promissory note payable on 31st May, 1848, and agreed, by way of collateral security, to give them a lien on his share of the assets of the partnership, which had not yet been ascertained and paid. In furtherance of this, B., one of the continuing partners, in July, 1847, at L.'s request, and with the consent of the other continuing partners, gave the plaintiffs an order on C. & Co., the agents of B. & Co., directing them to pay to the plaintiffs out of the funds of B. & Co. in their hands, 5,000*l.*, and engaged to pay to the plaintiffs the residue of L.'s share. C. & Co. had not at the time, nor afterwards, nearly so much as 5,000*l.* of B. & Co.'s money in their hands. In August, 1847, the plaintiffs presented the order to C. & Co., and were informed they had not funds to pay it. The plaintiffs gave B. no notice of this. In September, 1847, C. & Co. became insolvent, without having paid any part of the 5,000*l.* The promissory note was dishonoured. B. died in February, 1849. The share of L. was finally ascertained in 1853, and L. died in March, 1855. In November, 1855, the plaintiffs filed a bill to enforce their lien:—Held, that the plaintiffs were not, under the circumstances, barred from relief by delay, there being no statutory bar. *Glyn* v. *Hood*, 1 De G. F. & J. 334; 29 L. J., Ch. 204; 6 Jur. (N.S.) 153; 1 L. T. 353; 8 W. R. 248.

**Vendor's Lien for Purchase-money—Acknowledgment by Purchaser's Agent—Arrears of Interest.**]—See *Toft* v. *Stevenson*, col. 329.

6. In Informations by Attorney-General.

**An Information by the Attorney-General must be taken, with reference to the Statute, to commence with the Issue of Process.**] — See *Att.-Gen.* v. *Hall*, col. 27.

7. In Criminal Prosecutions.

There is no limitation at common law to criminal prosecutions by indictment. *Dorer* v. *Maestaer*, 5 Esp. 92.

8. In Petitions of Right.

*See also* ante, **A,** IV. 1 (col. 39), *and* post, **B,** II. 14 (col. 248).

The statute cannot be pleaded to a petition of right. *Rustomjee* v. *Reg.*, 45 L. J., Q. B. 249; 1 Q. B. D. 487; 34 L. T. 278; 24 W. R. 428. *S. C.* in C. A., 46 L. J., Q. B. 238; 2 Q. B. D. 69; 36 L. T. 190; 25 W. R. 333.

9. In Actions on Merchants' Accounts.

*The exception, in* 21 *Jac.* 1, *c.* 16, *s.* 3, *of merchants' accounts from the limitation of six years prescribed by that section was abolished by* 19 *&* 20 *Vict. c.* 97, *s.* 9, *which also provided that no statute-barred claim should be enforceable by reason only that some other matter of claim comprised in the same account arose within six years.*

**Construction of 19 & 20 Vict. c. 97, s. 9.**]—The phrase "comprised in the same account" in the 19 & 20 Vict. c. 97, s. 9, means that "would have been comprehended in." *Knox* v. *Gye*, 42 L. J., Ch. 234; L. R. 5 H. L. 656.

**What were Merchants' Accounts (before 19 & 20 Vict. c. 97, s. 9) within the Exception in 21 Jac. 1, c. 16, s. 3.**]—The exception as to merchants' accounts in the 21 Jac. 1, c. 16, s. 3, was confined to cases where an action of account would lie, or an action upon the case for not accounting. *Cottam* v. *Partridge*, 4 Scott (N. R.) 819; 4 M. & G. 271; 11 L. J., C. P. 161.

An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side should be considered as payment for those delivered on the other, did not constitute such an account as concerned the trade of merchandise between merchant and merchant within the exception of the 21 Jac. 1, c. 16, s. 3. *Ib.*

The exception of the 21 Jac. 1, c. 16, s. 3, as to merchants' accounts did not apply to an action of indebitatus assumpsit, but only to the action of account, or to an action on the case for not accounting. *Inglis* v. *Haigh*, 8 M. & W. 769; 9 D. P. C. 817; 10 L. J., Ex. 406; 5 Jur. 704. Followed in *Pritchard* v. *Scott*, 3 W. R. 482.

Mutual debts, there being no written accounts between the parties, were not within the exception. *Mills* v. *Fowkes*, 7 Scott, 444; 5 Bing. (N. C.) 455; 2 Arn. 62; 8 L. J., C. P. 276; 3 Jur. 406.

A sale of wine upon one side, and money on the other, do not constitute merchants' accounts. *Dutton* v. *Hutchinson*, 1 Jur. 772.

Where the account had been delivered fourteen years, and no objection taken, and defendant had lost his books by seizure in a foreign country:—Held, that defendant should not be charged beyond his own oath. *Holstcomb* v. *Rivers*, 1 Ch. Ca. 127.

If one merchant sends another an account stated, and he desires him to write to him speedily, and he sends his exceptions and then the matter rests for fourteen years, the account shall not be afterwards unravelled. *Ib.*

Statute of Limitations a bar to merchants' accounts; all accounts having ceased above six years. *Barber* v. *Barber*, 18 Ves. 286.

Merchants' accounts, after six years' total discontinuance, within the Statute of Limitations. *Martin* v. *Heathcote*, 2 Eden, 169.

Transactions with a foreign prince and his government do not concern the trade of merchandise, within the 21 Jac. 1, c. 16, s. 3. *Sturt* v. *Mellish*, 2 Atk. 612.

A letter of attorney from one merchant to another to get in debts will not make a person so deputed a merchant within the exception of 21 Jac. 1, c. 16, s. 3. *Ib.*

The creditor, by 4 Anne, c. 16, s. 19, has the same privilege of the debtor's being beyond sea as he had by the statutes of James, on his being beyond sea himself. *Ib.*

These statutes must not be so considered as if the clauses in the last had stood originally in the first. *Ib.*

Where the plaintiffs, as joint-owners, worked in co-partnership plantations in I., and kept an account with the merchants and agent at B., to whom they became largely indebted:—Held, not to be merchants' accounts within the exception in the statute; and a plea of the statutes of 21 Jac. 1, and 9 Geo. 4, held not double. *Forbes* v.

*Shelton*, 8 Sim. 335; 6 L. J., Ch. 159; 1 Jur. 117.

Will by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after notice of dissolution of the partnership, that partner retiring, and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out, so as to establish the right in equity of the bankrupt, and the legal right of the other partner. The other questions therefore were not determined: 1st. Whether a demand, the result of an over-payment in advance, upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchants' accounts in the Statute of Limitations. 2nd. As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years. 3rd. Upon the objection of laches, independent of the statute. *Duff* v. *East India Co.*, 15 Ves. 198.

The bankrupt and the petitioner had numerous dealings together, from January, 1820, to June, 1835, of which no account was actually delivered by the bankrupt to the petitioner, but the various items of which were entered in the bankrupt's books; the date of the last item being in April, 1835, which was an entry of a payment of 300*l.* by the bankrupt to the petitioner on account:—Held, that the petitioner was not barred by the Statute of Limitations, or by 9 Geo. 4, c. 14, from proving such balance as he could prove to be due to him, on the result of these transactions, and that they constituted a running and continuous account between the parties. *Seaber, Ex parte*, 1 Deac. 543; 2 Mont. & Ayr. 588; 5 L. J., Bk. 42.

### 10. In Claims for Interest.

**Interest on Wages left in Master's Hands.**] See *Blower* v. *Blower*, col. 46.

**Interest barred, though Principal paid into Court.**]—See *Collyer* v. *Willock*, col. 139.

**Interest on Legacy.**]—See *Walker, In re*, col. 235.

*And see* **B**, XI., post (col. 322).

### 11. In Claims of Set-Off.

*By* 9 *Geo.* 4, *c.* 14, *s.* 4, *Statute of Limitations applies to set-off.*

**Statute ceases to run against Set-off when Action brought.**]—See *Walker* v. *Clements*, and *Ord* v. *Ruspini*, col. 33.

**Statute-barred Debt set off against Legacy.**]—See *Courtney* v. *Williams*, col. 51.

**Statute-barred Debt set off against Debtor's Share of Intestate's Estate.**] — See *White* v. *Cordwell*, col. 82.

**Items to Defendant's Credit in Account shewing Balance against Him not sufficient to take Set-off out of Statute.**]—See *Williams* v. *Griffith*, col. 92.

**Set-off not taken out of Statute by Letter to third Person giving Defendant Credit for the Amount.**]—See *Francis* v. *Hawkesley*, col. 93.

**Statute must be replied specially.**] — See *Chappel* v. *Durston*, col. 146.

**Reply of Statute to Set-off admits the Facts.**]—See *Gale* v. *Capern*, and *Moore* v. *Wood*, col. 146.

### 12. In Actions for Penalties.

*Must be brought within two years, or, in case of common informer, suing qui tam, one year: see* 31 *Eliz. c.* 5, *s.* 5; *and* 3 *& 4 Will.* 4, *c.* 42, *s.* 3.

**Under By-Laws.**]—An action for a penalty incurred under a by-law made by virtue of a royal charter under the great seal, is an action of debt grounded upon a contract without specialty, within 21 Jac. 1, c. 16, s. 3, and therefore a plea of the statute bars the recovery of the penalty if the action is not commenced within six years after it was incurred. *Tobacco-pipe Makers' Co.* v. *Loder*, 16 Q. B. 765; 20 L. J., Q. B. 414; 15 Jur. 1194.

**No Objection to Discovery that It is of a Penal Matter, if Penalty barred by Statute.**]—Where Statute of Limitations had run against recovery of penalty for usury, the usurer cannot protect himself from discovery by demurrer, founded on liability of subjecting himself to forfeiture. *Talbot* v. *Smith*, 1 Ridgw. L. & S. 360.

If bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires, between the first and second answers, and exception is taken to the second answer for not discovering, the exceptions shall be allowed, and the party is bound to discover. *Williams* v. *Farrington*, 3 Bro. C. C. 38; 2 Cox, 202.

**Time of Commencement of Information at Suit of Attorney-General.**] — See *Att.-Gen.* v. *Hall*, col. 27.

**Period of Limitation.**] — See *Dyer* v. *Best*; *Maugham* v. *Walker*; *Cobbett* v. *Warner*; *Robinson* v. *Currey*, col. 74; and *Shepherd* v. *Hills*, col. 322.

### 13. In Proceedings in Lunacy.

*By* 21 *Jac.* 1, *c.* 16, *s.* 7, *and* 3 *& 4 Will.* 4, *c.* 42, *s.* 4, *a plaintiff who is non compos when the action accrues may bring it within six years from the removal of the disability.*

**Claim for Past Maintenance of Lunatic.**]—A claim for the past maintenance of a lunatic being simply a debt of the lunatic, the court will not pay out of the lunatic's estate in court more than six years' arrears of such maintenance. *Harris, In re*, 49 L. J., Ch. 327.

The brother of a lunatic lady, not so found by inquisition, advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the court made an allowance to the testator's estate for past maintenance, but limited

it to advances made within six years before the testator's death. *Weaver, In re*, 21 Ch. D. 615.

**As to Time running during Proceedings in Lunacy.**]—See *Rock* v. *Cooke*, col. 36.

14. In Actions on Foreign Judgments.

*See also* post, **B**, X. (col. 311).

**Only Simple Contract Debt.**]—If a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt on simple contract, and the Statute of Limitations will run upon it. *Dupleix* v. *De Roven*, 2 Vern. 540.

**Delay by Foreigner in enforcing against Estate here.**]—The plaintiffs, who were foreigners, and had always resided beyond seas, obtained judgment in 1842, in a foreign court, against H. In 1855 they filed a bill to enforce the foreign judgment against the estate of H., who had died in 1846:—Held, that although the Statute of Limitations did not apply, yet, in the absence of evidence accounting for the delay, they were not entitled to the assistance of the court to enforce their demand. *Reimers* v. *Druce*, 23 Beav. 145; 26 L. J., Ch. 196; 3 Jur. (N.S.) 147; 5 W. R. 211.

## VII. MATTERS IN AVOIDANCE OF THE STATUTES.

1. Acknowledgment.

### a. What amounts to.

**Nature of—Promise to Pay.**]—To take a case out of the statute, the acknowledgment of a debt must contain an express or implied promise to pay. *Linley* v. *Bonsor*, 2 Scott, 399; col. 90.

The acknowledgment in writing must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Buckett* v. *Church*, 9 Car. & P. 209.

When a debt is barred by the statute there must be, in order to take it out of the statute, one of three things: an acknowledgment of the debt, from which a promise to pay it must be implied; or an unconditional promise to pay the debt; or a conditional promise to pay the debt in writing, and evidence that that condition has been performed. *River Steamer Co., In re, Mitchell, Ex parte*, L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130. See also *Skeat* v. *Lindsay*, 46 L. J., Ex. 249; 2 Ex. D. 314; 36 L. T. 98; 25 W. R. 322.

The legal effect of acknowledging a debt barred by the Statute of Limitations is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise. *Philips* v. *Philips*, 3 Hare, 299; 13 L. J., Ch. 445.

An acknowledgment must, in order to take a case out of the Statute of Limitations, contain an express or implied promise to pay. *Wolmershausen, In re, Wolmershausen* v. *Wolmershausen*, 62 L. T. 541; 38 W. R. 537.

To take a debt out of the Statute of Limitations, there must be a direct admission of it; and in several cases it has been held that there must be an express promise to pay. *Lacon* v. *Briggs*, 3 Atk. 107.

"If C. has any claim on me, which I much doubt, I should wish it to be arranged":—Held, not a promise to pay, nor such an unqualified acknowledgment of liability that a promise could be implied from it. *Cassidy* v. *Firman*, 15 W. R. 432.

A debtor, on application for payment of a debt, handed over to the creditor certain book debts due to himself, with the following acknowledgment in writing: "I give the above accounts to you; so you must collect them, and you and I will be clear":—Held, that this was no bar to the statute, for, though an acknowledgment of the debt, no general promise to pay could be inferred from it, but merely a promise to pay in one particular manner. *Routledge* v. *Ramsay*, 3 N. & P. 319; 8 A. & E. 221; 1 W. W. & H. 232; 7 L. J., Q. B. 156; 2 Jur. 789.

**Question for Jury whether Letter amounts to.**]—A letter written by a debtor to the creditor's attorney (pleading the statute) on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute. *Lloyd* v. *Maund*, 2 Term Rep. 760.

A debtor having accompanied an acknowledgment of debt with an assertion that he should have nothing to do with the claim; that he wished the claimant would make him a bankrupt, and that he would rather go to gaol than pay the claimant:—Held, that it was properly left to a jury to consider whether the acknowledgment was one from which a promise to pay could be implied. *Linley* or *Linsell* v. *Bonsor*, 2 Scott, 399; 2 Bing. (N.C.) 241; 1 Hodges, 305; 5 L. J., C. P. 40.

In an action on a promissory note, the defendant having pleaded the statute, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff: "Business calls me to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol; otherwise, I must arrange matters with you as circumstances will permit." The defendant did not shew that there were any other matters besides the promissory note to which the letter could refer:—Held, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note and was a sufficient acknowledgment to take the case out of the statute. *Frost* v. *Bengough*, 1 Bing. 267; 1 L. J. (O.S.) C. P. 96; 25 R. R. 621.

**Made after Action.**]—An acknowledgment of a debt bars the statute, because it amounts to a new promise; and, therefore, if made after action, it is no bar. *Bateman* v. *Pinder*, 3 Q. B. 574; 2 G. & D. 790; 11 L. J., Q. B. 281.

**Verbal Acknowledgment of Written Contract.**]—Where a person having entered into a written guarantee, and become liable upon it, at a period of more than six years before the commencement of the action, verbally promised, within six years, that the matter should be arranged; and afterwards, on an action being brought, pleaded action non accrevit infra sex annos:—Held (before 9 Geo. 4, c. 14, s. 1), that the Statute of Frauds having been once satisfied by the original promise

being in writing, it was not necessary in order to take the case out of the Statute of Limitations, that the latter promise should also be in writing. *Gibbons* v. *M'Casland*, 1 B. & Ald. 690.

**Parol Statement.**]—A mere parol statement of an antecedent debt, without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the statute. *Jones* v. *Ryder*, 4 M. & W. 32; 1 H. & H. 256; 7 L. J., Ex. 216.

**Verbal Admission of Debt by deceased Debtor —Statement in Affidavit of Third Person.**]—See *Edwards* v. *James*, col. 114.

**Admission of Debt, subject to Set-off, in Statement of Cross Accounts.**]—L., being the holder for value of certain promissory notes made by the defendant, and being indebted to the defendant and D., as executors in a large amount, it was agreed between them that the amount of the notes should be set off against, and satisfied by, the same amount of L.'s debt. On that occasion the defendant gave to L. a paper, in which the amounts of the several notes and the interest thereon were enumerated, at the foot of which the defendant wrote as follows: "8th June, 1842. Approved due to T. L.—W. D." L. retained possession of the notes, and afterwards indorsed them to the plaintiff for value:—Held, that the paper so signed by the defendant was not such an acknowledgment in writing as to defeat a plea of the statute, inasmuch as, coupling it with the evidence, no promise to pay the debts could be inferred from it. *Cripps* v. *Davis*, 12 M. & W. 159; 13 L. J., Ex. 217.

A., being indebted to B., supplied him with goods, and afterwards sent 10*l.* on account of his own debt, and a bill for the goods supplied. B. replied by letter: "I beg to acknowledge the receipt of 7*l.* and a bill amounting to 17*l.*, both of which sums I have placed to your credit. I have enclosed your bill; receipt it and return the same by post.—B." No receipt was returned:—Held, that the letter was sufficient to defeat the statute for the price of the goods. *Evans* v. *Simon*, 9 Ex. 282; 2 C. L. R. 416; 23 L. J., Ex. 16; 2 W. R. 40.

One of two persons who had dealings together, and were mutually indebted to one another, had supplied some bricks on the credit of the other, in 1834, but no account had been delivered or made out on either side. In 1845 they signed, in duplicate, a memorandum, thus expressed: "It is agreed that Mr. R., in his general account, shall give credit to Dr. H. for 174*l.*, being for bricks delivered in 1834":—Held, that this was not such an acknowledgment as to take the general account out of the Statute of Limitations, and that the delivery of the bricks could not be treated as a part payment so as to have that effect. *Hughes* v. *Paramore*, 7 De G. M. & G. 229; 24 L. J., Ch. 681; 1 Jur. (N.S.) 1101; 3 Eq. R. 677; 3 W. R. 388.

M. agreed with a company to build for them certain ships, to be delivered at certain times, and to be paid for by instalments. In case of delay in delivery of the ships, fortnightly sums were to be paid as liquidated damages, and the company was to be at liberty to deduct them from the unpaid purchase-money. The agreement contained a provision for referring all disputes to arbitration. The ships having been supplied, M., who had received some instalments, sent in at the end of 1861 an account, shewing the final balance which he claimed. The company insisted that he was liable to deductions for delay to an amount exceeding this balance and that nothing was due to him. A correspondence ensued, and the company proposed to refer the dispute to arbitration; and in 1863, a draft reference having been approved, they named an arbitrator on their part, but M. would not name one on his. On the 19th of February, 1867, the managing director wrote to M. saying that his account omitted all the deductions to which the company was entitled, and which would leave the balance in their favour, but that they were still willing to have all questions decided by arbitration, according to the contract, and calling on M. to concur in referring them. This letter was expressed to be "without prejudice." M. did not answer this letter, nor take any steps to proceed to arbitration. A petition to wind up the company was presented in October, 1869, and an order made. M. claimed to prove for his balance, which was resisted, on the ground of the statute:—Held, that the letter did not contain an acknowledgment taking the case out of the statute, for that it did not contain any admission of a debt, since under the contract the liquidated damages were a deduction from the price, and not merely matter of set-off; and, semble, even the admission of a debt, if coupled with a claim to a set-off of larger amount, would not take a case out of the statute, as no promise to pay could be implied from it. Nor did it contain any unconditional promise to pay. Nor did it contain any promise to pay upon a condition which had since been performed; for on its fair construction it contained at most only a promise to pay what should be found due on an arbitration under the contract, if M. named an arbitrator within a reasonable time, which he had not done. *River Steamer Co., In re, Mitchell, Ex parte*, L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130.

To an action by the executor of an attorney, for his bill of costs, the defendant pleaded a set-off. The testator had transacted the law business of the defendant, and received his tithes and rents. The defendant, for the purpose of taking his set-off out of the statute, put in evidence an account furnished by the testator to the defendant, in obedience to a rule of court; and also an affidavit made and signed by the testator, on the occasion of his furnishing such account. The account contained items to the credit of the defendant, for tithes and rents received by the testator for the defendant, and also items to the credit of the testator, for cash paid to the defendant, and for work done; and the account claimed a balance as due to the testator. The affidavit in like manner claimed a balance as due to the testator on the same account:—Held, that the account and affidavit were not sufficient to take the set-off out of the statute. *Williams* v. *Griffith*, 3 Ex. 335; 18 L. J., Ex. 210.

—— **Proposal not accepted.**]—A creditor, in order to take a debt, pleaded as a set-off, out of the operation of the statute, gave in evidence a letter written by the debtor to a third person, stating an account shewing the existence of the debt, but also that a balance was due from the creditor to the debtor; and proposing to settle the matter upon payment by the creditor to the debtor of a sum named. The creditor had not

acceded to the proposal :—Held, that the letter was not a sufficient acknowledgment of the debt to defeat the operation of the statute. *Francis* v. *Hawkesley*, 1 El. & El. 1052 ; 28 L. J., Q. B. 370 ; 5 Jur. (N.S.) 1391 ; 7 W. R. 509.

**Balance of Accounts struck within six Years, not sufficient.**]—See *Clark* v. *Alexander*, col. 112.

**Item within six Years in open Account.**]—If there was a mutual account of any sort between the plaintiff and defendant, for any item of which credit had been given within six years, that was evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute. *Catling* v. *Skoulding*, 6 Term Rep. 189.

Since the 9 Geo. 4, c. 14, s. 1, the existence of items within six years in an open account will not operate to take the previous portion of the account out of the statute. *Cottam* v. *Partridge*, 4 Scott (N.R.) 819 ; 4 Man. & G. 271 ; 11 L. J., C. P. 161.

A occupied a house and land under B., at the rent of 16*l.* a year, and A. at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by A., and had been paid 12*s.* a week. A. continued in B.'s service for more than twelve years ; but there was no payment of rent on the one hand or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent :—Held, that it was not such an open account as would take the case out of the statute since the 9 Geo. 4, c. 14 ; but there must be a part payment in cash, or what is equivalent to it, to have that effect. *Williams* v. *Griffiths*, 2 C. M. & R. 45 ; 1 Gale, 65 ; 5 Tyr. 748 ; 4 L. J., Ex. 129.

The plaintiff, having lent the defendant a sum of money, took from him the following memorandum :

"I O U 100*l.*—C. R. 30 July, 1821."

"August 17th, received 50*l.*—C. R."

The last item alone was infra sex annos :—Held, that it did not amount to an acknowledgment of the existence of the prior debt, so as to take it out of the statute. *Robarts* v. *Robarts*, 1 M. & P. 487 ; 3 Car. & P. 296 ; 6 L. J. (O.S.) C. P. 117.

**Admission of open Account.**]—Semble, an unqualified admission of an account being open, or one which either party is at liberty to examine, implies a promise to pay the balance found due. *Banner* v. *Berridge*, 50 L. J., Ch. 630 ; 18 Ch. D. 254 ; 44 L. T. 680 ; 29 W. R. 844.

Correspondence and expressions with regard to an open account, from which the court collected (without resort to the above implication) a promise to pay the amount due. *Ib.*

To prevent the right to have an account from being barred by the Statute of Limitations it is not necessary to have an acknowledgment that a debt is actually due ; but it is sufficient that there should be an acknowledgment that the account is pending and a promise to pay the balance, if it should be found to be against the accounting party. *Prance* v. *Sympson*, 1 Kay, 678 ; 18 Jur. 929.

**Asking for Account.**]—In an action for work done, the plaintiff, in answer to a plea of the statute, put in the two following letters, written within six years of the commencement of the action by the defendant's testator, the person for whom the work was done, to the plaintiff : "I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week" :—Held, that they amounted to a promise to pay the balance due on the account, and took the case out of the statute. *Quincey* v. *Sharpe*, 45 L. J., Ex. 347 ; 1 Ex. D. 72 ; 34 L. T. 495 ; 24 W. R. 373.

A debtor, whose debt to his creditor was barred by the Statute of Limitations, wrote to the creditor within six years before action the following letter : "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and cheque sent to you for the amount due ; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim" :—Held, that the debt was revived, as the request to be furnished with an account with vouchers at a particular time and place did not negative the implied promise to pay arising from the admission of a balance due. *Skeat* v. *Lindsay*, 46 L. J., Ex. 249 ; 2 Ex. D. 314 ; 36 L. T. 98 ; 25 W. R. 322.

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857 the defendant wrote to the plaintiffs as follows : "September 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, and when the policy is paid, on the 29th October, I hope that you will have the whole of your account ready for me, as I hope to be with you on that day." "October 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.* ; of course this includes the 100*l.*, and interest, that I had some years since, and the 40*l.* promissory note, that I jointly signed with the late Mr. B ; of course, you are aware that you have paid 25*l.* to my credit that Mr. Y. paid over when he could not complete the purchase of the property in the High-street" :—Held, a sufficient acknowledgment. *Godwin* v. *Culley*, 4 H. & N. 373.

The following passages in a letter written by a debtor to his creditor : "Before closing this, I have to request you will be pleased to send me in any bill or what demands you have to make on me, and if just, I shall not give you the trouble of going to law. If you refer to your books you will find the last payment I made was in May, 1839. I shall leave town to-morrow, but shall be back in a few days for a month, and if you will bring my bill in here to me, by eleven, I shall be at your service"—are not sufficient to take the debt out of the statute. *Spong* v. *Wright*, 9 M. & W. 629 ; 12 L. J., Ex. 144.

A. having employed B. as his solicitor and agent for some years, on the 23rd April, 1813, writes him a letter in these words : "I have for a length of time been in expectation of receiving the account of whatever I may stand indebted to you ; let me again request you will oblige me with it, that everything may be settled." A. died in August, 1814, having made his will, by which he devised his real and personal estates in trust for sale, and directed his trustees to stand possessed of the moneys to

arise by the sale thereof, after paying his debts, and the charges and expenses attending his will upon the trusts therein mentioned. B. shortly after A.'s death delivered his bill, the last item of which was in August, 1808, and on the 18th November, 1820, he files his bill on behalf of himself and the other creditors of the testator:—Held, that the debt was taken out of the Statute of Limitations by the testator's letter of the 23rd April, and was continued to be kept out of the statute by the devise in the testator's will, and decreed for the plaintiff accordingly, but in consequence of his laches, and some misconduct, without costs. *Rendell* v. *Carpenter*, 2 Y. & J. 484; 31 R. R. 621.

A debtor wrote to her creditor as follows: "As I have been very unwell during the past winter, my state of health renders me anxious to know the exact relation I hold towards you. I must, therefore, once more request you to furnish me with an account of my debt to you. On looking over my papers, with a view of myself ascertaining the amount, I have found some inaccuracies of calculation in the dockets which you from time to time gave me; and in general, sums lent by you have got so mixed up with the receipts of yours from me that I have got rather confused by them." She then proceeded to suggest a plan by which to ascertain "clearly the position we hold to each other":—Held, a sufficient acknowledgment to prevent the debt being barred by the statute. *Burrows* v. *Baker*, Ir. R. 3 Eq. 596.

In an action commenced in 1885 for the administration of C. B.'s estate, on inquiries for creditors, A. J. P. brought in a claim to be paid a sum of 441*l.* 16*s.* 7*d.*, for commission and moneys lent before March, 1878. C. B. was sent to the Cape of Good Hope in March, 1878, and died there in 1884. He, while on board ship, wrote a letter in which he asked A. J. P. to make out his account, and send it to him, and added "I will send it to you as soon as possible." The account was sent in March, 1878, and C. B. afterwards wrote letters to A. J. P. in which he said, "I will send you a cheque as soon as I can," and "I will send some coin home as soon as ever I can":—Held, that there had not been an acknowledgment sufficient to enable the court to infer an absolute promise to pay. *Bethell, In re, Bethell* v. *Bethell*, 56 L. J., Ch. 334; 34 Ch. D. 561; 56 L. T. 92; 35 W. R. 330.

M. had acted for many years as solicitor for C.; but becoming dissatisfied with M., C. signed an authority to other solicitors to obtain and receive from M. all deeds in his possession belonging to C. The new solicitors accordingly wrote to M. inclosing a copy of the authority and requesting him to deliver particulars of his charges. Later on they wrote: "Our client only requires you to deliver particulars of any unsettled bill of costs you may have against him":—Held, that there was a sufficient acknowledgment to take the case out of the statute. *Curwen* v. *Milburn*, 42 Ch. D. 424; 62 L. T. 278; 38 W. R. 49.

**Offer to account sufficient.**]—Offer to account will take case out of the statute. *Pomfret (Earl)* v. *Windsor (Lord)*, 2 Ves. 485.

By a memorandum, dated the 28th April, 1874, it was witnessed that the defendant deposited with the plaintiff certain title deeds by way of equitable mortgage for 6,000*l.* and interest. The defendant also agreed to pay to the plaintiff on demand 6,000*l.* and interest, and to execute a proper mortgage with all the usual powers and authorities usually given to a mortgagee. This memorandum was not under seal. No interest was paid under this agreement, and nothing was done until about eleven years after the date of it, when this action was brought for the specific performance of the agreement. At the trial it was declared that the plaintiff was entitled to a lien on the property comprised in the deeds for the money advanced, and to have the agreement specifically performed, but that was without prejudice to the defendant's right to insist on the Statute of Limitations as a defence against any principal sum or interest. The question was, whether the plaintiff was entitled to have in the mortgage a covenant for principal and interest. The statute was relied on as a bar to any such right. A correspondence had in 1885 passed between the parties, in which the plaintiff had demanded an account of how matters stood between them. The defendant answered that he was unable to make out the account, but that he should be glad to leave the whole thing entirely in the plaintiff's hands, and adopt whatever he suggested. He also wrote: "There is only one thing which gives me uneasiness, which is, that, should I survive you, your executors might sell the land at a forced sale for little or nothing, and make a claim against me, which I have no funds to meet":—Held, that the defendant's letters amounted to an admission of his liability to account, and also of his present liability to the plaintiff; that there was nothing in those letters to prevent the admission from carrying with it a promise to pay; and that the case was taken out of the Statute of Limitations, and the plaintiff was entitled to have a covenant for the payment of principal and interest. *Firth* v. *Slingsby*, 58 L. T. 481.

**Tenant for Life rendering Account to Remainderman.**]—If tenant for life has rendered account to remainderman of timber cut by him during more than six years before bill is filed against him for account of such timber, and value thereof, statute cannot be pleaded to bill. *Hony* v. *Hony*, 1 Sim. & S. 568; 24 R. R. 235.

**Statement of Debt in Account between Debtor and Third Persons.**]—An account stated between a debtor, being part owner and ship's husband, and his co-owners, in which the items of the creditor's account for work done and money advanced are included, is not such an acknowledgment as will take the case out of the operation of the statute. *Nash* v. *Hill*, 1 F. & F. 198.

**Request for Delay.**]—A creditor having applied for payment of a debt, the debtor wrote in answer, "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time, and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter":—Held, a sufficient acknowledgment. *Collis* v. *Stack*, 1 H. & N. 605; 26 L. J., Ex. 138.

The question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made. *Ib.*

The following letter is an acknowledgment from which a promise to pay may be implied so as to rebut the statute: "In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat. Yours, J. J." *Cornforth* v. *Smithard*, 5 H. & N. 13; 29 L. J., Ex. 228; 8 W. R. 8.

An agent wrote to his principal: "I am now quite ready to go into the account, but it is necessary to have an appointment, to dispose of it satisfactorily. I understood you were to be here on the 29th of November, otherwise I should before this have gone over to London. I will, on hearing from you, go over and vouch the account"; and some time afterwards he again wrote: "I am going shortly to London, and will take with me the vouchers and papers necessary to close what remains open in the account":—Held, that the letters per se did not afford an answer to the statute to a claim for a balance due on the account. *Crawford* v. *Crawford*, Ir. R. 2 Eq. 166; 16 W. R. 414.

"As soon as my situation will allow, Mr. F.'s claim, with that of others, shall receive that attention which, as an honourable man, I consider them to deserve, and it has been and is my intention to pay them. But I must be allowed time to arrange my affairs; and if I am proceeded against, any exertion of mine will be rendered abortive":—Held, not a sufficient acknowledgment. *Fearn* v. *Lewis*, 6 Bing. 349; 4 M. & P. 1; 8 L. J. (o.s.) C. P. 95; 31 R. R. 434.

—— **Offer to Pay Interest.**]—A wife had lent the defendant 20*l.* (her own money) during her husband's lifetime, for which the defendant, shortly after the husband's death, viz., on the 16th of July, 1867, gave her an I O U. On the 12th of October, 1870, the defendant wrote to her agent: "Yours of the 10th instant received respecting Mrs. W.'s claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same. I am in the anticipation of a better position, and, should I be successful, Mrs. W.'s claim shall have my first consideration. Meanwhile, I shall be pleased to pay a reasonable interest on the amount. Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible." And on the 6th of March, 1871, he again wrote: "At present it is utterly out of my power to do anything. I am willing to endeavour to pay it off by easy instalments; or I am willing to pay you any reasonable interest to let the matter remain for the present." In an action for money lent, with a count upon a promise to pay in consideration of the plaintiff's forbearance to sue upon the I O U:—Held, that these letters amounted to a sufficient promise, founded upon a good consideration, to take the case out of the Statute of Limitations. *Wilby* v. *Elgee*, 44 L. J., C. P. 254; L. R. 10 C. P. 497; 32 L. T. 310.

**Suggesting Mode of Payment.**]—A letter as follows: "I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money, 30*l.* 9*s.* 9*d.*," is a sufficient acknowledgment that the balance was due. *Dabbs* v. *Humphries*, 10 Bing. 446; 4 M. & Scott, 285; 3 L. J., C. P. 139.

**Promise to remit Sum.**]—A., having become bankrupt in August, 1819, wrote, in November, 1826, a letter, in which he alluded to a debt of 98*l.* 15*s.*, due from him to B., and stated as follows: "By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them":—Held, that the letter contained a sufficient promise in answer to a plea of the statute. *Lang* v. *Mackenzie*, 4 Car. & P. 463.

A letter from a debtor to his creditor contained the following expressions: "I was in hopes of being able to send you some coin by small instalments, but as I have been ordered home, the matter must be in abeyance a little longer, which won't ruin you. I know you must live in hopes as I do, for a good time is rather long coming. . . . I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think you ought to know me by this time. When I have had the means you have pot luck":—Held, not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations. *Jupp* v. *Powell*, 1 Cab. & E. 349. Affirmed in C. A.

J. H. was the trustee of a settlement by which the T. B. estate was settled on the wife of the defendant for life, to her separate use without power of anticipation. J. H. lent money to the defendant, and for some time, with the wife's consent, the rents of the T. B. estate were applied towards payment of the debt, the wife giving receipts for them. In October, 1879, the defendant wrote to J. H.: "I thank you for your very kind intention to give up the rent of T. B. next Christmas, but I am happy to say at that time both principal and interest will have been paid in full":—Held, that this was not an acknowledgment which would take the debt out of the Statute of Limitations. *Green* v. *Humphreys*, 53 L. J., Ch. 625; 26 Ch. D. 474; 51 L. T. 42—C. A.

A debtor wrote in reply to a demand by his creditor for payment: "I don't see how it is possible for me to be indifferent on the matter of this debt. If I were able in any way to reduce it further, you may be quite sure I should do so":—Held, a sufficient acknowledgment to take the debt out of the Statute of Limitations. *Buskin, In re, Farlow, Ex parte*, 15 R. 117.

"I shall go to my attorney's and pay the debt and settle it":—Held, a sufficient acknowledgment. *Triggs* v. *Newnham*, 1 Car. & P. 631.

**Wish to Pay.**]—In a letter written to the creditor within six years, the debtor says: "I can never be happy until I have not only paid you everything, but all to whom I owe money"; and "your account is quite correct; and, oh! that I were now going to inclose you the amount of it":—Held, that this was evidence to go to the jury of an acknowledgment. *Dodson* v. *Mackey*, 4 N. & M. 327; 8 A. & E. 225, n.

Held, that such promise, accompanied by this expression: "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but immediately it is settled you shall be informed," is an absolute unconditional promise, and not a qualified or a conditional promise. *Ib.*

T. owed P. & Co. before their bankruptcy 275*l.* as surviving partner of T., Y. & Y., and 6,565*l.* due independently of such partnership. As part security for the latter debt, he had given P. & Co. a mortgage for 5,000*l.* The official assignee of

P. & Co. wrote to T.: "By the books of these bankrupts, there is a balance of 275*l.* standing against you," and requested immediate payment. T. replied: "You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with the assignees here: and at the last meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February next; after which I am in hopes that I shall be able to transfer the 5,000*l.* mortgage, to enable me to clear off the whole that may be standing against me." It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6,565*l.*; that the mortgage mentioned in the letter was the mortgage for 5,000*l.* given as part security for that debt; that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T., as surviving partner of T., Y. and Y., and that T. had paid off the 6,565*l.*:—Held, that the judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the statute, the letters not containing any absolute acknowledgment of a debt, or unqualified promise to pay, but only expressing a hope that, in the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him. *Smith* v. *Thorne*, 18 Q. B. 134; 21 L. J., Q. B. 199; 16 Jur. 332—Ex. Ch.

In answer to an application for payment of a debt, the debtor wrote: "I hope to be at H. soon, when I trust everything will be arranged with W. (the creditor) agreeably to her wishes":—Held, a sufficient promise. *Edmonds* v. *Goater*, 15 Beav. 415; 21 L. J., Ch. 290.

The following letter by a debtor to a clerk of the creditor, in answer to one applying for payment of a debt, is insufficient to defeat the statute: "I will not fail to meet Mr. H. (the creditor) on fair terms, and have now a hope that, before perhaps a week from this date, I shall have it in my power to pay him at all events a portion of the debt, when we shall settle about the liquidation of the balance." *Hart* v. *Prendergast*, 14 M. & W. 741; 15 L. J., Ex. 223.

The following letter from a debtor to the creditor's attorney is a sufficient acknowledgment: "Since the receipt of your letter, and indeed for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell* v. *Frith*, 3 M. & W. 402; 8 Car. & P. 246; 1 H. & H. 100; 7 L. J., Ex. 172; 2 Jur. 619.

A letter containing the following passage: "I wish I could comply with your request, for I am very wretched, on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last," is a sufficient acknowledgment. *Bird* v. *Gammon*, 5 Scott, 213; 3 Bing. (N.C.) 883; 3 Hodges, 224; 6 L. J., C. P. 258.

A letter written by a debtor to his creditor before the debt was barred, in the following terms: "It is quite true that I have not sent any money for years, but really I have none of my own. We just manage to exist on my wife's, at least, on what is left of her's. We have hard work to get on, but I will try to pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week"—is a sufficient acknowledgment. *Lee* v. *Wilmot*, 4 H. & C. 469; 35 L. J., Ex. 175; L. R. 1 Ex. 364; 12 Jur. (N.S.) 762; 14 L. T. 627; 14 W. R. 993.

**Admission of Debt coupled with Refusal to Pay.**]—On a debtor being arrested for a debt more than six years old, he said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it":—Held, not such an acknowledgment as would revive the debt. *A'Court* v. *Cross*, 3 Bing. 329; 11 Moore, 198; 4 L. J. (O.S.) C. P. 79.

In an action against an acceptor of a bill of exchange, evidence that he acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, and it was not in his power to pay it, was sufficient to take the case out of the statute. *Leaper* v. *Tatton*, 16 East, 420.

"It is ten years ago, and I cannot pay my new debts, much less my old ones":—Held, not a sufficient acknowledgment. *Knott* v. *Farren*, 4 D. & R. 179; 2 L. J. (O.S.) K. B. 122.

Where, after the lapse of six years, a debtor being asked for the payment of a debt said: "I owed the money, but I have a receipt in full of all demands; I shall search for it, and let you know in the event of my not being able to find it":—Held, that this was not sufficient to take the case out of the statute. *Brydges* v. *Plumptree*, 9 D. & R. 746. S. P., *Berk* v. *Guy*, 4 Esp. 184.

A debtor admitted a debt, but claimed to be discharged by a written instrument, which upon production did not amount to a legal discharge:—Held, that the acknowledgment was sufficient. *Partington* v. *Butcher*, 6 Esp. 66.

Plea of the Statute of Limitations to a bill of discovery overruled, upon letters assigning reasons for declining to pay, and recommending the plaintiff to bring an action, as amounting to an acknowledgment of the debt sufficient to take it out of the statute, upon the authorities, though against principle. *Baillie* v. *Sibbald*, 15 Ves. 185.

See *Linley* v. *Bonsor*, 2 Scott, 399; supra, col. 90; and *Brigstock* v. *Smith*, infra.

**Denial that Debt as large as alleged.**]—The following letter does not raise the implication of a promise to pay, and is not sufficient to take the case out of the statute: "In reply to your application of the 19th inst. for the payment of 89*l.* 10*s.* 11½*d.* to Mr. D. Brigstock, I beg to say that it is a claim I am by no means prepared to admit to the full extent, and to make the following observation respecting it. Of that sum, 68*l.* 3*s.* 8*d.* is made up of items for business and materials, stated to have been done and furnished between 1817 and 1821, a period during which I was concerned in two successive partnerships, to one or other of whom the accounts Mr. B. was entitled to recover ought to have been charged. Having at different times wound up both those concerns and quitted Carmarthen as long back as 1824, I was surprised to receive Mr. B.'s bill in 1829, five years afterwards; and it is certainly not a little strange that he should now send in a charge of so old a date, when, if any account was

due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow that I am liable to pay any part of the account previous to 1825; but as I anticipate being in Carmarthen shortly, I will then communicate with Mr. B. personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of Robert Smith & Co., to be done at the works in Carmarthen, in 1827, together with a few items for glazing in 1825, making together 20*l.* 17*s.* 5*d.*, which, I believe, to be correctly charged, and for which I enclose a cheque, and will thank you to acknowledge the receipt of it." *Brigstock* v. *Smith*, 1 C. & M. 483; 3 Tyr. 445; 2 L. J., Ex. 187.

The defendant wrote to the plaintiff's attorney as follows: "I have received yours respecting the plaintiff's demand; it is not a just one. I am ready to settle the account whenever the plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor anything like that sum; shall be happy to settle the difference by his meeting me":—Held, that the judge was justified in directing the jury, that after this letter the statute was out of the question. *Colledge* v. *Horn*, 10 Moore, 431; 3 Bing. 119; 3 L. J. (O.S.) C. P. 184; 28 R. R. 606. See *Skeet* v. *Lindsay*, col. 94.

**Offer of Property in Lieu of Payment.**]—The following letter, addressed by the defendant to the plaintiffs, within six years, respecting a debt otherwise barred by the statute, is not a sufficient acknowledgment: "I am surprised at receiving a letter from H. (the plaintiffs' attorney) this morning, for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. (one of the plaintiffs) was in town." *Cawley* v. *Furnell*, 12 C. B. 291; 20 L. J., C. P. 197; 15 Jur. 908.

**Promise to see an Account Paid.**]—In an answer to a plea of the Statute of Limitations in an action upon a promissory note, a letter from the defendant written within six years of the commencement of the action was put in evidence by the plaintiff: "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid; perhaps in the meantime you will let your clerk send me an account of how it stands":—Held, that this letter was a sufficient acknowledgment to bar the statute. *Chasemore* v. *Turner*, 45 L. J., Q. B. 66; L. R. 10 Q. B. 500; 33 L. T. 323; 24 W. R. 70—Ex. Ch.

**Offer to Pay.**]—In July, 1882, K. gave a promissory note payable on demand for 3,000*l.* to B., the money being intended to buy a seat for K. on the New York Stock Exchange. In April, 1884, B. died, having appointed his son residuary legatee. In November, 1885, K. wrote to B.'s son: "The great kindness of your father on every occasion, and more especially the money that he loaned me to purchase my seat on the New York Stock Exchange, place me now in your debt. I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York." In December, 1888, the present action was brought by B.'s son:—Held, that there was a sufficient acknowledgment of the debt to take the case out of the statute. *Buccleuch* (*Duke*) v. *Eden*, 61 L. T. 360.

**Promise to Pay Interest on Loan.**]—In an action to recover 170*l.* with interest, the plaintiff proved the loan of between 150*l.* and 180*l.*, and offered in evidence this document: "170*l.*, 16th March, 1841. Received from B. and T. 170*l.*, for which I promise to pay her at the rate of 5*l.* per cent. from the above date":—Held, a sufficient acknowledgment. *Taylor* v. *Steele*, 16 M. & W. 665; 16 L. J., Ex. 177; 11 Jur. 806.

**Asking Explanation of Bill.**]—In an action for work, labour and materials, it appeared that the work had been done more than six years before, but within the six years the debtor, in answer to a bill sent in to him by the creditor, wrote the following letter: "I have received your bill. It does not, I think, specify sufficiently to which cottages the work is done. For instance you say—" [The letter here repeated the first six items of the bill.] "I do not know where all this is done. I shall feel obliged if you will more particularly explain, and take your agreement to Mrs. H. It is my wish to settle your account immediately, but being at a distance, I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by the first post, with instructions to pay if correct":—Held, a sufficient acknowledgment, within the 9 Geo. 4, c. 14, to take the case out of the 21 Jac. 1, c. 16. *Sidwell* v. *Mason*, 2 H. & N. 303; 26 L. J., Ex. 407; 3 Jur. (N.S.) 649; 5 W. R. 72.

**Giving Credit for Debt in Bill.**]—The defendant having a claim against the plaintiff, the latter, at the foot of his bill, acknowledged the debt as follows: "By Mr. Lacy's bill," leaving a blank for the amount. He then wrote below: "Agreeably to your request above, I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance":—Held, a sufficient acknowledgment of the defendant's claim. *Waller* v. *Lacy*, 1 Scott (N.R.) 186; 1 Man. & G. 54; 8 D. P. C. 563; 9 L. J., C. P. 217; 4 Jur. 435. See *Waugh* v. *Cope*, 6 M. & W. 824; 10 L. J., Ex. 145.

**Promise to Pay, if Debt still Owing.**]—A letter in these terms: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly," is not a sufficient acknowledgment to take the case out of the statute. *Buckmaster* v. *Russell*, 10 C. B. (N.S.) 745; 8 Jur. (N.S.) 155; 4 L. T. 552; 9 W. R. 749.

"I will see Davis, or write him; I have no doubt he has paid it; if, by chance, he has not paid it, it is very fit it should be," in a letter, is not a sufficient acknowledgment of the debt.

*Poynder* v. *Bluck*, 5 D. P. C. 570; W. W. & D. 191.

A letter, the fair effect of which is, that the writer is not certain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment, notwithstanding that it contains expressions of regret that the debt should have been left so long unpaid. *Collinson* v. *Margesson*, 27 L. J., Ex. 305.

**Referring Creditor to Trustee for Payment of Debts.**]—Where a debtor referred a creditor, who applied to him for payment of a statute-barred debt, to a trustee to whom his estate had been assigned for payment of his debts:—Held, a sufficient acknowledgment. *Baillie* v. *Lord Inchiquin*, 1 Esp. 435.

**Insertion of Debt in Debtor's Statement of Affairs.**]—A debtor in making out a statement of his affairs for a creditor, inserted his name for 510*l.*, the amount of two promissory notes:—Held, a sufficient acknowledgment. *Holmes* v. *Mackrell*, 3 C. B. (N.S.) 789.

**In Bankrupt's Examination.**]—An entry in a bankrupt's examination, of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute. *Eicke* v. *Noakes*, 1 M. & Rob. 359.

**In Bankrupt's Schedule.**]—One of three joint makers of a note became insolvent, and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Debtors Court in respect of the note:—Held, that such was not sufficient to take the case out of the statute, either as against the other makers of the note or as against the insolvent himself. *Davis* v. *Edwards*, 7 Ex. 22; 21 L. J., Ex. 4; 15 Jur. 1014.

A creditor proved that, within six years of action brought, the debtor presented a petition for arrangement with his creditors, under 7 & 8 Vict. c. 70, and had inserted the debt upon which the action was brought in the account of his debts; and his proposal was, that, "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees:—Held, not to be sufficient to take the case out of the statute, as not shewing that from which the court could infer an unconditional promise, or a promise upon a condition fulfilled. *Everett* v. *Robertson*, 1 El. & El. 16; 28 L. J., Q. B. 23; 4 Jur. (N.S.) 1083; 7 W. R. 9.

Neither an entry by a debtor in his balance-sheet, nor a statement made by him upon an examination in his bankruptcy, will constitute an acknowledgment of the debt within the statute. *Courtnay* v. *Williams*, 3 Hare, 539; 13 L. J., Ch. 461.

The insertion of a debt in the schedule to a deed of inspectorship executed for the purpose of administering the estate of a debtor, is not, although the schedule is verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the statute, so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy. *Topping, Ex parte, Levy, In re*, 4 De G. J. & S. 551; 34 L. J., Bk. 44; 12 L. T. 787; 13 W. R. 1025.

And the payment by the inspectors of a dividend upon the debt is not a sufficient part payment for that purpose. *Ib.*

**Admissions by Bankrupt and by Accountant employed by Assignees insufficient as against Assignees.**]—See *Pott* v. *Clegg*, col. 118.

**Entry in Books of Town Commissioners.**]—Commissioners under a town improvement act, being in debt, appointed a finance committee, who made a report, to which was appended a schedule of liabilities, including arrears of salary due to the clerk of the commissioners more than six years. The commissioners made an entry in their minute-book that they accepted the report:—Held, no sufficient acknowledgment of the debt. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J., Ex. 17; 10 Jur. (N.S.) 347; 8 L. T. 501; 11 W. R. 1078.

**Surety consenting to Creditor's Rights.**]—In 1853 H., as principal, and the defendant as surety, gave to the plaintiff their joint and several note for payment of 200*l.* on demand. In 1861 H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter: "I hereby consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received the dividend, and in 1862 sued the defendant for the balance of the note:—Held, that the letter was not an acknowledgment of the debt, so as to take the case out of the statute. *Cockrill* v. *Sparke*, 1 H. & C. 699; 32 L. J., Ex. 118; 9 Jur. (N.S.) 307; 7 L. T. 752; 11 W. R. 428.

**Claims referred by Surety to Principal.**]—In 1859 B. M., with his two brothers, made a joint and several promissory note to secure a sum of money advanced by the plaintiff to one of the brothers. No acknowledgment of liability was made by him until September, 1870, when the brother to whom the money was advanced having failed to pay the amount, the lender applied for payment to B. M., who, in reply, wrote to the lender as follows: "I suppose I and my brother Thomas signed a note of hand to serve my brother Robert, therefore we trust you will use such means that you know will make him pay (he having plenty by him) before you ask us, you being able to do that which we should not like to take in law with a brother. Please don't let him know you have applied for the money, and oblige, yours respectfully, B. Mitchell. You had better send him a writ at once":—Held, that this was a sufficient acknowledgment or promise to prevent the operation of the statute. *Fisk* v. *Mitchell*, 24 L. T. 272; 19 W. R. 798.

In an action against one of the makers of a note, it appeared that he had signed the note as surety for the other maker, and after the expiration of six years, having been applied to by letter for the amount, wrote to request that application might be made to the executrix of the other maker, adding, "and what she may be short, I will assist to make up." Application was accordingly made to the executrix, who did not pay the amount:—Held, that this acknowledgment was sufficient to take the case out of the statute as against him, and that it was not necessary to take legal proceedings against the executrix

before proceeding against the surety. *Humphreys* v. *Jones*, 14 M. & W. 1; 14 L. J., Ex. 254; 9 Jur. 333.

**Renewal of Notes.**]—The renewal of notes cannot be considered as a promise to pay the original notes. *Foster* v. *Dawber*, 6 Ex. 839; 20 L. J., Ex. 385.

**Indorsement on a Note.**]—In 1846 L. gave to B. a promissory note for 500*l.* payable "to B., or S., his wife," and in 1866, B. being dead, L. indorsed on the note his name and the year thus, "W. H. L., 1866," and on production of the note the date 1846 appeared to have been altered to 1866:—Held, that under the circumstances this indorsement was a sufficient acknowledgment to take the debt out of the statute. *Bowdin* v. *Greenwood*, 41 L. J., Ch. 73; L. R. 13 Eq. 281; 25 L. T. 782; 20 W. R. 166.

**Acknowledgment of a Note taken to be Acknowledgment of the Note sued on in the Absence of Proof of any other Note.**]—See *Spickernell* v. *Hotham*, col. 115.

**Giving Bill of Exchange for Debt.**]—A bill of exchange was given by a bankrupt to a creditor in consideration of an advance of money made more than six years before the bill was given; five years after the proof was made, and dividends had been received upon it, the commissioners ordered the proof to be expunged, on the ground that the bill was not such an acknowledgment in writing of the debt as took the case out of the Statute of Limitations:—Held, that the bill was sufficient for that purpose, and, consequently, that the proof must be restored. *Wilson, Ex parte, Bentley, In re*, 1 Mont. D. & D. 586.

**Letter containing Note insufficiently Stamped.**]—A debtor sent to one of the persons beneficially interested, under the will of his creditor, a note insufficiently stamped for the amount of the debt, with a letter referring to the note as being for the money due:—Held, that the letter was not of itself a sufficient promise or acknowledgment to exclude the operation of the statute, and that the note being unstamped could not be received in evidence to shew what the promise was, that being a direct and not a collateral purpose. *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L. J., Ch. 508; 3 L. T. 799.

**Letter written "without prejudice."**]—A letter from a debtor which is stated to be "without prejudice," can never be relied upon to take the case out of the Statute of Limitations, for such a letter does not amount to a new contract, but is merely an offer which, if not simply accepted by the creditor, is intended to have no effect at all. *River Steamer Co., In re, Mitchell, Ex parte*, L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130. See *Cory* v. *Bretton*, col. 115.

**Incidental Reference.**]—To an action by the executor of an attorney for his bill of costs, the defendant pleaded the statute. The testator had transacted the law business of the defendant, and received his tithes and rents. A letter, written to the testator by the steward of the defendant by his desire, stated that the defendant wished to have the testator's account, for the purpose of settling it. Another letter, written in Welsh, stated that the defendant intended to borrow money on his estates, and that the writer would come to the testator's house for the deeds, and if any account required looking over, the writer and testator might do that at the same time. With reference to the last-mentioned letter, the testator wrote to the defendant as follows: "I have received a (Welsh) letter from your agent, and as far as I am able to understand it, he requests to have the abstract of title, and my bill against you, and account, as you are about to receive a sum of money to pay off the mortgages on your estates. I should be glad to hear from you, as I am no Welsh scholar myself, precisely what is wanted." In answer, the defendant wrote: "Being one of those people who think short accounts make long friends, I directed my agent, last year, to apply to you for your bill, in order that we might settle the tithe accounts. What he applied to you in Welsh the other day, was for my title-deeds":—Held, that the letters were not sufficient to take the plaintiff's claim out of the statute. *Williams* v. *Griffith*, 3 Ex. 335; 18 L. J., Ex. 210.

**Admission on receiving inoperative Discharge.**]—An admission of a debt made to a person who at the same time signed a paper, purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the statute, though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe. *Goate* v. *Goate*, 1 H. & N. 29.

**Amount Unspecified.**]—A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with the provisions of the 9 Geo. 4, c. 14, s. 1, to take the case out of the statute, though no amount is specified in the promise; and a creditor suing on such promise is not confined to nominal damages, but may recover the whole of such proportion, upon proving the amount by extrinsic evidence. *Lechmere* v. *Fletcher*, 1 C. & M. 623; 3 Tyr. 450; 2 L. J. Ex. 219.

If a debtor by a letter admits a balance to be due, without stating the amount, this will take the case out of the statute. *Dickinson* v. *Hatfield*, 5 Car. & P. 46; 1 M. & Rob. 141.

But, if the whole evidence is merely proof of the writing, and no proof of the original cause of action, the creditor can only recover nominal damages. *Ib.*

A letter was written by the debtor to his creditor as follows: "I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts, but interest upon them if I can. As you have mentioned the Limitation Act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever sum is due to you. To pay you now or within the year I am utterly unable; I really have not, as you imagine, received 600*l.* It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shewn you, in a former letter, that your account is not in accordance with the estimate upon which you agreed. If you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your

charges. You will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and so wipe the account entirely from your books. I am fully sensible of and thankful for the forbearance you have shewn, but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained":—Held, that the letter contained an unconditional promise to pay, and prevented the statute from operating. *Gardner* v. *M'Mahon*, 3 Q. B. 561; 2 G. & D. 593; 11 L. J., Q. B. 297; 6 Jur. 712.

—— **Recital of Debt in Deed referring Amount to Arbitration.**]—Where a deed, executed by A. and B., recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck, and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid as thereinafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed:—Held, that, notwithstanding the clause as to the arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained, and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient, consistently with the statute 9 Geo. 4, c. 14, to take the debt out of the Statute of Limitations. *Cheslyn* v. *Dalby*, 4 Y. & Coll. 238; 10 L. J., Ex. Eq. 21. *And see* 2 Y. & Coll. 171.

**Devise, Direction, or Charge, for Payment of Debts.**]—A devise in trust for payment of debts does not revive a debt, upon which the statute had taken effect by the expiration of time before the testator's death. *Burke* v. *Jones*, 2 Ves. & B. 275; 13 R. R. 83.

A direction for the payment of debts in a will of personal estate will not stop the running of the statute. *Freake* v. *Cranefeldt*, 3 Myl. & C. 499; 4 Jur. 1080.

A debt which, at the death of a testator, is not barred by the statute, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate; nor will the operation of the statute be prevented, though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it. *Scott* v. *Jones*, 4 Cl. & F. 382.

A stale debt, bearing interest, is not taken out of the statute by an engagement, signed by the debtor, to charge his estate with a sum corresponding in amount with the debt, with interest from the date of the engagement. *Martin* v. *Knowles*, 1 N. & M. 421; 2 L. J., K. B. 100.

See *Rendell* v. *Carpenter*, 2 Y. & J. 484, supra, col. 95.

**Entry of Debt by Administrator in Account Exhibited by him Sufficient Acknowledgment.**]—See *Smith* v. *Poole*, col. 118.

**Acknowledgment to Bind Executors.**]—See *Scholey* v. *Walton*; *McCulloch* v. *Dawes*; and *Tulloch* v. *Dunn*, col. 118.

**Payment of Interest on Debt by Executors, who are also Trustees of Realty, not necessarily an Acknowledgment to Bind Realty.**]—See *Fordham* v. *Wallis*, col. 134.

**Executors' Advertisement for Creditors.**]—See *Andrews* v. *Brown*; and *Scott* v. *Jones*, col. 119.

**Letter to Creditor, to be Opened after Debtor's Death, directing that Debts should be Paid.**]—See *Clinton* v. *Brophy*, col. 297.

**Interest on Loan Credited to Lender in Debtor's Books.**]—Entries made in the books of a firm crediting the person who advanced money to it, to be repaid on demand, with interest from time to time, on the footing of periodical rest:—Held, not to bar the statute. *Jackson* v. *Ogg*, 1 Johns. 397; 5 Jur. (N.S.) 976; 7 W. R. 730.

**Request by Debtor to Partner to Pay, or Obtain a Release of, Debt.**]—An acknowledgment of a debt, contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter, and others, or "obtaining a release of my liabilities in respect of such debts":—Held, not to amount to a promise to pay the debts, and therefore not to take the debts out of the Statute of Limitations. *Hindmarsh, In re*, 1 Dr. & Sm 129; 1 L. T. 475; 8 W. R. 203.

**Letter of Debtor asking Third Person to make an Offer to Creditor—Letter of Agent offering Composition.**] — See *Gibbon* v. *Bagshott*, col. 118.

**Promise to One of a Class to Rectify Mistake that affected all.**] — Where A., through misrepresentation, received from B. and several other persons, his tenants, sums of money to which he was not entitled; and B. applied to him to have the money returned, stating that he and the other tenants had been induced to pay more than was due; and A. replied, "that, if there was any mistake it should be rectified";—Held, that this obviated the statute as to payments made by the other tenants, as well as by B. *Clark* v. *Hougham*, 3 D. & R. 322; 2 B. & C. 149; 1 L. J. (O.S.) K. B. 249.

**Non-dissent of Debtor to Creditor's Account.**]—The mere sending of an account to a debtor appropriating money of the debtor, over which the creditor has control, to his debt, and from which appropriation the debtor does not dissent, does not amount to an "acknowledgment" by the debtor within the Statute of Limitations. *McHenry, In re, McDermott* v. *Boyd, Barker, Ex parte*, 8 R. 337; 71 L. T. 146; 42 W. R. 491.

**Resolution of Directors.**]—A resolution by a board of directors that "L. shall have the option of taking, within one month, any number of shares not exceeding 1,600, at par, in liquidation of 1,600*l.*, part of his claim" (the claim therein referred to having been made only as to a collateral security for part of an alleged debt), is no acknowledgment sufficient to defeat the operation of the statute. *Lowndes* v. *Garnett and Moseley Gold Mining Co.*, 33 L. J., Ch. 418; 10 L. T. 229; 12 W. R. 572.

Semble, that an acknowledgment made by a board of directors, of whom L. was one, in order to revive a debt claimed to be due to L., would not bind the company. *Ib.*

**Trespass.**]—An admission of a trespass will not take the case out of the statute. *Hurst* v. *Parkes*, 2 Chit. 249.

**Admission in Pleading.**]—Debt within Statute of Limitations taken out by words in answer. *Galway* v. *Barrymore* (*Earl*), Dick. 163. But see *Bateman* v. *Pinder*, 3 Q. B. 574, supra, col. 90.

**As to what Revives a Debt Barred by Statute.**]—See *Andrews* v. *Brown*, Pre. Ch. 385.

**Statute not Suspended by Letter of Licence.**]—See *Fuller* v. *Redman*, col. 26.

**Unacknowledged Demand Insufficient.**]—See *Hodle* v. *Healy*, col. 26.

**Insufficient Acknowledgment may be Evidence of Payment on Account.**]—See *Collinson* v. *Margesson*, col. 143.

**Plaintiff may Declare on Original Promise.**]—See *Leaper* v. *Tatton*; and *Upton* v. *Else*, col. 144.

**Of Mortgagor's Title by Mortgagee.**]—See *Stansfield* v. *Hobson*, col. 292.

**Of Specialty Debts.**]—See *Moodie* v. *Bannister*, col. 282; and *Howcutt* v. *Bonser*, col. 287.

### b. Conditional.

*See also* **A**, VII. 1, *a.*, ante (col. 89).

**Promise to Pay when able.**]—A statement by the defendant that he could not pay the debt, but would do so as soon as he was able:—Held, to be a conditional promise only. *Scales* v. *Jacobs*, 3 Bing. 638; 4 L. J. (o.s.) C. P. 209.

"These sums I mean honourably to pay, and I shall not avail myself of the Statute of Limitations. When I may be able to pay you I cannot now say":—Held, at most only a promise conditional upon the defendant's ability, which it was for the plaintiff to prove. *Woodham* v. *Hollis*, 3 L. J., K. B. 70.

A debtor writing, "I cannot pay the debt at present, but will pay it as soon as I can," is not sufficient to take it out of the statute without proof of his ability to pay. *Tanner* v. *Smart*, 6 B. & C. 603; 9 D. & R. 549; 5 L. J. (o.s.) K. B. 218; 30 R. R. 461.

A debtor within six years from the time of contracting a debt stated in a letter written to his creditor, "that he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power to do so":—Held, that this was a conditional promise only, and therefore not sufficient, per se, to take the case out of the statute. *Haydon* v. *Williams*, 4 M. & P. 811; 7 Bing. 163; 9 L. J. (o.s.) C. P. 16.

A debtor wrote to his creditor: "I will pay you as soon as I get it in my power":—Held, that the statute did not commence running until the debtor became of ability to pay. *Hammond* v. *Smith*, 33 Beav. 452; 10 Jur. (N.S.) 117; 9 L. T. 746; 12 W. R. 328.

**"As soon as Convenient."**]—In an action on a note payable with interest, the words in the letter acknowledging the debt were as follows: "I shall be most happy to pay you both interest and principal as soon as convenient":—Held, that this was a conditional promise, and that the creditor was bound to give some evidence to shew that the debtor was able to pay, or that it was convenient for him to do so. *Edmunds* v. *Downes*, 2 C. & M. 459; 4 Tyr. 173; 3 L. J., Ex. 98.

**If Third Party would Pay.**]—On a demand being made for payment of a debt barred by the statute, the debtor said he would be happy to pay it if he could, that a sum was due to him from one G., and that if the creditor could recover that debt he might pay himself thereout:—Held, that this was a mere conditional promise, and that the debtor's ability to pay must be shewn to entitle the creditor to recover. *Ayton* v. *Bowles*, 12 Moore, 305; 4 Bing. 105; 5 L. J. (o.s.) C. P. 109. S. P., *Gould* v. *Shirley*, 2 M. & P. 581; 7 L. J. (o.s.) C. P. 117.

**"If in Funds."**]—In a letter from a drawer to the holder of a bill of exchange, he said: "If in funds I would immediately pay the money, and take the bill out of your hands":—Held, insufficient. *Richardson* v. *Barry*, 29 Beav. 22.

—— **Conditional on Better Position.**]—In May, 1874, a debtor, in answer to a demand of a debt incurred by him in 1865, wrote to his creditor as follows: "Believe me that I never lose out of sight my obligations towards you, and that I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments." It was admitted that in one year since 1874 the debtor's income had been 14*l.* more than it was and since had been:—Held, that, assuming the letter to amount to such an acknowledgment as to warrant the inference of a promise to pay, it was a conditional promise only, and there was no affirmative proof of the substantial fulfilment of the condition. *Meyerhoff* v. *Froehlich*, 48 L. J., C. P. 43; 4 C. P. D. 63; 39 L. T. 620; 27 W. R. 258—C. A.

In answer to an application for payment of a debt, the debtor wrote as follows: "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling, but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance":—Held, that the letter contained no sufficient acknowledgment or promise to take the case out of the statute. *Rackham* v. *Marriott*, 2 H. & N. 196; 26 L. J., Ex. 315; 3 Jur. (N.S.) 495; 5 W. R. 572—Ex. Ch.

**Promise to Pay in Two Years.**]—The plaintiffs and S. sold a library of books for the defendant, some of which were returned by the purchasers as imperfect. The defendant thereupon wrote to the plaintiffs the following letter, dated the 18th December, 1827: "I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay in two

years":—Held, evidence of an account stated of debts which would become due in two years, so as to defeat a plea of the statute. *Wheatley* v. *Williams*, 1 M. & W. 533; Tyr. & G. 1043; 5 L. J., Ex. 237. See *Clark* v. *Alexander*, col. 112.

**Refusal to Pay till after a Specified Event.**]—In an action on a solicitor's bill of costs incurred more than six years before the issue of the writ, in which the client had refused payment (by letter) till taxation was completed:—Held, that a promise to pay might be inferred when the bills were taxed. *Nichols* v. *Regent's Canal Co.*, 63 L. J., Q. B. 641; 71 L. T. 249. See *S. C.* in C. A., 71 L. T. 836.

**Conditional on Reference to Arbitration.**]—An agreement to refer certain accounts between the parties thereto, after reciting that disputes had arisen between them in respect of them, empowered the arbitrators to ascertain what was due and of right payable, and to order any sum which might be found due to be paid at such times and in such proportions as they should deem fit. The arbitration having proved abortive:—Held, that the agreement amounted to a conditional recognition of the debt only on the part of the debtor, and that the condition being unfulfilled, it did not amount to a sufficient acknowledgment of the debt to take it out of the operation of the statute. *Hales* v. *Stevenson*, 9 Jur. (N.S.) 300; 7 L. T. 317; 11 W. R. 33. Affirmed, 8 L. T. 798; 11 W. R. 952—Ex. Ch.

**Recital in Deed of Assignment to Trustee for Creditors.**]—A debtor, by a deed reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff in trust to pay all such creditors as should sign the schedule of debts annexed, provided that, if all did not sign, the deed should be void. The plaintiff never signed, nor was the amount of his debt stated:—Held, not a sufficient acknowledgment to take his debt out of the statute, although it was admitted orally that he had but one debt. *Kennett* v. *Milbank*, 8 Bing. 38; 1 M. & Scott, 102; 1 L. J., C. P. 8.

**Denial of Liability, "unless H. did not act as S.'s Agent"—Sufficient Acknowledgment on Proof that H. did not so act.**]—In 1854 H., a solicitor, who had also acted as land agent to S., furnished his bill of costs. Both died. In 1862 the solicitor for S.'s executors, in answer to an application for payment, wrote that the executors had handed him the costs and account on foot of rents, which had been furnished; that the bill of costs at the time it was furnished, save a small sum, was barred by the Statute of Limitations; "but the instructions I have received were to look at the matter fairly, and if anything appeared due to settle it, notwithstanding Mr. H. not being legally entitled to recover. I have accordingly done so, and without entering into any particulars of the costs, but merely looking at the matter of the rents, it seems to me that Mr. H. is indebted to Mr. S.'s executors." The letter then made a claim in respect of rents of another property, alleged to have been lost by the agent's default, and concluded: "Therefore the executors are not in any way called on to pay, unless you can within a week show me in any reasonable way that Mr. H. did not act over these properties as Mr. S.'s agent, or that he used due diligence to collect the rents." The Master, in a suit in equity to administer the assets of S., found that H. was not agent over the latter property:—Held, that the letter contained a sufficient acknowledgment to save the bar of the Statute of Limitations. *Leland* v. *Murphy*, 16 Ir. Ch. R. 500.

An acknowledgment in writing by an agent after the Mercantile Law Amendment Act is sufficient to save from the bar of the Statute of Limitations a debt contracted before the act. *Ib.*

**Promise by Debtor of Payment by Others.**]—See *Whippy* v. *Hillary*, col. 113.

**Undertaking to Pay Costs when Taxed.**]—See *Archer* v. *Leonard*, col. 117.

**Where Plaintiff relies on Conditional Acknowledgment he must declare on it.**]—See *Haydon* v. *Williams*, col. 144.

### c. Signature of.

By 9 Geo. 4, c. 14 (Lord Tenterden's Act), s. 1, *an acknowledgment, to take a case out of the statute, must be signed by the party chargeable; [or by his agent duly authorised:* 19 *&* 20 *Vict. c.* 97 (*Mercantile Law Amendment Act*, 1856), *s.* 13].

**At Top of Document.**]—A debtor being called upon by his creditor (the holder of two promissory notes for 510*l.*, more than six months overdue) for a statement of his affairs, made out an account in which the notes were inserted as a debt for which he was liable:—Held, that the whole document being in the handwriting of the debtor, his name written at the top was a sufficient signature to bind him. *Holmes* v. *Mackrell*, 3 C. B. (N.S.) 789.

**By a Firm.**]—A defendant pleaded the Statute of Limitations. To prove the case on the part of the plaintiff a series of accounts for several years between himself and the house of A. & Co., in which the defendant was a partner, was put in evidence. In the last of those accounts the balance of the preceding account was carried over. The date of this item, as well as those of the other items, with three exceptions, were beyond six years from action brought. The exceptions were, that, on the credit side, there was one item within the six years—"Balance of interest to this day at 8*l.* per cent."; and on the debit side there were two items within that period, viz., "postage, petty charges and commission on disbursements." The balance of account, for which the action was brought, was then struck at a date also within the six years. The signature to the account was A. & Co., in the same handwriting as that affixed to the accounts of other customers with the firm; but there was no evidence that such signature was in the handwriting of the defendant, or in that of any of the partners:—Held, first, that the signature to the account was not "an acknowledgment in writing, signed by the parties chargeable thereby," within 9 Geo. 4, c. 14, s. 1. *Clark* v. *Alexander*, 8 Scott (N.R.) 147; 13 L. J., C. P. 133; 8 Jur. 496.

Held, secondly, that the account was not evidence of any payment of principal or interest

admitted to be due within the six years, so as to take the debt out of the statute. *Ib.*

Held, thirdly, that there was no evidence of an account stated between the parties, so as to be a new transaction, and to give a new right of suit, independent of, and distinct from, the original debt. *Ib.*

**Letter signed by Debtor, not by Party chargeable thereby.**]—The statute is not barred by a letter in which the debtor states, "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the debtor has handed the account to A.; that some time must elapse before payment, but that the debtor is authorised by A. to refer the creditor to him for any further information." For, by 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby, and such letter does not charge the debtor, as it is at most only a promise to pay as soon as the trustee is in cash. *Whippy* v. *Hillary*, 3 B. & Ad. 399; 5 Car. & P. 209; 1 L. J., K. B. 178.

**Unsigned Letter.**]—An unsigned letter acknowledging a debt, written by a debtor's wife at his dictation, and sent to the creditor in the same envelope with a letter to the creditor, written and signed by the wife, and which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorised agent of the debtor, so as to take the case out of the Statute of Limitations. *Ingram* v. *Little*, 1 Cab. & E. 186.

An admission in an unsigned letter, sent by order of the assignees of a bankrupt, will not take a debt out of the statute. *Pott* v. *Clegg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

**Authorised Agent signing Debtor's Name insufficient.**]—See *Hyde* v. *Johnson*, col. 117.

### d. Proof of.

By 9 Geo. 4, c. 14, s. 1, *an acknowledgment to take a case out of the statute, must be in writing. By s.* 8, *it need not have an agreement stamp.*

**Before 9 Geo. 4, c. 14, s. 1.**]—Where a person having entered into a written guarantee, and become liable upon it at a period of more than six years before the commencement of the action, verbally promised within six years that the matter should be arranged; and afterwards on an action being brought, pleaded actio non accrevit infra sex annos:—Held (before 9 Geo. 4, c. 14, s. 1), that the Statute of Frauds having been once satisfied by the original promise being in writing, it was not necessary in order to take the case out of the Statute of Limitations that the latter promise should also be in writing. *Gibbons* v. *M'Casland*, 1 B. & Ald. 690.

**Effect of 9 Geo. 4, c. 14, s. 1.**]—The statute does not alter the law as to the nature of the promise, but merely substitutes a different mode of proof. *Haydon* v. *Williams*, 4 M. & P. 811; 9 L. J. (o.s.) C. P. 16; 7 Bing. 163. S. P., *Dickinson* v. *Hatfield*, 5 Car. & P. 46; 1 M. & Rob. 141.

**Construction of Documents.**]—The construction of a doubtful document, given in evidence to defeat the statute, is for the court and not for a jury; if it is explained by extrinsic facts, they are for the consideration of the jury. *Morrell* v. *Frith*, 3 M. & W. 402; 8 Car. & P. 246; 1 H. & H. 100; 7 L. J., Ex. 172; 2 Jur. 619.

The question whether a particular document takes a case out of the statute, is for the judge and not for the jury. *Sidwell* v. *Mason*, 2 H. & N. 306; 26 L. J., Ex. 407; 3 Jur. (N.S.) 649.

**Ambiguous Letter should be left to Jury.**]—See *Lloyd* v. *Maund*, and *Linley* v. *Bonsor*, col. 90.

**When oral Evidence admissible.**]—When a written promise to pay a debt barred by the statute has been lost, oral evidence of the contents of the writing may be given. *Haydon* v. *Williams*, 4 M. & P. 811; 7 Bing. 163; 9 L. J. (o.s.) C. P. 16.

When a letter, acknowledging the existence of a debt, which was produced for the purpose of taking the case out of the statute, did not contain any date:—Held, that the time when the letter was written might be supplied by parol evidence. *Edmunds* v. *Downes*, 2 C. & M. 459; 4 Tyr. 173; 3 L. J., Ex. 98. And see *Hartley* v. *Wharton*, 3 P. & D. 529; 11 A. & E. 934; 9 L. J., Q. B. 209.

Evidence of verbal admissions, in 1850, by A., since deceased, that he owed a debt of 2,300*l.* to B.'s estate, the interest of which he had arranged to discharge, and which was discharged by paying two annuities bequeathed by B.'s will, together with a statement in an affidavit made by B.'s executor in 1850, which was inserted in the draft affidavit from the dictation of A., to the effect that B.'s executor had received in August, 1850, from A. a half-year's interest on 2,300*l.*, and had paid the said annuities the same half-year:—Held, sufficient to take the debt of 2,300*l.* out of the Statute of Limitations. *Edwards* v. *James*, 1 Kay & J. 534; 3 W. R. 566.

**Evidence to Construe Writing—Facts negativing Promise to pay.**]—See *Cripps* v. *Davis*, col. 91.

**Promise to pay Proportion of Joint Debt—Amount may be proved by extrinsic Evidence.**]—See *Lechmere* v. *Fletcher*, col. 106.

**Recital in Deed that A. indebted to B.—Sufficient Acknowledgment when coupled with Parol Evidence as to Amount.**]—See *Cheslyn* v. *Dalby*, col. 107.

**Where Proof of Debt necessary to supplement Acknowledgment.**]—See *Dickinson* v. *Hatfield*, col. 106.

**When exempt from Stamp Duty.**]—The following memorandum: "I acknowledge to owe M. 36*l.*, which I agree to pay him as soon as my circumstances will permit," is exempt from stamp duty, under 9 Geo. 4, c. 14, s. 8, as a writing made necessary by that statute, provided it is put in for the mere purpose of barring the statute, the debt itself being proved by other evidence. *Morris* v. *Dixon*, 6 N. & M. 438; 4 A. & E. 845; 2 H. & W. 57.

A note improperly stamped is not admissible as a memorandum, the 9 Geo. 4, c. 14, s. 8, applying only to instruments which might be stamped with an agreement stamp. *Jones* v.

*Ryder*, 4 M. & W. 32; 1 H. & H. 256; 7 L. J., Ex. 216.

P. being indebted to the executors of C. in 11,000*l.*, to which A. was beneficially entitled, sent a letter to A. as follows: "I have sent you a note for the money due to you which your mother left for you." Inclosed in this letter was a promissory note, on a receipt stamp, for 11,000*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent, the debt was barred by the statute:—Held, that there was not a sufficient acknowledgment by P., without referring to the note, to see what was the promise made, and this could not be done for the want of a proper stamp. *Parmiter* v. *Parmiter*, 3 De G. F. & J. 461; 30 L. J., Ch. 508; 3 L. T. 799; 8 W. R. 578.

A. gave to B. a promissory note, dated October, 1834, for 837*l.* 1*s.* 6*d.* payable on demand. In December, 1834, demand was made, and A. then promised to pay interest, and signed an unstamped memorandum, dated the 2nd December, 1834, as follows: "I promise to pay to B. 837*l.*, with 4*l.* per cent. interest thereon." Neither principal nor interest was paid, but in January, 1848, A. wrote to B. a letter referring to a promissory note for a debt, which he acknowledged, and promised thereby to pay:—Held, that the memorandum of December, 1834, and a letter accompanying it, shewed that interest was running; and that, though in form a promissory note, and unstamped, it could be looked at to see to what debt this interest was to be referred; and that as no other debt was proved to exist, the 837*l.* there mentioned was to be assumed to be part of the 837*l.* 1*s.* 6*d.* secured by the former promissory note. Held, also, that in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note of October, 1834, and thus to take it out of the Statute of Limitations. *Spickernell* v. *Hotham*, 1 Kay, 669; 2 W. R. 638.

**Claim in Action of Negligence not supported by Acknowledgment.**]—In an action for negligence by a solicitor, where the statute is pleaded, the only question is whether the negligence took place within six years. If a solicitor is liable at all for negligence committed more than six years before any action against him, but acknowledged by him within six years of an action, he can only be so when the action is brought specially upon such acknowledgment. *Short* v. *M'Carthy*, 3 B. & Ald. 626; 22 R. R. 503.

The plaintiff declared that the defendant promised to invest his money on good security, and assigned for breach that he invested it on bad security, and the defendant pleaded the statute: replication, that he promised within six years, and it was proved that, within that time, he acknowledged the security to be bad, and promised that the plaintiff should be paid:—Held, that as the declaration did not state a debt to which a subsequent promise could be applied, the plaintiff was not entitled to recover. *Whitehead* v. *Howard*, 2 Br. & B. 372; 5 Moore, 105; 23 R. R. 471.

**Letter written without Prejudice.**] — An acknowledgment of a debt contained in a letter, which was "not to be used in prejudice of" the debtor's rights, cannot be given in evidence. *Cory* v. *Bretton*, 4 Car. & P. 462. See *River Steamer Co., In re, Mitchell, Ex parte*, col. 105.

**Verbal Order by Turnpike Trustees to pay a Bill.**]—Where a turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute, unless it is so entered in writing. *Emery* v. *Day*, 1 C. M. & R. 245; 4 Tyr. 695; 3 L. J., Ex. 307.

**Acknowledgment after Action, no Bar.**]—See *Bateman* v. *Pinder*, col. 90.

### e. By and to whom made.

By 9 Geo. 4, c. 14, s. 1, *an acknowledgment by one joint contractor shall not bind any other.*

**To Stranger.**]—An acknowledgment, in order to exclude the statute, must be one from which a promise to pay the debt can be inferred, and must, therefore, be made to the creditor or his agent. *Tanner* v. *Smart*, 6 B. & C. 603; 9 D. & R. 549; 5 L. J. (O.S.) K. B. 218.

An acknowledgment of a debt barred by the Statute of Limitations, and given by the debtor to a person who was neither agent of, nor in privity with, the creditor, is not sufficient as a promise to pay the debt so as to enable the creditor to sue the debtor. *Tanner* v. *Smart* (6 B. & C. 603) followed. *Rogers* v. *Quinn*, 26 L. R., Ir. 136.

An acknowledgment by the acceptor of a bill of exchange of his liability to the payee, accompanied by a declaration that he was not liable to the drawers, there being no consideration for the acceptance, is not sufficient in an action by the drawers against the acceptor to take the case out of the statute. *Easterly* v. *Pullen*, 3 Stark. 186. See also *Stamford Banking Co.* v. *Smith*, 61 L. J., Q. B. 405; [1892] 1 Q. B. 765; 66 L. T. 306; 40 W. R. 355; and per Pollock, C. B., in *Godwin* v. *Culley*, 4 H. & N. 373. Contra, *Peters* v. *Brown*, 4 Esp. 46.

A deed made between the debtors and a third person, in which they acknowledged the existence of a debt, was sufficient to take the case out of the statute, although the creditors were wholly strangers to the deed. *Mountstephen* v. *Brooke*, 3 B. & A. 141. See *Halliday* v. *Ward*, 3 Camp. 32.

Semble, that, since the statute 9 Geo. 4, c. 14, an acknowledgment of a debt to a third person is not sufficient to take the case out of the statute. *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 662; 7 L. J. (N.S.) Ex. Eq. 42; 1 Jur. 940. See *Francis* v. *Hawkesley*, col. 93.

**To Creditor or Agent.**]—An acknowledgment to take a case out of the statute must be made to the creditor, and, semble, that one to his agent is sufficient. *Fuller* v. *Redman*, 26 Beav. 614.

An administratrix sueing for a debt due to the intestate more than six years before action was held to be entitled to recover upon an account stated between her agent and the debtor within six years. *Smith* v. *Forty*, 4 Car. & P. 126.

**To Executrix.**]—A statement made by the debtor to the creditor's executrix that the creditor always promised never to distress him for the debt is no evidence of a promise to pay made to the debtor. *Ward* v. *Hunter*, 6 Taunt. 210.

**Statute avoided, as to Claims by several Tenants for Over-payments, by Undertaking to**

**one to rectify any Mistake.**]—See *Clark* v. *Hougham*, col. 108.

**By Agents.**] — An acknowledgment by a wife, who had been accustomed to act as the agent of her husband, in purchasing the goods and managing the business generally, was sufficient. *Anderson* v. *Sanderson*, 2 Stark. 204; Holt, 591; 17 R. R. 681; 19 R. R. 703. S. P., *Palethorp* v. *Furnish*, 2 Esp. 511, n.

So, in an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years was admissible to take the case out of the statute. *Gregory* v. *Parker*, 1 Camp. 394; 10 R. R. 712.

But as the 9 Geo. 4, c. 14, s. 1, directed that no acknowledgment or promise should be sufficient to take a case out of the statute, unless in writing, "and signed by the party chargeable thereby," an acknowledgment contained in a letter which was written by the wife of the debtor, in his name, and at his request, was insufficient, because the statute gave no authority to an agent to make the acknowledgment. *Hyde* v. *Johnson*, 3 Scott, 289; 2 Bing. (N.C.) 776; 2 Hodges, 94; 5 L. J., C. P. 291.

Where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was sufficient. *Burt* v. *Palmer*, 5 Esp. 145.

An acknowledgment signed by the solicitor of the administrator of the debtor in 1862 will save from the bar of the Statute of Limitations a debt accrued before the passing of the 16 & 17 Vict. c. 113, s. 20. *Archer* v. *Leonard*, 15 Ir. Ch. R. 267.

The solicitor for the administrator, who had been furnished with several bills of costs by A., who had been solicitor for the intestate, by notice required him to tax any bills of costs properly payable out of the assets, the administrator thereby undertaking to pay any sum which might be found due on foot of said costs (after all fair credits), when the same should be taxed and certified, and the credits given, less the costs of taxation, if one-sixth should be taxed off, and requiring to be furnished with a requisition for taxation:—Held, that the notice saved the bar from the Statute of Limitations. *Ib.*

A son, who acts as his father's agent in matters of his trade, is not his agent to make an acknowledgment that money is due from the father, as an executor, to a legatee, so as to take the legacy out of the statute. *Whitehouse* v. *Abberley*, 1 Car. & K. 642.

—— **Unsigned Acknowledgment, enclosed in Letter from Debtor's Wife, insufficient.**]—See *Ingram* v. *Little*, col. 113.

—— **By Directors for Company.**]—See *Lowndes* v. *Garnett and Moseley Gold Mining Co.*, col. 108.

—— **In Writing.**]—See *Leland* v. *Murphy*, col. 112.

—— **By one Creditor authorised to arrange with the others.**]—A debtor had written a letter to T., to make a proposition to the creditor respecting a debt he owed him; and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the creditor, offering an acceptance for 7*s.* 6*d.* in the pound on the debt:—Held, not sufficient to take the case out of the statute. *Gibbon* v. *Bagshott*, 5 Car. & P. 211.

—— **By Accountant employed by Bankrupt's Assignees.**]—An accountant employed by the assignees of a bankrupt, sent to a creditor an unsigned statement of the account between the bankrupt and the creditor, in which he stated a balance in favour of the creditor:—Held, that this was not a sufficient acknowledgment of a debt to take the case out of the statute, as against the assignees. *Pott* v. *Clegg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

An admission by a bankrupt in his balance-sheet will not take a debt out of the statute as against his assignees. *Ib.*

**By Executors or Administrators.**]—In 1835, A. filed a creditors' bill against the administrator of his debtor, founded on a debt due on a note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832 the administrator, on the citation of a third person, signed and exhibited, in the Ecclesiastical Court, an inventory and account of the debtor's assets and debts, in which A.'s debt was entered:—Held, that the entry was a sufficient acknowledgment. *Smith* v. *Poole*, 12 Sim. 17; 10 L. J., Ch. 192.

An acknowledgment of, or promise to pay, a debt of a testator by one of several executors is sufficient to take the case out of the Statute of Limitations. *Tullock* v. *Dunn* (Ry. & M. 416) and *Scholey* v. *Walton* (13 L. J. Ex. 122; 12 M. & W. 510) distinguished. *Macdonald, In re, Dick* v. *Fraser*, 66 L. J., Ch. 630; [1897] 2 Ch. 181; 76 L. T. 713; 45 W. R. 628.

Semble, per Parke, B., an acknowledgment in writing by one of two executors of a debt due from the testator is not sufficient to take the debt out of the statute as against his co-executors, even although made by him in his representative capacity. *Scholey* v. *Walton*, 12 M. & W. 510; 13 L. J., Ex. 122; 8 Jur. 319.

Where one of two joint executors was applied to for payment of a debt of his testator's, who had been dead twenty years, and as against whom the debt was barred, and said: "I believe the debt is a just one, and has never been paid; I should be happy to serve you in the matter if I could, but I cannot do anything without the consent of the testator's family":—Held, in an action against both the executors, that there was no such acknowledgment of the debt as took the case out of the statute as against them, there being no promise, express or implied, to pay the debt. *M'Culloch* v. *Dawes*, 9 D. & R. 40; 5 L. J. (O.S.) K. B. 56; 30 R. R. 515.

In an action against several executors:—Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there must be an express promise by all. *Tullock* v. *Dunn*, R. & M. 416; 27 R. R. 765.

After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the statute out of its operation. *Phillips* v. *Beal*, 32 Beav. 26.

Where the statute had run against a debt,

due from a testator before his death, and the executor wrote thus to the creditor: "The legatees object to my paying the claim, though I think it just," and "I not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the court": —Held, that the debt was not revived, and that the real estate could not be subjected to it by any act of the devisees in trust, though they were also executors. *Briggs* v. *Wilson*, 5 De G. M. & G. 12; 17 Beav. 330; 2 Eq. R. 153.

A debt is not taken out of the statute by an advertisement published by the administrator requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient. *Scott* v. *Jones*, 4 Cl. & F. 382; 7 L. J., Ch. 242.

Semble, notice in a newspaper, by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the Statute of Limitations. *S. C.*, 1 Russ. & M. 255; 8 L. J. (o.s.) Ch. 83.

Advertisement by executor for creditor to come in to prove debts against testator revives a debt barred by the Statute of Limitations. Sed quære. *Andrews* v. *Brown*, 1 Eq. Abr. 305.

An admission by an executrix, in her answer, of the fact of there having been a debt due by the testator, is sufficient to prevent the debt from being barred by the 3 & 4 Will. 4, c. 42, s. 5. *Moodie* v. *Bannister*, 4 Drew. 432; 28 L. J., Ch. 881; 5 Jur. (N.S.) 402; 7 W. R. 278.

An acknowledgment, in order to take a case out of the statute (3 & 4 Will. 4, c. 27), must appear to have been made with the intention of charging the party making it, and it must have been made to a party then entitled to make the demand. Accordingly, where the demand was against two executors for a legacy due to deceased wife of plaintiff, and the arrears of interest accrued since her death, and the acknowledgment was made by one executor, with the object apparently of throwing the burden on the other, and it was made also before the plaintiff had entitled himself by taking out administration to his wife, it was held insufficient on both grounds. *Holland* v. *Clark*, 1 Y. & Coll. C. C. 151.

An admission of a debt by the executrix of a trader, within six years before the filing of a creditors' bill, will not take the debt out of the Statute of Limitations, so as to enable the creditor, under the 47 Geo. 3, c. 74, to claim payment out of the real estate in the hands of a devisee. *Putnam* v. *Bates*, 3 Russ. 188.

**Acknowledgment by Executors, who are also Trustees of Realty, not necessarily binding on Realty.**]—See *Fordham* v. *Wallis*, col. 134.

**By Joint Debtors.**]—An acknowledgment of a debt, contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter, and others, or "obtaining a release of my liabilities in respect of such debts," does not amount to a promise to pay the debts, and therefore does not take the debts out of the statute. *Hindmarsh, In re*, 1 Drew. & Sm. 129; 1 L. T. 475; 8 W. R. 203.

An admission made by one of two partners after the dissolution of the partnership, concerning joint contracts, that took place during the partnership, was sufficient to bar the statute. *Wood* v. *Braddick*, 1 Taunt. 104; 9 R. R. 711.

But the admission of one partner to bind another must be clear and explicit. *Holme* v. *Green*, 1 Stark. 488.

Where one of two partners, who was a certificated bankrupt, acknowledged a debt due to the plaintiff by his partner and himself:—Held, that it was not a sufficient acknowledgment to take the case out of the statute in an action against both, when the bankrupt pleaded his bankruptcy and the other the statute. *Marten* v. *Bridges*, 3 Car. & P. 83.

An acknowledgment of one of several makers of a joint and several note took it out of the statute as against the others, and might be given in evidence in a separate action against any of the others. *Whitcomb* v. *Whiting*, 2 Dougl. 628.

So, in the case of a joint note, even though one of the makers had never made any acknowledgment, and had signed the note as a surety only. *Perham* v. *Raynal*, 9 Moore, 566; 2 Bing. 306; 3 L. J. (o.s.) C. P. 271.

An account stated between a debtor, being part-owner and ship's husband, and his co-owners, in which the items of the creditor's account for work done and money advanced are included, is not such an acknowledgment as will take the case out of the operation of the statute. *Nash* v. *Hill*, 1 F. & F. 198.

The circumstance of there being no ascertained or adjusted debt till within six years, will not delay the operation of the statute. *Ib.*

A debt is not to be kept alive against one party by the admission of another, except in cases of continuing joint contract. *Fordham* v. *Wallis*, 10 Hare, 228; 22 L. J., Ch. 548; 17 Jur. 228.

The existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property. *Ib.*

—— **After Marriage of one.**]—Where an action was brought on a joint note, made by A. and B. whilst B. was sole, against A., B. and C., the husband of the latter, who was joined for conformity; and they pleaded actio non accrevit infra sex annos; to which the plaintiff replied, that the cause of action arose within six years: —Held, that an acknowledgment by A., within six years, that the debt was due, would not take the case out of the statute, such acknowledgment being made after the intermarriage of B. and C. *Pittam* v. *Foster*, 2 D. & R. 363; 1 B. & C. 248; 1 L. J. (o.s.) K. B. 81; 25 R. R. 385.

**By Infants.**]—An acknowledgment in writing given by an infant of a debt due for necessaries is effective for the purpose of taking the debt out of the statute. *Willins* v. *Smith*, 4 El. & Bl. 180; 3 C. L. R. 16; 24 L. J., Q. B. 62; 1 Jur. (N.S.) 163; 3 W. R. 22.

**Right to account as between Partners not kept alive after Dissolution by an Acknowledgment made by a Debtor of the Firm to one of the Partners.**]—See *Knox* v. *Gye*, col. 21.

**Schedule of Liabilities of Improvement Commissioners drawn up by their Finance Committee and accepted by them.**]—See *Bush* v. *Martin*, col. 104.

**By Debtor that another will pay.**]—See *Whippy* v. *Hillary*, col. 113.

**In the case of Specialty Debts.**]—See *Moodie* v. *Bannister*, col. 282.

2. CONCEALED FRAUD.

*See also* post, **B**, IX.

**Discovery prevented by Defendant's Fraud.**]—It is no answer to a plea of the statute that the plaintiff was prevented by the fraud of the defendant from knowing of the cause of action, until after the time of limitation expired. *Imperial Gaslight and Coke Co.* v. *London Gaslight Co.*, 10 Ex. 39; 2 C. L. R. 1230; 23 L. J., Ex. 303; 18 Jur. 497; 2 W. R. 527. See *Hunter* v. *Gibbons*, 1 H. & N. 459; 26 L. J., Ex. 1; 2 Jur. (N.S.) 1249; 5 W. R. 91; post, col. 123.

In an action to recover by way of damages money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was held good. *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J., Q. B. 313; 46 L. T. 248; 30 W. R. 591—C. A. Contra, *Imperial Gaslight and Coke Co.* v. *London Gaslight Co.*, and *Hunter* v. *Gibbons*, supra.

In an action to recover damages for fraudulent representation of the quality (viz. "the sheep-carrying power") of certain lands, whereby the plaintiff was induced to take leases thereof, the defendants pleaded the Statute of Limitations. Reply: That the cause of action relied on is the fraud and fraudulent misrepresentation of the defendants, and the injuries occasioned to the plaintiff thereby; and the plaintiff says that he did not, and could not, by the exercise of reasonable diligence, have discovered the said fraud, or that the said representation was untrue and fraudulent, until within six years before the commencement of this action:—Held, that the reply was no answer to the plea relying on the statute. *Gibbs* v. *Guild*, supra, commented on and distinguished. *Barber* v. *Houston*, 18 L. R., Ir. 475—C. A.

—— **Or by Fraud of Defendant's Partner.**]—Money of the plaintiff came into the hands of a firm of solicitors for investment, and was converted to the use of the firm. Owing to misrepresentations attributable to the firm the plaintiff was prevented from discovering the fraud until more than six years after the cause of action arose. In an action to recover the money, a partner, innocent of the fraud, claimed that under s. 8 of the Trustee Act, 1888, he was entitled to the benefit of the Statute of Limitations:—Held, that the principle of *Blair* v. *Bromley* (5 Hare, 542) applied, and he was deprived of the benefit of the statute by the misrepresentations, which bound him as a partner. *Moore* v. *Knight*, 60 L. J., Ch. 271; [1891] 1 Ch. 547; 63 L. T. 831; 39 W. R. 312.

—— **Taking Partnership Accounts.**]—For the purpose of taking partnership accounts, a partnership between three persons, carried on without any break after the death of one by the survivors, is, as between the survivors, one continuous partnership. As between partners, in cases of concealed fraud the Statute of Limitations does not commence to run from the time when with reasonable diligence the fraud might have been discovered, but only from the time when it has in fact been discovered unless the person complaining has had his suspicion aroused, and, having the means of knowledge, has not chosen to avail himself of that means. *Rawlins* v. *Wickham* (3 De G. & J. 304) followed. *Gibbs* v. *Guild* (9 Q. B. D. 59) examined. *Betjemann* v. *Betjemann*, 64 L. J., Ch. 641; [1895] 2 Ch. 474; 12 R. 455; 73 L. T. 2; 44 W. R. 182—C. A.

**Fraud must be Defendant's or known to him.**]—If non-discovery of fraud is relied on to take a case out of the statute, it must be the fraud of the person who invokes the aid of the statute or of his agent when acting for him. *Thorne* v. *Heard*, 64 L. J., Ch. 652; [1895] A. C. 495; 11 R. 254; 73 L. T. 291; 44 W. R. 155—H. L.

A personal representative having found among the papers of the deceased a mortgage deed, and having assigned it more than six years ago for the mortgage-money, affirming and reciting in the deed of assignment that it was a mortgage deed, made or mentioned to have been made between the mortgagor and mortgagee for that sum, the assignee shall not recover back the mortgage-money, although it turns out that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brings his action, unless the assignor knew it to be a forgery. *Bell* v. *Holbeck*, 2 Dougl. 654.

**Averment necessary that Fraud only discovered within six years of Action.**]—The Statute of Limitations is no plea where the bill charges a fraud, but then it should be charged by the bill that the fraud was discovered within six years before the bill was filed. *South Sea Co.* v. *Wymondsell*, 3 P. W. 143.

**Time does not run till Facts constituting Fraud known.**]—See *Blennerhassett* v. *Day*, and *Blair* v. *Bromley*, col. 19.

**Or till they might with reasonable Diligence have been known.**]—See *Willis* v. *Howe*, col. 308.

**Statute not avoided by Concealment without Fraud.**]—In an action for negligence, concealment of the negligence until within six years before action is no answer to the defence of the Statute of Limitations if the defendant has not been guilty of fraud. *Armstrong* v. *Milburn*, 54 L. T. 723—C. A.

**Wrongful Working of Mines.**]—The plaintiffs, the owners of coal mines, discovered in 1872 that the defendant more than six years previously had, when working an adjoining colliery, worked a large quantity of the plaintiffs' coal by breaking their boundary. There had been no subsidence of the surface or anything to put the plaintiffs on inquiry, and the defendant in plans which he kept of the workings in his own mine, had not marked the illegal workings:—Held, that the omission in the plans was not sufficient to constitute a case of concealed fraud so as to

entitle the plaintiffs to an account and damages. *Dawes* v. *Bagnall*, 23 W. R. 690.

The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the bonâ fide belief that he was about to obtain from them a contract authorising him so to work, and gave to one of the trustees notice that he was about to commence working:—Held, that the working, though no contract was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently; and in taking an account of the minerals gotten without authority the defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to the defendant that no contract would be made with him authorising him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank. *Trotter* v. *Maclean*, 49 L. J., Ch. 256; 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.

So long as a wrongful working is to be treated as inadvertent the Statute of Limitations applies, and the account will only be directed for six years from the issue of the writ. But the onus is on the defendant to shew that minerals gotten by him were gotten before the six years. *Ib.*

To a plea of the statute, in an action of trespass, or trespass on the case, the plaintiff will not be allowed to reply as an equitable answer that the trespasses were underground, and had been fraudulently concealed from the plaintiff till within six years before action. *Hunter* v. *Gibbons*, 1 H. & N. 459; 26 L. J., Ex. 1; 2 Jur. (N.S.) 1249; 5 W. R. 91. But see *Gibbs* v. *Guild*, 51 L. J., Q. B. 313; 9 Q. B. D. 59; 46 L. T. 248; 30 W. R. 591; ante, col. 121.—C. A.

**Liability to refund Sum knowingly paid to Person not entitled.**]—In 1842 B. lent to G. 600*l.* upon a promissory note. By a will made in the same year B. bequeathed 600*l.*, which he described as being in the hands of G., to his son-in-law, upon trust to invest and pay the dividends and interest to his daughter, the wife of R., for life, free from the debts and control of her husband; and after her death for R. for life; and after the death of the survivor, for their children. On the death of the testator R. became indebted to G., and in order to discharge part of the debt, in 1842 he delivered to G. the note for 600*l.*:—Held, that as G. had information of the manner of the bequest, he was a party to the fraudulent abstraction of the trust property, and liable to refund the amount. The relief in such a case is founded on fraud and not on constructive trust, and being so founded, it is governed by the principle that the right of the party defrauded is not affected by lapse of time. *Rolfe* v. *Gregory*, 34 L. J., Ch. 274; 11 Jur. (N.S.) 98; 12 L. T. 162; 13 W. R. 355—L. C.

**Family Settlement procured by.**]—Agreement in settlement of family disputes, one party being guilty of gross fraud and concealment of the rights of the other, set aside after great length of time. *Gordon* v. *Gordon*, 3 Swan. 400; 19 R. R. 230.

**Bond obtained by False Pretences.**]—A., under pretence that B. was instrumental in procuring a beneficial marriage for C., obtains a bond from C. to B. for one thousand guineas, as a reward for his services. The bond is paid when due; but in nine years afterwards C. discovers the whole to be a gross imposition in A., and that he received all the money. On a bill brought, A. was decreed to repay C. the whole money, with interest and costs. *Booth* v. *Warrington (Earl)*, 4 Bro. P. C. 163.

**By Agents, Stewards, and Brokers.**]—Interest and costs decreed against a steward upon fraud, wilful concealment, &c., and in such cases, generally, there is no limitation of time. *Hardwicke (Earl)* v. *Vernon*, 14 Ves. 504; 9 R. R. 329.

Where two agents conspire to defraud their principal, the estates of both the agents will be liable in equity to the estate of the principal, in respect of the fraud so committed. *Walsham* v. *Stainton*, 12 W. R. 63.

In such a case an agent is considered as a trustee for his principal, and lapse of time is no bar. *Ib.*

A steward and agent, being employed to sell an estate, purchased part of it himself at an undervalue, and secretly, in the name of another person. All actions and matters of difference between the parties were afterwards submitted to arbitration; an award was made, and mutual releases executed. The court, forty-seven years after the purchase, and twenty-eight years after the award, set aside the purchase, holding, first, that the principal having been kept ignorant of the fraud, was not bound by the lapse of time; and secondly, that he was not bound by the award and release, on the ground that the deception had been continued, and that the purchase and the fraudulent circumstances relating to it had not been brought under the consideration of the arbitrator. *Trevelyan* v. *Charter*, 4 L. J., Ch. 209. Affirmed nom. *Charter* v. *Trevelyan*, 11 Cl. & F. 714; 8 Jur. 1015.

Reversionary leases, at undervalue, obtained by agent from principal, the relation of creditor and debtor also subsisting, after an acquiescence of twenty-seven years, not set aside; the fiduciary character having, during that period, ceased to exist, and the transactions being recognised on oath by the principal as fair. *Medlicott* v. *O'Donell*, 1 Ball & B. 156.

Where it was alleged that the agent of the former owner of estates devised to the plaintiff, had within a few days after the decease obtained a conveyance of part of the property in discharge of a settled balance, alleged to be due to him, and obtained the deed, under an assertion that he had a secret by which the plaintiff's title might be impeached, but the latter had, under legal advice, acquiesced and confirmed the transaction, and after a lapse of above fifteen years sought to open the accounts on the ground of fraud; the house affirmed the judgment below, dismissing the bill. *De Montmorency* v. *Devereux*, West, 64; 7 Cl. & F. 188; 2 Dr. & Wal. 410; 4 Jur. 403.

Where a broker sold to his employer, as being the property of a third person, shares held in trust for him, the broker, the transaction was held void on grounds of public policy, and set aside without entering into the question of fairness of price, at the expiration of twelve years, the fraud not appearing to have been discovered more than a year. *Gillett* v. *Peppercorne*, 3 Beav. 78.

**Claim in Winding-up against Director for Shares improperly allotted to him not barred by Statute—Knowledge of Directors not Knowledge of Company.**]—See *Fitzroy Bessemer Steel Co., In re*, col. 80.

### 3. Payment on Account.

*See also* post, **B**, VI.

#### a. What amounts to.

**Of Interest.**]—A payment made within six years, of interest which has become due upon a note more than six years ago, is sufficient, where the note remains in the hands of the payee. *Bealey* v. *Greenslade*, 2 Tyr. 121 ; 2 C. & J. 61 ; 1 L. J., Ex. 1.

To constitute a payment of interest sufficient to take a debt out of the statute, it is not essential that money should actually pass between the debtor and creditor. *Maber* v. *Maber*, 36 L. J., Ex. 70 ; L. R. 2 Ex. 153 ; 16 L. T. 26.

After a debt due to a father from his son had been barred by the statute, the father, his son and his son's wife had an interview, at which the interest due was calculated. The son then put his hand into his pocket, as if to get out the money to pay it. The father stopped him, and, writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties :—Held, that this transaction was a sufficient payment to take the debt out of the statute. *Ib.*

Payment of interest upon a note payable on demand is sufficient to take the case out of the statute, although there is no independent evidence that any demand of payment of the note has been made. *Bradfield* v. *Tupper*, 7 Ex. 27 ; 21 L. J., Ex. 6.

**Payment of Rent by Debtor for Creditor may be Evidence of Payment of Interest on Debt.**]—See *Worthington* v. *Grimsditch*, col. 133.

**Pleading to Allegation of Payment of Interest.**]—See *Hollis* v. *Palmer*, col. 145.

**Where no Promise to pay Debt can be implied.**]—Part payment of a debt will not take the case out of the statute, unless the payment is made under circumstances which warrant a jury in inferring a promise to pay the residue ; therefore, where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it :—Held, that it was a question for the jury to say, whether he intended to refuse payment or merely spoke in jest. *Wainman* v. *Kynman*, 1 Ex. 118 ; 16 L. J., Ex. 232.

In an action on a note, dated 7th December, 1845, for payment of 500*l.* and interest, on demand, to C., the plaintiff's testator, and on a similar note for 500*l.*, dated 20th January, 1846, at the trial it appeared from the defendant's answer to a bill of discovery, that in 1835, and in 1842, C. lent to the defendant two sums of 500*l.*, upon the security of his notes, payable on demand, with interest. The interest was duly paid, and memoranda thereon indorsed by C. on the backs of the notes. At length, the backs of the notes being covered with these memoranda, it was arranged between C. and the defendant that new notes should be substituted, and accordingly the defendant gave C. the notes on which the action was brought. In February, 1846, C. told the defendant that he intended to give him the 1,000*l.* secured by the notes, and he wished to give the defendant a release and a discharge for the same and interest due thereon, and he directed the defendant to write out a receipt for 1,000*l.* and interest, for him, C. to sign, as a release and a discharge ; and thereupon the defendant purchased a 10*s.* receipt stamp, and wrote thereon the receipt as follows : "Hull, 16 February, 1846. Received of R. D. (the defendant) 1,080*l.*, being the interest and principal on the notes, dated December, 1845, and January, 1846, and in full of all demands," which C. signed and delivered to the defendant. C. subsequently died, having previously bequeathed the notes to his executors, with directions as to the investment of the proceeds :—Held, that the payment of interest in 1846 alleged in the receipt was not, under the circumstances, a part payment or an acknowledgment of the debt, so as to take the case out of the statute. *Foster* v. *Dawber*, 6 Ex. 839 ; 20 L. J., Ex. 385.

Upon a plaint brought in the county court to recover two years' interest due upon a promissory note, against the representatives of the deceased maker of the note, they pleaded the Statute of Limitations, in answer to which plea an acknowledgment within six years was given in evidence, and judgment was given for the plaintiff, and the defendants thereupon paid into court the amount of the judgment :—Held, in an action brought to recover the principal and further interest thereon two years after such payment into court and more than six years after the acknowledgment proved in such plaint, that such payment did not necessarily imply a promise to pay the principal, and therefore was no evidence of an acknowledgment to pay the debt within six years, so as to take the case out of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3. *Morgan* v. *Rowlands*, 41 L. J., Q. B. 187 ; L. R. 7 Q. B. 493 ; 26 L. T. 855 ; 20 W. R. 726.

Part payment of a debt does not take it out of the operation of the 21 Jac. 1, c. 16, unless it is made under such circumstances that a promise to pay the remainder may be reasonably inferred from it. *Ib.*

A payment made under an order of the Landed Estates Court, in presence of a debtor, on account of the creditor's demand is an acknowledgment by part payment. *Cronin* v. *Dennehy*, Ir. R. 3 C. L. 289.

**Receipt of Dividend by order of Insolvent Debtors' Court not a sufficient Payment.**]—See *Davis* v. *Edwards*, and *Topping, Ex parte, Levy, In re*, col. 103.

**Payment by Trustee under Composition Deed.**]—See *Linley* v. *Bonsor*, col. 131.

**Words accompanying Payment.**]—See *Evans* v. *Davies*, col. 142.

**By Bill, Dates from Delivery.**]—When a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid, when due, by the drawee to the creditor, it operates as a part payment, to defeat the statute, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Irving* v. *Veitch*, 3 M. & W. 90 ; Mur. & H. 313 ;

7 L. J., Ex. 25. See *Gowan* v. *Forster*, 3 B. & Ad. 507.

**Immaterial that Bill afterwards dishonoured.**]—Giving a bill of exchange in payment on account of a debt, under circumstances which raise an implication of a promise to pay the balance, is a payment within the proviso of 9 Geo. 4, c. 14, s. 1, and therefore takes the debt out of the statute, notwithstanding the bill is afterwards dishonoured. *Turney* v. *Dodwell*, 3 El. & Bl. 136; 2 C. L. R. 666; 23 L. J., Q. B. 137; 18 Jur. 187.

**Indorsements on Notes.**]—When an indorsement on a note of payment of interest made by the authority of a deceased holder appears to have been made after the statute had run, it is not evidence to exclude the operation of the statute. *Briggs* v. *Wilson*, 5 De G. M. & G. 12; 2 Eq. R. 153. *And see* 9 Geo. 4, c. 14, s. 3.

**Appropriation, when some of the Debts are Statute-barred.**]—A bill of exchange for 375*l.* given generally towards payment of a running account of over 1,000*l.*, some items of which had been due longer than six years, takes the whole account out of the statute. *Curlewis* v. *Mornington*, 5 W. R. 491.

For many years F. & Co. had been employed as commission agents by E. & Co. to effect sales for them. The course of business was as follows: E. & Co. sent goods to the firm, who forwarded them to the purchasers, received the purchase-money, and accounted to E. & Co. for the same after deducting commission. On August 29, 1894, E. & Co. sent the firm a statement of account shewing a balance due to E. & Co. of 494*l.* 6*s.* 4*d.* This was arrived at by debiting F. & Co., first, with a series of items which, on the face of the account, had become due within six years from the date when the account was sent; and secondly, with certain items included in a "consignment account." All the items under the heading "Consignment account" were in August, 1894, statute-barred with the exception of two. F. & Co. sent a cheque in September, 1894, for 300*l.* "on account," and stated that they would "thoroughly examine statements next week, and close up the affair altogether if possible." The 300*l.* so paid was by E. & Co. placed to the credit of the consignment account. Nothing further was done down to the death of one of the partners in F. & Co., against whose estate E. & Co. sought to prove for the balance due to them. The Statute of Limitations was relied on:—Held, that the existence of a fiduciary relation between the parties did not prevent the defence of the statute being set up. *Burdick* v. *Garrick* (39 L. J., Ch. 369; L. R. 5 Ch. 233) and *Soar* v. *Ashwell*, ([1893] 2 Q. B. 390) distinguished. *Friend, In re, Friend* v. *Friend*, 66 L. J., Ch. 737; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139.

Held further, that the appropriation by E. & Co. of the 300*l.* to the consignment account did not operate to take the case out of the statute, but that the payment was an acknowledgment by F. & Co. that there was pending between them and E. & Co. an account relating to the several items mentioned in the statement, including the consignment account, from which a promise to pay the balance of the account when ascertained ought to be inferred, and that consequently E. & Co. were entitled to prove in respect of the items in the consignment account. *Mills* v. *Fowkes* (5 Bing. (N.C.) 455; 8 L. J., C. P. 276), and *Nash* v. *Hodgson* (6 De G. M. & G. 474; 25 L. J., Ch. 186) distinguished. *Ib.*

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the statute the debts due longer than six years. *Mills* v. *Fowkes*, 7 Scott, 444; 5 Bing. (N.C.) 455; 2 Arn. 62; 8 L. J., C. P. 276; 3 Jur. 406.

But the creditor may, at any time, apply such payment to the debts due longer than six years. *Ib.*

And may manifest his election to make such application by bringing an action within a reasonable time after such payment. *Ib.*

A. owed B. three sums on three several promissory notes, dated respectively in 1839, 1840, 1841. In 1846 B. applied for interest, and A. paid 5*l.* on account of interest generally, and a few days afterwards B., without the knowledge or concurrence of A., made a memorandum on the note of 1841, that the payment had been made on account of interest thereon. At the time of this payment two of the notes were barred by the statute:—Held, that the payment of the interest generally could not be referred exclusively to the two notes that were barred, but must be referred, either to the three notes, or to the one not barred: and, in either view the effect of the payment was to take the note of 1841 out of the statute. *Nash* v. *Hodgson*, 6 De G. M. & G. 474; 25 L. J., Ch. 186; 1 Jur. (N.S.) 946.

Semble, the appropriation by the creditor, without the knowledge or consent of the debtor, will not, per se, furnish sufficient ground for raising against the debtor a new promise to pay. *Ib.*

Semble, where there is a payment of a smaller sum on account of a large, that payment takes the case out of the statute as to all sums of money not barred by the statute at the time of the payment, but it can have no effect in reviving a debt then barred by the statute if the payment can be attributed to any sum not then barred by the statute. *Ib.*

In 1877, an action was commenced to administer the estate of A., who owed B. 1,864*l.* for cash advances from time to time made to her by B. from the year 1851, down to the time of her death in 1877. Most of the advances were made before 1871. B. claimed to prove for the entire debt, alleging that a small cash payment made by A. in 1872, and again in 1873, were payments made on account of the general balance of the debt:—Held, on the evidence, that the payments in question were specific repayments made in respect of particular advances, and that the general balance of the debt was statute-barred. *Rainforth, In re, Gwynn* v. *Gwynn*, 49 L. J., Ch. 5; 41 L. T. 610—C. A.

**Application of Income by Trustee.**] — The application by a trustee of the income of trust property received by him, to the partial liquidation of a debt due to him by his cestui que trust, will, if made by the authority of the latter, prevent the residue of the debt from being affected by the Statute of Limitations, in respect of the

lapse of time preceding the last application. *Stewart* v. *Connick*, Ir. R. 5 C. L. 562.

**Evidence of Appropriation of Money in Hands of Solicitor to Payment of Costs.**]—See *Waugh* v. *Cope*, col. 142.

**Several Items.**]—Semble, that part payment will not bar the statute, where the debt to which it is applied consists of several items. *Brigstocke* v. *Smith*, 3 Tyr. 445; 1 C. & M. 483; 2 L. J., Ex. 187.

**Payment of specific Part of Account.**] — Between Midsummer, 1845, and Lady-day, 1854, the guardians of the Wycombe Union made payments by way of relief to non-settled paupers of the Eton Union. The only authority for these payments were letters written in 1847, 1849, and 1850, in which the guardians of the Eton Union requested the guardians of the Wycombe Union to make weekly payments to certain paupers. One of these letters stated that "the money would be repaid quarterly," and another stated that "if they would furnish an account at the end of each quarter they would be repaid." In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account, in which they claimed a balance (after giving credit for a payment made in November, 1849), for relief of non-settled paupers of the Eton Union, from Lady-day, 1845, to Lady-day, 1847, and from Lady-day, 1849, to Lady-day, 1850. No previous account had been sent in or claim made in respect thereof:—Held, that the payment not being generally on account, did not take the case out of the statute. *Wycombe Union Guardians* v. *Eton Union Guardians*, 1 H. & N. 687.

**Where two Debts, a Payment not appropriated will not keep either alive.**]—See *Burn* v. *Boulton*, col. 142.

**Payment in respect of one of two Sums secured by one Bond.**]—See *Ashlin* v. *Lee*, col. 317.

**On Account of Unascertained Balance.**]—A creditor, who had, more than six years before, supplied ships' stores on seven separate occasions to the debtor, amounting in the aggregate to more than 300*l*., within six years, asked his debtor for money. The debtor answered that he had not looked into his accounts, but supposed the balance due to be between 90*l*. and 100*l*., but he had not cash. Being pressed, he accepted a draft at four months for 60*l*., taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ships' stores was 95*l*.: but the different accounts were never balanced or ascertained between the creditor and the debtor:—Held, that evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due, sufficient to take the whole out of the statute. *Walker* v. *Butler*, 6 El. & Bl. 506; 25 L. J., Q. B. 377; 2 Jur. (N.S.) 687.

**By Delivery of Goods.**]—A delivery of goods by a debtor to his creditor in liquidation of a previous debt, is a sufficient part payment. *Hooper* v. *Stevens*, 4 A. & E. 71; 1 H. & W. 480; 5 N. & M. 635; 7 Car. & P. 260; 5 L. J., K. B. 4. S. P., *Hart* v. *Naish* or *Nash*, 2 C. M. & R. 337; 1 Gale, 171; 5 Tyr. 955. See also *Collinson* v. *Margesson*, 27 L. J., Ex. 305.

A., having authority to collect the debts of a firm, agreed with B., who was indebted to the firm, to purchase goods from him, and to allow him the amount of the purchase-money in his account with the firm, and drew a cheque including that amount, and delivered the same to the bankers of the firm. The greater part of B.'s debt to the firm was incurred beyond the period of the statute:—Held, that there was sufficient evidence of a part payment to prevent the operation of the statute. *Pearce* v. *Selby*, 6 Jur. 896.

**By Settlement of Cross Accounts.**]—Where A. has an account against B., some of the items of which are more than six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favour, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance, and takes the case out of the operation of the statute. *Ashby* v. *James*, 11 M. & W. 542; 12 L. J., Ex. 295.

The setting off a sum of money in an account stated and settled is a payment within the 9 Geo. 4, c. 14. *Schuley* v. *Walton*, 12 M. & W. 510; 13 L. J., Ex. 122; 8 Jur. 319.

**By Maintaining Creditor's Child.**]—In January, 1833, A. gave B., then a feme sole, his note for 24*l*. B., after having received part of the amount, died in 1834, leaving her husband, the plaintiff, surviving and one child. The plaintiff did not then take out letters of administration, but arranged with A. that the interest of the note should go towards the maintenance of B.'s child, then under the care of A. In September, 1839, A. and the plaintiff settled their accounts, and A. indorsed on the note a memorandum that all the interest upon the note was paid up to that date, but no money passed. In 1848 the child died. In 1853 the plaintiff took out letters of administration, and brought an action as administrator against A., to recover the amount of the note:—Held (dubitante Parke, B.), that there was a payment sufficient to take the case out of the statute, the maintenance of the child being treated by the parties as a money payment equivalent to the interest. *Bodger* v. *Arch*, 10 Ex. 333; 2 C. L. R. 1491; 24 L. J., Ex. 19.

**Agreement between Cross Debtors that a Sum is to go to the Credit of One.**]—One of two persons who had dealings together, and were mutually indebted to one another, had supplied some bricks on the credit of the other, in 1834, but no account had been delivered or made out on either side. In 1845 they signed, in duplicate, a memorandum, thus expressed: "It is agreed that Mr. R., in his general account, shall give credit to Dr. H. for 17*l*., being for bricks delivered in 1834":—Held, that this was insufficient to exclude the mutual debts from the operation of the statute. *Hughes* v. *Paramore*, 7 De G. M. & G. 229; 24 L. J., Ch. 681; 1 Jur. (N.S.) 1101; 3 W. R. 388; 3 Eq. R. 677.

**Not a Fraudulent Preference to Revive Statute-Barred Debt.**]—A debtor paid a sum of 5*l.* to his creditor within three months of his bankruptcy, with the intention of reviving a debt which was statute-barred, but which had always been treated by both debtor and creditor as valid and subsisting:—Held, that the payment was not void as a fraudulent preference, and operated to revive the debt. *Gaze, Ex parte, Lane, In re*, 58 L. J., Q. B. 373; 23 Q. B. D. 74; 61 L. T. 54; 37 W. R. 671; 6 Morrell, 143.

**Payment of Tax by Agent for Principal, Evidence of a Running Account between.**]—See *Peachey, Ex parte, Seaber, In re*, col. 64.

**Receipt of Dividend under Creditors' Deed afterwards avoided, not a sufficient Payment.**]—See *Topping, Ex parte, Levy, In re*, col. 78.

**Bailiff occupying House, and not paying Rent or receiving Wages.**]—See *Williams* v. *Griffiths*, col. 93.

**Unsigned Entry of Payment in Debtor's Books.**]—See *Cleave* v. *Jones*, col. 140.

**Right to Sue for General Administration not revived by a Payment by Administrator after Right barred.**]—See *Johnson, In re, Sly* v. *Blake*, col. 233.

**Payment of Premiums on Policies effected for Benefit of Creditors, Payments on Account of Debts.**]—See *Scott* v. *Synge*, col. 293.

**Receipt of Proceeds of Policy effected as Collateral Security for Mortgage Debt a Part Payment.**]—See *Conlan's Estate, In re*, col. 293.

### b. By and to Agents, Representatives and Co-Debtors.

By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, *one co-contractor, co-debtor, &c., shall not lose the benefit of the statute by reason only of a payment by any other co-contractor, &c.*

**By Agent.**]—Payment by an agent of a sum of money on account of the whole debt:—Held, to take the case out of the Statute of Limitations. *Forster* v. *Thompson*, 2 Con. & L. 568; 4 Dr. & War. 303; 6 Ir. Eq. R. 168.

**By Trustee—Against Instructions.**]—To shew a part payment within six years, the creditor proved a payment of a portion of his demand by the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed the money over as a part payment, and took a receipt accordingly. This payment so made was expressly repudiated by the debtor:—Held, that this was not a payment within the exception. *Linley* or *Linsell* v. *Bonsor*, 2 Scott, 399; 2 Bing. (N.C.) 241; 1 Hodges, 305; 5 L. J., C. P. 40.

**By Receiver.**]—A., B. and C. carried on business as co-partners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner; and the other parties covenanted to make up the deficiency, according to their equitable liability. After the death of A. and B. their respective personal representatives filed a bill against C. to take the accounts of the partnership, and a receiver was appointed, who got in the assets, and without the sanction of the court, but with the approbation of the parties, paid them to the executors of A., to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debt due to A.'s estate, and the estate of B. remained liable to the estate of A. to a considerable amount in respect of that debt:—Held, that it not being proved that the receiver made the payments with the sanction of the personal representative of B. for the purpose of discharging the liability of C.'s estate, those payments did not take the demand against B.'s estate out of the statute. *Whitley* v. *Lowe*, 2 De G. & J. 704; 4 Jur. (N.S.) 815; 6 W. R. 819.

**By Parish Officers.**]—A parish vestry having agreed to borrow money for building almshouses, the defendants, being two of the parish officers, in 1830 gave to the testator, who advanced the money, a promissory note, signed thus:—

"J. H., "G. R., } Churchwardens. } Or others for the time being."

"J. E., "W. G., } Overseers. }

Interest on this note had been regularly paid by the overseers for the time being up to 1847, and had been by them debited to the parish. An action having been brought upon the note, and the statute pleaded:—Held, that the very form of the note made the existing parish officers the agents of the defendants for the payment of the interest on the note, and therefore that the judge was wrong in withdrawing the form of the note from the consideration of the jury, and stating that the question was, whether the interest had been paid with the authority or knowledge of the defendants. *Jones* v. *Hughes* or *Evans*, 5 Ex. 104; 19 L. J., Ex. 200.

The payment of interest on a note given by churchwardens on the parish account from time to time by the vestry, is a sufficient acknowledgment of the debt, as against the makers: *a fortiori*, where one of them has audited the parish accounts, in which payments of interest on the note are entered. *Crew* v. *Petit*, 3 N. & M. 456. *S. C.*, nom. *Rew* v. *Pettet*, 1 A. & E. 196.

**To Third Party.**]—Accounts between G. and D., drawn up by G., more than six years old, shewed sums due from him for interest and payments made by him of rent for D. The first payment of rent appeared to be without express authority. In subsequent accounts the rent was treated as deductions from the sum due for interest, and as having been paid for D., and were classed with cash payments on account. Afterwards the direct interest account disappeared, but G. stated accounts on one side only, in which he charged the rents as paid for D. In the early periods the interest and rent nearly balanced each other in amount; in later periods, by a lowering of the rent, the interest exceeded. The payments of rent were proved to have been continued down to 1841. In an action by D. for money lent:—Held, that the jury might infer that the payments of rent were made by

G., as agent for D., out of the interest due to D., in which case they were payments of interest, and would take the case out of the statute. *Worthington* v. *Grimsditch*, 7 Q. B. 479; 15 L. J., Q. B. 52; 10 Jur. 26.

Where money is paid by a debtor on behalf of a creditor, the character of such payments is matter rather of evidence than of law. *Ib.*

**By Third Party.**]—The defendant, in order to obtain an advance of money, gave a note to H., a customer of the plaintiffs, who were bankers. H. indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them. The defendant was debited by H. with the amount, and H. had paid interest on the note to the plaintiffs within six years:—Held, that these payments did not take the note out of the statute as against the defendant, H. not being his agent for that purpose. *Harding* v. *Edgecumbe*, 28 L. J., Ex. 313.

**To Personal Representatives.**]—The payment of interest upon a note by the makers to the personal representatives of the payee within six years of the commencement of the action, is a sufficient acknowledgment, although the letters of administration under which the party claimed to whom the payments were made, were not obtained in the diocese in which the note was bonum notabile. *Clarke* v. *Hooper*, 4 M. & Scott, 353; 10 Bing. 480; 3 L. J., C. P. 159. See comments on this case in *Stamford Banking Co.* v. *Smith*, col. 134.

**By Executor, but not in Representative Character.**]—In an action by the payee of a note for 300*l.*, against the surviving executors of W. P., the maker, the plaintiff proved that he had been supplied by J. P., the deceased executor, with malt and other articles, and he put in evidence an account between them, signed as follows: "Settled, J. P."; on one side of which the plaintiff was charged with various quantities of malt, and on the other side had credit for payments, there being amongst others the following item: "To one year's interest, 15*l.*":—Held, that this settlement of account was evidence of payment of the 15*l.* by J. P., but not in his representative character. *Scholey* v. *Walton*, 12 M. & W. 510; 13 L. J., Ex. 122; 8 Jur. 319.

Semble, per Parke, B., payment by one of several executors, of a debt due from the testator, is not sufficient to take the case out of the statute as against his co-executors, even though made by him in his executive capacity. *Ib.*

**To Executor, whether in Representative Character, Question for Jury.**]—Where the action is by an executor, who has also claims due to himself in his own right, it will be for the jury to consider whether the payments were upon account of the debt due to the testator, or to the executor in his own right. *Collinson* v. *Margesson*, 27 L. J., Ex. 305.

**By Executors who are also Trustees of Real Estate.**]—Payment of interest is an acknowledgment of a debt; and upon a general acknowledgment of a debt, where nothing is said to prevent it, a general promise to pay is to be implied; and such an acknowledgment made by a party filling the two characters of beneficial devisee and executor will be attributed to both characters, and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of executor or trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made, and not what is its extent or effect. Payment of interest of a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, does not necessarily keep the debt alive as against such real estate, for, although the executors and trustees were the same persons, they filled different characters; and where the payment was made by them in the character of executors only, the real estate was not affected by it. *Fordham* v. *Wallis*, 10 Hare, 217; 22 L. J., Ch. 548; 17 Jur. 228; 1 W. R. 118.

Payment of interest on a debt of the testator by his executors keeps alive the debt as against residuary legatees. *Ib.*

**By Tenant for Life.**]—Payment by a devisee for life of interest on a simple contract debt of his testator, is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder. The law in regard to the payment of interest by a tenant for life on a simple contract debt stands on the same footing as that in respect of payment of interest on a specialty debt. *Roddam* v. *Morley* (1 De G. & J. 1) discussed and considered. *Hollingshead, In re, Hollingshead* v. *Webster*, 57 L. J., Ch. 400; 37 Ch. D. 651; 58 L. T. 758; 36 W. R. 660.

**To Cestui que Trust preserves Claim by Trustees.**]—A father bequeathed to his two daughters 250*l.* each, to be paid when they arrived at the age of twenty-one, and, till that period, the expenses of board, clothes, and education to be borne and paid by his executors. He appointed executors and also trustees, with all necessary powers to fulfil the will. At a meeting of the trustees and executors for the purpose of settling the testator's affairs, the executors paid over to the trustees 500*l.*, to be set apart for the payment of the legacies to the daughters, when they attained their majority. This sum was afterwards lent by the trustees to the defendant on a note, which described them as "trustees acting under the will of the late Mr. W. B.":—Held, that a payment of principal and interest to one of the legatees within six years was sufficient to take the case out of the statute, and that the trustees had a right to maintain an action on the note. *Megginson* v. *Harper*, 2 C. & M. 322; 4 Tyr. 94; 3 L. J., Ex. 50.

**To Original Holder of Note after he has assigned.**]—Part payment on account of a debt will not prevent the operation of the Statute of Limitations, unless made to the creditor or his agent. *Stamford Banking Co.* v. *Smith*, 61 L. J., Q. B. 405; [1892] 1 Q. B. 765; 66 L. T. 306; 40 W. R. 355; 56 J. P. 229—C. A.

The payee of a promissory note made by the defendant indorsed the note and pledged it with the plaintiffs. The defendant, having no notice of the indorsement, paid off the amount due on the note by several instalments to the pledgor. On one such instalment being paid the pledgor informed the plaintiffs thereof, who made an

entry in their books that the note was pro tanto discharged:—Held, in an action on the note, first, that the instalment of which the plaintiffs had notice was not made to the pledgor as agent for the plaintiffs, and, therefore, was not a part payment sufficient to prevent the operation of the Statute of Limitations; secondly (by Lord Herschell), that, if the plaintiffs could adopt the pledgor as their agent for the purpose of that instalment, they could not, without previous notice to the defendant, repudiate his agency with respect to the other instalments, but must treat the note as wholly discharged. *Ib.*

**To Husband for Wife.**]—A feme sole being a payee of a note payable with interest, married, and her husband survived her:—Held, that the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life; for that he did not thereby reduce the chose in action into possession; and that the payment of such interest in his wife's lifetime, to the husband, within six years before action, must be considered as made to him in the character of an agent to the wife, and was an answer to a plea of the statute. *Hart* v. *Stephens*, 6 Q. B. 937; 14 L. J., Q. B. 148; 9 Jur. 225.

**By Wife—Without Privity of Husband.**]—A declaration against husband and wife, upon a joint and several note made by the wife, before coverture, and A., alleged a promise by the wife, dum sola. The plaintiffs proved a payment of interest within six years, made by the wife after marriage, with money sent by A., but without the privity or subsequent ratification of the husband:—Held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the statute; inasmuch as, the wife being incapable of making any promise in law, expressed or implied, payment by her or the other joint maker of the note could create no promise on her part; and, as such payment was not made by the husband, or for any consideration affecting him, or with his sanction, it raised no implied promise on his part. *Neve* v. *Holland*, 18 Q. B. 262; 21 L. J., Q. B. 289; 16 Jur. 933.

**By Co-Debtors.**]—Payment on account of a debt by one joint contractor will bind the other, although he may have no notice of such payment. *Manderston* v. *Robertson*, 7 L. J. (O.S.) K. B. 251; 4 M. & Ry. 440.

*See now* Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14.

The liability of one co-debtor to indemnify another who has paid more than his share is not affected by 19 & 20 Vict. c. 97, s. 14. *Gardner* v. *Brooke*, [1897] 2 Ir. R. 6.

The statute 19 & 20 Vict. c. 97, s. 14, does not apply to a payment made before the act. *Jackson* v. *Woolley*, 8 El. & Bl. 778; 27 L. J., Q. B. 448; 4 Jur. (N.S.) 656; 6 W. R. 686—Ex. Ch. Contra, *Thompson* v. *Waithman*, col. 137.

When a payment by one co-debtor is made with the mere knowledge and consent of the other, the latter does not lose the benefit of the statute. *S. C.*, 27 L. J., Q. B. 181; 4 Jur. (N.S.) 409; 6 W. R. 223.

To a plea of the statute on a note, the plaintiff replied that the note was made by the defendant jointly with P., and that within six years before action P. paid the plaintiff interest on the note:—Held, that, assuming the payment to have been made before the 19 & 20 Vict. c. 97, the replication was bad on general demurrer. *Ridd* v. *Moggridge*, 2 H. & N. 567.

Under 9 Geo. 4, c. 14, a payment of interest within six years by one of several joint contractors took the debt out of the statute as against all. *Wyatt* v. *Hodson*, 8 Bing. 209; 1 M. & Scott, 442; 1 L. J., C. P. 93. S. P., *Chippendale* v. *Thurston*, 4 Car. & P. 98; M. & M. 411. *Pease* v. *Hirst*, 10 B. & C. 122; 5 M. & Ry. 88; 8 L. J. (O.S.) K. B. 94.

—— **By Principal Debtor — Principal and Surety—Several Liability.**]—Where a principal and surety are severally liable for a debt, a payment by the principal does not prevent the Statute of Limitations from running in favour of the surety. The law in this respect was the same before the passing of the Mercantile Law Amendment Act, 1856. *Wolmershausen, In re, Wolmershausen* v. *Wolmershausen*, 62 L. T. 541; 38 W. R. 537.

—— **Joint and Several Liability.**]—In 1853 H. as principal and the defendant as a surety, gave a joint and several note to the plaintiff, payable on demand. In 1861 H. made an assignment for the benefit of his creditors, and the defendant signed and gave the following letter to the plaintiff: "I consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received a dividend on the note, and afterwards brought an action on it against the defendant for the balance:—Held, that the payment of the dividend, coupled with the letter, did not amount to more than a payment only by one co-debtor under 19 & 20 Vict. c. 97, s. 14, and that therefore the other co-debtor was entitled to the benefit of the statute by virtue of that section. *Cockrill* v. *Sparke*, 1 H. & C. 699; 32 L. J., Ex. 118; 9 Jur. (N.S.) 307; 7 L. T. 752; 11 W. R. 428.

A payment of interest by A. on the joint and several note of A. and B. was evidence of a promise by B., and, before 19 & 20 Vict. c. 97, s. 14, took the note out of the statute, though B. was a mere surety, and the payment was made without his knowledge. *Burleigh* v. *Stott*, 2 M. & Ry. 93; 8 B. & C. 36; 6 L. J. (O.S.) K. B. 232.

—— **Payment of Interest by Mortgagor keeps alive Remedy against Surety.**]—See *Frisby, In re, Allison* v. *Frisby*, col. 292.

—— **By one Partner.**]—One of two partners must be presumed, in the absence of proof to the contrary, to have authority to make a payment on account of a debt due by the firm, so as to take the debt out of the operation of the Statute of Limitations as against the other. A., one of the partners in a firm, gave instructions to G., their solicitor, to put in force and realise a bill of sale held by the firm as security from a customer and to place the proceeds when received "to the account of the firm," who were then indebted to G. for his bill of costs. G. now sued A. and B., the partners, for the balance of his account. B. pleaded the Statute of Limitations:—Held, that as every partner must be presumed, in the absence of evidence to the contrary, to have the authority of his co-partner to apply the partnership assets in discharge of partnership debts, and that as there was no such evidence in

this case, there was a part payment sufficient to take the case out of the operation of the Statute of Limitations. *Goodwin* v. *Parton*, 41 L. T. 91.

A. and B., partners, gave a promissory note in the name of the firm. A. died, leaving B. his sole executor, and no proceedings were taken against his estate for more than six years; but B., who continued the business, made payments of interest, and then became bankrupt:—Held, that the payments were made in his character of surviving partner, and not as executor of A., and that, having regard to the 19 & 20 Vict. c. 97, s. 14, the debt was barred as against the estate of A. *Thompson* v. *Waithman*, 3 Drew. 628; 26 L. J., Ch. 134; 2 Jur. (N.S.) 1080; 5 W. R. 30.

A payment made by one partner after the dissolution of partnership on account of a partnership debt, and after six years had elapsed without any acknowledgment of the debt, was sufficient to take the case out of the operation of the statute, as against the other partner, though the jury found that the payment was fraudulently made, against his consent, and in concert with the creditor to revive the debt. *Goddard* v. *Ingram*, 3 Q. B. 839; 3 G. & D. 46; 12 L. J., Q. B. 9; 6 Jur. 1060.

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 14, applies to a case of dissolution of partnership where agency has not been expressly or impliedly created, between the persons who were formerly partners. *Watson* v. *Woodman*, 45 L. J., Ch. 57; L. R. 20 Eq. 721; 24 W. R. 47.

W. T., a member of a firm, was jointly and severally liable in a sum of money deposited with the firm by the trustees of a will. In 1883 W. T. retired from the firm, and a deed of dissolution was executed by which it was agreed that W. T.'s retirement should not be made known for a year, and then that it should be optional whether it should be gazetted; that the continuing partners should take and collect all the assets and should pay all the debts and liabilities, and should indemnify W. T. against them, and should pay him a certain sum by instalments; and that so long as any money remained due to him he should have power on giving notice to collect the debts due to the firm and to re-enter on the premises and carry on the business himself. W. T.'s retirement was never gazetted, and the business was carried on in the old name of the firm. Down to 1891 interest was regularly paid to the testator's estate on the loan by cheques drawn in the name of the firm:—Held, in a suit by the beneficiaries under the will, that, as against W. T., the debt was not barred by the Statute of Limitations, notwithstanding s. 14 of the Mercantile Law Amendment Act; for that, considering the terms of the deed of dissolution and the fact that the retirement of W. T. was kept secret, the payment of interest, after his retirement, by the continuing partners, must be taken to have been made by them on his behalf and as his agents. *Watson* v. *Woodman* (supra) distinguished. *Tucker, In re, Tucker* v. *Tucker*, 63 L. J., Ch. 737; [1894] 3 Ch. 429; 12 R. 141; 71 L. T. 453—C. A.

B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. and C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L. died, having devised his real and personal estate to trustees, one of whom was his son, upon trust to raise money to pay his debts, and subject thereto upon trust for his son, whom he appointed sole executor. The son was admitted a partner in the bank. In 1835 E. L. died, and in 1843 C. F. died. C. S. F. and the son continued the business, but became bankrupts in 1847. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupts' estate; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*:—Held, that the interest was not paid by the continuing partners, as agents of H. B. L.; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the statute in six years; that B. had accepted the surviving partners as his debtors, and the devise made by H. B. L. for payment of debts was satisfied. *Brown* v. *Gordon*, 16 Beav. 302; 22 L. J., Ch. 65; 1 W. R. 2.

—— **Bequest to Third Person of Share in Sum advanced by Testator for Partnership Purposes—Right of Legatee to an Account not preserved by a Payment to Surviving Partner by Person into whose Hands part of such Sum had come.**]—See *Knox* v. *Gye*, col. 76.

—— **Payment of Interest by one Partner on Client's Money misapplied by him will not preserve Right of Action of Client against Firm.**]—See *Sims* v. *Brutton*, col. 57.

—— **Before 19 & 20 Vict. c. 97, s. 14—By Joint Makers of Bills and Notes and their Executors.**]—A payment by one of two joint makers of a promissory note of any interest due on the note prevents the other joint maker from availing himself of the Statute of Limitations. *Woodward, Ex parte, Turner, In re* (Case 1), 3 Mont. & Ayr. 609; 3 Deac. 290.

Where a debt, due jointly from several persons, has been barred by the statute, subsequent payment of interest by or on account of one debtor will not revive it against the others. *Woodward, Ex parte, Turner, In re* (Case 3), 3 Mont. & Ayr. 609, 615; 3 Deac. 294.

A. and B. made a joint promissory note, ten years after the date of which B. executes an assignment of his property, in trust for his creditors, under which a dividend is paid to the holder of the note. A. becomes bankrupt:—Held, that the payment of the dividend under B.'s assignment, being after the Statute of Limitations had already run, did not revive the debt as against A., so as to enable the holder to prove on the note under the fiat against A. *Ib.*

Payment of interest by one of the makers of a joint and several note, though made more than six years after it became due, was sufficient as against the other maker. *Channell* v. *Ditchburn*, 5 M. & W. 494; 9 L. J., Ex. 1; 3 Jur. 1107.

One of two makers of a joint and several note having become a bankrupt, the payee received a dividend under the commission on account of the note:—Held, that this would prevent the other maker from availing himself of the statute for the remainder of the money due on the note: the dividend having been received within six years before the action brought. *Jackson* v. *Fairbank*, 2 H. Bl. 340.

But where one of two joint drawers of a bill of exchange became bankrupt, and under his commission the indorsees proved a debt (beyond the amount of the bill) for goods sold, and exhibited the bill as a security they then held for their debt, and afterwards received a

dividend:—Held, in an action by the indorsees of the bill against the solvent partner, that the statute was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years. *Brandram* v. *Wharton*, 1 B. & Ald. 463; 19 R. R. 354, 357.

A. having applied to B. for a loan of 300*l.* on mortgage, B., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several note for 50*l.* from A. and C., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by A. to pay the 300*l.*, and interest at 5*l.* per cent. Several half-yearly payments of 7*l.* 10*s.* each for interest having been made by A.:—Held, in an action against C. upon the note, that such payments by A. kept all the securities alive, and prevented the operation of the statute as to the note. *Dowling* v. *Ford*, 11 M. & W. 329; 12 L. J., Ex. 342.

A. and B. made a joint and several note, and, after the lapse of six years, A. died, leaving B. one of his executors, who ten years after his death paid interest on the note, but not in his character of executor, but personally as a maker of the note. In an action on the note by the executors of the payee, against the executors of A.:—Held, that the payment of interest by B. (who suffered judgment by default) within six years from the commencement of the action, was not sufficient so as to make A.'s executors liable. *Atkins* v. *Tredgold*, 3 D. & R. 200; 2 B. & C. 23; 1 L. J. (O.S.) K. B. 228; 26 R. R. 254.

After the death of one maker of a joint and several note, signed by two, a payment upon it by the executor of the deceased party did not take the debt out of the statute as against the survivor. *Slater* v. *Lawson*, 1 B. & Ad. 396; 9 L. J. (O.S.) K. B. 4.

**By Mortgagor after he has assigned—By former Solicitor of Mortgagor.**]—See *Newbould* v. *Smith*, col. 288.

**By Assignee of Equity of Redemption.**]—See *Dibb* v. *Walker*, col. 221; and *Forsyth* v. *Bristowe*, col. 287.

### c. After Action.

Part payment after action will not take a debt out of the statute. *Bateman* v. *Pinder*, 2 G. & D. 790; 3 Q. B. 574; 11 L. J., Q. B. 281.

Paying money into court for goods sold and delivered does not deprive a defendant of the benefit of the statute as to the residue of the demand. *Long* v. *Greville*, 4 D. & R. 632; 3 B. & C. 10; 2 L. J. (O.S.) K. B. 205.

And payment of the principal into court, the claim for which is barred by the statute, will not take the claim of interest out of the statute. *Collyer* v. *Willock*, 12 Moore, 557; 4 Bing. 313; 5 L. J. (O.S.) C. P. 181. See *Lechmere* v. *Fletcher*, 1 C. & M. 623; 3 Tyr. 450. And see *Morgan* v. *Rowlands*, col. 126.

### d. Proof of.

By 9 Geo. 4, c. 14, s. 3, *no indorsement of a payment on a note, bill, or writing, by the party to whom payment is made, is to be deemed proof of such payment, so as to take the case out of the statute.*

**Indorsement on Notes.**]—Indorsements on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date. *Smith* v. *Battens*, 1 M. & Rob. 341.

Where an indorsement on a promissory note of payment of interest made by the authority of a deceased holder appears to have been made after the Statute of Limitations had run, it is not evidence to exclude the operation of the statute. *Briggs* v. *Wilson*, 5 De G. M. & G. 12.

In a case unaffected by Lord Tenterden's Act, the words, "interest on this note paid up to the 13th day of May, 1852," indorsed upon a promissory note in the handwriting of a person who was in the habit of transacting business for both the maker and payee of the note, were held sufficient to take the note out of the operation of the statute. *S. C.*, 17 Beav. 330.

See *Rutherford, In re, Brown* v. *Rutherford*, col. 5.

**—— By Payee before Indorsement to Holder.**]—See *Gale* v. *Capern*, col. 146.

**Memorandum by Agent.**]—A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant was in his own handwriting, but said he could not recollect the fact of payment:—Held, nevertheless, that there was sufficient evidence to go to a jury, as to the fact of payment, to take the case out of the statute. *Trentham* v. *Deverill*, 4 Scott, 128; 3 Bing. (N.C.) 397.

**—— By Executor.**]—In an action by the executor of a payee of a note against the maker, in order to take the case out of the statute, he produced a book in which he had made memoranda by the direction of the testatrix, of payments of interest by the defendant to the testatrix within six years:—Held, admissible, and not excluded by 9 Geo. 4, c. 14, s. 3. *Bradley* v. *James*, 13 C. B. 822; 1 C. L. R. 494; 22 L. J., C. P. 193; 1 W. R. 388.

**Unsigned or Parol Acknowledgment of Payment.**]—An acknowledgment of payment, in writing, although unsigned, is sufficient to take a debt out of the statute. *Cleave* v. *Jones*, 6 Ex. 573; 20 L. J., Ex. 238; 15 Jur. 515—Ex. Ch.

To a note for 350*l.*, with interest, the debtor pleaded the statute. At the trial the only evidence given by the creditor was the following unsigned entry in a book of the debtor's, and in her handwriting: "1843. Cleave's Int. on 350*l.*—17*l.* 10*s.*:—Held, sufficient evidence of payment of interest to the creditor to take the case out of the statute. *Ib.*

Part payment of principal or payment of interest on account of a debt is not affected by 9 Geo. 4, c. 14, s. 3, and therefore a parol acknowledgment of payment within six years before action will take the case out of the statute. *Ib.*

In an action by payee against maker of a note, to rebut a plea of the statute, the plaintiff proved the fact of a payment on account of the note within six years, and he further proved a parol admission by the party paying that he had made this payment:—Held, that this admission was rightly received to corroborate the direct proof of the fact of payment, as 9 Geo. 4, c. 14, s. 3, merely excludes the acknowledgment "by words only." *Bevan* or *Beavan* v. *Gething* or *Gethin*, 3 Q. B. 740; 3 G. & D. 59; 12 L. J., Q. B. 37; 6 Jur. 971.

Part payment, proved only by the defendant's verbal or unsigned admission, will not take the case out of the statute. *Bayley* v. *Ashton*, 12 Ad. & E. 493; 4 P. & D. 214; 9 L. J., Q. B. 376. *Willis* v. *Newham*, 3 Y. & J. 518. *Maghee* v. *O'Neil*, 10 L. J., Ex. 326; 7 M. & W. 531. *Eastwood* v. *Seville*, 11 L. J., Ex. 383; 9 M. & W. 615. But see now *Cleave* v. *Jones*, supra.

**Verbal Admissions of Payment by deceased Debtor.**]—Evidence of verbal admissions, in 1850, by A., since deceased, that he owed a debt of 2,300*l.* to B.'s estate, the interest of which he was discharging by paying two annuities under B.'s will, together with a statement in an affidavit by B.'s executor in 1850, which was inserted in a draft affidavit from A.'s dictation, to the effect that B.'s executor had received in August, 1850, from A., a half-year's interest on 2,300*l.*, and had paid the annuities the same half-year, is sufficient to take the debt of 2,300*l.* out of the statute. *Edwards* v. *James*, 1 Kay & J. 534; 3 W. R. 566.

**Whether Payments are in respect of General Balance.**]—Where there are two debts, one of which is barred by the statute, and there is a part payment not specially appropriated by the debtor, it is a question for the jury whether the payment was made generally on account of whatever might be due from the debtor at the time, or on a particular account. *Walker* v. *Butler*, 6 El. & Bl. 506; 25 L. J., Q. B. 377; 2 Jur. (N.S.) 687. See *Burn* v. *Boulton*, infra.

In 1877 an action was commenced to administer the estate of A., who owed B. 1,864*l.* for cash advances from time to time made to her by B. from the year 1851 down to the time of her death in 1877. Most of the advances were made before 1871. B. claimed to prove for the entire debt, alleging that a small cash payment made by A. in 1872, and again in 1873, were payments made on account of the general balance of the debt:—Held, on the evidence, that the payments in question were specific repayments made in respect of particular advances, and that the general balance of the debt was statute-barred. *Rainforth, In re, Gwynn* v. *Gwynn*, 49 L. J., Ch. 5; 41 L. T. 610.

**Evidence that Payments are in respect of Debt sued for.**]—The plaintiff, an attorney, had done professional business of various kinds for the defendant in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2*l.* 2*s.* and 10*s.* 6*d.*, inclosing receipts for those sums for the defendant's signature, and concluding: "I will give you credit for the sums in my account against you, agreeably to your note of the 21st of July last." The defendant returned the receipts signed by him, and the 2*l.* 2*s.* and 10*s.* 6*d.* were paid to the plaintiff on the production of those receipts. In 1831 the plaintiff delivered to the defendant a bill of costs, amounting to 289*l.*, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for 3*l.* and 5*l.* cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in Jan. 1839:—Held, that the letters given in evidence did not sufficiently shew that the 2*l.* 2*s.* and 10*s.* 6*d.* were paid in the discharge of the debt for which the action was brought, so as to take the case out of the statute as to any part of the demand. *Waugh* v. *Cope*, 6 M. & W. 824; 10 L. J., Ex. 145. See *Waller* v. *Lacy*, 1 Scott (N.R.) 186; 1 Man. & G. 54; 8 D. P. C. 562; 9 L. J., C. P. 217; 4 Jur. 435.

Where there are two clear and undisputed debts, the case is not taken out of the statute, as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or the other. *Burn* v. *Boulton*, 2 C. B. 476; 15 L. J., C. P. 97.

Where a specific sum of money is due, as upon a note, the mere fact of a payment of a smaller sum by the debtor to the creditor, is some evidence of a part payment to take the case out of the statute. *Ib.*

In an action on a note bearing interest, proof that the defendant being sent to by the plaintiff for money, paid 1*l.*, and said, "This puts us straight for last year's interest, all but 18*s.*; some day next week I will bring that up," is sufficient answer to a plea of the statute, no evidence being given of any other debt being due. *Evans* v. *Davies*, 4 A. & E. 840; 2 H. & W. 15; 6 L. J., K. B. 268.

In an action for money lent, at the trial the plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in chancery, in which the defendant admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity and not of interest:—Held, that the evidence for the plaintiff was sufficient to go to the jury; that the construction of the admission in the answer was for the court; that the whole of it should have been left to the jury; and that they might believe the fact of the payments having been made half-yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest. *Baildon* v. *Walton*, 1 Ex. 617; 17 L. J., Ex. 357—Ex. Ch.

Words used at the time of making a payment qualify it, but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment. *Ib.*

The mere fact of the payment of a sum by a debtor to his creditor, is not enough to take a case out of the statute without some evidence to satisfy a jury, first that it was a payment of a debt, and next that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt. *Tippetts* v. *Heane*, 1 C. M. & R. 252; 4 Tyr. 772; 3 L. J., Ex. 281.

The appropriation of a payment to a particular debt may be proved by declarations of the debtor, not contemporaneous with the payment. The defendant, being the maker of several promissory notes, was applied to on behalf of the holder for payment of interest. Two or three times he made excuses for his wife not having called and paid the interest. On several occasions the wife called and paid money:—Held, to be evidence for the jury of payment of interest on the notes, so as to take them out of the statute. *Waters* v. *Tompkins*, 2 C. M. & R. 723; 1 Tyr. & G. 137; 5 L. J., Ex. 61.

A letter not in itself sufficient to bar the statute may be left, with other evidence, to the jury, upon the question whether there have been payments or deliveries of goods, in part satisfaction of the debt, within the six years. It will be a question for the jury, whether the payments or deliveries of goods were made and received on account of the particular debt sued for. *Collinson* v. *Margesson*, 27 L. J., Ex. 305.

**Where two of three Notes are Statute-barred, a Payment of Interest will be attributed to the Third.**]—See *Nash* v. *Hodgson*, col. 128.

**Where there is no Appropriation, a Payment on Account will not be attributed to Statute-barred Debts.**]—See *Mills* v. *Fowkes*, col. 128.

**Payment of Rent for Creditor Evidence of Payment of Interest.**] — See *Worthington* v. *Grimsditch*, col. 133.

**Entry of a Payment of Interest in an Account not Evidence of Payment.**]—See *Clark* v. *Alexander*, col. 112.

**Note payable on Demand—Payment of Interest taken to be after Demand.**]—See *Bradfield* v. *Tupper*, col. 125.

**Recital in Assignment by Mortgagor that all Interest paid.**]—See *Forsyth* v. *Bristowe*, col. 287.

**Entry of Receipt of Interest in Diary of deceased Mortgagee.**]—See *Newbould* v. *Smith*, col. 288.

4. AGREEMENTS TO WAIVE THE STATUTE.

**Consideration for.**]—Semble, there may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage shall be taken of the statute, in respect of the time employed in the inquiry, and an action may be brought for a breach of such agreement. *East India Co.* v. *Paul*, 7 Moore, P. C. 85; 14 Jur. 253.

A parol agreement was entered into between the executors of L. and T., that various old accounts between their testators should be settled without reference to the time that they had been running, and that a balance should be struck. The accounts were accordingly settled, and the executors of L. were allowed the value of a promissory note, which, but for the agreement, would have been barred by the statute. The executors of T. afterwards discovered a note from L. to T., which, but for the same reason, would have been barred by the statute:—Held, that the agreement was one for valuable consideration on both sides to waive the benefit of the statute, and ought to be enforced. *Lade* v. *Trill*, 11 L. J., Ch. 102; 6 Jur. 272.

**In Consideration of Solicitors giving up Lien.**]—In May, 1849, an order was made to wind up a company, and in the ensuing October the solicitors who had acted for the company carried in a claim against them for costs. In November, 1850, the solicitors, on the application of the official manager, delivered to him the company's books and papers, on which they had a lien for their costs, upon the official manager at the same time undertaking in writing to pay them the amount of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the master. In 1859 the official manager recovered a sum of money, and the solicitors subsequently thereto sent in to him a larger bill of costs against the company:—Held, that having regard to the undertaking of the official manager, of November, 1850, the solicitors' claim was not barred by the Statute of Limitations; and an order was made to tax their bill of costs, without prejudice to the question whether they were entitled to have a call made to pay the same when taxed. *Gloucester, Aberystwith and Central Wales Ry., In re*, 29 L. J., Ch. 383; 2 Giff. 47.

**Failure of Consideration for.**]—Where accounts are referred to an arbitrator, with a special agreement as to the mode in which they are to be taken, and afterwards, upon the failure of the arbitration, the same accounts are referred to the master, he will be directed to take them in the ordinary way, and not according to the special agreement. Therefore, where, under such circumstances, it was one of the terms of the agreement that no advantage should be taken of the Statute of Limitations:— Held, that the master was not to be ruled by that stipulation. *Cheslyn* v. *Dalby*, 2 Y. & Coll. 170.

**When Conditional.**]—A., being indebted to B. on two overdue bills of exchange, gave a written undertaking as follows: "In consideration of your not proceeding on the bills, I hereby debar myself of the plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the bills, and I promise to pay them whenever my circumstances enable me to do so, and I may be called upon for that purpose":—Held, that the statute began to run as soon as A. became of ability to pay, although B. had had no notice or knowledge of such ability, and had made no demand of payment. *Waters* v. *Thaner* (*Earl*), 2 G. & D. 166; 2 Q. B. 757; 11 L. J., Q. B. 87; 6 Jur. 708.

## VIII. PLEADINGS AND PROCEDURE.

*See also* post, **B**, XII., col. 331

**Declaration when original Promise Barred.**]—The plaintiff may declare on the original promise, although he relies on a subsequent promise, to take the case out of the statute. *Leaper* v. *Tatton*, 16 East, 420. S. P., *Irving* v. *Veitch*, 3 M. & W. 90; 7 L. J., Ex. 25.

A new promise infra sex annos need not be declared on specially, although made thirteen years after the accrual of the original cause of action. *Upton* v. *Else*, 12 Moore, 303; 5 L. J. (o.s.) C. P. 108.

But a promise to pay a debt, barred by the statute, if conditional, must be declared on as conditional, notwithstanding it was given within six years from the time of the contraction of the debt. *Haydon* v. *Williams*, 7 Bing. 163; 4 M. & P. 811; 9 L. J. (o.s.) C. P. 16.

**Plea of the Statute.**]—In trover by an administrator, "not guilty of the premises within six years," is a bad plea, not being equivalent to an allegation that the cause of action did not accrue within six years. *Pratt* v. *Swaine*, 2 M. & Ry. 350; 8 B. & C. 285; 6 L. J. (o.s.) K. B. 353.

To a declaration in an action founded on tort,

a plea of not guilty of the supposed grievances in the declaration mentioned, within six years before the exhibiting the plaintiff's bill, was bad on special demurrer. *Dyster* v. *Battye*, 3 B. & Ald. 448.

So a plea that "the supposed debt, if any such there be," did not accrue within six years was bad on special demurrer, for not confessing the debt. *Margetts* v. *Bays*, 4 A. & E. 489 ; 6 N. & M. 228 ; 5 L. J., K. B. 105.

A plea that a debt accrued more than six years ago, without stating that it did not accrue within the six years, does not amount to an informal plea of the statute. *Bush* v. *Martin*, 2 H. & C. 311 ; 33 L. J., Ex. 17 ; 10 Jur. (N.S.) 347 ; 9 L. T. 510 ; 12 W. R. 205.

In an action for money due on a promissory note, payable with interest, the declaration stated, that the defendant had not paid the amount of the note and interest, "except interest on the note from its date up to a certain day within six years next before the commencement of the suit." The defendant pleaded the statute in the usual form :—Held, that the plea was good, because the interest was accessory to the principal ; and the allegation of the payment of the interest was merely a statement of evidence, which might or might not take the case out of the statute. *Hollis* v. *Palmer*, 3 Scott, 265 ; 2 Bing. (N.C.) 713 ; 2 Hodges, 55 ; 5 L. J., C. P. 264.

The Statute of Limitations must, under the new procedure, be pleaded, and cannot be raised by demurrer. *Wakelee* v. *Davis*, 25 W. R. 60.

A defence under the Statute of Limitations may in all cases be raised by demurrer. *Noyes* v. *Crawley*, 48 L. J., Ch. 112 ; 10 Ch. D. 31 ; 39 L. T. 266 ; 27 W. R. 109. But see, per Cairns, L.C., in *Dawkins* v. *Penrhyn* (*Lord*), 4 App. Cas. 51, and preceding case.

In an action for partnership accounts brought more than six years after the termination of the partnership, the defence of the statute may be raised by demurrer. *Ib.*

Where, on the face of the bill, it appeared that more than six years had elapsed since the cause of action, the defendant might demur. *Hoare* v. *Peck*, 6 Sim. 51 ; 2 L. J., Ch. 123.

Bill by annuitant under a will for an account and arrears against two administrators with the will annexed ; one pleaded the Statute of Limitations to so much as sought satisfaction for the arrears, or so much as was stated to have accrued due previous to six years before the bill ; he also, by answer, set up an agreement to relinquish the annuity ; plea overruled, without prejudice to insisting on the same matter by answer. *Higgins* v. *Crawford*, 2 Ves. J. 570.

Plea of Statute of Limitations to a bill for the discovery of evidence of debt good. *Burdett* v. *Twysden*, 2 Jur. 805.

**To Action for Specific Performance, bad.**]—See *Talmarsh* v. *Muggleston*, col. 151.

**To Bill of Revivor.**]—See *Perry* v. *Jenkins*, col. 50.

**Statute must be Specially Pleaded.**] — *See* R. S. C., 1883, Ord. XIX. r. 15.

**Plea of the Statute by some joint Debtors, and not by others.**]—Parties, who being joint and several debtors, had not availed themselves of the statute, and have been held liable to debts which the statute would have barred, cannot insist upon contribution from other joint and several debtors who have protected themselves by setting up the statute, from their liability in respect of the same debts. Semble. *Fordham* v. *Wallis*, 10 Hare, 231 ; 22 L. J., Ch. 548 ; 17 Jur. 228 ; 1 W. R. 118.

But, whatever the right to such contribution may be, it does not entitle the creditor to insist upon its application as against the debtors who have so protected themselves. *Ib.*

**Non-continuance of Writ need not be pleaded.**]—See *Pratt* v. *Hawkins*, col. 29.

**Executors and Administrators not bound to plead the Statute.**]—See *Garratt, In re ; Castleton* v. *Fanshaw ;* and *Norton* v. *Frecker*, col. 50 ; and *Adams* v. *Waller*, col. 81 ; *Hunter* v. *Baxter*, *Frear, In re*, col. 82.

**Reply of Statute to Set-Off.**]—The statute must be replied specially to a plea of set-off, and cannot be taken advantage of under a general replication of nil debet. *Chappel* v. *Durston*, 1 C. & J. 1.

A plea of set-off stated, that the plaintiff made his promissory note payable to C., which was duly indorsed and delivered to the defendant at C.'s death, by C.'s administrator, and was unpaid. Replication, that the supposed cause of set-off on the note did not accrue to the defendant within six years :—Held, that this replication admitted not only the making of the note, but the indorsement of it to the defendant by C.'s administrator, and that the defendant might, therefore, avail himself of memoranda of the payment of interest, written on the note by C. before 9 Geo. 4, c. 14, to bar the statute. *Gale* v. *Capern* or *Capron*, 1 A. & E. 102 ; 3 N. & M. 863 ; 3 L. J., K. B. 140.

A plaintiff, under a replication of the statute, to a plea of set-off, could not, on the trial, reduce the amount of the set-off by shewing payment of part, before 15 & 16 Vict. c. 76, s. 75 ; the payment of part ought to have been replied. *Moore* v. *Wood*, 2 M. & Rob. 407.

**Reply of Fraud.**]—If a plaintiff intends to rely on fraud committed by the defendant as an answer to a plea of the statute, it must be replied specially, and cannot be taken advantage of under the replication, that the latter did promise within six years. *Clark* v. *Hougham*, 3 D. & R. 322 ; 2 B. & C. 149 ; 1 L. J. (O.S.) K. B. 249.

**Reply alleging Concealed Fraud.**]—See *Gibbs* v. *Guild ; Hunter* v. *Gibbons ;* and *Barber* v. *Houston*, col. 121.

**Reply that Cause of Action did accrue within six years.**]—The 2 Will. 4, c. 39, having put all actions on the same footing and made the issuing of the writ of summons the commencement of the suit, the plea of the statute ought to be in the same form ; and, if the plaintiff replied that the cause did accrue within the limited time, he must have shewn by proper record all the formalities required by s. 10 to have been complied with, just as he must have done before the statute where there was a plea that the cause of action did not accrue within six years before the commencement of the suit. *Higgs* v. *Mortimer* 1 Ex. 711 ; 5 D. & L. 757 ; 12 Jur. 249.

—— **Onus of Proof.**]—In an action for goods sold and delivered, the general issue and the statute were pleaded. The replication traversed the latter plea. The plaintiff's evidence consisted of such an admission by the defendant as would have been evidence to go to a jury, on the general issue, that a debt was owing from him to the plaintiff, but he did not prove when the debt was contracted. No evidence was given for the defendant in support of his plea:—Held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by shewing that the debt was contracted within six years, or that the acknowledgment or promise was made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 Geo. 4, c. 14, and a nonsuit was entered accordingly. *Wilby* v. *Henman*, 4 Tyr. 957; 2 C. & M. 658; 4 L. J., Ex. 262.

**Reply that Defendant beyond seas at time of promise.**]—A replication to a plea of the statute to a declaration, containing several counts on promises, averred that, before and at the time of the making of the several promises, the defendant was in parts beyond the sea, and afterwards returned, which was his first return after making the several promises:—Held, that the word "several" might be taken distributively, and considered to mean that it was the defendant's first return after "each and every" of the promises. *Plummer* v. *Woodburne*, 7 D. & R. 25; 4 B. & C. 625; 4 L. J. (o.s.) K. B. 6.

It is unnecessary, in a replication, under 4 Anne, c. 16, s. 19, to allege that the defendant has returned from beyond the seas, or that the action was brought within six years after his return from beyond the seas since the cause of action accrued. *Forbes* v. *Smith*, 11 Ex. 161; 24 L. J., Ex. 299; 1 Jur. (N.S.) 503; 3 W. R. 476.

**Reply of Coverture—Rejoinder.**]—In an action by payee against the maker of a note, he pleaded the statute. A replication, that when the cause of action accrued the plaintiff was the wife of B., and that she continued to be so until B. died, and the plaintiff became discovert, and that she sued within six years after his death, is good. *Scarpellini* v. *Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333; 9 Jur. 827.

A rejoinder that the plaintiff was a feme covert, and the wife of B. until the time of his death; that the note was payable to her order; and that, before it was due B. authorised her to indorse it in blank in her own name, and deliver it to F., which she did for value; that, when the note became due, and more than six years before action brought, the note was in the hands of another indorsee who presented it for payment; and that afterwards, and before action brought, the note came to the possession of the plaintiff by delivery from the last-mentioned indorsee, who was then entitled to sue thereon, is bad, for either the matter alleged was a departure after pleading the statute, which plea admitted an original right of action, or if the rejoinder was confined to the matter stated in the replication, it was no answer for want of a denial that the action was brought within six years after the husband's death. *Ib.*

**Issue of Process need not be specially replied.**]—See *Dickenson* v. *Teague*, col. 29.

**Objection that Solicitor not entitled to set up Statute against his Client's Demand can only be raised by Reply in the Action.**]—See *Triston, In re*, col. 58.

**Acknowledgment must be pleaded in Reply.**]—See *Kempe* v. *Gibbon*, col. 300.

**Discovery to disprove Plea of Statute.**]—Statute of Limitations may be pleaded as to a debt, but not to discovery as to when debt was due. *Mackworth* v. *Clifton*, 2 Atk. 51. S. P., *Downing* v. *Kirby*. Rep. t. Finch, 14.

Object of a bill being to obtain discovery from defendant to be used at law, in order to disprove plea of defendant there, that he has made no promise within six years; this discovery the defendant is bound to give; but he has a right to protect himself in equity by the Statute of Limitations from discovery as to the original constitution of the debt, and whether it has since been paid; to such last-mentioned matters he should plead statute, and answer fully the rest of the bill. *Cork* v. *Wilcock*, 5 Madd. 331.

**Statute not a bar to Discovery, if Debt acknowledged.**]—See *Baillie* v. *Sibbald*, col. 100.

**Where Statute has barred Penalty, Right to Protection against Discovery gone.**]—See *Talbot* v. *Smith*, and *Williams* v. *Farrington*, col. 88.

**Demurrer to Allegation as to Return of Writ.**]—See *Williams* v. *Williams*, col. 28.

**No Extension of Time nunc pro tunc when Statute has run.**]—See *Morris* v. *Richards*, col. 30.

## B. ACTIONS RELATING TO LAND AND ACTIONS ON SPECIALTIES AND FOR LEGACIES.

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, *the period of limitation for the recovery of any land or rent is twelve years. By s. 8, the period of limitation for bringing an action to recover a mortgage debt, judgment debt, legacy, or to enforce a charge on land, is twelve years.*

By 3 & 4 Will. 4, c. 42, s. 3, *the period of limitation for bringing an action of debt for rent on an indenture of demise, or of covenant or debt on any bond, specialty, or recognizance, is twenty years.*

By 3 & 4 Will. 4, c. 27, s. 27, *the right of courts of equity to refuse relief on the ground of acquiescence, in cases not within the act, is preserved.*

### I. CONSTRUCTION OF THE STATUTES AND SUBJECT-MATTERS TO WHICH THEY APPLY.

*See also* ante, **A**, I. (col. 4).

By 3 & 4 Will. 4, c. 27, s. 1, *"Land" means manors and all corporeal hereditaments and tithes; "Rent" means heriots, and all services for which distress lies, and annuities charged on land; "Person through whom another claims" means the person by, through, or under, or by the*

*act of whom, the claimant is entitled, as heir, issue in tail, &c., &c.; "Person" includes any body or class of persons. By s. 24, a suit to recover land or rent in equity is to be brought within the same time as at law. By s. 34, when the time limited has expired, the title of the party out of possession to the land is extinguished.*

**Title of Person out of Possession not transferred to Person in Possession.**]—The effect of s. 34 of the Real Property Limitation Act (3 & 4 Will. 4, c. 27) is merely to extinguish the title of the prior rightful owner, and not to transfer that title to the person in possession. *Tichborne* v. *Weir*, 4 R. 26; 67 L. T. 735.—C. A.

The plaintiff granted a lease of certain premises, the lease containing the usual covenant by the lessee and his assigns to repair. The defendant took possession during the term without any assignment from the lessee, and remained in possession for more than twenty years, paying the rent to the plaintiff. In an action at the expiration of the term for breach of the covenant to repair:—Held, that the defendant was not liable on the covenants in the lease. *Ib.*

**Statute confers Title by Possession.**]—The distinction between the old statutes of limitations and the 3 & 4 Will. 4, c. 27, is that the former acts only barred the remedy, whereas under the latter when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar. *Incorporated Society for Protestant Schools* v. *Richards*, Sau. & Sc. 559. *And see* 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

The Statute of Limitations (3 & 4 Will. 4, c. 27) transfers the estate, at the expiration of the statutable period, from the rightful owner to the person whose possession has barred his right. *Scott* v. *Nixon*, 2 Con. & L. 185; 3 Dr. & War. 388; 6 Ir. Eq. R. 8.

General policy of statutes of prescription. The old English statutes of limitation barred the remedy only, not the right; but the modern ones cut off the right as well as the remedy. *Dundee Harbour Trustees* v. *Dougall*, 1 Macq. H. L. 317.

**Title barred by Statute not restored by Entry.**]—See *Bryan* v. *Cowdal*, col. 270.

**Possession not Adverse at the passing of the Act—3 & 4 Will. 4, c. 27, s. 15.**]—The party in possession of an estate (which on failure of certain limitations thereof had been devised in 1773 to a charity) in 1820 entered into a correspondence with the claimants on behalf of the charity, which contained references to, and an implied recognition of, their rights, but no direct acknowledgment thereof:—Held, that neither his possession nor that of the person of whom he was the representative, and who had been in possession of the estate, under a conveyance by a tenant for life, was an adverse possession within the 15th section of the 3 & 4 Will. 4, c. 27, at the time of the passing of the act, and as the bill was filed within five years (in 1837), the act must be considered as not to have operated. *Incorporated Society* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177. And see *S. C.*, Sau. & Sc. 559.

The owner of one moiety of an estate, whose wife was seised in fee of the other, remained in possession of the entirety from her death in 1815:—Held, that the case fell within the 15th section of the 3 & 4 Will. 4, c. 27; and that, notwithstanding the possession might not be adverse, the heir of the wife was barred after the five years from the passing of the act. The 19th section of that act, which removes disabilities by reason of residence in Ireland, applies to a residence there before it passed, where the contest has arisen since. *Hasell, Ex parte*, 3 Y. & Coll. 617; 3 Jur. 1101.

Semble, the five years given by the 15th section cannot be extended on account of the infancy of the claimant. *Scott* v. *Nixon*, 2 Con. & L. 185; 3 Dr. & War. 338; 6 Ir. Eq. R. 8.

**Statute not retrospective.**]—The statute 3 & 4 Will. 4, c. 27, is not retrospective. *Peyton* v. *M'Dermott*, 1 Dr. & Wal. 198.

**Retrospective Operation of Statute.**]—See *Doe* d. *Angell* v. *Angell*, col. 152; *Doe* d. *Holt* v. *Horrocks*, and *Culley* v. *Doe* d. *Taylerson*, col. 166; *Goodall* v. *Skerratt*, col. 170; *Wrixon* v. *Vize*, col. 206; and *Batchelor* v. *Middleton*, col. 290.

**Turnpike Tolls.**]—Turnpike tolls are not within the Statute of Limitations of the 3 & 4 Will. 4, c. 27, and, consequently, more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls, notwithstanding the 42nd section of that act. *Mellish* v. *Brooks*, 3 Beav. 22; 9 L. J., Ch. 362; 4 Jur. 739.

**Action to have Dower assigned.**]—A widow's right to sue in equity for dower is barred when she has not, for upwards of thirty years, taken any proceedings, either at law or in equity, to have it assigned to her. *Marshall* v. *Smith*, 34 L. J., Ch. 189; 10 Jur. (N.S.) 1174; 11 L. T. 443; 13 W. R. 198.

**Suit for Admittance to Copyhold Tenement, a Suit to recover Land within the Statute.**]—See *Walters* v. *Webb*, col. 303.

**"Rent."**]—The statute does not apply to rent reserved on a demise under seal. *Grant* v. *Ellis*, 9 M. & W. 113; 11 L. J., Ex. 228.

**Applicable in Equity.**]—The 24th section of 3 & 4 Will. 4, c. 27, only bars equitable rights, so far as they would have been barred if they had been legal rights. *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur. (N.S.) 1169; 5 L. T. 160.

Length of time, which will not bar an ejectment, shall not bar a bill in equity. *Cook* v. *Arnham*, 3 P. W. 287.

Statute of Limitations founded on the soundest principles, and courts of equity are bound to adopt it where the legal and equitable titles correspond, differing only in the court where it is to be enforced. *Medlicott* v. *O'Donel*, 1 Ball & B. 166.

Many of the provisions of the 3 & 4 Will 4, c. 42, will be adopted by courts of equity, though made with reference to proceedings at law. *Hyde* v. *Price*, 8 Sim. 578; C. P. C. 193. *S. C.*, nom. *Hart* v. *Cradock*, 6 L. J., Ch. 358; 1 Jur. 735.

The true meaning of the Statute of Limitations, as applied to titles to land is, that the party should have twenty years, during which it should be open to him to proceed to assert his title. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413.

Though the Statute of Limitations does not

apply in terms to proceedings in equity, yet such proceedings are affected by analogy to the statute: so that, in general, if a party be guilty of such laches in pursuing his equitable title as would bar him at law he shall be barred in equity. But equity will remove the legal bar proceeding from lapse of time, as it would any other legal advantage, if sought to be used unconscientiously. *Ib.* See *Horenden* v. *Annesley*; *Foley* v. *Hill*; *Knox* v. *Gye*; and *Hodle* v. *Healey*, cols. 75, 76.

**Specific Performance.**]—The Statute of Limitations cannot be pleaded to a suit for specific performance. *Talmash* v. *Mugleston*, 4 L. J. (O.S.) Ch. 200.

If there has been such a lapse of time, that the court, proceeding upon a rule adopted by analogy to the Statute of Limitations, would refuse to enforce specific performance: these circumstances, if not disclosed in the bill so as to enable the defendant to demur, ought to be stated in the plea; and the court for the purpose of applying its own rule, will advert to the statute, though not pleaded. *Ib.*

**Contract for future Purchase.**]—Semble, that the statute would not apply to the case of a contract to repurchase an estate in twenty-five years, or at any time during the life of another. *Alderson* v. *White*, 2 De G. & J. 97; 4 Jur. (N.S.) 125; 6 W. R. 242.

**Outstanding Terms.**]—The Statute of Limitations may be pleaded in bar to a bill to prevent the setting up outstanding terms. *Jermy* v. *Best*, 1 Sim. 373.

**Statute bars Poor of Parish, or Attorney-General suing for them.**]—The 3 & 4 Will. 4, c. 27, s. 1, extends the word person to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section. *Magdalen College, Oxford* v. *Att.-Gen.*, 6 H. L. Cas. 189; 26 L. J., Ch. 620; 3 Jur. (N.S.) 675. Varying *S. C.*, nom. *Att.-Gen.* v. *Magdalen College, Oxford*, 18 Beav. 223; 23 L. J., Ch. 844; 18 Jur. 363.

Where the attorney-general, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred. *Ib.*

**Charitable Trusts.**]—See *Commissioners of Charitable Donations* v. *Wybrants*, col. 200.

**Statute not applicable to Land in Jamaica.**]—By will, in 1810, B. demised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives. B. gave other annuities out of the rents and profits of the estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into court:—Held, that the Statute of Limitations, 3 & 4 Will. 4, c. 27, did not apply to Jamaica, and that the legal personal representative of H. was entitled to be paid the arrears due to her. *Pitt* v. *Ducre* (*Lord*), 45 L. J., Ch. 796; 3 Ch. D. 295; 24 W. R. 943.

**Possessory Law of Jamaica.**]—Effect of the Statute of Limitations, on possessory law of Jamaica (beyond the Statutes of Limitation in this country), barring not merely the legal remedy, but any suit, claim, or demand; converting seven years' possession into a positive, absolute title. No exception in favour of absentees; not being within the exception expressed, as there was no such exception out of the Statutes of Limitation in this country; until expressly given by statute 4 Anne, c. 16, s. 19. The exception in the law of Jamaica relating to trustees, means actual not constructive trusts. The exception as to tenants for life not applicable, where they could convey the fee under a power of sale. *Beckford* v. *Wade*, 17 Ves. 87; 11 R. R. 20.

**Right to dig for Stone in Isle of Man not lost by Non-user.**]—Non-user for twenty-one years does not deprive the tenants or farmers of the Isle of Man of the right to dig for and raise limestone and other stones in the quarry of a tenant, provided the stones, &c., are for the use of the party obtaining them, or to be employed by him for the improvement of his own or neighbour's estate. By the supplemental Act of Settlement (6th June, 1704), a discretionary power is vested in the governor to allow the exercise of this right. *Christian* v. *Gibson*, 3 Moore, P. C. 351.

## II. APPLICATION OF THE STATUTES TO PARTICULAR PERSONS.

### 1. Landlord and Tenant.

#### a. Generally.

By 3 & 4 Will. 4, c. 27, s. 35, *the receipt of rent is to be deemed to be the receipt of profits. By s. 9, where a yearly rent amounting to 20s. is reserved by a lease in writing, statute runs against landlord from time of first payment of rent to any person wrongfully claiming.*

**Section retrospective.**]—A., in 1776, demised lands for sixty-one years. Upon his death, in 1786, the defendant's father, and subsequently the defendant, received the rent under the lease until its expiration in 1837. An ejectment was brought in 1837, after the expiration of the lease, by the plaintiff claiming under the will:—Held, that the 9th section was retrospective, and that the action would be barred by lapse of time under that section, but was saved by s. 15. *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328; 15 L. J., Q. B. 193; 10 Jur. 705.

**Rent reserved but not paid.**]—Semble, that the provisions of the 9th section are applicable to the case when rent is reserved, and no rent paid, but not to a case when no rent is reserved. *Jones, Ex parte*, 4 Y. & C. 466.

**"Person Wrongfully Claiming"—Who is.**]—A person claiming without any real title, to be entitled to land is a person wrongfully claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9, and that section applies, although the claim may

be put forward under a mistake, and without any improper intention to deprive others of their property. *Williams* v. *Pott*, 40 L. J., Ch. 775; L. R. 12 Eq. 149.

**Services in Lieu of Rent.**]—In ejectment for two cottages by churchwardens and overseers, it appeared that the defendant had within twenty years swept the church and tolled the church bell:—Held, that the sweeping of the church and tolling of the church bell were services for which a distress might be made, and that the action was, therefore, brought within the time limited by 3 & 4 Will. 4, c. 27, s. 8. *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976; 14 L. J., Q. B. 342; 9 Jur. 662.

Where the overseers of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish, the enjoyment of this privilege, by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under 3 & 4 Will. 4, c. 27. *Doe* d. *Robinson* v. *Hinde*, 2 M. & Rob. 441.

**Payment must be of Rent as such.**]—Where a person makes a payment expressly or impliedly on account of something else than the rent of land of which he is tenant, such a payment is not a payment of rent within the 3 & 4 Will. 4, c. 27, s. 8; and under such circumstances a defence founded on that statute is a complete bar. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

**Statute does not run against Right of Landlord during Tenancy.**]—So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by nonpayment, except that under the 3 & 4 Will. 4, c. 27, s. 42, the amount to be recovered is limited to six years. *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur. (N.S.) 1169; 5 L. T. 160.

**Rent of Mine paid in Specie.**]—Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it; and, therefore, the statute will run from the time of such receipt, and not from the time of such sale. *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

**Occupation after Attornment to Claimant, not Occupation of Claimant.**]—E. being in occupation of land attorned to L., who claimed the fee, and had entered in the name of taking possession. The land was copyhold. After the attornment, L. was not admitted, nor did he receive rent, nor occupy, nor in any way interfere with the land, the fee in which was several times sold, with proper formalities, in the copyhold court within the twenty years following:—Held, that L. was absolutely barred from bringing ejectment at the end of twenty years, though E. continued in occupation till within twenty years of the ejectment being brought. *Doe* d. *Linsey* v. *Edwards*, 5 A. & E. 95; 6 N. & M. 633; 5 L. J., K. B. 238.

**Possession under Agreement for a Lease—When Time begins to run against Owner—Implied Trust.**]—Where a person is in possession of land under an agreement by which, on the performance of certain conditions, the owner has undertaken to grant him a lease, his legal position is that of a tenant at will; but though no lease be in fact granted, yet inasmuch as ejectment proceedings on the part of the owner could be successfully met by a claim on the part of the occupier for specific performance of the agreement, the owner has no effective right to recover possession until the end of the term for which the lease was agreed to be granted. The Statute of Limitations, therefore, does not begin to run against the owner so as to bar his right to recover possession until after the term has expired. *Warren* v. *Murray*, 64 L. J., Q. B. 42; [1894] 2 Q. B. 648; 9 R. 793; 71 L. T. 458; 43 W. R. 3—C. A.

Per Kay, L.J.: The proviso in s. 7 of the Real Property Limitation Act, 1833, applies to implied as well as express trusts, and an intended lessee under an agreement such as above described is a cestui que trust, so as to be deprived of the benefit of the earlier part of the section. *Ib.*

**Possession under Informal Demise by Overseers.**]—In 1824, B. was let into possession of a cottage under an agreement purporting to be a demise by the churchwardens and overseers of the poor of a parish, at the rent of 1*s.* 6*d.* per week, B. to quit on one month's notice being given. This agreement was signed only by one of the overseers. The churchwardens did not sign, nor was there any evidence to shew that they had assented to the agreement. B. never paid any rent or made any acknowledgment. B. afterwards sold the premises to the defendant:—Held, in an ejectment, brought after twenty years, by the churchwardens and overseers for the time being, against the defendant, that as the agreement did not pass an interest it did not amount to a lease in writing within the 3 & 4 Will. 4, c. 27, s. 8, and that consequently the claim of the churchwardens and overseers was barred by twenty years' adverse possession. *Doe* d. *Lansdell* v. *Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57; 16 Jur. 100.

**Encroachment by Tenant.**]—In 1829, W. leased land to the defendant for twenty-one years. The defendant applied to W. for leave to take in a piece of ground adjoining, but W. declined to give such leave, stating that other persons, to whom he had sold adjoining houses, had a right of way over it. The defendant notwithstanding, inclosed and occupied it for twenty years, without payment of rent or acknowledgment of title:—Held, that the piece of ground could not be considered as having been occupied by the defendant as part of the demised premises in respect of which rent was paid, and therefore an action by W. was barred by 3 & 4 Will. 4, c. 27, ss. 2, 3. *Doe* d. *Badeley* v. *Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434; 15 Jur. 1031.

The lessee of premises for a term of ninety-nine years, dependent on four lives, inclosed, with the assent of the lessor given by word of mouth, a piece of adjoining waste which belonged to the lessor as lord of the manor, on the understanding that the piece so inclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the enclosure, the reversioners brought an ejectment to recover the land so inclosed from the tenant:—Held, that the assent

of the landlord to the inclosure of the additional piece of land did not create such a tenancy of the land so as to bring the case within 3 & 4 Will. 4, c. 27, s. 7, or prevent such inclosure from being an encroachment within the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord, and treated as part of the demised premises; and that consequently the Statute of Limitations did not begin to run till the determination of the lease, and the reversioners were entitled to recover the land. *Whitmore* v. *Humphries*, 41 L. J., C. P. 43; L. R. 7 C. P. 1; 25 L. T. 496; 20 W. R. 79.

One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the plot so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him. *Dixon* v. *Baty*, L. R. 1 Ex. 259; 12 Jur. (N.S.) 1024; 14 W. R. 836.

**Whether Doctrine that Encroachments by Tenant enure to Benefit of Landlord applies to Copyholds.**]—See *Att.-Gen.* v. *Tomline*, col. 302.

**Yearly Tenant ceasing to occupy or pay Rent.**]—See *Leigh* v. *Thornton*, col. 161.

**Statute need not be Pleaded specially in Replevin.**]—See *De Beauvoir* v. *Owen*, col. 331.

### b. Lessees for Lives.

**Sub-Lease for other Lives—Sub-Lessee holding over after Expiration of Sub-Lease—Statute does not run against Reversioner in Fee until Expiration of Head Lease.**]—C., the owner in fee and predecessor in title of the plaintiffs, in 1805 granted a freehold lease of land for three lives. The lessees in 1807 sub-demised part of the land for a term determinable on the dropping of the last of the three lives, which occurred in 1874. The lessees in 1832 surrendered their lease, and on the next day took a new lease for lives, the last of which dropped in 1891. This lease was by common law demise, and bore an indorsement of livery of seisin. The defendant, claiming through the sub-lessees, had been, since 1874, when the sub-lease expired, in actual possession of the lands comprised therein without title. In an action to recover possession:—Held, that the lease of 1832, being a valid lease by virtue of 4 Geo. 2, c. 28, s. 6, operated to pass an estate to the lessees; and therefore the plaintiffs' reversionary estate did not become an estate in possession within the meaning of the Real Property Limitation Act, 1874, until 1891, when the last life in the lease dropped; and therefore that the plaintiffs' right to recover was not barred under that act. The expression "interesse termini" is never used with regard to a freehold lease, to which it has no application. *Ecclesiastical Commissioners* v. *Rowe* (5 App. Cas. 736) distinguished. *Ecclesiastical Commissioners* v. *Treemer*, 62 L. J., Ch. 119; [1893] 1 Ch. 166; 3 R. 136; 68 L. T. 11; 41 W. R. 166.

**Possession of Person claiming under Lease for lives, after Grant of Second Lease.**]—Where a lease for years, determinable on lives, was granted in 1732, and in 1784 the same lessor granted a similar lease of the same premises to another lessee, who always afterwards paid rent; and another person who was in possession at the granting of the second lease claimed to be entitled to the estate, on the ground that one of the lives in the first lease was in existence, and continued to hold it until his death in 1811:—Held, that he had no adverse possession to give him the freehold. *Rex* v. *Axbridge*, 4 N. & M. 477; 2 A. & E. 520; 1 H. & W. 74; 4 L. J., M. C. 61.

**Heir of Lessee for Lives also Heir to Reversioner—Adverse Possession during Lease—Right of Entry on Determination of Lease barred.**]—See *Doe* d. *Hall* v. *Moulsdale*, col. 179.

### c. Lessees for Years.

**Possession under void Lease of Charity Lands.**]—An eleemosynary corporation is within the meaning and operation of 13 Eliz. c. 10. A lease of land belonging to such a corporation, not in conformity with the provisions of the 3rd section of that statute, is therefore absolutely void. The governors of Magdalen Hospital (created a corporation, for certain charitable purposes, by the 9 Geo. 3, c. 31) made, in 1783, a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The only covenants, on the part of the lessee, were to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end, and on the part of the governors, for quiet enjoyment. No act had been done until now to avoid the lease, or to interfere with the persons holding the land. In July, 1876, the governors brought an action in chancery to recover possession of the land thus leased:—Held, that the lease was absolutely void within the provisions of the statute 13 Eliz. c. 10. That consequently the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and that right not having been sought to be enforced till now, was barred by the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 2. *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; 48 L. J., Ch. 579; 40 L. T. 466; 27 W. R. 602. Reversing 46 L. J., Ch. 149; 5 Ch. D. 175; 31 L. T. 189; 25 W. R. 181.

Per Lord Selborne: If any rent, however small, had been reserved, and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations could not have run. *Ib.*

By a lease to six persons described as trustees, a building used as a dissenting chapel, though not so described, and reserving to the lessors a right of access to their pews therein, was demised for ninety-nine years, with a covenant for renewal, at the yearly rent of 1*s.* The lease was not enrolled. New trustees of the chapel had been appointed under the provisions of 13 & 14 Vict. c. 28. Shortly before the expiration of the term the trustees served the reversioner with a notice for renewal. At that time no rent had been paid for above twenty years, but some of the arrears were then paid to and accepted by the reversioner. The reversioner refused to renew the lease. Five years afterwards he brought an action against the trustees to recover possession of the building:—Held, that the plaintiff's right of action was not extinguished under s. 34 of the Statute of Limitations (3 & 4 Will. 4, c. 27). *Bunting* v. *Sargent*, 49 L. J., Ch.

109; 13 Ch. D. 330; 41 L. T. 643; 28 W. R. 123.

Semble, if the lease had contained a power for the trustees to sell the chapel and apply the money to other purposes, it would still have been a grant for charitable purposes within the meaning of the Mortmain Act. *Ib.*

**When Estate in Reversion becomes in Possession—Surrender by Operation of Law.**]—Sects. 3 and 5 of the Statute of Limitations (3 & 4 Will. 4, c. 27) enact that the right to bring an action to recover any land shall be shewed to have first accrued with respect to estates or interests in reversion, "at the time when such estate or interest became an estate or interest in possession." During the continuance of a lease for years the reversioner in fee granted a new lease of the premises for years to his tenant:—Held, that, although the first lease became surrendered by operation of law on the granting of the second, the reversioner's estate did not thereby become an "estate in possession" within the meaning of ss. 3 and 5, and therefore that time did not begin to run against him under the act. *Corpus Christi College, Oxford* v. *Rogers*, 49 L. J., Ex. 4; 44 J. P. 216—C. A. Distinguished in *Ecclesiastical Commissioners* v. *Rowe*, infra.

—— **Renewal of Lease during Encroachment.**]—An allotment under an Inclosure Act (described as 137 A.), was made in respect of premises held by a person under lease from a dean, the property leased being that of the dean in right of his deanery. By the 29th section of 3 & 4 Will. 4, c. 27, a dean could recover possession of such land within the term of sixty years from the time when the right of action first accrued. By the 3 & 4 Vict. c. 113, deanery lands, after the death of any dean then in possession, passed to the Ecclesiastical Commissioners; and the 57th section of that statute declared that "the Ecclesiastical Commissioners shall for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies at law and in equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery, &c., in respect of which such profits and emoluments, &c., respectively are, by or under the provisions of this act, to be paid or accrue and to be vested in the said commissioners." Renewals of the original leases had been made, but the allotment 137 A. was never referred to in them. It had been in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, and it was, in that way, held adversely to him. The dean died in 1854, and the commissioners then came into possession, under the statute, of the property of the deanery. In 1877, the commissioners brought an action to recover the allotment:—Held, first, that the right of action to recover the land accrued at the surrender of the lease current when the allotment was made. *Ecclesiastical Commissioners* v. *Rowe*, 49 L. J., Q. B. 771; 5 App. Cas. 736; 43 L. T. 353; 29 W. R. 159; 45 J. P. 36—H. L. (E.)

Held, secondly (dissentiente Lord Blackburn), that under the words of the 57th section the commissioners had the same time within which to enforce their claim to the property that the dean would have had under the 29th section of 3 & 4 Will. 4, c. 27. There was a legal continuity between the rights, powers, and remedies of the dean, and those of the commissioners. His right of action was transferred to them by statute, and was not barred by the mere fact of the transfer. *Ib.*

Per Lord Blackburn: There are no words in the 57th section of 3 & 4 Vict. c. 113, which, as to time, render the 29th section of the 3 & 4 Will. 4, c. 27, applicable to the commissioners. *Ib.*

**Sale of Premises in Fee by Lessee in Possession without paying Rent.**]—Where a party interested in a long term, having been in possession above twenty years without having paid any rent, sold the premises in fee:—Held, that the reversioner was barred. *Jones, Ex parte, St. Philip's Bridge Co., In re*, 4 Y. & Coll. 466.

Semble, that the provisions of the 9th section of statute 3 & 4 Will. 4, c. 27, are applicable to the case where rent is reserved and no rent paid, but not to a case where no rent is reserved. *Ib.*

**Payment of Rent by Sub-Lessee to Head Landlord.**]—From 1782 to 1839, persons claiming under a sub-lease paid their rent directly to the head landlord. The persons claiming under the head lease of 1782 neither received nor paid any rent, nor was their title acknowledged by the head landlord, save that in 1833 they were served by him with an ejectment for nonpayment of rent. Quære, was their title barred by the Statute of Limitations. *Drew* v. *Norbury (Lord)*, 3 Jo. & Lat. 267; 9 Ir. Eq. R. 171, 524.

**Payment of Rent by Tenant to Third Person, whether Adverse to Reversioner.**]—When the plaintiff in ejectment purchased the reversion subject to a lease for years, at the rent of 4*l.*, and to an annuity of 4*l.*, and the tenant in possession under the lease paid the sum of 4*l.* yearly for upwards of twenty years to the annuitant, until his death, in 1830; and, subsequently, to his widow:—Held, that it was for the jury to consider in what character the tenant made such annual payment, and if as agent for his landlord, the possession was not adverse; and the right of the person entitled to the reversion was not barred by 3 & 4 Will. 4, c. 27. *Doe* d. *Newman* v. *Godsill*, 5 Jur. 170.

**Receipt of Rent by Stranger to Lease.**]—See *Doe* d. *Angell* v. *Angell*, col. 152.

**Lessee paying no Rent.**]—When a lessor permits his lessee, during the continuance of the lease, to pay no rent either to himself or any other person for twenty years, the lessor is not then barred by 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of s. 3, which, in the case of an estate or an interest in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the lease has expired. *Doe* d. *Davy* v. *Oxenden*, 7 M. & W. 131; 1 H. & W. 4; 10 L. J., Ex. 6; 4 Jur. 1016.

Nonpayment of rent reserved on a lease, though for upwards of twenty years, shall not bar the lessor from recovering possession at the

expiration of the term. *Sanders* v. *Annesley* (*Lord*), 2 Sch. & Lef. 106.

—— **Statute only runs during Lease if Rent paid to one wrongfully claiming the Reversion.**]—Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion. *Chadwick* v. *Broadwood*, 3 Beav. 308, 530; 10 L. J., Ch. 242; 5 Jur. 359. And see *Scott* v. *Broadwood*, 2 Coll. 447; 15 L. J., Ch. 257; 10 Jur. 214.

A bill of discovery in aid of an ejectment, filed in 1840, stated that, in 1776, A. B. being seised in fee, granted leases of the property, which expired in 1825, and that the plaintiff, as heir of A. B., was now entitled to the property, for the recovery of which he was about to bring an action of ejectment. The defendant pleaded the Statute of Limitations (3 & 4 Will. 4, c. 27), and averred that the plaintiff had not been in possession or received rents for more than twenty years before the bill was filed, that the defendant had entered into possession, as purchaser in fee simple, in 1819, and had ever since remained in peaceable possession as tenant in fee:—Held, that this plea could not, in law, be sustained, for, there being no allegation that the rent had been paid to any one wrongfully claiming to be entitled in reversion immediate expectant on the determination of the lease, the plaintiff's right did not accrue until the expiration of the lease in 1825, or within twenty years from the filing of the bill. *Ib.*

**Sub-Lease for whole Term—Right to Rent from Sub-Lessee not lost by Nonpayment for twenty years, though no Reversion.**]—S., a lessee of premises for 125 years from the 25th of March, 1782, by a lease, dated the 21st of July, 1787, and which contained clauses of distress and re-entry, demised the same to H. for 120 years from the 25th of March last past. Twenty-two years' arrears of rent accrued due to the representatives of the lessor in the last-mentioned lease:—Held, that although S. had no reversion expectant on the determination of the lease of the 21st of July, 1787, yet that the rent reserved by the lease was a conventional rent, and that therefore, the right of the representatives of S. to the rent during the residue of the term was not barred by the 3 & 4 Will. 4, c. 27, s. 2. *Turner, In re*, 11 Ir. Ch. R. 304.

**Payment to Person wrongfully claiming to be entitled.**]—The reversion upon a lease was severed by a conveyance to the plaintiff, in 1872, of a small part of the land out of which the rent issued. The rent was never legally apportioned; no rent was ever paid to the plaintiff in respect of his part of the reversion; but the whole rent continued to be paid, as before, by the defendant, the lessee, to H., the owner of the other part of the reversion, until August, 1875, when H. conveyed his part of the reversion to the defendant. The lease expired at Michaelmas, 1891:—Held, that the payment of the whole rent to H. was not a payment to "some person wrongfully claiming to be entitled to" plaintiff's part of the land within the meaning of s. 9 of the act of 3 & 4 Will. 4, c. 27; and that, therefore, time had not begun to run against the plaintiff. *Laybourn* v. *Gridley*, 61 L. J., Ch. 352; 40 W. R. 474.

A person claiming, without any real title, to be entitled to land is a person wrongfully claiming within the meaning of 3 & 4 Will. 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. *Williams* v. *Pott*, 40 L. J., Ch. 775; L. R. 12 Eq. 149.

By a marriage settlement of 1802 freehold property was conveyed to trustees to the use of T. H. for life, remainder, subject to a jointure to C. H., the intended wife of T. H., for the use of the children of the marriage as T. H. should appoint, and in default of appointment equally, and a power to lease for any term whatever was given to T. H. and C. H. In 1805, a lease for sixty-one years was made by T. H. and C. H., reserving the rent to them, their heirs or assigns. T. H. died in 1815, and the rent, which exceeded the jointure, was received by C. H. from that time until her death in 1854; and afterwards by one of the children of the marriage, who obtained a fee-farm grant to himself, and sold the property to the defendant in 1860:—Held, that the receipt of the rent by C. H. was not a wrongful receipt of it within the 3 & 4 Will. 4, c. 27, s. 9, and that time did not begin to run against the children until her death in 1854. *Shaw* v. *Keighron*, Ir. R. 3 Eq. 574.

**Covenant to Repair—Premises Burnt—Continuing Breach.**]—In 1832, an equitable tenant for life made a lease containing a covenant to keep the demised premises in repair, and, upon the determination of the lease by the death of the lessor, the lessee and his devisee continued in possession, and paid rent to the remainderman, without any fresh express agreement. In 1855, the remainderman assigned the reversion to a purchaser, who, in the following year, demised the premises to the remainderman for a term still unexpired. The premises were burnt in 1859, and no change of tenancy had taken place up to the death of the devisee in 1871:—Held, first, that the assets of the devisee were liable, under the covenant, to the expense of rebuilding the premises, and that the Statute of Limitations did not apply. *Morrough* v. *Alleyne*, Ir. R. 7 Eq. 487.

Held, secondly, that the title of the remainderman being merely equitable, could not be relied on as a bar to his claim. *Ib.*

**Equitable Assignee of Leaseholds.**]—The liability of an equitable assignee of leaseholds is that of simple contract, and the Statute of Limitations limits his liability to six years after the cause of suit. *Sanders* v. *Benson*, 4 Beav. 350.

**Possession for Statutory Period of Leasehold Premises, paying Rent to Lessor but without Assignment from Lessee, does not involve Liability on Covenants.**]—See *Tichborne* v. *Weir*, col. 149.

**Person in Possession under Agreement for a Lease—Statute does not run against Owner till Expiration of proposed Term.**]—See *Warren* v. *Murray*, col. 154.

**Inclosure by Lessee with Assent of Lessor.**]—See *Whitmore* v. *Humphries*, col. 155.

**Grant of Lease determining Tenancy at Will gives no Right of Entry.**]—See *Hogan* v. *Hand*, col. 162.

**Occupation of Land with Right in Equity to demand Lease for Years, Occupation as Cestui que Trust.**]—See *Drummond* v. *Sant*, col. 182.

**Demise on Trust to secure Annuity—Time does not run during Term.**]—See *Bermingham, In re*, col. 190.

**Demise by Way of Mortgage.**]—See *Hemming* v. *Blanton*, col. 217.

**Title by Adverse Possession after Expiration of Term—Owner within Lands Clauses Act.**]—See *Metropolitan Street Improvement Act, In re, Chamberlain, Ex parte*, col. 243.

**Lessee in Possession of Surface in Possession of Mines, if not reserved.**]—See *Keyse* v. *Powell*, col. 254.

**Acts done by, cannot have Effect of Adverse Possession.**]—See *Cholmondeley* v. *Clinton*, col. 258.

**Action for Specific Performance of Agreement to accept Lease—Answer by Defendant in Possession under Agreement—Acknowledgment of Title.**]—See *Goode* v. *Job*, col. 299.

**Grant of Tithe by Rector in Lease to Him—Rent not paid but Tithe received.**]—See *Roe* d. *Pellatt* v. *Ferrars*, col. 304.

### d. Yearly Tenants.

By 3 & 4 Will. 4, c. 27, s. 8, *in the case of verbal yearly or other tenancies, time runs against the landlord at the end of the first year or other period, or from the last receipt of rent after that time.*

**Section Retrospective.**]—The 8th section has a retrospective effect, and applies to a tenancy from year to year, created previously to the passing of the act. *Doe* d. *Jukes* v. *Sumner*, 14 M. & W. 39; 14 L. J., Ex. 337; 9 Jur. 413.

**Premises Unoccupied.**]—The statute is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit. *Leigh* v. *Thornton*, 1 B. & Ald. 625; 19 R. R. 407. And see *Hughes* v. *Thomas*, 13 East, 474.

**Time runs from last Payment.**]—A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in 1846; rent again became due in November, but was not paid. A. died in December of the same year, and B. retained possession. In ejectment by A.'s heir:—Held, that the time under 3 & 4 Will. 4, c. 27, ran from the last payment of rent, and not from the death of A., as the case fell within s. 8, and not within s. 3. *Baines* v. *Lumley*, 16 W. R. 574.

—— **Parol Evidence to Prove.**]—In ejectment by a landlord to recover land held under a tenancy from year to year, a statement made by the tenant in 1835 (since deceased), when speaking to an agent of the landlord about the property, "I have no property in W. but what I hold of Lord S., for which I pay 100*l.* a year," is evidence of payment of rent for the land at that time, under 3 & 4 Will. 4, c. 27, s. 8, so as to prevent an adverse right running against the landlord from the period of the determination of the first year of such tenancy. *Doe* d. *Spencer (Earl)* v. *Beckett*, 4 Q. B. 601; 12 L. J., Q. B. 236; 7 Jur. 532.

**Nonpayment of Rent by.**]—See *Hawkshee* v. *Hawkshee*, col. 257.

**Paying Rent to Agent under Belief that He is Agent of Owner.**]—See *McAuliffe* v. *Fitzsimons*, col. 260.

### e. Tenants at Will.

By 3 & 4 *Will.* 4, *c.* 27, *s.* 7, *time runs in favour of a tenant at will at the expiration of a year or from any earlier determination of the tenancy.*

**Sect. 7 not Retrospective.**]—Under 3 & 4 Will. 4, c. 27, s. 7, no title accrues to a party who is tenant at will, and holds without interruption for twenty years after the expiration of the first year, but who has quitted possession before the act passed. *Doe* d. *Thompson* v. *Thompson*, 2 N. & P. 656; 6 A. & E. 721; W. W. & D. 236; 6 L. J., K. B. 167.

Sect. 7 is not retrospective, and applies only to tenancies at will, created after the passing of the act, or, at most, to such tenancies at will as existed when it passed. *Doe* d. *Evans* v. *Page*, 5 Q. B. 767; D. & M. 601; 13 L. J., Q. B. 153; 8 Jur. 999.

A tenancy at will, commencing in 1824, and determined in 1831, is no bar, under ss. 2 and 7, to an ejectment commenced in 1847. *Doe* d. *Birmingham Canal Co.* v. *Bold*, 11 Q. B. 127; 13 Jur. 871.

**Determination of Tenancy.**]—A. in 1817 let B. into possession of a farm as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—Held, that this entry amounted to a determination of the estate at will. *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643; 11 L. J., Ex. 453—Ex. Ch.

It is only on the determination of a tenancy at will that there is such a vested right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2. *Ib.*

The granting a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 and 4 Will. 4, c. 27, s. 2. *Hogan* v. *Hand*, 14 Moore, P. C. 310; 4 L. T. 465; 9 W. R. 673.

**Tenancy at Will determined by Death of Landlord—Heir beyond Seas had Thirty Years to Enter.**]—*Ib.* post, col. 246.

**Determination of Tenancy by Entry—New Tenancy.**]—See *Locke* v. *Matthews*, col. 271.

**Possession by Husband in Right of Wife.**]—D. permitted the defendant and his wife, the daughter of D., to be in the occupation of premises without paying rent for more than thirty years, and they were so in the occupation in 1833. D. died in 1837, having devised the premises to the defendant's wife for life, and after her death to the plaintiff. By his will an annuity was given

to the defendant's wife, which the defendant received regularly. The ejectment was brought upon the death of the wife in 1844:—Held, first, that, assuming that the defendant was tenant at will to D., the right of D. was barred by s. 7, and not saved by s. 15 of 3 & 4 Will. 4, c. 27. *Doe* d. *Dayman* v. *Moore*, 9 Q. B. 555; 15 L. J., Q. B. 324; 10 Jur. 815.

Held, secondly, that defendant was not precluded from insisting on the statute, either by the receipt of the annuity under the will, or by the estate for life which the testator professed to give to his wife. *Ib.*

**Occupation by Stepfather of Heir—Occasional Residence of, and Mortgage executed by, Heir.**]—On the death of the owner in fee of a dwelling-house intestate, his widow and son, a minor, resided in it till her marriage with the defendant in 1798, after which the defendant held and occupied the premises in his own name. C., the son, continued to reside there till 1805, when he left the premises, but between that year and 1841 he resided there occasionally, two or three weeks at a time, with the defendant and his wife. In 1842, the defendant having applied to the plaintiff for an advance of money upon a mortgage of the premises, in an interview with the solicitor of the plaintiff, produced the title-deeds, and, upon its being stated that C. was heir-at-law, and was the proper party to grant a mortgage, he said that C. would execute the mortgage, and on a subsequent day he brought C., who executed the mortgage deed in his presence, whereupon he received the mortgage-money. In ejectment:—Held, that the defendant was tenant at will to C.; that he had not acquired an estate by virtue of 3 & 4 Will. 4, c. 27; and that the plaintiff, claiming through C., was entitled to recover. *Doe* d. *Groves* v. *Groves*, 10 Q. B. 486; 16 L. J., Q. B. 297; 11 Jur. 558.

**Occupation by—Letting Land with Knowledge of Owner.**]—A tenant at will without interruption for more than twenty years, during which period he has let and transferred portions of the land, with the knowledge, and without the interference of the owner in fee, acquires an indefeasible title against the owner, whose right of entry after that period is barred by 3 & 4 Will. 4, c. 27, ss. 2, 7, 34. *Day* v. *Day*, 40 L. J., P. C. 35; L. R. 3 P. C. 751; 24 L. T. 856; 19 W. R. 1017.

In May, 1842, a father let his son into possession of land. The son continued to occupy the land as tenant at will until 1864. In 1852 the son, with the knowledge of his father, let portions of the land on weekly and yearly tenancies, and received rent for the same:—Held, that the right of entry accrued at the end of the first year from the creation of the tenancy, and that the right of entry in the father was barred by the uninterrupted occupation by the son for twenty years. *Ib.*

**Son let into Possession as—Continuous Occupation by Son, as Tenant at Will or on Sufferance, and by Son's Widow.**]—See *Doe* d. *Goody* v. *Carter*, col. 257.

**Occupation by Consent of Lessees—Power to Sublet expressly Prohibited.**]—In the year 1850 an act (13 Vict. c. v.) was passed to enable commissioners (appointed by 6 Geo. 4, c. cxxix.) for managing the affairs of Brighton to purchase the Pavilion estate. By s. 19 of the act the commissioners were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854 the town of Brighton was incorporated, and in 1855 the powers and property of the commissioners under the act of 6 Geo. 4 were transferred to the corporation. Down to the year 1853 the guardians of the poor of Brighton had had the use of offices in the town hall. On the 7th of March in that year they removed (by arrangement with the commissioners) to buildings which formed part of the Pavilion estate, in the adaptation of which to their purposes they expended a considerable sum of money; and they continued in the exclusive occupation of their new offices, without payment of rent or any acknowledgment of title in the commissioners or the corporation, down to the 19th November, 1879, when an action was brought by the latter to recover possession:—Held, that, inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years (assuming their relation to the corporation to have been that of tenants at will), the claim of the corporation was barred by the Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local act. *Brighton Corporation* v. *Brighton Union*, 49 L. J., C. P. 648; 5 C. P. D. 368; 44 J. P. 683.

**Possession under Agreement for Lease—Tenancy at Will—Statute does not run against Owner till End of proposed Term.**]—See *Warren* v. *Murray*, col. 154.

**Cestui que Trust not Tenant at Will of Trustee unless in actual Occupation.**]—See *Melling* v. *Leak*, col. 181.

**Payment of Interest by Mortgagor, who has not had Possession, without Knowledge of Tenant at Will in Possession—Statute only runs against Mortgagee from such Payment.**]—See *Doe* d. *Palmer* v. *Eyre*, col. 219.

**After Mortgage Debt paid, Mortgagor Tenant at Will to Mortgagee until Reconveyance.**]—See *Sands* v. *Thompson*, col. 214.

**Widow of, continuing in Possession, does not occupy as Tenant.**]—See *Doe* d. *Stanway* v. *Rock*, col. 228.

**Possession under Agreement to Purchase.**]—See *Doe* d. *Counsell* v. *Caperton*, col. 228.

**Occupation as Guests, not as Tenants at Will.**]—See *Peakin* v. *Peakin*, col. 251.

**Dispossession of—Resumption of Possession by.**]—See *Randall* v. *Stevens*, col. 271.

**Inclosing Waste by Licence of Lord—Licensees Tenants at Will.**]—See *Hodgson* v. *Hooper*, col. 301.

2. JOINT TENANTS AND TENANTS IN COMMON.

By 3 & 4 Will. 4, c. 27, s. 12, *possession by one joint tenant or tenant in common of more than his share shall not be deemed to have been the possession of the person entitled.*

**Partition.**]—A partition by parol and separate possession cannot be questioned after being acted on for more than twenty years. *Paine* v. *Ryder*, 24 Beav. 151.

**Coparceners—Possession by Agreement unexecuted.**]—Three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for a partition by deed of the lands held in coparcenary, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery, within twenty years after her death, and before 3 & 4 Will. 4, c. 27, to recover her share, which had been held by the husband of one of the other coparceners:—Held, that the possession was under the agreement, and not adverse. *Doe* d. *Millett* v. *Millett*, 11 Q. B. 1036; 17 L. J., Q. B. 202; 12 Jur. 649.

Held, also, that nothing could be presumed beyond what was contemplated by the agreement, which provided for a deed, and not for a recovery. *Ib.*

—— **Disability of One.**]—If an estate descends to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other after the twenty years elapsed. *Roe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441; 11 R. R. 640.

**Entry by one Coparcener on the Entirety operative only as to his Moiety.**]—See *Doe* d. *Daniel* v. *Woodroffe*, col. 172.

**Joint Tenants—"More than undivided Share."**]—3 & 4 Will. 4, c. 27, s. 12, applies not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands; and the words "or more than his or their undivided share or shares of such land," apply as well to the case where one of several joint tenants has been in possession of more than his undivided share in any portion of the lands held jointly, as to the case where he has been in possession of more than his undivided share in the whole of such lands. *Murphy* v. *Murphy*, 15 Ir. C. L. R. 205.

—— **Creation of Joint Tenancy by Wrongful Possession.**]—A testator devised a copyhold in 1796 to W. for life, with remainder to her children as tenants in common, without words of limitation. W., who had three children, let the property to her two sons, L. and B., and after the death of L. to his son R. and B., who occupied the estate together till the death of W. in 1841. On W.'s death the property—subject, as to one third, to B.'s life estate—belonged in moieties to R. and X., as the co-heirs of the testator. R. and B. continued to occupy the whole property as owners, and farmed it at their equal expense, till the death of B., in 1862, after which it was similarly farmed by B.'s son and R. till 1869, when B.'s son died. The devisee of B.'s son afterwards filed a bill for a partition:—Held, that R. and B., as regarded that third share, of which their possession became wrongful on the death of W., must be considered as joint tenants; and that as B. had died first, his interest in the estate had determined, and the devisee of B.'s son had no title. *Ward* v. *Ward*, L. R. 6 Ch. 789.

**Tenants in Common.**]—The statute operates to make the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from the time of the passing of the statute. *Doe* d. *Holt* v. *Horrocks*, 1 Car. & K. 566.

—— **One out of Possession.**]—Where one tenant in common has been out of possession for twenty years prior to the passing of the 3 & 4 Will. 4, c. 27, he is barred by ss. 2 and 12 from bringing his action, but might maintain it under s. 15, within five years of the passing of the act, if the other tenant in common had not been in possession adversely to him at the time of passing the act. *Culley* v. *Doe* d. *Taylerson*, 3 P. & D. 539; 11 A. & E. 1008; 9 L. J., Q. B. 288.

In ejectment by the heir of T., for two acres of land, it appeared that the father of T., more than fifty years before, had devised four acres (comprising the two in question) to his widow for life, and then to T. and his sister S. in remainder in fee. For more than twenty years T., by arrangement between his mother and S., occupied the two acres, and devised them to his widow for life, and on her death or marriage to his daughter; and then there was a devise in similar terms, on the same event, to his son the heir. The daughter occupied with her husband until her death, and he, without giving any notice as tenant in common, claimed to defend the action:—Held, that although there was no deed of partition, the long occupation inevitably barred the title of S. as tenant in common, under 3 & 4 Will. 4, c. 27, s. 12. *Tidball* v. *James*, 29 L. J., Ex. 91.

By 2 & 3 Will. 4, c. 27, actual possession by enjoyment of rents, &c. though not adverse in the old sense, is a bar in itself, and, therefore, four out of five tenants in common being in exclusive enjoyment for more than twenty years, the fifth was barred. Time runs the moment after an acknowledgment of title. *Burroughs* v. *M'Creight*, 1 Jo. & Lat. 290; 7 Ir. Eq. R. 49.

T. and J. became entitled in possession to a freehold as tenants in common in 1833. In 1879 persons claiming under J. brought an action for sale or partition. The defendant, who claimed under T., alleged that T. was in receipt of the rents of the entirety from 1833 to 1864, without accounting, and claimed the benefit of the Statute of Limitations. The parties entered into admissions which stated that T. received the rents of the entirety from 1833 till his death in 1877, and that T. paid to the solicitors of J.'s mortgagees a moiety of the rents due in November, 1864, and continued to pay to them a moiety of the rents till his death. The admissions did not state, nor was there any evidence, whether T. did or did not account for a moiety of the rents before 1864:—Held, by the vice-chancellor, that the acknowledgment by T. of J.'s title, though after twenty years' adverse possession, excluded the operation of the Statute of Limitations, and that the plaintiffs were entitled to judgment. But held, by the Court of Appeal, that where a tenant in common has gained by the statute an adverse title to another

share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute:—Held, further, by the Court of Appeal, that the payment of a moiety of the rents to persons claiming under J. from 1864 to 1877 raised a presumption that a similar payment was made previously, and that as the admissions did not negative this inference the defence on the Statute of Limitations could not be supported. *Sanders* v. *Sanders*, 51 L. J., Ch. 276; 19 Ch. D. 373; 45 L. T. 637; 30 W. R. 280—C. A. Affirming, on different grounds, 50 L. J., Ch. 367; 44 L. T. 171; 29 W. R. 413.

—— **Agreement to pay Occupation Rent.**]—Two being tenants in common, one entered into possession in 1827, with the consent of the other, upon an understanding that he should pay an occupation rent when called upon to do so. The tenant in possession died in 1839. The survivor claimed six years' rent:—Held, that the claim must be allowed, and that 4 Anne, c. 16, was not repealed by 3 & 4 Will. 4, c. 27. *Henderson* v. *Eason*, 15 Sim. 303; 15 L. J., Ch. 457; 10 Jur. 821. *S. C.*, on appeal, 2 Ph. 308.

**Time does not run against a Mortgagor when the Mortgagee is in Possession as a Tenant in Common.**]—See *Wynne* v. *Styan*, col. 211.

**Right of Infant to undivided Share not barred by Possession of Purchaser with Notice.**]—See *Young* v. *Harris*, col. 245.

**On Death of Father, one Son acting as sole Owner of Equity of Redemption — Possession not adverse to other Son.**]—See *Scott* v. *Knox*, col. 264.

**Acknowledgment by one of two Trustees who are Joint Mortgagees will not keep alive Equity of Redemption.**]—See *Richardson* v. *Younge*, col. 290.

### 3. Tenants for Life.

*See also* **B**, II. 5, post (col. 174).

**Waste by.**]—A tenant for life having committed waste during the infancy of his eldest son, the first tenant in tail in remainder, who came of age ten years after, and who, although cognisant of the waste, did not institute the suit until nearly thirty years after, and two years after his father's death:—Held, not barred by the lapse of time. *Leeds (Duke)* v. *Amherst (Lord)*, 14 Sim. 357; 15 L. J., Ch. 351. Affirmed, 2 Ph. 117; 10 Jur. 956.

If a tenant for life has rendered accounts to the remainderman of timber cut by him, within a period of six years before a bill is filed against him for account of such timber and value thereof, Statute of Limitations cannot be pleaded to bill. *Hony* v. *Hony*, 1 Sim. & S. 568; 24 R. R. 235. And see *Alderman* v. *Bannister*, 4 L. J. (O.S.) Ch. 126.

Real estate was devised to A. for life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail male, with remainder to B., C. and D., and their first and other sons in a similar way, with remainder to the testator's right heirs, with liberty to any tenant for life for the time being to fell and convert timber for the purpose of repairs. A. enjoyed the estate as tenant for life, the ultimate remainder in fee being invested in him, down to his death in 1859. B. enjoyed the estate in the same way down to his death in 1864. C. then entered into possession. A. and B. had each cut timber and sold it, but had expended money in repairs. In 1869 C. filed a bill to make their estates respectively account for such timber. The court refused an account against A.'s representative: first, because he had expended more than he had received; secondly, because the claim was barred by the Statute of Limitations. An account of what had been received and paid by B. during his life was directed. *Birch-Wolfe* v. *Birch*, 39 L. J., Ch. 345; L. R. 9 Eq. 683; 23 L. T. 216; 18 W. R. 594.

A., being equitable tenant for life of lands impeachable for waste, and B. equitable tenant in tail in remainder after certain intervening contingent equitable estates of inheritance which did not take effect, acts of waste were committed by A. in cutting down ornamental and other timber. In an action by B. for an account of the waste: plea, that the alleged acts of waste were committed more than six years before action brought:—Held, on demurrer, a good defence. *Simpson* v. *Simpson*, 3 L. R., Ir. 308.

A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber:—Held, that the Statute of Limitations began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life. *Higginbotham* v. *Hawkins*, 41 L. J., Ch. 828; L. R. 7 Ch. 676; 27 L. T. 328; 20 W. R. 955.

Held, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life. *Ib.*

—— **Statute runs from Tortious Act.**]—See *Seagram* v. *Knight*, col. 17.

**Possession under Devise by—Right of Reversioner barred.**]—Where a copyhold estate was granted to A. for her own life and the life of B., with a grant of the reversion to C. for other lives, and A. devised the estate to B., who kept possession for more than twenty years:—Held, that C.'s right of possession attached on the death of A., and as no claim had been made within twenty years, an ejectment for the premises was barred by the statute. *Doe* d. *Foster* v. *Scott*, 7 D. & R. 190; 4 B. & C. 706; 4 L. J. (O.S.) K. B. 39.

**Assignee of.**]—Adverse possession of the equitable assignee of a tenant for life does not commence as against the trustee of the estate till the death of the tenant for life. *Fausset* v. *Carpenter*, 2 Dow & Cl. 232.

**Payment of Interest by, an Acknowledgment binding Remainderman.**]—See *Roddam* v. *Morley*, col. 282; *Dibb* v. *Walker*, col. 221; *Hollingshead, In re*, col. 134.

**Possessory Law of Jamaica—Exception as to Tenants for Life.**]—See *Beckford* v. *Wade*, col. 152.

**With Remainder in Tail, creating a Base Fee—When Time begins to run against Reversioner.**]—See *Mills* v. *Capel*, col. 172.

**"Interest in Possession" — Settlement of Wife's Property on her during joint Lives—New Estate for Life by Implication on Husband's Death—Statute only runs in Favour of Trustees on Death of Husband—Trustee Act, 1888, s. 8, sub-s. 1 (b).**]—See *Mara* v. *Browne*, col. 45.

**Settlement upon Issue of Marriage by Person not in Possession—Statute runs against Issue from Time Settlor entitled to Possession.**]—See *Stackpoole* v. *Stackpoole*, col. 179.

**Covenant to settle Stock on Covenantor for Life with Remainders over—Time runs against Remaindermen from Date of Covenant.**]—See *Spickernell* v. *Hotham*, col. 199.

**Misappropriation by—Claim of Remainderman, who is also Trustee, after Death of Tenant for Life, not barred.**]—See *Butler* v. *Carter*, col. 202.

**Nonpayment by, of Interest on Mortgage—Statute does not run against Mortgagee in Favour of Remaindermen.**]—See *Wrixon* v. *Vize*, col. 206.

**Non-Receipt by, of Interest on Mortgage—When Remainderman barred.**]—See *Barcroft* v. *Murphy*, col. 218.

**Possession of Mortgagee, who has purchased the Equitable Estate for Life, not adverse to Remaindermen.**]—See *Hyde* v. *Dallaway*, and *Raffety* v. *King*, col. 210.

**Mortgage of Reversion—Covenant to pay Principal on Death of Tenant for Life—Statute runs from then.**]—See *Turner's Estate, In re, Turner* v. *Spencer*, col. 222.

**Husband of, holding over after her Death.**]—See *Doe* d. *Parker* v. *Gregory*, col. 258.

**Remainderman not bound to dispossess on Forfeiture by.**]—See *Lewis* v. *Rees*, col. 263; and *Astley* v. *Essex*, col. 269.

**Liable to account for more than Six Years' Interest on Charge.**]—See *Stackhouse* v. *Barnston*, col. 281.

**Paying off Charge on Estate—Statute does not run against Charge vested in.**]—See *Burrell* v. *Egremont*, col. 278.

**Not paying Interest on Incumbrances—Claim of Remaindermen against Estate of, when accruing.**]—See *Kirwan* v. *Kennedy*, col. 279.

**—— Statute does not run against Remainderman's Claim, when Fund in Court.**]—See *Howlin* v. *Sheppard*, col. 328.

**Contingent Interest in Land devised to Wife for Life, Remainder to Son subject to Charge—Statute begins to run against Charge on Death of Wife, though Contingency not happened.**]—See *Owen, In re*, col. 280.

**Admission by, of Payment of Interest on Mortgage, not binding on Remainderman.**]—See *Gregson* v. *Hindley*, col. 283. Cf. *Fitzmaurice, In re*, col. 283.

**Payment of Interest by, after Charge on Land barred, not binding on Remainderman.**]—See *Becher* v. *Delacour*, col. 283.

**Acknowledgment of Judgment Debt by Debtor binding on Tenant for Life of his settled Estates.**]—See *Vincent* v. *Willington*, col. 285.

**Fraudulent Sales by.**]—See *Bandon* v. *Becher*, col. 309.

**Claim on the Estate by, in respect of Paid Bonds.**]—See *Morley* v. *Morley*, col. 319.

**Liability of Mortgagee of, in Possession, to account to Remainderman.**]—See *Hickman* v. *Upsall*, col. 324.

### 4. Tenants in Tail.

By 3 & 4 Will. 4, c. 27, s. 21, *when a tenant in tail is barred by the statute, any person, whose right he might have barred, is also barred.*

By s. 22, *when a tenant in tail dies before he is barred, any person, whose right he might have barred, will be barred at the time at which he would have been, if he had lived.*

By s. 6 of 37 & 38 Vict. c. 57 (*replacing s.* 23 *of above act*), *when a tenant in tail makes an assurance which does not operate to bar the estates in remainder, such estates shall be barred twelve years after the time when such tenant or his successor in tail would, by executing such an assurance, have barred such estates.*

**Retrospective Effect—Disabilities.**]—The 21st and 22nd sections of 3 & 4 Will. 4, c. 27, are retrospective. *Goodall* v. *Sherratt*, 3 Drew. 216; 3 Eq. R. 295; 24 L. J., Ch. 323; 1 Jur. (N.S.) 57; 3 W. R. 152.

If the statute has begun to run against a tenant in tail, it will continue to run against the remainderman, though he may be under disabilities. *Ib.*

The title of the plaintiff, against which a recovery was set up, accrued in 1837; the plaintiff brought ejectment in 1852, but was forced to abandon it, and to proceed in equity. He filed his bill in 1855:—Held, that he was not barred of his title to relief by lapse of time; and in particular that the 23rd section of the 3 & 4 Will. 4, c. 27, did not apply. *Penny* v. *Allen*, 7 De G. M. & G. 409.

**Barring of Issue.**]—Sect. 23 applies only to assurances by the tenant in tail which are effectual to bar the issue in tail. *Ib.* S.P., *Morgan* v. *Morgan*, col. 171.

In ejectment, the plaintiff proved that A. being seised in fee of the land in question, devised it to the father of the plaintiff in tail general, and died in 1799; the plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person of whom the defendant obtained possession:—Held, that under 3 & 4 Will. 4, c. 27, s. 21, since the tenant in tail was barred, the issue in tail was also barred. *Austin* v. *Llewellyn*, 9 Ex. 276; 2 C. L. R. 409; 23 L. J., Ex. 11.

An estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death:—Held, that the issue in tail might bring his writ of formedon at any time within twenty years next after such

death, the period of limitation prescribed by 3 & 4 Will. 4, c. 27, not running against him during the life of the tenant in tail. *Cannon* v. *Rimington*, 12 C. B. 1; 21 L. J., C. P. 137. Affirmed, 12 C. B. 18; 22 L. J., C. P. 153; 1 W. R. 291—Ex. Ch.

—— **Conveyance by Deed not Inrolled.**]—A tenant in tail in 1847 conveyed his lands by deed not inrolled, and possession was enjoyed for more than twenty years under that deed:—Held, that his issue in tail was not barred by 3 & 4 Will 4, c. 27, s. 23, and that he was entitled to have the property delivered up to him with an account of rents from the filing of the bill. *Morgan* v. *Morgan*, 39 L. J., Ch. 493; L. R. 10 Eq. 99; 22 L. T. 595; 18 W. R. 744.

—— **Infant.**]—The plaintiff's mother was tenant in tail by descent of certain property which was entailed by the will of a testator who died in January, 1811, and she became entitled to the possession of the property on the death of R. W., which took place in November, 1871, at which time the plaintiff's mother was under no disability either of coverture or infancy. She married in 1875, and died in 1882, without ever having acquired possession of the property. Upon her death the plaintiff became entitled to possession as her issue in tail, and in 1889 he commenced an action to enforce his right to such possession. The point of law raised by the pleadings in the action was set down for hearing before the trial, the question being whether the plaintiff not having claimed, or taken possession until after the expiration of twelve years from November, 1871, and who was an infant on his mother's death, and also at the date of the action, was entitled to the benefit of his infancy to prevent the Statute of Limitations from running:—Held, that as the plaintiff claimed through his mother as a tenant in tail, the right to possession first accrued to her; that, as there had been no possession by either of them for twelve years, the statute applied; and that, therefore, the plaintiff was not now entitled to claim the property. *Murray* v. *Watkins*, 62 L. T. 796.

—— **Before Statute.**]—The twenty years within which a formedon in the descender must have been brought under 21 Jac. 1, c. 16, s. 1, began to run when the title descended to the first heir in tail; and there was no distinction between the heir of a tenant in fee taking by descent and the heir of a tenant in tail. *Tolson* v. *Kaye*, 3 Br. & B. 217; 6 Moore, 542; 23 R. R. 615. *S. C.*, 6 Man. & G. 536; 7 Scott (N.R.) 222.

A tenant in tail died, leaving issue in tail, a granddaughter, a feme covert; the granddaughter died covert, leaving issue in tail two sons, infants: the elder attained the age of twenty-one and died, the younger attained his age of twenty-one, and fourteen years after sued out a writ of formedon in the descender:—Held, that he was barred by 21 Jac. 1, c. 16, s. 1. *Cotterell* v. *Dutton*, 4 Taunt. 826; 14 R. R. 675.

An heir in tail brought ejectment against a defendant who had been in receipt of the rent thirty years, during the life of the ancestor in tail, and seven years after his death. The ancestor had had seisin:—Held, that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by shewing that the ancestor had not conveyed by fine and recovery. *Doe* d. *Smith* v. *Pike*, 3 B. & Ad. 738; 1 N. & M. 385; 1 L. J., K. B. 105.

**Grant in Fee by—Covenant to stand Seised—Creation of Base Fee—Right of Entry of Issue in Tail—Entry of one Coparcener.**]—An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow and G., an only son, and L. and H. only daughters, the widow, in 1735, by a deed-poll, in consideration of an annuity granted to her by G., and of natural affection, granted, surrendered and yielded up the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died without issue in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L. (then dead), and subject thereto to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790 W., on his father's death, entered into possession of the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety to mortgagees in fee. In 1818 M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure (subject to the trusts of a term) to the use of W.'s mortgagees:—Held, first, that the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail; secondly, that the base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; thirdly, that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to anyone until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother, and consequently W.'s entry (in 1790) was not barred by lapse of time; fourthly, that although W. entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted as to his moiety to the original estate tail which was barred by the recovery in 1814; and fifthly, that the entry and remitter of W. did not operate to remit his coparcener M. to the other moiety of the estate. *Doe* d. *Daniel* v. *Woodroffe*, 2 H. L. Cas. 811; 13 Jur. 1013.

—— **When Time runs against Remainders over.**]—When a tenant for life with remainder (in the events which happen) to himself in tail executes an assurance which, for want of the protector's consent, creates only a base fee, time does not run under the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 23, to make such assurance effectual against the reversions, so long as any estates coming between his estate for life and estate in tail are in existence. *Mills* v. *Capel*, 44 L. J., Ch. 674; L. R. 20 Eq. 692; 33 L. T. 158.

Lands limited in equity to T., F. and F.'s wife E. successively for life, with remainder to

the first and other sons of F. and E. successively in tail male, with remainder to F. in tail general, with remainders over, were in 1835, without the consent of T., the protector of the settlement, by deed inrolled, reciting, contrary to the fact, the seisin in fee-simple of F., conveyed by F., E. joining to transfer or bar her dower, to a purchaser in fee-simple; and the purchaser then entered into possession. T. died in 1848, F. died without issue in 1859, and E. died in 1873:—Held, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of F., and, consequently, was not a possession the continuance of which for the period of twenty years would, under s. 23, bar the remainders over. *Ib.*

**Special Clause in Settlement preserving Right of Entry of Heirs in Tail.**]—By a private act of 2 & 3 P. & M., lands were limited to N. and others successively in tail male, with limitations over, and an ultimate limitation to the Crown; and it was provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof," by N., or the other persons named, "or by any of them, or by any of their heirs male of their several bodies, should bind or conclude, or put from entry," the Crown, or any of the heirs in tail. A lease for three lives was made in 1781, by the heir in tail male of N., then in possession, of part of the lands so settled; the lease expired in 1832, and since that time the land had been held by the defendant, and those through whom he claimed, without payment of rent or acknowledgment of the title of the tenants in tail for the time being. In an action by the present heir in tail male of N. to recover the land:—Held (by Channell and Cleasby, BB., Bramwell, B., dissentiente), that he was not barred by 3 & 4 Will. 4, c. 27. *Abergavenny (Earl)* v. *Brace*, 41 L. J., Ex. 120; L. R. 7 Ex. 145; 26 L. T. 514; 20 W. R. 462.

Semble, that the section of 3 & 4 Will. 4, c. 27, which bars issue in tail is s. 2, and not s. 21. *Ib.*

**Non-compliance by, with Condition—Right of Entry of Remainderman.**]—An estate was settled on a tenant for life and remainderman in tail, with a name and arms clause, providing that in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession the estate should go over as if he were dead. C. entered into possession as tenant in tail, and did not comply with the condition; he remained in possession for more than twenty years after he had forfeited the estate:—Held, that he did not acquire a title by adverse possession, but that under 3 & 4 Will. 4, c. 27, s. 4, the right of the remaindermen to enter commenced on his death. *Astley* v. *Essex (Earl)*, 43 L. J., Ch. 817; L. R. 18 Eq. 290; 30 L. T. 485; 22 W. R. 620.

At the death of the tenant for life the next remainderman was in India, and was ignorant of the clause until after the twelve months expired:—Held, that his ignorance did not prevent the forfeiture operating as to his interest. *Ib.*

The 3 & 4 Will. 4, c. 27, s. 4, extends to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage. *Ib.*

**Separate Occupation by Co-partners in Tail under unexecuted Agreement for Partition—Action by Heir in Tail.**]—See *Doe* d. *Millett* v. *Millett*, col. 165.

**Time does not run against Tenant in Tail's Claim for Waste until He comes into Possession.**]—See *Leeds* v. *Amherst*, col. 167.

**Life Estate carved out of Estate Tail in Remainder—Statute runs against Life Estate from Estate Tail coming into Possession.**]—See *Doe* d. *Curzon* v. *Edmonds*, col. 176.

**Devise in Tail upon Trust not to obstruct Devises over—Common Recovery—No Express Trust so as to avoid Statute.**]—See *Dawkins* v. *Penrhyn*, col. 184.

**Statute-barred Title of Mortgagor restored by Acknowledgment of Devisee in Tail of Mortgagee—Purchase of Equity of Redemption by Tenant in Tail bars Remainderman.**]—See *Pendleton* v. *Booth*, col. 213.

**Payment of Interest by Tenant for Life after Charge barred by Statute not binding on Tenant in Tail in Remainder.**]—See *Becher* v. *Delacour*, col. 283.

**Claim against, by Tenant for Life who has Paid Bonds.**]—See *Morley* v. *Morley*, col. 319.

### 5. Remaindermen.

*See also* **B**, II. 3, ante (col. 167).

By 3 & 4 Will. 4, c. 27, s. 3, *the right to recover any land or rent, as regards interests in reversion or remainder or other future estates, shall be deemed to have first accrued at the time they became interests in possession; and, by s. 4, the right shall still be deemed to have then first accrued, notwithstanding that an earlier right accrued by reason of a forfeiture. By 37 & 38 Vict. c. 57, s. 2, if the person last entitled to the preceding particular estate is not in possession when such estate determines, the person then becoming entitled to the future interest must recover the land or rent within six years, or within twelve years from the time when it first might have been recovered by the person whose estate has determined, whichever be the longer period. If the right of the owner of the particular estate is barred by the statute, any person, claiming under an instrument executed after time began to run against such owner, shall be barred. By 3 & 4 Will. 4, c. 27, s. 20, when the right of any person to an estate in possession is barred, the right of the same person to future estates in the same land or rent shall also be barred, unless in the meantime such land or rent shall have been recovered by some person entitled in succession to the estate in possession.*

**Particular Estate in Land—Estate in Remainder expectant thereon—Conveyance of Particular Estate—"Person last Entitled."**]—Where a person entitled to a particular estate, in respect of which land is held or the profits thereof or rent received, and upon which a future estate is expectant, conveys away his estate, he

is not, when the particular estate determines, "the person last entitled to the particular estate upon which the future estate was expectant," and consequently the proviso in s. 2 of the Real Property Limitation Act, 1874, does not apply to limit the time within which the person who on the determination of the particular estate becomes entitled to an estate in possession may make an entry or distress or bring an action to recover such land or rent. *Pedder* v. *Hunt*, 56 L. J., Q. B. 212; 18 Q. B. D. 565; 56 L. T. 687; 35 W. R. 371—C. A.

A testator devised certain land to his sons successively for life, beginning with the youngest, and after their death "to be for ever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives for ever." The eldest surviving son being in possession executed, more than six years before his death, a conveyance in fee to the defendant. He left one son, who more than six but within twelve years after his father's death brought this action to recover possession of the land, claiming as devisee under the will of the testator:—Held, that the claim was not barred, as the plaintiff's father, having conveyed away his life estate, was not "the person last entitled to the particular estate" on which the plaintiff's estate in remainder was expectant within the meaning of the proviso in s. 2 of the Real Property Limitation Act, 1874. *Ib.*

**Tenant for Life, with General Power to appoint to Uses—Estate of Tenant for Life barred—Right of Appointees.**]—The estate of a tenant for life in land became barred by the Statutes of Limitations. He had a general power of appointing to uses expectant on the estate of a subsequent tenant for life, who died without having recovered the land. Thereupon the appointees under the power claimed to recover:—Held, that the power of appointing to uses was not a "right in remainder" so as to cause the appointees' estate to be barred by s. 20 of the act of 1833, which provides, in effect, that where the right to an estate in possession is barred, the right of the same person to any other estate in the land is also barred:—Held, also, that the claimants were not within the meaning of the term "appointee," as used in s. 1 of the act of 1833, so as to make them persons claiming through the donee of the power, and consequently barred under s. 1 of the act of 1874, by reason of his right having become barred thereunder, but that they were entitled, under s. 2 of the act of 1874, to recover the land within the period therein specified. *Devon's (Earl) Settled Estates, In re*, 65 L. J., Ch. 810; [1896] 2 Ch. 562; 75 L. T. 178; 45 W. R. 25.

**Life Estate carved out of Estate Tail.**]—In 1788 estates were settled by a marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor (whose heiress-at-law she was) in fee. In 1818, by deeds to which the husband and wife, and their only son, were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the son for life, remainder to his issue in tail, and remainder to his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and the son in 1828:—Held, that, inasmuch as the estate of the sister was carved out of the estate of the son, she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds as he would have had if he had continued alive, viz. twenty years from 1822, when his remainder came into possession. *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295.

**Evidence that Tenant for Life alive within Twenty Years.**]—Ejectment brought by a remainderman more than twenty but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence from which the jury may infer that the tenant for life was alive within twenty years. *Slade* v. *Nepean*, 2 N. & M. 219.

**Onus Probandi—No Presumption against Remainderman from Fifty Years' Possession during prior Particular Estates.**]—See *Cole* v. *Heydon*, 1 L. T. 439.

**Surrender of Life Estate—Claim by Son of Life Tenant.**]—A., being tenant for life of a copyhold estate, and B., his daughter, being tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the use of B. for life, remainder to the right heirs of the survivor. A. and B. shortly afterwards surrendered the fee to a bonâ fide purchaser, the contingent remainder to A. being void:—Held, that as the surrender passed B.'s life estate, the claim to the fee by B.'s son did not accrue till her death. *Doe* d. *Hinton* v. *Role*, 3 N. & P. 648; 8 A. & E. 650.

**Possession under Void Appointment.**]—A. was tenant for life with a power of appointment, by will attested by three witnesses; he appointed the land to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B. entered, and held the land till his death, which was three years after the death of B.:—Held, that the statute did not begin to run against C. till the death of B. *Doe* d. *Allen* v. *Blakeway*, 5 Car. & P. 563. And see *Faussett* v. *Carpenter*, 5 Bligh (N.S.) 75.

**Future Estate—Grant to Husband and Wife for joint Lives, Remainder to Husband's Heirs.**]—Copyhold land was surrendered, in 1798, to a husband and wife for their joint lives, with remainder to the heirs of the husband. In 1805 the husband absconded and went abroad, and was never afterwards heard of. In 1807 a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the estate until her death in 1841, whereupon the assignee was admitted:—Held, that an ejectment by the assignee brought after her death was in time, for that the husband's reversion in fee was a future estate within 3 & 4 Will. 4, c. 27, s. 3. *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517; 13 L. J., Ex. 61.

**When Statute does not run against, till Death of Tenant for Life.**]—When children claim as remaindermen under articles, time does not commence to run against their right under the articles, in favour of a purchaser, until the death of the tenant for life. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

Semble, unless a man is a mere trustee on express trust, time will run from the conveyance, but where a party is entitled in remainder he cannot be bound before the period when his right to possession accrues. *Ib.*

When a legacy, charged upon the residuary real estate was bequeathed to trustees, for B. for life, and after his death for his children, and there was not, during his life, from 1806 to 1863, any payment made on account of the legacy, or any trustee capable of giving a discharge for it: —Held, that the Statute of Limitations did not begin to run against the children until the death of B. *Carroll* v. *Hargrave*, Ir. R. 5 Eq. 123.

—— **Trusts of unpaid Purchase-money recited in contemporaneous Deed.**]— Purchase-money proved to have been left in the hands of the purchaser as an indemnity in the year 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of a deed contemporaneous with the purchase, and executed in order to enable the purchase to be completed, and these recitals stating trusts of the fund under which the plaintiffs were entitled in remainder after two life estates, the last of which expired in 1845:—Held, that as the plaintiffs' title in possession did not accrue till 1845, they were entitled, on a bill filed in 1852, to have the trust fund made good out of the assets (real estate) of the purchaser who had died in 1811. *Hawkins* v. *Gardiner*, 2 Sm. & G. 441.

See also *Prior* v. *Horniblow*, col. 237.

**Payment by, of Arrears of Interest on Charges —Claim of Executor to be recouped out of Fund in Court.**]—A remainderman paid with his own money, after he came into possession, interest which had accrued, during the preceding estate for life, upon charges affecting the inheritance: —Held, first, that his executors were entitled in 1870 (as against the personal representative of the tenant for life), to be recouped out of a fund in court, the produce of rents of the life estate brought in, in 1815, by a receiver appointed in an incumbrancer's suit instituted against the tenant for life. *Howlin* v. *Sheppard*, Ir. R. 6 Eq. 38. Affirmed Ir. R. 6 Eq. 497.

Held, secondly, that the fund having remained in court, during the whole period from 1815 to 1870, in usum jus habentium, the claim of H.'s executor was not barred. *Ib.*

**Judgment Creditor of—More than Six Years' Arrears of Interest not recoverable out of the Lands on Debtor's Title vesting.**]—See *Vincent* v. *Going*, col. 323.

**Mortgagee purchasing Estate for Life in Equity of Redemption acquires no Title as against.**]—Where a mortgagee purchases the interest of the tenant for life of the equity of redemption, and enters into possession, time does not run as against the remainderman, for he takes the estate, subject to the duty of the tenant for life of keeping down the interest on the mortgage. *Raffity* v. *King*, 1 Keen, 601; 6 L. J., Ch. 87.

**Purchase of Equity of Redemption by Devisee in Tail of Mortgagee bars the Remainders under the Will.**]—See *Pendleton* v. *Booth*, col. 213.

**Acknowledgment by Devisee revives Right to redeem as against.**]—See *Pendleton* v. *Booth*, col. 291.

**Where Statute begins to run against, in favour of Mortgagee.**]—See *Blake* v. *Foster*, and *Harrison* v. *Hollins*, col. 212.

**Claim of, to Compensation—Loss of Lease by Neglect of Tenant for Life.**]—Testator bequeathed a church lease for twenty-one years, to A. for life, remainder to his first and other sons, and directed the lease to be continually renewed by the persons in possession for the time being. A. neglected to renew, and the lease expired in 1798. His eldest son attained twenty-one in 1800. In 1830 A. died. In 1831 the eldest son filed his bill, praying to be compensated for the loss of the lease, out of A.'s assets:—Held, that he was entitled to the relief, notwithstanding the lapse of time. *Bennett* v. *Colley*, 5 Sim. 181. Affirmed 2 Myl. & K. 225; Coop. t. Brough. 248.

**Claim of, against Executors for neglecting to convert Leaseholds, not barred while Tenancies for Life subsisting.**]—See *Mehrtens* v. *Andrews*, col. 240.

**Demurrer to Bill of Discovery in Action of Intrusion by.**]— To a bill of discovery in aid of an action of intrusion brought by a remainderman in a devise after a lapse of thirty-nine years from the death of the tenant for life, and twenty-seven years from the time when the remainderman attained the age of twenty-one, demurrer allowed. *Cuthbert* v. *Creasy*, 4 Bligh, 125. And see *Pim* v. *Goodwin*, *id.* 133; *Foster* v. *Blake*, *id.* 140.

**Right of, not barred by Twenty Years' Continuance in Possession of Tenant in Tail after Forfeiture.**]—See *Astley* v. *Essex*, col. 173.

**Under Disabilities, Statute continuing to run against.**]—See *Goodall* v. *Skerratt*, col. 170.

**Trust not to obstruct Devises over—Common Recovery—Running of Statute against Remainderman.**]—See *Dawkins* v. *Penrhyn*, col. 184.

**Life Estate to Settlor, Remainder to Son—Continuous Possession by Settlor and Son — Statute runs in favour of Son from Date of Settlement.**]—See *Smith* v. *Smith*, col. 192.

**Entry and Possession as Person entitled in Remainder — Real Remainderman barred by Statute.**]—See *Cholmondeley* v. *Clinton*, col. 259.

**Appointment of Receiver under Judgment on Bond of Tenant for Life and Remainderman does not stay Statute running in favour of Remainderman.**]—See *Greene's Estate, In re*, col. 320.

### 6. Reversioners.

By 37 & 38 Vict. c. 57, s. 2, *a right to recover any land or rent, in respect of an interest in reversion, shall be deemed to have accrued when it becomes an interest in possession by the determination of the particular estate, notwithstanding any possession by the reversioner previously to the creation of the particular estate.*

**Determination of Particular Estate—No New Right of Entry.**]—In 1784 premises were leased to H. J., for three lives. He, by will, devised all his estates and interest in the premises to his wife, A., her heirs and assigns. She, in 1793, conveyed the estates so devised to her son, J., and the heirs of his body, with a proviso, that if

he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A., her heirs and assigns. In 1811, J. purchased the reversion in fee in the premises expectant on the lease for lives, which was conveyed to him, and at the same time an old satisfied term of 5,000 years affecting the premises was assigned to a trustee for him to attend the inheritance. J. died in 1812, without issue, leaving his nephew, L., his heir-at-law and the heir-at-law of A. The lease for lives determined in 1835. For upwards of twenty years from the death of J. the premises were held adversely to L.:—Held, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the leases for lives in 1835. *Doe* d. *Hall* v. *Moulsdale*, 16 M. & W. 689; 16 L. J., Ex. 169.

That branch of the 3 & 4 Will. 4, c. 27, which relates to estates in reversion expectant on the determination of a particular estate, applies only where another person than the reversioner is entitled to the particular estate. *Ib.*

A., upon his marriage, in 1815, being entitled under a will to a contingent interest, by way of a shifting use to an estate, conveyed it by lease and release to the use of himself for life, remainder among the issue of the marriage in the usual course of strict settlement, with the ultimate reversion to himself and his heirs; in 1816 the event upon which he became entitled to the possession occurred, but he did not take possession thereupon; in 1827, upon his second marriage, he by deed reciting that under the settlement of 1815 he had a reversion in fee, expectant upon the failure of issue male of the former marriage, covenanted to settle the reversion upon the issue of the second marriage; A. died in 1835, and the issue male of the first marriage in 1840. In 1841 the issue of the second marriage filed their bill against the person from whom the estate should have shifted in 1816, praying that they might be declared entitled to the estate:—Held, that they stood in the place of A., and that the bar of the Statute of Limitations commenced to run against them from 1816; a person not being able after the statute has commenced to run to create new rights by executing settlements of the estate which he claims. *Stackpoole* v. *Stackpoole*, 2 Con. & L. 489; 4 Dr. & War. 320; 6 Ir. Eq. R. 18.

**Estate of Lessor for Lives does not become an Estate in Possession until Expiration of Lease, though original Lease surrendered and fresh one granted, and sub-Lessee under first Lease in Possession after Expiration of sub-Lease and original Lease.**] — See *Ecclesiastical Commissioners* v. *Treemer*, col. 155.

**Lease by Husband and Wife of Property settled on Husband for Life, Remainder to Children subject to Wife's Jointure—Statute does not run against Children till Wife's Death, though Rent exceeds Jointure.**]—See *Shaw* v. *Keighron*, col. 160.

**Statute does not begin to run against Lessor during Lease, though no Rent paid.**]—See *Doe* d. *Davy* v. *Owenden*, col. 158.

**Payment by Lessee of Annuity due from Purchaser of the Reversion, whether Payment of Rent.**]—See *Doe* d. *Newman* v. *Godsill*, col. 158.

**Determination of Tenancy at Will by Grant of Lease gives no Right of Entry.**]—See *Hogan* v. *Hand*, col. 162.

**Mortgagee of Reversion—Statute only runs against, when Reversion falls into Possession.**]—See *Hancock, In re*, col. 222.

**Time does not run against Legatee of Reversionary Interest in Term during Life Interest.**]—See *Quinton* v. *Frith*, col. 239.

**Reversion obtained by Fraud—When Statute begins to run.**]—See *Whalley* v. *Whalley*, col. 308.

**Mortgage of Reversionary Right to Legacy of Residue invested on Mortgage — Arrears of Interest.**]—See *Smith* v. *Hill*, col. 327.

### 7. Trustee and Cestui que Trust.

*See also* ante, **A**, IV. 3 (col. 40).

By 3 & 4 Will. 4, c. 27, s. 25, *when any land or rent is vested in a trustee upon any express trust, the statute only begins to run against the cestui que trust upon a conveyance of such land or rent to a purchaser for valuable consideration.*

By the Judicature Act, 1873, s. 25, sub-s. 2, *no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.*

By 37 & 38 Vict. c. 57, s. 10, *no sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, and no arrears of such rent or interest on such sum of money or legacy, shall be recoverable, except within the time when they would be if there was no such trust.*

By the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, *in any proceeding against a trustee, except where the claim is founded upon a fraud to which the trustee was privy, or is to recover trust property or its proceeds still retained by the trustee, or converted to his use, he shall enjoy all rights conferred by any statute of limitations as if he had not been a trustee, and, if no such statute applies, he may plead the lapse of time to any proceeding to recover money or property as if the action had been one of debt for money had and received.*

**When Statute not Applicable as between.**]—Statute of Limitations does not run against a trust. *Hollis's Case*, 2 Vent. 345.

Statute of Limitations cannot be pleaded to breach of trust. *Milnes* v. *Cowley*, 4 Price, 103.

Statute of Limitations cannot be pleaded where estate in law is in trustees. *Lawley* v. *Lawley*, 9 Mod. 33.

The object of the statute was to settle the rights of persons adversely litigating with each other, not to deal with cases of trustee and cestui que trust, where there is but one single interest, viz. that of the person beneficially entitled. *Garrard* v. *Tuck*, 8 C. B. 231; 18 L. J., C. P. 338.

A cestui que trust who enters into possession of land becomes at law tenant at will to the trustee. *Ib.*

The 3 & 4 Will. 4, c. 27, s. 3, does not apply to a cestui que trust holding possession of land under the trustee. *Ib.*

In cases of express trust, the statute is no bar

to a demand of a cestui que trust, though the other cestuis que trustent have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant. *Knight* v. *Bowyer*, 3 De G. & J. 421; 27 L. J., Ch. 520; 4 Jur. (N.S.) 569; 6 W. R. 565.

**When Cestui que Trust Tenant-at-Will to Trustee—When Possession of, Adverse to Trustee.**]—The doctrine that a cestui que trust who is in possession of the estate by the consent or acquiescence of the trustee, must be regarded as his tenant-at-will, only applies where the cestui que trust is the actual occupant; where he is merely allowed to receive the rents or otherwise deal with the estate in the hands of occupying tenants, he is merely the agent of the trustees. *Melling* v. *Leak*, 16 C. B. 652; 3 C. L. R. 1017; 24 L. J., C. P. 187; 1 Jur. (N.S.) 759; 3 W. R. 595.

The management of an estate was intrusted by the trustees in fee to the cestui que trust for life as beneficial owner, and the latter, having never been in actual occupation, let C. into possession, who occupied during the life of the cestui que trust for more than twenty years, without paying rent or acknowledging title:—Held, that a tenancy at will had not been created between the cestui que trust and C., and that C. had therefore acquired a good title by adverse possession under the 3 & 4 Will. 4, c. 27. *Ib.*

In 1767, the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H. to attend the inheritance. In 1844 the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H. The owner of the legal interest in the term had never been in possession. No demand of possession had been made before action brought:—Held, that the action was not maintainable, for, if a tenancy at will existed as between the trustee and cestui que trust, it had not been determined by demand of possession; and if no tenancy existed such as to render necessary a demand of possession, then the action might have been brought twenty years before, and was consequently barred by 3 & 4 Will. 4, c. 27, ss. 2 and 3. *Doe* d. *Jacobs* v. *Phillips*, 10 Q. B. 130; 16 L. J., Q. B. 269; 11 Jur. 692.

Possession of the cestui que trust was not adverse to the title of the trustee. *Smith* d. *Dennison* v. *King*, 16 East, 283.

—— **Occupation under Agreement for Lease.**]—S., being seised in fee of land abutting on the convex side of an arc formed by the course of the Thames, entered into an agreement of the 23rd of June, 1769, whereby he covenanted with A. to grant leases to him, for ninety-nine years from 1768, of messuages, which A. covenanted to erect on the land. A., and persons having interest in neighbouring property, contemplated making an embankment along the chord of the aforesaid arc, so as to gain from the river the land inside the curve. They therefore obtained an act, which, after reciting that the promoters had "very valuable freehold and leasehold interest in houses, wharfs and grounds next adjoining the river," empowered them to make the embankment in front of their respective houses, and enacted that the soil of the river so to be inclosed in front of such respective houses should vest, and the same was thereby vested in the owner or owners, proprietor or proprietors of such adjoining houses, according to his or their respective estates, trusts or interests. Having erected houses according to the agreement, A. duly received leases. The embankment was contemporaneously made, and A. also built on the ground reclaimed. The leases, which expired in 1867, did not include that land; but A. and his representatives retained possession of it until the present day, without any demise to or acknowledgment by them. The plaintiffs, who derived their title from S., brought ejectment for the reclaimed land:—Held, that they were entitled to recover, for that the embankment act vested the fee-simple in S., subject to the interests created by the agreement, and A., having had a right in equity to demand leases for ninety-nine years from 1768, the occupation of the reclaimed land, although at law merely a tenancy at will, had been that of cestui que trusts in possession, and, therefore, the title of the plaintiffs was not barred by the Statute of Limitations. *Drummond* v. *Sant*, 41 L. J., Q. B. 21; L. R. 6 Q. B. 763; 25 L. T. 419; 20 W. R. 18.

**A Person in Possession under an Agreement for a Lease is a Cestui que Trust of, and therefore not to be deemed to be a Tenant-at-Will to the Owner.**]—See *Warren* v. *Murray*, col. 154.

The proviso in s. 7 of the 3 & 4 Will. 4, c. 27, applies to actual direct trusts, and is not limited to express trusts. *Drummond* v. *Sant*, supra. And see *Garrard* v. *Tuck*, col. 180.

**Possession of Trustee, that of real Cestui que Trust.**]—The possession of trustees cannot be adverse to their true cestuis que trustent, and the fact that for upwards of twenty years they have treated the land as belonging to one cestui que trust, whereas in fact it belonged to another cestui que trust, does not operate as a bar under the Statute of Limitations. *Lister* v. *Pickford*, 34 L. J., Ch. 582; 11 Jur. (N.S.) 649; 12 L. T. 587; 13 W. R. 827. See *Cholmondeley* v. *Clinton*, col. 258.

**Covenant to convey to Trustee for Infant—No Conveyance executed—Possession of Trustee not adverse to Covenantor's Devisee till Death of Infant.**]—See *Doe* d. *Colclough* v. *Hulse*, col. 263.

**Possession of Estate by Person entitled to share in Proceeds of Sale, adverse to Trustees for Sale.**]—A testatrix, by her will, devised real estate to trustees, their heirs and assigns, in trust for her daughter for life, and after her death to sell and divide the proceeds between four persons, A., B., C. and D., share and share alike. On the death of the testatrix the tenant for life entered and occupied until her own death in 1857. On her death C. and D. entered and remained in possession until the death of the latter in 1874. C. remained in possession until his death in 1880. The trustees never in any way acted, so far as the real estate was concerned, and the property was enjoyed by C. and D., and after the death of D. by C. without interruption and acknowledgment:—Held, that the legal estate in fee of the trustees was extinguished by the expiration of twenty years from the death of the tenant for life, and with it the trusts by which it was affected; and that it would be wrong to ascribe the possession of C. and D., which was

unlawful for all the purposes of the will, to the supposed lawful title which they each had in respect of one-fourth share of the proceeds of sale. *Bolling* v. *Hobday*, 31 W. R. 9.

**Possession of Cestui que Trust under invalid Devise not adverse to Trustee, though adverse to Heir-at-Law.**]—Cestuis que trustent, under an invalid devise, who remain in possession without acknowledgment of title for more than twenty years, and thus bar the right of the heir-at-law, do not thereby acquire the legal estate in the devised lands, which vests in the trustees, and subject to the trusts of the devise. *Kernaghan* v. *M'Nally*, 12 Ir. Ch. R. 89.

**Possession of Cestui que Trust Possession of Trustee, not ceasing on Death of Cestui que Trust in Possession but enuring as Seisin of the next entitled.**]—See *Parker* v. *Carter*, col. 251.

**Trustee of Estate not barred by Possession of Assignee of Tenant for Life.**]—See *Fausset* v. *Carpenter*, col. 168.

**"Express Trust"—On Face of Will.**]—The testator devised a house and all other his real estate to his executors upon trust, the declaration of trust being as to the house only. He died seised of two other houses, and his executors took possession of them, and received the rents for more than twelve years from the death of the testator. His heir-at-law afterwards brought an action against the executors, alleging that the two houses vested in them in trust for him, and claimed execution of the trust:—Held, on the authority of *Salter* v. *Cavanagh* (1 Dr. & Wal. 668), that there was on the face of the will an express trust for the heir-at-law within s. 25 of the Statute of Limitations (3 & 4 Wm. 4, c. 27), and that his right was not barred. *Patrick* v. *Simpson*, 59 L. J., Q. B. 7; 24 Q. B. D. 128; 61 L. T. 686.

A party having been expressly named a trustee in a will under which a question rested as to whether he was not partially beneficially interested, it was held that his representatives were trustees within the 3 & 4 Will. 4, c. 27, s. 25, and that though a constructive trust would be barred by this statute, and might have been barred previously to it by length of time, yet that that only applied to cases where the trust did not arise on the face of the instrument, but was to be made out by evidence. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668.

In 1824 an estate was conveyed to A. in fee by way of mortgage, the conveyance being upon trust to sell. A. by his will, executed in February, 1826, devised his real estates to trustees for sale, and to hold the proceeds as part of his personal estate; he then devised to the same trustees all estates vested in him by way of mortgage or in trust for any persons, on payment to them of the mortgage moneys to convey the mortgaged hereditaments to the persons entitled to the equity of redemption in the same, and directed that the mortgage moneys when so paid to them should be held upon the same trusts as declared concerning his personal estate. Subsequently to the date of his will, A. purchased the equity of redemption in the estate, and entered into possession, but no conveyance was ever made to him. A. died in October, 1826, leaving Y. and C. his co-heirs-at-law. In 1827 the trustees of A.'s will entered into possession of the estate and administered and dealt with the net rents and profits in accordance with the trusts of the will for more than forty years. In 1869 the representatives of Y. set up a claim to three-fourths of the estate on the grounds, first, that A. having died intestate as to the estate, one moiety descended on Y. as one of his heirs-at-law; secondly, that C. having by deed released all her right and interest in the estate to the trustees of the will, such release operated in favour of (in the events which happened) A.'s two residuary legatees, of whom Y. was one, and, consequently that a moiety of the other moiety of the estate also belonged to them:—Held, that although A. died intestate as to the estate, and a moiety thereof descended on Y. as one of his co-heirs, yet that the claim of Y.'s representatives was barred by the Statute of Limitations, there being no trust, express or implied, on the face of the will in favour of the testator's heirs. *Yardley* v. *Holland*, L. R. 20 Eq. 428; 33 L. T. 301.

A father devised estates to his son, R. P., and the heirs of his body lawfully begotten, "but upon special trust and confidence in my son that in case he shall have no issue of his own body lawfully begotten, he, my said son, will not do or suffer any act in law or otherwise to obstruct or prevent the several following devises and trusts and limitations of my estates from taking effect, but, on the contrary, that he will do or cause to be done every act in his power to establish and confirm the same"; and there were certain limitations over in the event of his death without issue. The father died in 1782, and the son shortly afterwards suffered a common recovery, and he died without issue in 1808, having devised one-fourth of the estates to G. H. D. P., who died in 1840, and devised the said one-fourth moiety to the defendant. D., who was entitled to the estates upon the death of G. H. D. P. under the limitations contained in the will, died in 1852, leaving a son who died in 1864, leaving the plaintiff, his eldest son and heir-at-law. In 1877, the plaintiff commenced an action claiming a declaration that he was entitled to one-fourth part of the testator's estates and to mesne profits, and he alleged in his statement of claim that his father remained until his death in ignorance of the provisions of the testator's will; and that he himself did not discover his rights thereunder until 1875; and that the common recovery suffered by R. P. was invalid:—Held, that the common recovery suffered by the tenant in tail defeated the limitations over; that the words of the devise did not create an express trust within 3 & 4 Will. 4, c. 27, s. 25; and that the plaintiff's claim was barred by 3 & 4 Will. 4, c. 27, s. 34. *Dawkins* v. *Penrhyn (Lord)* 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173. H. L. (E.)

—— **For Payment of Debts.**]—A trust in a will for the payment of debts out of real estate does not prevent the operation of the Statute of Limitations, if the testator in fact leaves no real estate to support the trust. *Smith, Ex parte, Hepburn, In re*, 54 L. J., Q. B. 422; 14 Q. B. D. 394.

A testator charged all his real estate with payment of his debts, if his personal estate was insufficient to pay them, and directed his executors to raise sufficient for their payment by mortgage or otherwise:—Held, that this did not create an express trust within the exception

contained in the 3 & 4 Will. 4, c. 27, s. 25. *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52; 1 N. R. 141; 32 L. J., Ch. 37; 9 Jur. (N.S.) 237; 7 L. T. 655.

A testator charged his real estates with his debts, and he devised his C. plantation in trust to pay his debts. He died in 1834, and the produce of C. being in court:—Held, in 1859, that the creditors were not barred as to the fund in court, a trust having been created in their favour, but that they were barred as to the other real estates, they having a mere charge thereon. *Jacquet* v. *Jacquet*, 27 Beav. 332.

A trust for payment of debts has been held to revive such as have been barred by the statute, though judges have murmured at it; yet it is now established in equity; and where real estate has been affected by such stale debts it is a plain case, but not where it depends on an account to be taken. *Lacon* v. *Briggs*, 3 Atk. 107.

Time does not run against a creditor after the death of the testator, in case of a trust or charge for the payment of debts. *Hargreaves* v. *Michell*, 6 Madd. 326; 23 R. R. 231.

Devise in trust for payment of debts, does not revive a debt upon which the Statute of Limitations had taken effect by the expiration of the time before the testator's death. *Burke* v. *Jones*, 2 Ves. & B. 275; 13 R. R. 83.

J. S. being indebted by simple contract, which was barred by the Statute of Limitations, made will and devised lands in trust to pay debts. Quære, whether devise revives the debt, and whether to bill by creditor for benefit of trust a plea of statute is allowable. *Stafford* v. *Blakeway*, 6 Bro. P. C. 630.

Where lands are devised to pay debts, debts barred by statute are revived. Sed quære. *Anon.*, 1 Salk. 154.

Where real estates are devised in trust to pay debts in aid of the personal estate, the Statute of Limitations does not run in equity after the death of the testator. *Hughes* v. *Wynne*, Turn. & R. 307.

Where lands were devised in trust for payment of debts, the Statute of Limitations runs not after death of testator against debts not barred thereby at his death. *Fergus* v. *Gore*, 1 Sch. & Lef. 107.

A devise of lands to A. for life, subject to debts, &c. and a bequest of testator's personal property to A., the better to enable her to pay debts, &c. does not prevent a judgment from being barred by the 40th section of the 3 & 4 Will. 4, c. 27, or create a trust within the 25th section. *Dundas* v. *Blake*, 11 Ir. Eq. R. 138.

The distinction between charges on lands and trusts for debts considered, and the several cases on their effect in reference to the Statute of Limitations reviewed. *Ib.*

F. was indebted to C. in 800*l.*, to secure which, in 1814, he granted to C. an annuity or rent of 100*l.*, to be issued out of the lands of Dovegrove (held by F. under a lease from C.), habendum until thereby the 800*l.* and interest was paid, and F. covenanted to pay the annuity. In 1815 C. assigned the sum of 798*l.* (being the money then due on foot of the 800*l.*) and the annuity to H., and covenanted that the annuity should be regularly paid; and being entitled to a sum of 2,000*l.* charged on lands of which he was himself tenant for life, he, as a further security, assigned 800*l.*, part of the 2,000*l.*, to a trustee upon trust, in case the annuity should be unpaid for forty-one days, then from time to time to call in and receive such parts of the 2,000*l.* as should be sufficient to satisfy the arrears, and apply the same in payment thereof, and after payment thereof in trust for C. In 1816 the annuity was unpaid for more than forty-one days, but payments were made on foot of it up to October, 1821. In 1820 C. evicted the lands of Dovegrove for non-payment of rent, and died in 1824. Under a decree, to take an account of incumbrances affecting the land charged with the 2,000*l.*, made in a suit instituted in 1839, the master reported that the principal money which in October, 1821, was due on foot of the 798*l.* and to secure which the 800*l.* had been assigned, was still due, and that the residue of the 2,000*l.* after payment of that sum, was due to the personal representative of C. Upon an exception taken by the personal representative of C.:—Held, that the demand of H. was not barred by the 3 & 4 Will. 4, c. 27, s. 40. The trust created by the deed of 1815 is a continuing trust not to be executed once for all, and a present right to receive the 800*l.*, within the meaning of the 3 & 4 Will. 4, c. 27, s. 40, did not accrue upon the nonpayment of the annuity for forty-one days. A person entitled to a sum of money charged upon land assigned it to trustees in trust to secure the payment of a debt, and after payment thereof, in trust for himself. He cannot as against his creditor, insist that the trust is barred by the Statute of Limitations. *Heenan* v. *Berry*, 2 Jo. & Lat. 303.

Where a trust is created by will for the payment of debts, the right of a judgment creditor to the benefit of that trust is not affected by the 40th section of the 3 & 4 Will. 4, c. 27. *Dillon* v. *Cruise*, 3 Ir. Eq. R. 70.

A. being seised in fee-simple of four denominations of land, over which B. had an equitable charge in respect of an advance made by him on a contract with A. for the purchase of the land, which was subsequently broken off, did, on the occasion of his marriage, convey two of the denominations to the uses of the settlement, and the other two upon trust that the trustees should as soon as they should be required in writing by A., raise, by sale or mortgage thereof, sufficient to pay off the incumbrances affecting the lands, as set out in a schedule annexed thereto, with interest thereon. B.'s incumbrance was in the schedule, but he was no party to the deed:—Held, that he was not a cestui que trust under this deed, so as to be entitled to file a bill to carry the trusts into execution; and that therefore the case was not within the 25th section of 3 & 4 Will. 4, c. 27 (even supposing that to extend to the provisions of the 42nd), and that B. was entitled only to six years' interest. *Evans* v. *Bagwell*, 2 Con. & L. 612; 4 Dr. & War. 398.

Quære, whether the 25th section creates an exception out of the 42nd section of the 3 & 4 Will. 4, c. 27. *Ib.*

The existence of a trust by a devise of real estate for the payment of debts prevents the application of the Statute of Limitations as against such debts; and the statute 5 Geo. 2, c. 7, s. 4, does not so convert real estate situated in the American plantations into personal estate, as to take it out of the operation of that principle. *Tulloch* v. *Simpson*, 9 L. J., Ch. 145.

A direction in a will, for the payment of any specified debts, takes them out of the Statute of

Limitations. *Williamson* v. *Naylor*, 3 Y. & Coll. 208.

Where a testator revives debts barred by the Statute of Limitations, he may appropriate a specific fund for their payment, and if the fund is not sufficient, the creditors must take ratably. *Ib.*

Testator by his will declared, that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained the names of the creditors, and the debts due to them:—Held, that the direction so given for payment of these debts prevented the operation of the Statute of Limitations. *Ib.*

Testator having first directed his debts to be paid out of his real and personal estate, afterwards by a separate clause provided that if his personal estate should fall short of paying his debts, then his executor should enter into possession of the real estate, and apply the rents in payment of the debts. The personal estate was sufficient:—Held, nevertheless, that such a trust had been created for payment of the debts out of the realty as to prevent the Statute of Limitations from running against the debts, and that the real estate remained liable to pay a simple contract debt left unpaid after distribution of the residuary personal estate. *Crallan* v. *Oulton*, 3 Beav. 1; 9 L. J., Ch. 319.

A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed, and the creditors, in consideration thereof, granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person, or his goods, chattels and effects, by any such creditors; and that in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—Held, that this amounted only to a licence by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed, nor an administration suit by the creditor against the estate of the debtor after his decease, for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust-deed, or amounted to an acquittance of the debt:—Held, also, that the existence of the trust-deed, and the covenants and licence therein contained, prevented the operation of the Statute of Limitations during the life of the debtor in respect of the debts for the payment of which the trust was created. *O'Brien* v. *Osborne*, 10 Hare, 92; 15 Jur. 960.

A promissory note, dated 4th of October, 1842, was payable at "six months' notice." An action was brought on it in October, 1848, and the indorsement on the writ stated that on payment within four days, proceedings would be stayed. The action was abandoned, and a formal notice to pay in six months was given in January, 1850. The testator died in December, 1850, having devised his real and personal estate to his executors, in trust to sell, and in the first place to pay his debts. A creditors' suit was instituted by the payee in 1855, to which the executors pleaded the Statute of Limitations. The court held, that the trusts for payment of the debts prevented the operation of the statute, both as to the real and personal estate, and that neither the action nor the indorsement on the writ of summons was sufficient notice to pay, according to the tenor of the note. *Moore* v. *Petchell*, 22 Beav. 172.

—— **Statute-barred Creditor excluded from Devise in Trust for Payment of Debts.**]—See *Magennis* v. *Fallon*, col. 53.

—— **Action to recover Legacy.**]—A testatrix by her will bequeathed an annuity to J. for his life. She also bequeathed some pecuniary legacies, payable after the decease of the survivor of herself, her mother, and J., one of them being to the plaintiff. And she devised and bequeathed all her real and personal estate to trustees upon trust for sale and conversion, and out of the proceeds to pay her debts, and funeral and testamentary expenses, and the expenses of conversion, and to invest the residue, and out of the income, in the first place, to pay the annuity to J., and in subordination to the aforesaid trust to pay and apply during the life of the mother the residue of the income (not exceeding 800*l.*), at the discretion of the trustees, for the benefit of the mother, and, after her death, if J. should survive her, the trustees were, out of the income to pay the annuity given to him, so long as the same should continue payable, and, "subject to the several trusts, provisions and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed," the testatrix directed that her trustees should stand possessed of the estate in trust for the defendant absolutely. The testatrix died in June, 1860. She had no real estate. In December, 1860, the mother died. J. died in January, 1866. Owing to the default of the solicitor of the executors and trustees of the will, who had placed in his hands a sum sufficient to pay the plaintiff's legacy, the legacy was not paid to the plaintiff. The plaintiff, in 1891, issued an originating summons against the defendant, who was the surviving trustee and executor and the residuary legatee of the testatrix, claiming administration of her estate:—Held, that no express trust was declared of the legacies, and that, consequently, the plaintiff's right was barred by the act 37 & 38 Vict. c. 57, s. 8. *Barker, In re, Buxton* v. *Campbell*, 62 L. J., Ch. 76; [1892] 2 Ch. 491; 66 L. T. 848.

A devisee of lands charged with payment of legacies, devised his estate at H. to S., in trust, to sell, and in the meantime to let the estate, and apply the rents and net proceeds towards payment of his debts, and the legacies charged thereon by his testator's will:—Held, an express trust for the payment of the legacies; and on a bill being filed by the legatees against the representatives of the trustee, held, that the claim was not barred by s. 40 of the 3 & 4 Will. 4. c. 27. *Watson* v. *Saul*, 1 Giff. 188; 5 Jur. (N.S.) 404; 7 W. R. 197.

The provisions of that section do not apply to cases of express trust. *Ib.*

—— **Executor assenting to Legacy.**]—An executor who has, under the terms of the will, active duties as a trustee to perform in respect to the raising and investment of a legacy bequeathed upon trust for a minor, by assenting to it becomes an express trustee, so as to save the bar of the 3 & 4 Will. 4. c. 27, s. 40. *O'Reilly* v. *Walsh*, Ir. R. 6 Eq. 555.

Where an executor separated from the testator's property a sum bequeathed to him on trust, to which he for some time applied the interest,

and afterwards applied the fund to his own use:—Held, that he was liable as a trustee, and that the suit against him was not to be deemed a suit for a legacy, nor the right affected by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40). *Phillipo* v. *Munnings*, 2 Myl. & C. 309.

R., by his will, directed his executors to invest 1,500*l.*, and to pay the interest to his wife for her life, and after her decease to divide the principal equally among his five children. In a suit by the representatives of R.'s children, for their respective shares of the 1,500*l.*, upwards of thirty years after their right accrued, praying that the executor who proved the will might be declared to have been a trustee of the 1,500*l.* for R.'s children:—Held, on demurrer, that this is a suit not for a legacy, but for the execution of a trust, and the Statute of Limitations did not apply. *Daly* v. *Kirwan*, 1 Ir. Eq. R. 156.

—— **Legacy charged on Land, although a Trust, within the Statute.**]—See *Knox* v. *Kelly*, col. 280.

—— **Devise for Sale.**]—Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:—Held, that the trust was an express trust within 3 & 4 Will. 4, c. 27 (the Statute of Limitations), s. 25, and a decree for the execution of the trust of the unsold land was made at the suit of a residuary legatee. *Mutlow* v. *Bigg*, L. R. 18 Eq. 246; 22 W. R. 469. See *S. C.*, in C. A., 45 L. J., Ch. 282; 1 Ch. D. 385; 34 L. T. 273; 24 W. R. 401.

Gift of a leasehold house to executors, with direction to sell it, and out of the proceeds to pay 50*l.* to A.:—Held, that there being a trust for sale, the gift to A. is not barred by the Statute of Limitations. *Low* v. *Nash*, 1 W. R. 63. See *Pawsey* v *Barnes*, col. 281.

—— **Devise for Repair of Road.**]—Devise to a corporation upon trust, "from time to time yearly for ever," to lay out the yearly rents and profits in the repairs of a road, "at their discretion." Upon an information against the corporation, at the relation of the trustees of the road, under a turnpike act, an account was directed from the time of passing the act. No analogy in case of trust to the Statute of Limitations. *Att.-Gen.* v. *Brewers Co.*, 1 Mer. 495.

—— **Devise to secure Annuity.**]—A husband left landed estate to his wife for life, he then left all his property, real and personal, not "otherwise specifically devised," to trustees upon trust, to pay to his wife an annuity "out of the profits and issues of my trade and business to be hereafter carried on by my three sons in trust for the benefit of my wife and children, as likewise out of all profits arising from all and every part of my estate and property whatsoever." After the widow's death the landed estate was to go to the eldest son, "only on condition of well and truly paying, or causing to be paid, the several legacies herein directed, and discharging with fidelity the different trusts herein committed to him," and the three sons were made residuary legatees "on paying and discharging the different legacies and trusts in this my will":—Held, that the will did not impose upon the landed estate an express trust for the payment of the annuity within the meaning of s. 25 of 3 & 4 Will. 4, c. 27. *Cunningham* v. *Foot*, 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 858. H. L. (Ir.)

An express trust within s. 25 of 3 & 4 Will. 4, c. 27, must arise upon the words of the instrument itself, not upon any inference of law. *Ib.*

[See also, as to Trusts under Wills, **B**, II. 11., post (col. 232).]

—— **Demise to secure Annuity.**]—B., in consideration of a sum of money, by indenture granted an annuity for lives, and by the same instrument demised the lands out of which the annuity issued to a trustee for a term of years upon trusts for the better securing the annuity:—Held, that the creation of the term operated to create the relation of trustee and cestui que trust between the trustee of the term and the owner of the lands, and to avoid the bar of the 3 & 4 Will. 4, c. 27, so long as the term had not determined by effluxion of time. *Bermingham's Estate, In re*, Ir. R. 4 Eq. 187. Affirmed, Ir. R. 5 Eq. 147—Ch. App.

—— **Grant of Reversion to secure Annuity.**]—An owner of a reversionary interest in real estates, for the purpose of better securing an annuity, granted the estates to trustees, upon trust to permit him to hold and enjoy the same until default should be made in payment of the annuity; and in case of default, upon trust to sell the estates, and, after payment of the costs attending the sale, to pay the arrears of the annuity, and invest the residue to meet the growing payments of the annuity; and, subject thereto, in trust for the grantor, his executors, administrators and assigns absolutely:—Held, that an express trust was created for the benefit of the annuitant within the 25th section of the 3 & 4 Will. 4, c. 27, and that he was entitled to recover the whole of the arrears of the annuity. *Lewis* v. *Duncombe*, 29 Beav. 175; 30 L. J., Ch. 732; 7 Jur. (N.S.) 695; 3 L. T. 867; 9 W. R. 446.

—— **Annuity not barred, where Trust to pay.**]—See *Ward* v. *Arch*, col. 275; and *Thompson* v. *Bowyer*, col. 289.

—— **Annuity charged upon Land barred after Twelve Years, notwithstanding Trust.**]—See *Hughes* v. *Coles*, col. 273.

—— **In Favour of Mortgagor.**]—A mortgagor of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favour of the mortgagor within 3 & 4 Will. 4. c. 27, s. 25. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113. S. P., *Sands to Thompson, In re*, 52 L. J., Ch. 406; 22 Ch. D. 614; 48 L. T. 210; 31 W. R. 397.

The mortgagor's right to redeem under such a mortgage is barred by twenty years' possession by the mortgagee without any acknowledgment of the mortgagor's title. *Ib.*

—— **Statute does not affect Covenant to pay in Mortgage, so long as a Trust to sell and pay Debt subsists.**]—See *Bennett* v. *Cooper*, col. 281.

—— **Interest on Mortgage not limited to Six Years, where Term created to secure.**]—See *Shaw* v. *Johnson*, col. 326; and *Snow* v. *Booth*, col. 325.

—— **No fiduciary Relation between Mortgagee of deceased Tenant for Life in Possession and Remainderman.**]—See *Hickman* v. *Upsall*, col. 324.

[See, in the case of other trusts between mortgagors and mortgagees, **B**, II. 9, post (col. 206).]

—— **Trust in Marriage Settlement for raising Sum for Issue.**]—By settlement of 1786, lands were conveyed to trustees, upon trust to raise 500*l.* for the issue of the marriage, and subject thereto for the husband and his heirs. In 1792 the husband and the trustees joined in demising the lands to B., in consideration of a sum of money paid to the husband, and a bond for 500*l.* given by B. to the trustees; and it was declared that B. should not be liable to be sued for the 500*l.* until the trust vested in the trustees, relative to the 500*l.*, should be executed or spent, pursuant to the settlement of 1786, without effecting or in any way charging or incumbering the lands in the hands of B., his heirs or assigns, or until the husband or his heirs should otherwise discharge and exonerate the lands from the said sum of 500*l.* There was issue of the marriage one child only, a daughter, who married J. S., and died, and J. S. became entitled to the 500*l.* The trustees entered judgment on the bond against B., and in 1812 assigned it to J. S. No part of the principal or interest of the 500*l.* had been paid, or acknowledgment given, since 1812 :—Held, that the demand of J. S. to the 500*l.* was not barred by the Statute of Limitations; that the assignment of the judgment in 1812 to J. S. being a transaction to which the trustee and himself alone were parties merely substituted him in the place of the trustee, and did not discharge the estate from the original trust or vary the rights of the parties to the 500*l.*; and that the trust created by the settlement of 1786, for raising the 500*l.*, was an express trust, and within the 25th section of the 3 & 4 Will. 4, c. 27. *Blair* v. *Nugent*, 3 Jo. & Lat. 659; 9 Ir. Eq. R 400.

Under a marriage settlement, a term was vested in trustees for raising 10,000*l.* for the younger children of the marriage, and, subject thereto, the estates were limited to the first and other sons in tail male. Much more than six years after the 10,000*l.* ought to have been raised and paid, the younger children filed a bill to have that sum raised:—Held, that the relation of trustee and cestui que trust existed between the parties; and, therefore, the Statute of Limitations, which enacts that money to be raised out of land shall not be recoverable but within twenty years next after a right to receive the same shall have accrued to some person capable of giving a receipt for the same, did not apply. *Young* v. *Waterpark* (*Lord*), 13 Sim. 204; 6 Jur. 656. Affirmed, 15 L. J., Ch. 63; 10 Jur. 1.

Where, in a resettlement of a family estate in 1829, and in a subsequent family arrangement of 1851, two previously created terms for 1,000 and 500 years were treated and acknowledged as subsisting, but between the two dates no interest had been paid upon them:—Held, that the Statute of Limitations did not operate, and the sums secured by them were ordered to be raised. *Lawton* v. *Ford*, L. R. 2 Eq. 97; 14 L. T. 320; 14 W. R. 575.

—— **Conveyance by Trustee to Assignee in Bankruptcy.**]—A cestui que trust of real estate under a will was discharged in 1825, under the Insolvent Debtors' Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the estate from the trustee, in trust for the creditors under the bankruptcy:—Held, that it thereby became vested in him upon an express trust, viz. that declared by the will, the benefit of which belonged to the creditors under the insolvency, and that on a bill being filed by the assignee in insolvency in 1853, the statute afforded no defence to the recovery of the estate or the mesne profits. *Sturgis* v. *Morse*, 3 De G. & J. 1.

—— **In respect of Rents.**]—A testator having devised lands to R. and W., as trustees of his will, with power to grant leases of such duration as they should think advisable, directed that W. should receive the rent to be reserved, upon certain trusts. On the death of W., his heir-at-law, H. entered into possession of the whole of the lands:—Held, in a suit for an account by one of the cestuis que trustent of the rent, that H. was an express trustee of the rent within s. 25 of the Statute of Limitations (3 & 4 Will. 4, c. 27), and that the plaintiff was entitled to rely upon the section, although there was an absence of evidence that W. was the surviving trustee of the will. *Smith* v. *Smith*, Ir. R. 10 Eq. 273.

—— **Conveyance for Value within s. 25.**]—To prove a conveyance for value within s. 25, the defendant, who was the eldest son of H., offered in evidence, as proof of a lost deed, a memorial in the registry of deeds office of a deed, to which H., A., M. and G. were parties, whereby H. conveyed the lands to M. and G. upon certain trusts, which were not, however, disclosed by the memorial. It was also proved that in the same year in which the deed bore date a marriage was solemnised between H. and A.; and that H., until his death in 1862, and thenceforward the defendant, had been continuously in possession and in receipt of the rent for their own use and benefit:—Held, that it might be inferred that the lost deed was a settlement executed on the marriage of H. and A., under which H. took a life estate, and the defendant an estate in remainder, and that under it the defendant was a purchaser for value. *Ib.*

Held, also, that the statute began to run in the defendant's favour from the time of the execution of the deed. *Ib.*

—— **Heir-at-Law of Trustee—Pleading.**]—A cestui que trust under a will brought an action against the administratrix and the heir-at-law of the sole trustee, who had died intestate, to make his estate liable for the loss which had accrued to the trust estate owing to a breach of trust committed by him. The Statute of Limitations was not pleaded, and at the trial an account was directed on the footing of the liability of the heir; he raised the defence of the statute on the further consideration:—Held, that the statute should have been pleaded, and that the heir-at-law could not set up the statute in answer to a claim arising out of a breach of trust committed by the person whose estate had descended to him. *Brittlebank* v. *Goodwin* (L. R. 5 Eq. 545) applied. *Burge, In re, Gillard* v. *Lawrenson*, 57 L. T. 364; 52 J. P. 20.

—— **Charge on Land.**]—An express trust of a charge upon land is as much saved from the operation of the 3 & 4 Will. 4, c. 27, as an express

trust of the land itself. *Burrowes* v. *Gore*, 6 H. L. Cas. 907; 4 Jur. (N.S.) 1245; 6 W. R. 699. See also *Att.-Gen.* v. *Davis*, 18 W. R. 1132.

*But see* 37 & 38 Vict. c. 57, s. 10.

—— **Charge not barred by Non-payment by Trustees to Life Tenant.**]—See *M'Carthy* v. *Daunt*, col. 278.

—— **Trustees of Pension Fund.**]—A fund was established at Bombay by the covenanted civil servants of the East India Company serving in that presidency, for granting pensions and annuities to members, their widows and children. By the original articles certain persons were appointed managers, and they were declared to be "the trustees of the fund," and the property was vested in them:—Held, that they were not mere trustees for the association, but trustees properly so called, and that the members of the fund were the beneficiaries, so that the defence of the Statute of Limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards* v. *Warden*, 45 L. J., Ch. 713; 1 App. Cas. 281; 35 L. T. 174—H. L. (E.) Reversing 22 W. R. 669.

—— **Debt from Solicitor to Client.**]—After a dissolution of partnership, by which the continuing partner covenanted to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:—Held, that non-payment of a debt by the continuing partner during the half-year could not be set up against the retiring partner as an answer to the Statute of Limitations. *Watson* v. *Woodman*, 45 L. J., Ch. 57; L. R. 20 Eq. 721; 24 W. R. 47.

Held, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. *Ib.*

—— **Statute not a bar to Claim by Mortgagee against his Solicitor for Balance of Proceeds of Sale.**]—See *Bell, In re, Lake* v. *Bell*, col. 205.

—— **Statute not a bar to Claim by Client against Administrator of Solicitor-Agent for Sum improperly invested.**]—See *Power* v. *Power*, col. 206.

—— **Where Laches, Lapse of Time material.**]—A. devised his real estate to B. charged with the payment of 10,000*l.* each to K. and his nephew C. K. had no nephew C., but had a grand-nephew called C., who was unknown to A. A. died in 1831, and in 1832 C. claimed the legacy from B., who refused to pay it on the ground that C. was not the legatee intended. C. did not again claim. B.'s heir (on whom the estate descended) by his will created an express trust "for the payment of all charges or claims then existing" on the estate, and died before 1851. In 1869 the personal representative of C. (although previously for years in possession of the previous correspondence about the legacy) claimed the 10,000*l.* from the person then in possession of the lands charged, subject to the last-mentioned trusts:—Held, that the claim was barred by lapse of time and C.'s knowledge or means of knowledge of his rights, notwithstanding the express trust. *Carey* v. *Cuthbert*, Ir. R. 7 Eq. 542; 22 W. R. 249. Affirmed in H. L., Ir. R. 9 Eq. 330.

The doctrine that where there is an express trust lapse of time is not material does not apply where there has been gross laches on the part of the cestui que trust. *Bright* v. *Legerton*, 2 De G. F. & J. 606; 8 W. R. 678.

The Statute of Limitations does not apply to an express trust for a legacy, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, equity will, when enforcing it, apply as to interest on the legacy, the principle of the statute. *Thompson* v. *Eastwood*, 2 App. Cas. 215.

A will, in 1807, began thus: "I appoint my after-named executor, Charles E., my youngest brother, to be trustee for the following legacies." Several were then named, and the will went on, "considering that money will be more essential to my dear brother, Samuel E., than a distant possession of land, I bequeath to Samuel E. during his natural life the interest of 3,000*l.*, and after his death to his eldest son, James E., by his last wife, Margaret J., or M., or E., till he attains twenty-one, and then to obtain the principal. I order that my youngest brother Charles E. shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also pay my legacies when regularly due, and all expenses; and to enable him to do all this, I bequeath unconditionally to him all my estates and landed property, with all emoluments belonging to them, in the county of Armagh. I also bequeath to him, the said Charles, all my estates, &c., with all their emoluments, in the county of Louth, or elsewhere":—Held, that the will constituted an express trust, so as to prevent the statute applying to it. *Ib.*

But, there having been no proceedings taken until 1872 with the direct purpose of enforcing payment of the legacy (though other proceedings connected with the will had been going on), and the estates having passed into the hands of the representatives of the original trustee, the interest on the legacy was directed to be calculated only from six years before filing the bill. *Ib.*

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity the general rule is that stale demands are not to be encouraged. *M'Donnel* v. *White*, 11 H. L. Cas. 271.

—— **Cestui que Trust's Representatives suing Trustee's—Delay in proceeding with Action.**]—See *Dickinson* v. *Holland*, col. 32. *See also* as to lapse of time affecting express trusts, under WAIVER AND ACQUIESCENCE.

—— **Not expressed by any Deed.**]—Express trusts within s. 25 are not confined to trusts expressed by deed, but cover a case where property wholly belonging to one party is put in the hands of another for the owner's benefit. *Banner* v. *Berridge*, 50 L. J., Ch. 630; 18 Ch. D. 254; 44 L. T. 680; 29 W. R. 844; 4 Asp., M. C. 420.

Semble, 3 & 4 Will. 4, c. 27, s. 25, is by the effect of the Judicature Act applicable to personal property as well as to land. *Ib.*

—— **Possessory Law of Jamaica—Actual, not constructive, Trusts.**]—See *Beckford* v. *Wade*, col. 152.

—— **Trustee de son tort.**]—With respect to the operation of the Statute of Limitations upon

cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the cestui que trust, and no length of such possession will bar. If a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered. *Hovenden* v. *Annesley*, 2 Sch. & Lef. 633; 9 R. R. 119.

Where a trust is created by the act of parties, no time is a bar to relief; but where there is no trust, except such as is created by a decree of the court, on setting aside the transaction, time runs from the discovery of circumstances which constitute the right of relief. *Clanricarde* (*Marquis*) v. *Henning*, 30 Beav. 175; 30 L. J., Ch. 865; 7 Jur. (N.S.) 1113; 5 L. T. 168; 9 W. R. 912.

A trustee de son tort is an express trustee, and the lapse of more than twenty years does not bar a cestui que trust of a fund which has been misapplied of his remedy against such a trustee. *Life Association of Scotland* v. *Siddall*, *Cooper* v. *Greene*, 3 De G. F. & J. 58; 7 Jur. (N.S.) 785; 4 L. T. 311; 9 W. R. 541.

A trustee of real estate devised his real estate to T., subject to the payment of a legacy, so that the trust estate did not pay. T. however acted as trustee:—Held, that she might be deemed a trustee upon express trust, and that the Statute of Limitations was therefore no defence to a claim against her estate in respect of a breach of trust. *Ib.*

T. improperly allowed part of the trust fund to be received by B., the tenant for life. S., one of the reversioners, borrowed money from C., and mortgaged to him her share in the trust funds. B. at the same time gave C. a bond and a mortgage of other property for the same debt, B. being a surety for S. in this transaction. The defendant having been paid out of B.'s estate:—Held, that T.'s representative could not claim to have this payment set off against the claim of S. in respect of the misapplied part of the trust fund. *Ib.*

In 1840 a father left a legacy to his daughter to be paid ten years after his death. In 1847 the executor assigned to her husband certain leaseholds, which formed part of her father's estate, in consideration of the amount of the legacy, the assignee having notice of the trusts of the will. In 1870 the persons entitled to the residuary estate filed a bill against the executor and the assignee of the leaseholds, alleging that the leaseholds had been sold at an under-value, and that the assignee was a party to the breach of trust thus committed, and praying for administration of the trusts of the will, and that the assignment might be set aside:—Held, that the bill was not multifarious. *Pyrah* v. *Woodcock*, 24 L. T. 407; 19 W. R. 463.

Held, also, that the assignee was not an express trustee, so as to bring the case within s. 25 of the 3 & 4 Will. 4, c. 27, the Statute of Limitations. *Ib.*

**Implied Trust.**]—By a will, dated in 1761, a trust was created in favour of a certain class of the testator's relations, nearly all of whom were paid their proportions. The surviving executor and trustee of the testator had the remainder of the funds standing in his name at his death, and by his will he recognised the existence of the trust, and directed that it should devolve upon his nephew. Administration de bonis non was granted in 1822 to the surviving executor's estate, and subsequently to another person in 1826, when the remaining trust fund was mixed up with such administrator's personal estate, and applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy under the original testator's will, charging a breach of trust by the surviving executor, and that his real and personal estate was liable to make good the amount:—Held, that the real estate could not be charged with the legacy; that there was an implied trust created by the will, but the right of the claimants having accrued more than twenty years since, their claim was barred by the Statute of Limitations. *Henderson* v. *Atkins*, 28 L. J., Ch. 913.

A rule that trusts are not within the Statute of Limitations applies only as between trustee and cestui que trust, and will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity. *Townsend* v. *Townsend*, 1 Cox 28; 1 Bro. C. C. 551.

Semble, the Statute of Limitations is no bar to a proof against the estate of a trustee by implication. *Gowers, Ex parte, Seaber, In re*, 3 Mont. & Ayr. 172; 2 Deac. 207; 6 L. J., Bk. 49.

A court of equity will not, after a great lapse of time (as of more than twenty years), and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against a defendant, although the same lapse of time would be no bar to a claim founded upon an express trust. *Portlock* v. *Gardner*, 1 Hare, 594; 11 L. J., Ch. 313; 6 Jur. 795.

A trust implied from mandatory words in a will:—Held, to be barred by adverse possession. *Kingston* v. *Lorton*, 2 Hog. 166.

A. devises K. Lodge and other real estates to trustees in aid of his personal estate; and after said trusts are fulfilled, to convey to B. in fee; and by a codicil recommended B., if he chose to keep the house and demesne at M——, that he should within twelve months make over K. Lodge to the plaintiff. A. died in 1797. The trustees did not sell any part of the real estate, nor was it necessary to resort to it. B. entered on the real estate, and resided at M——, and died seised in 1799, having devised K. Lodge to the defendant, who entered and continued seised from thence to the filing of the bill in 1828. On a bill filed in 1828:—Held, that the words of the codicil were mandatory, but that as they only raised an implied trust, the plaintiff was barred by adverse possession since 1799. *Ib.*

**Persons in wrongful Possession—Purchasers not barred, where Trustee is.**]—A renewable leasehold for lives was vested in A. in trust for B., for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B. for life, remainder to the sons of that marriage in tail, under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name, without noticing the trust; and, after the death of B., D. entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him for a time much beyond the period of

limitation, and more than twenty years before the commencement of a suit by those claiming under C. D., on his marriage, assigned the leasehold to the trustees of his marriage settlement, and it was enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead. There was much ground for believing that the parties had intended the deed to include the leasehold:—Held, firstly, that assuming the possession of D., and those claiming under him, to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement, by D. could, as purchasers, set up the statute. *Petre* v. *Petre*, 1 Drew. 371.

**Separate Use of Married Woman.**]—A father, on the marriage of his son, conveys an equity of redemption on trust for the separate use of son's wife. He afterwards purchases the outstanding mortgage, brings an ejectment, and goes into possession as mortgagee. Son, having separated from his wife, enters, after the death of his father, as his heir-at-law, and twenty years elapse:—Held, he cannot set up the Statute of Limitations against his wife's separate estate. *Booth* v. *Purser*, 1 Ir. Eq. R. 43.

In 1832 M., by will, appointed his daughter and her husband, the defendant, his residuary legatees, and named them respectively his executrix and executor. In 1837, by a codicil, M. bequeathed to her 2,000*l.* for her sole use and benefit. M. died in 1841. The defendant paid all M.'s debts and legacies, except this legacy of 2,000*l.* The legatee died in 1866, indebted to the plaintiff for money lent upon the credit of her separate estate. The plaintiff obtained administration to her, and instituted this suit in 1867, praying a declaration that this will and codicil created a valid trust (binding the defendant) of this legacy for the sole and separate use of the legatee, and to compel payment of the whole 2,000*l.*, or at least of so much as should be necessary to discharge the liabilities affecting her separate estate:—Held, that a trust had been created for the separate use of the legatee, and that the plaintiff's right to enforce it was not barred by the 40th section of the Statute of Limitations. *Hartford* v. *Power*, Ir. R. 2 Eq. 204; 16 W. R. 822.

By the Trustee Act, 1888, s. 8, *the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation.*

**Trusts attaching to Fee acquired under Statute.**]—A., being the owner in fee of estate K. and other estates in Ireland, subject to a mortgage in fee, by a deed of February, 1807, which upon the face of it was for valuable consideration, purported to convey these estates to trustees in fee, upon trust for himself, for life, remainder to his eldest son, B. (then unmarried), for life, remainder to B.'s first and other sons in tail male, &c. In June, 1807, A. and B., by deed, which on the face of it did not appear to be for value, purported to convey estate K. to trustees in fee, upon trust for A. for life, remainder to W., a younger son of A. for life, remainder to W.'s first and other sons in tail male, thereby, in effect, treating the previous deed as cancelled. A. died in 1808, when W. entered into possession of estate K., and either he or the appellant J., his eldest son, had remained in possession ever since. In 1811 the mortgage was paid off by B., and the legal fee in estate K. was conveyed to him. In 1815 W. married, upon which occasion estate K. was made the subject of settlement. In 1837 B. died, leaving the respondent, J. B., his eldest son, his heir-at-law and in tail. In 1844 J. B. claimed estate K. under the deed of February, 1807, and brought his ejectment against J., but failed, the judge who tried the case being of opinion, and so directing the jury, that the plaintiff was barred by the Statute of Limitations and the twenty years' possession of the defendant. J. B. then brought his suit in equity to obtain possession of estate K., and that the reconveyance of the legal fee in 1811 might be declared to have been obtained by B. as a trustee for the parties claiming under the deed of February, 1807:—Held (agreeing with the court below that the deed of February, 1807, should be treated as a deed for value, and that of June, 1807, as not for value), that the fee acquired under the Statute of Limitations did not create any bar in this case, for that the possession of W. and his son was to be treated exactly in the same way as if he had obtained the legal fee by conveyance, in which case the trusts of the deed of February, 1807, would have attached. *Scott* v. *Scott*, 18 Jur. 755.

**Fund given by Deed and Will to pay Bond when called on—No Trust created.**]—A bond was executed in favour of the Bank of England by B. in 1813. In 1823, B. made a voluntary settlement of his property, giving certain funds to trustees in trust to pay thereout the principal and interest due on the bond when and as B. should be required to pay the same. B. died in 1828, and the trust funds subsequently became the property of E. E., by her will made in 1869, gave certain funds to trustees in trust to pay the principal and interest due on the bond when, and if, the trustees of the deed of 1823 should be called on to pay the same, and subject thereto as therein mentioned. The bank was unaware of being entitled till 1870, and no claim was made by them under the bond:—Held, that no trust for the bank was created by the deed or will, and that the only person who could call on the trustees to pay was B.; the claim, therefore, was barred by the Statute of Limitations. *Henriques* v. *Bensusan*, 20 W. R 350.

**Marriage Settlement—Sum secured by Bond—Action by Trustees.**]—By a marriage settlement, personal estate belonging to the lady was vested in trustees for the husband for life, remainder to the wife for life, remainder to the children of the marriage, with remainders over. Part of the settled fund was a bond to secure a sum of money lent by the lady to her intended husband, conditioned for repayment by him, with 5*l.* per cent. interest, in six months, if he should be called upon to do so. There were no children of the marriage. Neither principal nor interest was ever paid by the husband, or by the wife, who was his executrix:—Held, that after more than twenty years from the date of the bond, the representative of the trustees was entitled to enforce payment of the sum secured by the bond.

*Mills* v. *Borthwick*, 35 L. J., Ch. 31; 11 Jur. (N.S.) 558; 12 L. T. 600; 13 W. R. 707.

—— **Recital that Sum agreed to be settled had been paid to Trustee—Covenant to pay future Sum—Settlor constituting himself Trustee.**]—By a post-nuptial settlement dated in 1814, made in pursuance of an ante-nuptial agreement, after reciting that the husband had agreed to settle 1,000*l.* in manner thereinafter mentioned, and to enter into the covenants thereinafter contained, and reciting that this sum had been paid to G., it was witnessed that G. covenanted with the settlor that he would hold that sum upon trust, with the approbation of the settlor, to invest it, in the joint names of the settlor and himself, either in the public funds or in government or real securities, and would hold the trust funds and securities upon trust for the settlor and his wife during their respective lives, and after their death upon trust for the benefit of their children; and the settlor covenanted that he would at the expiration of twelve months pay to G. another sum of 1,000*l.*, to be held by him upon the same trusts as the first sum. G. died in 1821, and the settlor having survived his wife, died in 1868. Neither of the sums was really paid to G., or invested in the joint names of G. and the settlor:—Held, first, that the settlor had constituted himself a trustee of the first sum, and that his estate was liable for his breach of trust in not seeing that it was invested, notwithstanding the Statute of Limitations. *Stone* v. *Stone*, 39 L. J., Ch. 196; L. R. 5 Ch. 74; 22 L. T. 182; 18 W. R. 225.

Held, secondly, that as to the second sum, the settlor was in a position of a simple covenantor, and that the remedy of the claimants for his breach of the covenant was barred by the statute. *Ib.*

By a marriage settlement, dated in 1828, A. covenanted to transfer a sum of stock belonging to him to trustees, upon trust to pay the dividends to himself for life, and then upon trusts for the benefit of the intended wife and the issue of the marriage. The stock was not transferred:—Held, that A. was not a trustee of it within the exception of the Statute of Limitations, but that it was a debt from him, and that, notwithstanding his life interest, time began to run against this debt from the execution of the settlement. *Spickernell* v. *Hotham*, 1 Kay, 669; 2 W. R. 638.

**Money due from Receiver.**]—A sum of money due from a receiver, whether the amount had been ascertained or not:—Held, so long as the recognizance exists, to be a debt of record. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

The receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed, and the recognizances vacated. *Ib.*

**Charities.**]—Charities are trusts, and are, as such, within the operation of s. 25 of 3 & 4 Will. 4, c. 27. *Magdalen College, Oxford* v. *Att.-Gen.*, 6 H. L. Cas. 189; 26 L. J., Ch. 620; 3 Jur. (N.S.) 675.

Where the attorney-general, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred. *Ib.*

Testator devised lands to trustees, and their heirs upon trust to grant and convey the same to the use of J. W. for life, subject nevertheless to and charged with four annuities, to commence upon the death of X., three of which were to be paid to three different charitable institutions, two of them being corporate bodies, and the fourth to the poor of a parish, and after the death of J. W., subject to the annuities, to the use of his first and other sons in tail; and he directed said several annuities to be paid (not saying by whom) on the days therein mentioned, and expressly charged his estate with the same. X. died more than twenty years before the filing of the bill to establish the charitable devises, and no payment or other satisfaction was ever made on behalf of the annuities. No conveyance had been executed by the trustees, but J. W. had, since the death of the testator, been in possession of the estates, and he and his eldest son suffered a recovery and resettled them:—Held, that the right to recover the annuities was not barred by the 3 & 4 Will. 4, c. 27, the trust for the charities being an express one, within the meaning of the 25th section of that act. Charities are, equally with other trusts, within the operation of the 3 & 4 Will. 4, c. 27. *Commissioners of Charitable Donations* v. *Wybrants*, 2 Jo. & Lat. 182; 7 Ir. Eq. R. 580.

An express trust to support a curate for a chapel out of the profits of certain premises is not barred by the statute as against the heir-at-law of one taking the premises with notice of the trust. *Att.-Gen.* v. *Davis*, 18 W. R. 1132.

**Grant subject to Charge, not a Trust.**]—Granting an estate to a man to hold, "subject to" a charge, does not make the grantee a trustee, so as to prevent the bar of the Statute of Limitations. *Hughes* v. *Kelly*, 2 Con. & L. 223; 3 Dr. & War. 482; 5 Ir. Eq. R. 286.

Where, in execution of power, cestui que trust appoints trustees to convey to use of A., and charges estate with annuities: it is a conveyance of the legal estate to A. and not a trust, so that length of time will run against annuities if not demanded. *Weston* v. *Bowes*, 9 Mod. 309.

**Failure of Consideration for Surrender of Copyhold—Surrenderee a Trustee.**]—In consideration of a marriage intended to be had betwixt two copyholders, the man surrenders his copyhold to the use of himself and his intended wife, and the survivor of them; and the woman, in like manner, surrenders her copyhold to the like use. The man dies before any marriage had; the woman enters and enjoys for thirty years: declared a trust, and the re-surrender and account of profits decreed. *Hamond* v. *Hicks*, 1 Vern. 432.

**Company taking Land under Statutory Powers—Neglect to pay Purchase-money into Court—Trustee for true Owner.**]—A canal company, under the powers of their acts, took possession of common lands in 1812, under a contract with A., whose title was then doubtful, but did not pay the purchase-money into court as they were bound to do in such case; by an award made in 1837 under an inclosure act, A. was first ascertained to be the true owner, when he commenced proceedings for the purchase-money:—Held, that he was not barred by the lapse of time, the company standing in the character of trustees for the true owners when ascertained.

*Cator* v. *Croydon Canal Co.*, 4 Y. & Coll. 405; 13 L. J., Ch. 89; 8 Jur. 277.

Where a trustee admits that the trust-money has not been paid, but that it has remained for a length of time in his hands, quære, whether any length of time will operate as a bar to the lawful claimant in a court of equity. *Ib.*

**Whether Trust of Purchase-money for Vendor is only Constructive.**]—Quære, whether from the relation existing between the vendor and purchaser of land, constituting the purchaser a trustee of the purchase-money for the vendor, there arises any other than a constructive trust, as to which the relief in equity by analogy to the Statute of Limitations will be barred by long acquiescence. *Toft* v. *Stephenson*, 7 Hare, 1. See *S. C.* on appeal, 1 De G. M. & G. 28; 21 L. J., Ch. 129; 15 Jur. 1187.

**Person holding under Agreement to Purchase—No express Trust.**]—See *Doe* d. *Stanway* v. *Rock*, col. 228.

**Borrowing Trust-money as such.**]—In 1825 A. borrowed from the executors in trust of a will a fund which was thereby bequeathed to them, in trust for himself for life, and then for other persons, and gave to them a promissory note for the repayment of this sum to them as "executors in trust," with lawful interest:—Held, that A. borrowed the fund and promised to repay it as trust-money, and therefore that lapse of time was no bar to the claim against him for repayment. *Spickernell* v. *Hotham*, 1 Kay, 669; 2 W. R. 638.

**Loan by Trustees to Husband on his Bond under Power in Settlement—Trust-money.**]—A husband, under a power in his marriage settlement, had 1,000*l.* advanced to him by the trustees, secured by his bond, payable at his death. He died intestate, and all his debts being paid but the bond, a reversionary sum of 1,600*l.* fell into the estate. The representative of the intestate's father and the intestate's widow were the only parties entitled to his estate, and the trustees of the settlement, having given notice to such representative of the bond debt and the 1,600*l.* assets, which, in another suit, were ordered to be paid to the widow, he (the father's representative) filed a bill against the widow, claiming the 1,600*l.*, as against the trustees, on the ground that they were barred by the Statute of Limitations, not having proved under a decree in the suit in which it was dealt with, and the bond having fallen due twenty-seven years previously:—Held, that the 1,000*l.* was trust money, and the statute was no bar; that the widow could retain the 1,600*l.* against creditors and next of kin, and the plaintiff must pay the costs. *Coxwell* v. *Franklinsky*, 11 L. T. 153; 12 W. R. 1072.

Bill by a cestui que trust under a marriage settlement stated, that in and prior to 1827 trustees of a marriage settlement, under a power, lent to the husband, on his bond, moneys held in trust for the wife for life, and after her decease, for her appointees; the death of the wife in 1861; an appointment to the plaintiff; that there were no trustees of the settlement; that no payment, either of principal or interest, had ever been made by the husband, and prayed an account of principal and interest and payment. Demurrer, on the ground that the debt was barred by the Statute of Limitations, overruled with costs. *Jenner* v. *Ackerman*, 10 Jur. (N.S.) 465; 10 L. T. 328.

**Bonds vested in Trustees of Marriage Settlement—Trusts for benefit of Children—Right of Children to sue on Bonds, though Obligees barred.**]—In 1806 bonds for payment of money were given by B., with warrants of attorney to confess judgment. The conditions were, to pay the principal upon the death of B., with interest on the first bond from the day of its date, and on the latter from the day of the death of the obligor. The obligees were T., a son of the obligor, and C., in whom the bonds were vested as trustees of the marriage settlement of G., upon trusts for the benefit of the children of the marriage. In 1807 the real estates of B. were settled upon T., one of the obligees, subject to a term of 300 years for raising 5,000*l.*, which was to be applied in satisfying a debt, and the remainder was to go towards payment of "judgment and specialty debts then owing by B." The obligor died in 1816, leaving his son T. his executor, who survived his co-trustee C., and died in 1836. On the death of B., T. came into possession of the estates. On a bill filed by the children of G. against B. and his children, who were entitled to the estates subject to the term, and also against the owners of the term, praying for an account, and payment of the amount due on the bonds, and that the same might be decreed to be well charged on the lands included in the term:—Held, that the bonds did not come within the description of "judgment and specialty debts now due and owing," and therefore were not a charge upon the estate subject to the term, but that the children of G. were entitled to be paid out of the general assets of the obligor, of which the money to be raised by the term formed part. *Burrowes* v. *Gore*, 6 H. L. Cas. 907; 4 Jur. (N.S.) 1245; 6 W. R. 699.

Held, also, that the Statute of Limitations was no bar to the right of the cestuis que trustent, the children of G., to sue upon the bonds, although the obligees were barred, inasmuch as B. was their trustee, and his was the hand to pay and the hand to receive. *Ib.*

T. being the trustee of the bonds and the personal representative of B., the right of the cestui que trust did not accrue until the death of G. in 1846, and therefore the statute did not apply. *Ib.*

**Misapplication of Trust Fund by Tenant for Life—Claim against Tenant for Life's Estate by Executor of Remainderman.**]—By a marriage settlement made in 1821, stock belonging to the wife was assigned to B. and another, upon trust for the separate use of the wife for life, with remainder for the husband for life, with remainder, in default of children of the marriage, for B. The trustees neglected to have the stock transferred to them, and it remained in the name of the wife, and in 1822 the husband sold it, and possessed himself of the proceeds. B. died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866 B.'s executors claimed the trust fund from the husband's estate:—Held, that their claim was not barred by the Statute of Limitations, or by acquiescence, or by the fact that B. was one of the trustees whose negligence rendered the misapplication of the trust fund possible. *Butler*

v. *Carter*, L. R. 5 Eq. 276; 18 L. T. 11; 16 W. R. 388.

**Claim for Breach of Trust against Representatives of deceased Trustee.**]—A trustee can never be heard to set up the defence of the Statute of Limitations to a claim by his cestui que trust in respect of a breach of trust, and after his death those who take his assets as volunteers must answer to the extent of the assets they take, just as he would, if living, have been bound to answer. *Brittlebank* v. *Goodwin*, 37 L. J., Ch. 377; L. R. 5 Eq. 545; 16 W. R. 696.

The liability in such cases does not depend on any new assumpsit, but originates from, and depends entirely on, the liability of the testator or intestate; it is a liability simply as representing the testator or intestate in respect of his property. *Ib.*

**Covenant by Husband to settle after-acquired Property—Sum paid by Administrator of an Intestate, with Notice of Covenant, to Husband—Action by Trustee of Settlement.**]—In his marriage settlement, a husband covenanted that any after-acquired property, exceeding 200*l.*, should be settled in the same manner as certain sums therein mentioned. The husband, as next of kin, became, in 1848, entitled to a sum exceeding the above amount, and he induced the administrator, who had notice of the trust, to pay the whole to him, the wife consenting and signing a memorandum at the time. The husband died in January, 1862, and in December following the surviving trustee of the settlement, in conjunction with the widow, filed a bill for a declaration that the estate of the administrator (he having died in 1853) was, in the hands of his representative, liable to make good the sum paid to the husband; and the court held that the widow was entitled to have raised out of the real estate of the administrator (his personal estate having been fully administered) a sum sufficient to provide her an annuity equal to the interest of the misapplied fund; and that the right of the trustee of the settlement to sue was not barred by the Statute of Limitations. *Cresswell* v. *Dewell*, 10 Jur. (N.S.) 354; 10 L. T. 22; 12 W. R. 123; 3 N. R. 148.

**Trustee's Assigns.**]—A person who has taken a conveyance from a trustee, cannot shelter himself under a plea of the Statute of Limitations. *Boteler* v. *Allington*, 3 Atk. 459.

**Time runs after Purchase from a Trustee, unless from a mere Trustee on express Trusts.**]—See *Thompson* v. *Simpson*, col. 229.

**Executors setting up Statute as Bar to Claim for Devastavit—Trustees for Creditors.**]—See *Hyatt, In re*; *Marsden, In re*; and *Gale, In re*, cols. 51, 52.

**Acknowledgment by Executors, who are also Trustees of Realty, not necessarily binding on Realty.**]—See *Fordham* v. *Wallis*, col. 134.

**Agent continuing to receive Rents after Owner's Death, Trustee for Heir.**]—See *Lyell* v. *Kennedy*, col. 204.

**Title to Share of Lands barred by the Statute, as against Purchaser for Value, notwithstanding executory Trust.**]—See *Stewart* v. *Conyngham*, col. 230.

**Discretionary Trust for Benefit of Infant in undivided Share of Estate—Statute does not run against Infant in favour of Purchaser with Notice.**]—See *Young* v. *Harris*, col. 245.

**Acknowledgment by One of Two Trustees, who are joint Mortgagees, will not keep alive Equity of Redemption.**]—See *Richardson* v. *Younge*, col. 290.

**Admission of Debt by Devisees in Trust of Debtor.**]—See *Blair* v. *Nugent*, col. 299; *Francis* v. *Grover*; and *St. John* v. *Boughton*, col. 284.

### 8. Principal and Agent.

*See also* ante, **A**, IV. 12 (col. 64).

**Receipt of Rents by Agent—Possession of Agent Possession of Principal.**]—During the life of D., owner in fee of land which was let to tenants from year to year and week to week, the property was managed by the defendant as her agent, the defendant receiving the rents and paying them into a separate ear-marked account at his own bank. D. having died intestate in 1867, the defendant continued to receive the rents and pay them into the bank exactly as before, not informing the tenants of D.'s death, but stating to several persons that he was acting as agent and receiver for the true heir whoever he might be. The defendant thus acted till 1880, when, more than twelve years having elapsed after D.'s death, he claimed the property on his own account. The assignee of D.'s heir having in 1881 brought an action against the defendant to recover possession of the land and for an account of the rents and profits:—Held, that as to the land the acts of the defendant in receiving the rents as agent for the heir could not dispossess the heir so as to put him to his action under ss. 2 & 3 or s. 8 of 3 & 4 Will. 4, c. 27; that the defendant's acts as such agent though unauthorised might be ratified by the true owner, and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained; that as to the accumulated rents and profits the defendant had made himself a trustee; that the action was not barred by the Statute of Limitations; and that the plaintiff was entitled to judgment for the recovery of possession of the land and to an account of the rents and profits since D.'s death. *Lyell* v. *Kennedy*, 59 L. J., Q. B. 268; 14 App. Cas. 437; 62 L. T. 77; 38 W. R. 353—H. L. (E.)

The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams* v. *Pott*, 40 L. J., Ch. 775; L. R. 12 Eq. 149.

So long as an agent is in receipt of the rent of land, the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 3, will not run against his employer; and if a person commences to receive rents as the agent for another, and afterwards continues to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shewn. *Smith* v. *Bennett*, 30 L. T. 100.

**Statute runs in favour of Agent continuing in Possession after Bankruptcy of Principal.**]—See *Markwick* v. *Hardingham*, col. 227.

**Presumption against Agent's Possession being Adverse.**]—See *Att.-Gen.* v. *London*, col. 260.

**Yearly Tenant paying Rent to Agent under Belief he is Owner's Agent—Ratification by Owner.**]—See *McAuliffe* v. *Fitzsimons*, col. 260.

**Entry into Possession of Brother's Property on his Death treated as Possession as Bailiff for Infant Heir.**]—See *Pelley* v. *Bascombe*, col. 272.

**So, Father's Possession of Infant Son's Property.**]—See *Tinker* v. *Rodwell*, and *Hobbs*, *In re*, col. 251; and *Thomas* v. *Thomas*, col. 272.

**Money received by Agent in Fiduciary Capacity—Solicitor and Client.**]—In 1868, upon the death of the mortgagor, the mortgaged property was sold by A., the mortgagee, under the power of sale contained in the mortgage deed. The balance of the proceeds after payment of the mortgage debt was retained by B., who in effecting the mortgages, had acted as solicitor for both parties, and conducted the sale on behalf of A. The power of sale in the mortgage deed contained the usual provision that the surplus proceeds should be paid to the mortgagor, his heirs, or assigns. The mortgagor had died unmarried and intestate, and being illegitimate left no next of kin. Administration had not been taken out to him. A. died in 1877, having left all his property to his widow C., whom he appointed his executrix. C. died in 1878, having appointed B. and R. her executors. Upon the death of B. in 1881, R., as being through C. the legal personal representative of A., claimed as against B.'s estate the balance of the proceeds of the sale in 1868 of the mortgaged property:—Held, that B., having received this balance in a fiduciary character as agent for A., and with full knowledge that A. was an express trustee of the balance for the mortgagor, and, in the circumstances, liable to a claim by the crown, had brought himself within the principle of *Burdick* v. *Garrick* (L. R. 5 Ch. 233), and, accordingly, that the Statute of Limitations could not be set up as a bar to the claim. *Bell*, *In re*, *Lake* v. *Bell*, 56 L. J., Ch. 307; 34 Ch. D. 462; 55 L. T. 757; 35 W. R. 212.

P., who was a solicitor, had acted as agent for the late husband of M. in several matters of business, including investments of money. P. collected the personal estate, and received large sums on foot of it. He acted not only as solicitor, but as general agent for M., and furnished her with accounts of his receipts and disbursements. While acting as agent for M. in 1871, P. invested 1,500*l.* on a mortgage to H., upon security which proved to be worthless. There was no evidence that P. was authorised to lend on this or on any special security. P. acted as solicitor both for M. and H. in the matter of the loan. The interest was paid for some years on the 1,500*l.*, but afterwards H. ceased to pay any interest. Proceedings were undertaken, and expenses incurred by M. in endeavouring to realise the security, which proved fruitless. Upon P.'s death M. claimed as a creditor in an administration action the sum of 1,500*l.*, arrears of interest, and the costs of the proceedings taken by her to realise her security:—Held, that there was a fiduciary relation between the parties, which precluded the personal representative of P. from relying on the Statute of Limitations, and that M. was entitled to reject the investment and to insist on the disallowance of the 1,500*l.* credit in P.'s account. *Power* v. *Power*, 13 L. R., Ir. 281.

**Cestui que Trust managing Estate for Trustee, Agent, not Tenant-at-Will.**]—See *Melling* v. *Leak*, col. 181.

### 9. Mortgagor and Mortgagee.

*See also* post, **B**, V. (col. 273), and **B**, XI. (col. 322).

By 37 & 38 Vict. c. 57, s. 7 (amending 3 & 4 Will. 4, c. 27, s. 28), *a mortgagor shall not bring an action to redeem after twelve years from the mortgagee's obtaining possession or signing a written acknowledgment of the mortgagor's title. By s.* 8 *(amending* 3 *&* 4 *Will.* 4, *c.* 27, *s.* 40*), no action shall be brought to recover any sum secured by a mortgage, but within twelve years after the right to receive the same has accrued or after a part-payment of principal or interest or an acknowledgment. By s.* 9 *(amending* 7 *Will.* 4 *&* 1 *Vict. c.* 28*), a mortgagee or person claiming under any mortgage may recover the land within twelve years from the last payment of any part of the principal and interest, though more than twelve years have elapsed since the right of action accrued.*

**Possession not Adverse to Mortgagee at Passing of Act—Foreclosure Action—When Time runs against—Equity of Redemption in Settlement.**]—A mortgage was executed in 1802, and in 1812, the mortgagor, upon his marriage, settled the equity of redemption upon himself for life, remainder to trustees for a term of years to secure a jointure for his wife, and portions for his younger children, remainder to his first and other sons in tail. That settlement was never registered; and the mortgagee shortly after its execution filed a bill of foreclosure against the mortgagor alone, and obtained a decree of sequestration against him. The mortgagee's representative revived the suit, and in September, 1830, got a receiver appointed, who received the rents of part of the mortgaged lands. The mortgagor died in February, 1833, and a bill of revivor was filed against his eldest son, as heir, who allowed a decree on sequestration to pass against him, an account to be taken under that decree, and a final decree to be obtained without opposition. A conditional order for an attachment was obtained against him for not bringing in the title-deeds, and he filed an affidavit stating the settlement. The mortgagee's representative filed a supplemental bill against the widow and younger children in May, 1838, to carry the decree into execution:—Held, that the possession was not adverse to the mortgagee when the 3 & 4 Will. 4, c. 27, passed; that the 15th section of that act, taken in connection with the subsequent act, 7 Will. 4 & 1 Vict. c. 28, s. 1, gave to the mortgagee the right to file a bill of foreclosure, within five years from the passing of the first act. *Wrixon* v. *Vize*, 5 Ir. Eq. R. 173; 3 Dr. & War. 104; 2 Con. & L. 138.

A bill of foreclosure is not a suit for the recovery of money charged on land, within the 40th section of the act 3 & 4 Will. 4, c. 27; but is within the 24th section. *Ib.*

The 24th section of that act applies as well to mortgagees of the legal estate, as to those of the equitable estate. *Ib.*

A bill of foreclosure is not a suit in equity for the recovery of the money charged upon land, although it may lead to that, but it is in effect a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate. Quære, therefore, as to *Dearman* v. *Wyche* (9 Sim. 570). *Ib.*

The right to file a bill of foreclosure whether the mortgage be legal or equitable falls within the 3 & 4 Will. 4, c. 27, s. 24, and the 7 Will. 4 & 1 Vict. c. 28, and the time is governed by the legal right of the party to bring an action, or, if he have not the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one. *Ib.*

Semble, an adjudication of a court of equity would save the right from being barred by the statute, and the court would restrain the party from setting up the statute at law. *Ib.*

Where an equity of redemption is put in settlement, though the tenant for life is the party bound to pay the interest upon the mortgage, yet the mere laches of the mortgagee to demand such interest from the tenant for life will not prejudice his claim against those in remainder. *Ib.*

D. mortgaged land in fee to J., subject to a proviso of cessor, upon payment of the money secured, upon a day more than twenty years before the passing of the 3 & 4 Will. 4, c. 27. Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment by the heir of J., within five years after the passing of the statute, the jury found that the mortgage money was unpaid:—Held, that the ejectment was not barred by s. 2, D.'s possession not being adverse at the time of passing the statute; and, therefore, the heir of J. had, by s. 15, five years from that time to bring the action, though no proof was given that he had been in possession, or received rent or interest. *Doe* d. *Jones* v. *Williams*, 6 N. & M. 816; 5 A. & E. 291; 2 H. & W. 213; 5 L. J., K. B. 231.

It was doubted whether ss. 2 & 3 of 3 & 4 Will. 4, c. 27, comprehended the case of a mortgagee so as to render it necessary for him to bring an ejectment within twenty years from the day of default made in the payment of the mortgage-money. *Ib.* *See now* Littledale's Act (7 Will. 4 & 1 Vict. c. 28), amended by Real Property Limitation Act, 1874, s. 9.

**Before the Statute.**]—Where A. mortgaged his premises in fee to B., with a proviso for redemption on payment of the mortgage money on a given day; but A. continued in possession until his death, after which C., his son and heir, and his widow, continued in possession until the death of the latter, when C. conveyed the premises in fee to D., who levied a fine with proclamations, and entered into possession; on an ejectment being brought by E., the heir-at-law of B., the original mortgagee, and a special verdict finding as a fact the nonpayment of the mortgage debt on the given day, without finding either an adverse possession by A. or his heir, or that interest had been paid upon the mortgage-money by the mortgagor:—Held, that though there had been a lapse of thirty-seven years since default in payment of the principal, the 21 Jac. 1, c. 16, was no bar to the ejectment, and, consequently, that the mortgagee was not precluded thereby. *Hall* v. *Doe* d. *Surtees*, 1 D. & R. 340; 5 B. & Ald. 687; 24 R. R. 529.

**Retrospective Operation of Statute—Acknowledgment by Mortgagee in Transfer without Privity of Mortgagor.**]—In 1816, a mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises; and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833, 3 & 4 Will. 4, c. 27, was passed. In 1845, the representative of the mortgagor filed a bill for redemption against the representatives of the second transferee:—Held, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828; and that the suit (as to that estate) was therefore barred. *Batchelor* v. *Middleton*, 6 Hare, 75.

**When Mortgagor barred in Isle of Man, prior to Statute.**]—Held, that before the passing of the 3 Will. 4, c. 27, which applies to the Isle of Man, the equity of redemption of lands there was, under the Act of Tynwald, of 1703, called the Act of Settlement, barred by the lapse of twenty-one years from the date of the mortgage, though the mortgagor had remained in possession and paid interest of the mortgage debt. *Christian* v. *Goldie*, 2 Moore, P. C. 226.

**Person claiming under a Mortgage, who is.**]—In 1821, N., being seised in fee of land, leased it to W. In 1822, W. mortgaged it for a term of years. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the plaintiff claimed:—Held, that the plaintiff was a person claiming under a mortgage within 7 Will. 4 & 1 Vict. c. 28, and therefore might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession. *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434; 15 Jur. 1031. Questioned in *Thornton* v. *France*, infra. Cf. judgment in *Heath* v. *Pugh*, 6 Q. B. D. 345.

An owner in fee of land, prior to mortgaging it for a term of years put A. into possession. A. occupied for twenty-five years without payment of rent or a written acknowledgment of the mortgagor's title. A. then conveyed in fee to the plaintiff, and after attorning to him as his tenant gave up possession for a sum of money to B., the representative of the mortgagor, and to C., the executor of the mortgagee (whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants:—Held, in ejectment, that the defendants were persons claiming under a mortgage within 7 Will. 4 & 1 Vict. c. 28, and consequently that the 3 & 4 Will. 4, c. 27, did not operate to bar their title. *Ford* v. *Ager*, 2 H. & C. 279; 32 L. J., Ex. 269; 9 Jur. (N.S.) 804; 8 L. T. 546; 11 W. R. 1073.

An undivided moiety of real property was in 1875 conveyed to a purchaser, who never entered into possession or into receipt of the rents and

profits thereof. In 1886 the purchaser mortgaged his estate in the property to a mortgagee, and in 1890 sold the equity of redemption to the plaintiff, who subsequently paid off the mortgage:—Held, in an action for partition of the property against the owners of the other moiety who had been by themselves and their predecessors in title in separate possession of the property continuously, since 1875, for sixty years, that, as the equitable title of the plaintiff had been barred by s. 24 of the Real Property Limitation Act, 1833, before he paid off the mortgage, he was not a person claiming under a mortgage of land within the meaning of the Real Property Limitation Act, 1837. *Thornton* v. *France*, 66 L. J., Q. B. 705; [1897] 2 Q. B. 143; 77 L. T. 38; 46 W. R. 56—C. A.

The Real Property Limitation Act, 1837, does not confer a new right of entry on a mortgagee when at the time of making the mortgage some person is in possession of the mortgaged property holding adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor. *Ib.*

**Mortgagor's Right to Redeem, and to surplus Proceeds on Sale, barred, notwithstanding Trust in Mortgage.**]—A mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favour of the mortgagor within 3 & 4 Will. 4, c. 27, s. 25. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113.

Under such a mortgage the only right of the mortgagor is to redeem, and he cannot file a bill for a sale. The only right of the mortgagee is to have the property sold, and he is not entitled to foreclose. *Ib.*

The mortgagor's right to redeem under such a mortgage is barred by twenty years' possession by the mortgagee without any acknowledgment of the mortgagor's title. *Ib.*

Where twenty years have elapsed from entry by a mortgagee, and there has been no subsequent acknowledgment, the mortgagor's right of redemption becomes extinct, under the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 28, 34); and if in such a case the mortgage deed contained a power of sale with a trust of surplus proceeds for the mortgagor and his representatives, and that power of sale has not been exercised within the twenty years from entry by the mortgagee, the trust of surplus proceeds becomes equally extinct, and cannot be enforced with respect to surplus proceeds resulting from a subsequent sale. *Chapman* v. *Corpe*, 41 L. T. 22; 27 W. R. 781.

**Mortgagee in Possession Twenty Years—Good Title to Sell—Mortgagor no Right to Surplus.**]—A security for money lent was made in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than twenty years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount then due for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited:—Held, that such a security is simply a mortgage; also that a mortgagee who has been in possession for more than twenty years may make a title and convey under his power of sale. *Alison, In re, Johnson* v. *Mounsey*, 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537.

Held, also, that the devisees in trust could only convey as owners in fee, and that the mortgagors had no right to the surplus of the purchase-money. *Ib.*

**Mortgagor's Right to Redeem—Whether preserved as to Whole by Possession of Part.**]—Redemption of a mortgage not barred by length of time, unless the mortgagee has had twenty years' uninterrupted adverse possession of the entire of the mortgaged premises; therefore, redemption decreed where mortgagee eighty years in possession of part only of the mortgaged premises, the mortgagor continuing in possession of the remainder. *Burke* v. *Lynch*, 2 Ball & B. 426. *See* next case.

The rule that prevailed prior to the Statute of Limitations (3 & 4 Will. 4, c. 27), that no lapse of time barred the right of a mortgagor of lands to redeem the whole, provided he held possession of part (*Rakestraw* v. *Brayer*, Select Cas. in Ch. 55; Moseley, 189), has been abolished by s. 28 of the statute. Accordingly, where a mortgagee had been in undisturbed possession of part of the land comprised in the mortgage for upwards of twenty years, the right of the mortgagor to redeem was held to be barred by that section, although he held possession of the remainder of the land. *Kinsman* v. *Rouse*, 50 L. J., Ch. 486; 17 Ch. D. 104; 44 L. T. 597; 29 W. R. 627.

See *Blake* v. *Foster*, col. 212.

—— **Where Mortgagor under Disability.**]—Sect. 1 of the Statute of Limitations (3 & 4 Will. 4, c. 27), saving the rights of persons under disability, such as absence beyond seas, does not apply as between a mortgagor and mortgagee. *Ib.*

See *St. John* v. *Turner*, and *Anon.*, col. 247.

Under the Real Property Limitation Act, 1874, the twelve years' bar to a redemption suit from the time when the mortgagee took possession, or from the last written acknowledgment, is absolute, and not to be extended by reason of any disability of the mortgagor. *Forster* v. *Patterson*, 50 L. J., Ch. 603; 17 Ch. D. 132; 44 L. T. 465; 29 W. R. 463.

**Statute runs in favour of Mortgagee in Possession without accounting; but not if he is also Purchaser of Life Estate in Equity of Redemption.**]—If the mortgagee enters into possession in his character of mortgagee, or by virtue of his mortgage title alone, he is for the period of twenty years liable to account, and, if payment be tendered to him, liable to become trustee for the mortgagor; but, if the mortgagor permits the mortgagee to hold for twenty years without accounting or admitting his mortgage title, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it was previously at law; and, in such a case, the time runs against the mortgagor from the moment the mortgagee takes possession, and continues to run against all those claiming under the mortgagor, whatever may be the disabilities to which they may be subjected. *Raffety* v. *King*, 1 Keen, 601; 6 L. J., Ch. 87.

But if the mortgagee enters, not in his character of mortgagee only, but as purchaser of the

equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes; and if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of a mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of the person or persons entitled in remainder, and time will not run against the remaindermen during the continuance of the estate for life. *Ib.*

A mortgagee in possession for six years, without acknowledgment of the mortgagor's title, purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer:—Held, that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner. *Hyde* v. *Dallaway*, 2 Hare, 528.

Baron and feme, seised in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption, by lease and release, to the mortgagee; the mortgagee remains in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, from whom he had his conveyance; the heir of the wife is not barred of his equity of redemption by lapse of time. *Corbett* v. *Barker*, 3 Anstr. 755; 4 R. R. 856. Reversing 1 Anstr. 138.

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is a tenant, in common with others, of the mortgaged estate. *Wynne* v. *Styan*, 2 Ph. 303.

**Bill to Redeem—Length of Time in Equity.**]—Bill to redeem a mortgage forty years old, Lord K. declared he would not relieve mortgages after twenty years, the Statute of Limitations having confined an entry to that time, unless there be circumstances of incapacity. *White* v. *Ewer*, 2 Vent. 340.

Bill for a redemption; plea of Statute of Limitations allowed, the mortgagee having been thirty years in possession; for length of time is a kind of equitable bar in analogy to the Statute of Limitations. King, Ch., allowed a demurrer in such a case, but Lord Hardwicke thought it would be carrying it too far, as the case would then be out of court, but it was said in this case that defendant should insist upon length of time by his answer, and not by plea. *Aggas* v. *Pickerell*, 3 Atk. 225.

Defendant pleaded forty years' possession, without account or admission of any debt, to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed; the plea was allowed. *Blewitt* v. *Thomas*, 2 Ves. J. 669.

Adverse possession of an equity of redemption for twenty years is a bar. A mortgagee in possession, keeping no account, and making no acknowledgment, becomes owner of the estate after the lapse of twenty years. *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 191; 22 R. R. 99. Affirmed, 4 Bligh, 1; 22 R. R. 83.

Acts done by a trustee or termor for years cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee. *Ib.*

Length of time may bar in equity; twenty years' possession bars an equity of redemption, but no time can cover a fraud. *Pickering* v. *Stamford (Lord)*, 2 Ves. J. 280; 4 Bro. C. C. 214.

See *Alderson* v. *White*, col. 231.

—— **Remainderman.**]—A remote remainderman of an equity of redemption, filing a bill to redeem immediately after his title vested in possession:—Held, not too late to set aside a title founded on a decree made upwards of twenty years, which was fraudulent and void as against him, and the other persons claiming remainders under the will; and length of time no bar. *Blake* v. *Foster*, 2 Ball & B. 387.

The limitation of time to redeem a mortgage is, in equity, in analogy to the Statute of Limitations at law. *Ib.*, 402.

Although it be fraud in taking an account under a decree in a foreclosure cause, not to make the tenant for life keep down the interest on the mortgage, and directing the surplus of the purchase-money to be paid to him, yet a redemption cannot on that ground be decreed to a remainderman; and it was an order of the court for which the purchaser could not be made responsible, and it does not vitiate the purchase, or entitle the remainderman to set aside the sale. When a mortgagor has been permitted to continue in possession of part of the mortgaged premises, he is entitled to a redemption of the entire, although the mortgagee upwards of twenty years in possession of the remainder; but where, by sale of part of the premises, the mortgage has been paid off, and the remainder reconveyed to the mortgagor, he will not, after twenty years, be entitled to redeem the purchase; the mortgagor's title to that part of the premises in his possession not being derived from the mortgage. *Ib.*, 565.

The mortgagor is considered in equity as the owner of the estate, the mortgagee a mere incumbrancer; the limitation of a bill to redeem is borrowed from the statute, and no satisfactory reason can be assigned for rejecting the most important provision in the act, namely, the period from which the adverse possession shall begin to run as against the remainderman. *Ib.*, 575.

If mortgagee enters in lifetime of tenant for life of mortgaged premises, remainderman will be barred of equity of redemption after twenty years from such entry. *Harrison* v. *Hollins*, 1 Sim. & S. 471.

N., in 1790, entered into possession of lands as assignee of mortgages thereof, and purchaser from A., B., C. and D., who were tenants for life of one-fourth each. A. died in 1819, and B. in 1836; the next remaindermen of their shares, who were tenants in tail thereof, filed a bill against the devisees of N. to redeem the premises:—Held, that the plaintiffs were within the terms of, and consequently bound by, the 28th section of the 3 & 4 Will. 4, c. 27:—Held, also, that the provisions of the 28th section are totally independent of those of the 15th section, the latter relating to the title to the lands so affected by the provisions of the preceding section, the former exclusively to mortgagees. *Browne* v. *Cork (Bishop)*, 1 Dr. & Wal. 700.

**Clause restricting Period of Redemption void.**]—Any clause introduced into a mortgage deed

to limit the period of redemption is, in equity, totally disregarded, as the parties cannot, by any such clause, restrict the equity of redemption, for it would be an oppression on the mortgagor. *Goodman* v. *Grierson*, 2 Ball & B. 278; 12 R. R. 82.

**Acknowledgment by Mortgagee to Third Person.**]—Redemption decreed against the heir of mortgagee and a purchaser with notice, upon acknowledgment of the mortgage within twenty years before the bill, in transaction with other persons, not with the heirs of the mortgagor. *Hansard* v. *Hardy*, 18 Ves. 455.

**Acknowledgment—By Mortgagee's Devisee in Tail after Time has run.**]—A mortgagee in fee in possession for more than twenty years, having devised the estate to his son in tail, with limitations over:—Held, that an acknowledgment by the tenant in tail of the mortgage title restored the right of redemption, so as to bind the remainderman; and that a purchase of the equity of redemption by him, and conveyance of it to him in fee, gave him an absolute right to the estate, to the exclusion of the devisees in remainder under the will of the mortgagee, who had, as mortgagee, been more than twenty years in possession. *Pendleton* v. *Booth*, 1 Giff. 35; 29 L. J., Ch. 265; 5 Jur. (N.S.) 840. Affirmed, 1 De G. F. & J. 81; 29 L. J., Ch. 265; 6 Jur. (N.S.) 182; 8 W. R. 101.

—— **By one Joint Mortgagee.**]—An acknowledgment of the title of a mortgagor given by one only of two joint mortgagees, who, on the face of the mortgage deed, are shewn to advance the money on a joint account as trustees, does not keep alive the right of redemption either as against the whole property or against a moiety of it, but is wholly inoperative. *Richardson* v. *Younge*, 40 L. J., Ch. 338; L. R. 6 Ch. 478; 25 L. T. 230; 19 W. R. 612.

*See* **B,** VI., post (col. 282).

**Bill to Redeem Mortgage—Pleading.**]—A bill to redeem a mortgage, made twenty-five years before, stated that the mortgagee entered into possession of the estate shortly after the date and execution of the mortgage deed, and had been in possession ever since:—Held, that the court could not intend, from that statement, that the mortgagee entered within the first five years after the date of the deed. *Baker* v. *Wetton*, 14 Sim. 426; 9 Jur. 98.

**Possession by Mortgagee after Mortgage Satisfied.**]—Time no bar to redemption in case of a mortgage, where no time is fixed for redemption, unless twenty years after principal and interest paid by perception of rents and profits. *Fenwick* v. *Reed*, 1 Mer. 114.

Length of possession as a ground for presuming a release of the equity of redemption, depends on the nature of the possession, whether adverse or not. *Ib.*

**Conveyance in Form absolute, but in Substance a Mortgage.**] — The plaintiff, in 1842, executed an absolute conveyance of certain property to the defendant in fee, as on a sale. In 1860 he filed a bill to have the transaction treated as a mortgage transaction and to redeem. The court being satisfied by parol evidence that the agreement between the parties had been that the defendant should only hold the estate as a security for the money which he paid, and should receive the rents in lieu of interest:—Held, that the lapse of time was no bar to relief, for that the right to redeem could not be lost in a shorter period than if the transaction had been in form a mortgage. *Douglas* v. *Culverwell*, 4 De G. F. & J. 20; 6 L. T. 272; 10 W. R. 327.

Held, also, that the case was not to be treated as one of conditional sale, but that the defendant must account as a mortgagee in possession and with rests, being allowed interest at 5*l.* per cent. on the money he had advanced, and that he had been rightly ordered to pay the costs of the suit. *Ib.*

**Time as a Bar to Redemption.**]—See *Pickering* v. *Stamford*, col. 311.

**Possession of Mortgagor after Mortgage Satisfied, but before Reconveyance.**] — When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years' adverse possession of the mortgagor. The 25th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) relates to express trusts only, and does not apply to the relation between a mortgagee whose mortgage has been satisfied and the mortgagor. *Sands to Thompson*, 52 L. J., Ch. 406; 22 Ch. D. 614; 48 L. T. 210; 31 W. R. 397.

**Mortgagor entitled, during Wife's Life, to Mortgage Interest—Mortgagee barred by Nonpayment of Interest from Wife's Death—Express Trust.**]—A., by will made in 1809, devised 470*l.* to her daughter E., the interest whereof was to be paid to B., the husband of E., "until the time hereinafter limited and appointed for the payment of the legacy of 470*l.*; that is to say, in case E. should survive her husband B.," then the legacy and interest were to be for her and her children; but if she should die before B., leaving issue, then the legacy was to be placed out at interest for the benefit of the issue, and paid to them on their attaining their respective ages of twenty-one; and if no issue, then the legacy was to be divided between M. and T. The will contained a clause empowering the executor to advance the 470*l.* to B. on approved security. In 1811 the executor advanced 470*l.* to B. on a mortgage of lands belonging to B.'s father, B. and his father joining in the mortgage. E. died in 1827, leaving issue. B. died subsequently, within twenty years before the presenting the petition for sale of the mortgaged lands. The issue attained their ages of twenty-one within the same period. No interest had ever been paid on the mortgage up to the presenting of the petition, a period of more than forty years:—Held, that B.'s interest in the trust fund determined on the death of his wife in 1827; and that as more than twenty years from that period had elapsed without payment of interest the mortgage was barred by the Statute of Limitations. *Scott, In re*, 8 Ir. Ch. R. 316.

Held, also, that there was an express trust created in the owner of the lands, within the meaning of the 25th section of the 3 & 4 Will. 4, c. 27. *Ib.*

**Foreclosure Action.**]—A bill of foreclosure, being in fact a suit in equity, for the recovery of money, the plea of the statute 3 & 4 Will. 4, c. 27, s. 40, held good. *Dearman* v. *Wyche*, 9 Sim. 570; 9 L. J., Ch. 76.

—— **Action for Recovery of Land.**]—A foreclosure action is an action for the recovery of land, and is therefore not within s. 40 of 3 & 4 Will. 4, c. 27, but is within ss. 2 and 21, and consequently within the supplementary enactment of 1 Vict. c. 28. *Harlock* v. *Ashberry*, 51 L. J., Ch. 394; 19 Ch. D. 539; 46 L. T. 356; 30 W. R. 327—C. A.

**Case in which Mortgagee out of Possession not Barred.**]—Where a mortgagee who had not been in receipt of the rents and profits of the mortgaged premises for upwards of twenty years, nor received such an acknowledgment as is required by the 3 & 4 Will. 4, c. 27, nor had even known of his rights until informed thereof by a puisne creditor, was brought before the court by that creditor, by an amendment made in 1837 to a supplemental bill filed in 1833, for the purpose of completing title to a purchaser, so as to have distributed among the creditors of the estate certain funds which had been impounded to indemnify the purchaser against an outstanding and apparently unsatisfied charge, of which the mortgage formed a moiety:—Held, that the mortgagee's claim was not barred by the 3 & 4 Will. 4, c. 27. *Murphy* v. *Sterne*, 1 Dr. & Wal. 236.

**Foreclosure Action—Presumption of Payment of Interests.**]—Lands liable to a jointure of 2,000*l.* per annum, payable to the wife of the testator, were devised by him to A. for life, with remainder to trustees for one thousand years, upon trust to raise money to pay the debts and legacies of the testator, with remainder to B. for life, with remainder to C. for life, with remainder over; the testator died in 1804; the jointress in 1805 advanced 8,500*l.* in payment of his debts, and took a mortgage to secure that sum from the trustees of the one thousand years' term; in 1806 she married B. On that occasion the jointure was settled to her separate use, and the 8,500*l.* was settled on B. for life, and, if he survived the intended wife, upon him absolutely. On the death of the testator, A. entered into possession of the lands, and died in 1807, without leaving issue male. G. F. E., a third devisee for life, then entered into possession of the lands; his wife, the jointress, died in 1828, and he died in 1829. C. then entered into possession, and, being entitled to the personal estate of the jointress, filed a bill in 1843, praying a foreclosure of the mortgage. That bill stated that during the life of the jointress the rents of the lands had been insufficient to pay the jointure. There was not any evidence of any payment of interest upon the mortgage up to the filing of the bill:—Held, that the mortgage debt was not barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27; held, also, that although upon the death of the jointress in 1828, more than twenty years had elapsed without any payment in respect of the mortgage, yet the court would presume that from that period B., and after his death C., had kept down the interest. *Carbery (Lord)* v. *Preston*, 13 Ir. Eq. R. 455.

**Man in Possession by Agreement to receive Rents and keep down Interest—Rents only sufficient to pay Interest on First Mortgage.**]—When an owner of an estate contracts for valuable consideration with his mortgagees to put a man in possession, and directs him to apply the rents in payment of the interest on the first mortgage, and then the interest on the second, the mortgagor cannot afterwards urge that the Statute of Limitations excludes the second mortgagee, because the rents were no more than sufficient to pay the first, and the second mortgagee had for more than twenty years received nothing. *Knight* v. *Bowyer*, 23 Beav. 609; 3 Jur. (N.S.) 968. Affirmed, 27 L. J., Ch. 520; 4 Jur. (N.S.) 569; 6 W. R. 565.

**Sale by Mortgagor of some of Mortgaged Lands—Whole Interest paid out of Unsold Lands.**]—Where there is a mortgage over several denominations of land, and the mortgagor subsequently sells some of the denominations to a purchaser, for valuable consideration, without the concurrence of the mortgagee, and the interest due under the mortgage is regularly paid out of the remaining denominations, the lands sold are not discharged from the mortgage, although no proceedings have been taken against them within twenty years (3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28). *Muskerry, In re*, 9 Ir. Ch. R. 94.

**Action for Foreclosure before Time run—Action for Possession after.**]—A legal mortgage of freehold land in 1856; no possession by the mortgagee, and no payment of principal or interest to him, nor any acknowledgment of his title. In 1870 a bill by the mortgagee for redemption or foreclosure; in 1874 a decree nisi for redemption or foreclosure; and in 1877 an order absolute for foreclosure. In 1878 an action by the mortgagee to recover possession of the land:—Held, that although brought more than twenty years after the date of the mortgage deed the action was not barred by the Statutes of Limitations (3 & 4 Will. 4, c. 27, and 1 Vict. c. 28). *Pugh* v. *Heath*, 51 L. J., Q. B. 367; 7 App. Cas. 235; 46 L. T. 321; 30 W. R. 553—H. L. (E.) See *Thornton* v. *France*, [1897] 2 Q. B. 143; col. 209.

Semble, per Earl Cairns, that the action, being brought by one who had become absolute owner of the land under the foreclosure decree, was an action as to which the right to bring it must be taken to have accrued within s. 2 of 3 & 4 Will. 4, c. 27, at the date of that decree; and that s. 3 of that act in defining when the right shall be deemed to have accrued is not necessarily exhaustive, or otherwise inconsistent with this view. *Ib.*

**Time runs from Execution of Deed.**]—By deeds of lease and release of 7th and 8th September, 1819, lands were mortgaged in fee, subject to a proviso, that if the mortgagor should pay the principal and interest on the 25th March then next, the mortgagee, his heirs and assigns, should and would reconvey and reassure the premises to the mortgagor, his heirs and assigns. There was also a covenant that it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after default should be made in payment of the principal and interest, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy the premises; and also a covenant by the mortgagor for further assurance in case of such

default:—Held, that the mortgagee had the right of possession under this deed from the time of its execution, and not merely from the 25th March, 1820, and, therefore, that an ejectment for the recovery of the premises by the heir-at-law of the mortgagee, within twenty years of the latter but not of the former date (no interest having been paid in the meantime) was too late. *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553; 11 L. J., Ex. 151; 5 Jur. 966.

**Proof of Previous Proceedings in Ejectment.**]—In 1836 certain property was mortgaged; in 1847 a portion of it was taken possession of by the mortgagee, who commenced an ejectment to recover possession; in the present action no proof of the service of the proceedings in ejectment in 1847 was given, but it was shewn that a paper was served on the mortgagor:—Held, that the representative of the mortgagee was not entitled to recover, as there was no proof of possession by him or his predecessors in title within twenty years. *Thorp* v. *Facey*, 1 H. & R. 678; 35 L. J., C. P. 349; 12 Jur. (N.S.) 741.

**Payment of Principal or Interest by Mortgagor or his Agent.**]—A payment to come within the 1 Vict. c. 28, must be a payment of principal or interest, and must be made by the mortgagor or some person bound to pay principal or interest on his behalf. *Harlock* v. *Ashberry*, supra, col. 215.

So the word "paid" in 3 & 4 Will. 4, c. 27, s. 40, involves by implication the addition of "the person liable to pay." Therefore a payment of rent made by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Ib.*

The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made. *Ib.*

**Possession of Mortgagor without Acknowledgment—Payment of Arrears after Time has run.**]—When a demise for a term of 1,000 years by way of mortgage is created in land, and no payment of principal or of interest or acknowledgment is made for more than twenty years, and the mortgagor and those claiming under him remain in possession of the premises without interruption, the title of the mortgagee under the mortgage is thenceforth barred. *Hemming* v. *Blanton*, 42 L. J., C. P. 158; 21 W. R. 636.

Therefore a payment of arrears of interest and the principal to the mortgagee under a decree in a foreclosure suit, after that time has elapsed, does not revive the title in the mortgagee, and an ejectment does not then lie to recover the possession. *Ib.*

**Mortgagee's Estate vested in Trustees—Non-Receipt of Interest by Tenant for Life—Remainderman barred.**]—If interest is not paid on a mortgage for a period exceeding the statutory period to a person who is tenant for life of the estate of the mortgagee, this will not bar the remainderman. But the remainderman is barred by nonpayment of interest for twelve years, if the mortgagee's estate is vested in trustees, with full powers of converting and realising the mortgage debt, and with power of giving receipts, even though the trustees only hold the moneys, when realised, on trust to pay the interest to tenant for life, and afterwards for the remainderman. *Barcroft* v. *Murphy*, [1896] 1 Ir. R. 590.

**Possession of Mortgagor without Accounting.**]—See *Blewitt* v. *Thomas*, col. 250.

**Mortgage by Husband to Wife's Trustee—Nonpayment of Interest — Mortgage not barred.**]—Where a married woman was under a will entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mortgage, and the husband and wife had lived together in amity for a period of more than twenty years after the date of the mortgage, during which time the husband had never paid any interest on the mortgage debt, or given any written acknowledgment of the mortgage to the mortgagee-trustee for the wife:—Held, that the husband retained the interest as a gift from the wife; that it was the same hand to pay and to receive; that, therefore, no payment over was requisite; and, consequently, that the Statute of Limitations did not run, and the mortgage was still subsisting. *Hawes, In re, Burchell, In re, Burchell* v. *Hawes*, 62 L. J., Ch. 463; 3 R. 133; 67 L. T. 756; 41 W. R. 173.

**Equity of Redemption Wife's Separate Estate—Legal Estate in Husband—Statute no Bar to Wife's Right to Redeem.**]—See *Booth* v. *Purser*, col. 197.

**Cestui que Trust entitled both to Rents of, and to Interest on Mortgage of, Lands—Mortgage not barred by Nonpayment of Interest.**]—S. was, under a will, entitled for her life to the interest on a sum of money which had been invested by the trustees of the will on mortgage of land. The mortgagor had afterwards conveyed the land (subject to the mortgage) to trustees on trust for S. for her life. During her life she received and retained the rents for more than twenty years:—Held, that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest, the rights of the trustee of the mortgage were not barred by 3 & 4 Will. 4, c. 27, s. 40, and that the fact of the rents being payable to one set of trustees and the interest being payable to another set of trustees did not alter the case where the cestui que trust was in each case the same. *Burrell* v. *Earl of Egremont*, (7 Beav. 205) followed and explained. *Topham* v. *Booth*, 56 L. J., Ch. 812; 35 Ch. D. 607; 57 L. T. 170; 35 W. R. 715.

**Equitable Mortgagee barred if no Acknowledgment—Prior Legal Mortgage—Mortgagor in Possession.**]—Where an equitable mortgagee has for more than the period provided by the Statute of Limitations received no interest on the mortgage debt, no part payment of principal, and no acknowledgment, his charge upon the land is extinguished, although the debt itself is not, and the fact that there is a prior legal mortgage outstanding, the owner of which has never been in possession of the land, inasmuch as the mortgagor himself was in possession during the statutory period, does not prevent time from

running, for the equitable mortgagee could have taken proceedings during such period against the land, e.g. he might have brought an action for foreclosure. *Kibble* v. *Fairthorne*, 64 L. J., Ch. 184; [1895] 1 Ch. 219; 71 L. T. 755; 43 W. R. 327; 13 R. 75.

**Payment of Interest—By Surety binds Mortgagor.**]—In ejectment by a mortgagee to recover possession of land mortgaged, it is sufficient to prove part payment of interest by a surety, without giving any evidence that the mortgagor was in default, or that the surety was compelled to pay, or that the payment was made at the request of the mortgagor. *Cann* v. *Taylor*, 1 F. & F. 651.

—— **By Mortgagor not in Possession binds his Tenant at Will in Possession.**] — The 7 Will. 4 & 1 Vict. c. 28, is not confined to cases where a mortgagor has been in possession of the mortgaged premises, but its object was to protect mortgagees generally, and to make mortgages an available security, wherever they are valid in their inception; and the mortgagee having received payment of his interest, cannot be charged with any laches. *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366; 20 L. J., Q. B. 431; 15 Jur. 1031.

A., in 1821, became entitled to the possession in fee-simple of premises, of which he had never been in actual possession, but which had been occupied by the defendant, as tenant at will to him, for more than twenty years before action brought. In 1823 A. mortgaged the property to B., who afterwards assigned the mortgage to the plaintiff. A. had paid interest upon this mortgage within twenty years before the action was commenced, but had done so without the knowledge of the defendant:—Held, that 7 Will. 4 & 1 Vict. c. 28, applied, and that the plaintiff, having brought his action within twenty years next after the last payment of interest upon the mortgage, was not barred, although more than twenty years had elapsed since the time at which the right to bring such action had first accrued. *Ib.*

See *Thornton* v. *France*, [1897] 2 Q. B. 143; col. 209.

—— **By Person interested in Mortgagor's Residue.**]—Freeholds and leaseholds were mortgaged in 1822. The mortgagor devised and bequeathed his residuary estate upon trust to pay his debts, including mortgage debts, and afterwards on trust for H. A beneficial tenant for life under the will of the mortgagor in a moiety of a freehold not comprised in the mortgage, and also interested in the residue under the will of H., paid interest on the mortgage down to her death in 1859:—Held, that such payment prevented the Statutes of Limitations being a bar to the mortgagee's proceeding, either against the property comprised in the mortgage or on the covenant for repayment against the estate of the mortgagor. *Pears* v. *Laing*, 40 L. J., Ch. 225; L. R. 12 Eq. 41; 24 L. T. 19; 19 W. R. 653.

—— **By Devisee of Mortgaged Lands preserves Right to proceed against Residuary Legatees.**] — A testator in 1855 mortgaged certain freeholds of which he was absolute owner, and also his life estate in certain other freeholds, to secure repayment of 3,109*l.* advanced by the mortgagees, who were trustees of a marriage settlement, with interest at 5 per cent. The testator died in 1862, having by his will devised the mortgaged lands to his son A. for life, with remainder to his first and other sons in tail male, and other freeholds to his son B. in like manner, and bequeathed his residuary personal estate to his executors upon trust for his daughters. The mortgagees were aware of the testator's death, but did not require payment of the mortgage debt. The executors paid the testator's debts (other than the mortgage debt), and converted into money and set apart the residuary personal estate for the benefit of the residuary legatees. Part was afterwards paid over to them, and the remainder was invested by the executors, and the income paid to the residuary legatees. Two of the daughters married, and their shares of the residuary were put in settlement. Interest on the mortgage was paid by the devisee of the mortgaged lands down to 1886, when it fell into arrear, and a receiver was appointed. In 1890 an order for sale of the lands was made on the petition of the mortgagees, which proceedings were pending in 1891, when the mortgagees, believing that the lands when sold would not realise sufficient to satisfy their claim for principal and interest, brought an action to administer the real and personal estate of the deceased mortgagor, and claimed the right to follow the assets remaining in the hands of the surviving executor as trustee for the residuary legatees, or which had been paid over by him to them. No interest had been paid to the mortgagees since the mortgagor's death except by the devisee. The defendants pleaded (1) the Statute of Limitations; (2) the Trustee Act, 1888, s. 8; and (3) laches and acquiescence:—Held, (1) that the payment of interest by the devisee kept alive the plaintiff's right to resort to the residuary personal estate or the testator's other real estate in the event of the security of the lands being insufficient, and that therefore the Statute of Limitations did not apply; (2) that the residuary legatees were not persons "claiming through a trustee" within s. 8 of the Trustee Act, 1888; and (3) that there were no special circumstances or action or conduct on the plaintiff's part to disentitle them to follow the assets, and that they were entitled to the relief sought. *Ridgway* v. *Newstead* (3 De G. F. & J. 474) and *Blake* v. *Gale* (32 Ch. D. 571) distinguished. *Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206—C. A.

—— **By Mortgagor's Widow—Effect on Co-Heirs.**]—On the death of the mortgagor in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs, and she paid interest on the mortgage. In 1858 the mortgagee instituted a suit to realise his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval:—Held, that the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf. *Ames* v. *Mannering*, 26 Beav. 583.

—— **By one Joint Mortgagor.**]—If estates A., B. and C. are included in one mortgage, and the owner of A. pays the interest, the mortgagee is not barred by 7 Will. 4 & 1 Vict. c. 28, or by 3 & 4 Will. 4, c. 27, s. 40, from his remedy against B. and C. *Chinnery* v. *Evans*, 11 H. L. Cas. 115;

4 N. R. 520; 10 Jur. (N.S.) 855; 11 L. T. 68; 13 W. R. 20.

In a mortgage deed of land, dated in 1853, A. and B., the mortgagors, jointly and severally covenanted with C., the mortgagee, for payment of principal and interest. Interest was paid by A. to the time of action brought. Neither principal nor interest was paid by B. In an action on the covenant against A. and B.:—Held, that the payments by A. prevented the Statute of Limitations from running in favour of B. *Bailie* v. *Irwin*, [1897] 2 Ir. R. 614.

—— **By Mortgagor or his Agent.**]—The payment of money to a mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. *Chinnery* v. *Evans*, supra.

A receiver of the rents of a mortgaged estate is the receiver of the mortgagor, and any payment made by such receiver, by order of the court, is a payment in law by the legal agent of the person liable to pay within 3 & 4 Will. 4, c. 27, s. 40. *Ib.*

The words in s. 40, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment and the signing of an acknowledgment. *Ib.*

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the 3 & 4 Will. 4, c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest. *Ib.*

But the payment of interest on a mortgage by a mere stranger would not be a payment within 3 & 4 Will. 4, c. 27, ss. 40, 42. *Ib.*

—— **By Assignee for Life of Mortgagor.**]—The payment of interest by an assignee for life of an equity of redemption is sufficient payment to keep alive the right of action on the covenants of the mortgagor, under s. 5 of 3 & 4 Will. 4, c. 42. *Forsyth* v. *Bristowe* (8 Ex. 716) and *Roddam* v. *Morley* (1 De G. & J. 1) followed. *Dibb* v. *Walker*, 62 L. J., Ch. 536; [1893] 2 Ch. 429; 3 R. 474; 68 L. T. 610; 41 W. R. 427.

**Acknowledgment by Mortgagor does not bind Puisne Mortgagee.**]—An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the 3 & 4 Will. 4, c. 27. *Bolding* v. *Lane*, 1 De G. J. & S. 122; 1 N. R. 248; 32 L. J., Ch. 219; 9 Jur. (N.S.) 506; 7 L. T. 812; 11 W. R. 386.

**Acknowledgment must be Replied Specially.**]—See *Kempe* v. *Gibbon*, col. 332.

[*See also*, as to Acknowledgments by Mortgagors, **B**, VI., post (col. 282).]

**Mortgage of Reversionary Interest—When Time runs against Foreclosure.**]—Two brothers, A. and B., were entitled, subject to their mother's life interest, to a fund in equal moieties. In 1858 A. mortgaged his reversionary interest to his father, who died, having appointed B. his executor and residuary legatee. The property having fallen into possession on the death of the mother in 1887, B. wrote to A. that, in accordance with her wish that he should hand over to A. the mortgage deed, he gave himself the satisfaction of fulfilling her desire, and he inclosed the deed accordingly. Afterwards B. insisted on his right under the mortgage:—Held, that the Statute of Limitations was no bar to the claim under the mortgage, as the right to enforce the mortgage arose only when the reversionary interest fell into possession. *Hancock, In re, Hancock* v. *Berrey*, 57 L. J., Ch. 793; 59 L. T. 197; 36 W. R. 710.

Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession. *Hugill* v. *Wilkinson*, 57 L. J., Ch. 1019; 38 Ch. D. 480; 58 L. T. 880; 36 W. R. 633.

Where a mortgage of a reversion contains a proviso for redemption on or before the death of the tenant for life, and separate covenants for the payment of the principal on the death, and for payment of interest in the meantime, the Statute of Limitations begins to run at the death of the tenant for life, at which date the mortgagee's right to foreclose arises. *Sutton* v. *Sutton* (22 Ch. D. 511) explained. *Turner's Estate, In re, Turner* v. *Spencer*, 13 R. 132; 43 W. R. 153.

—— **In Personal Estate—Remedy on Covenant Barred—Remedy against Property.**]—In 1870 A., B. and C. mortgaged certain reversionary shares in a fund in court to which B. and C. were entitled under a will, to secure the repayment by A. of 70*l.* The mortgage contained a joint and several covenant by A. and C. for repayment of principal and interest. In 1873 the mortgagee recovered judgment against C. on the covenant. In 1889 the reversionary interest fell into possession. No interest had ever been paid on the mortgage or judgment, nor had any acknowledgment been given:—Held, that although the personal remedy against C. was barred by the Statute of Limitations, the assignment of the property comprised in the mortgage was nevertheless good; and that therefore the mortgagee was entitled to C.'s share of the property under the will. *Lake's Trusts, In re*, 63 L. T. 416.

—— **Interest on, by Way of Damages—More than Six Years' Arrears recoverable.**]—See *Mellersh* v. *Brown*, col. 226.

—— **In Trust Fund—Mortgagee not Barred.**]—In 1824 a reversionary interest in funds, vested in trustees, was assigned to secure the payment of a sum in 1825. The reversion fell in in 1860, no notice having been given to the trustee, nor any interest paid or acknowledgment made in the meantime:—Held, that the mortgagee's right against the fund was not barred by the Statute of Limitations or the lapse of time. *Lowe, In re*, 30 Beav. 95.

**Action on Covenant in Mortgage.**]—The limitation of twelve years imposed by the Real Property Limitation Act, 1874, s. 8, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. *Sutton* v. *Sutton*, 52 L. J., Ch. 333; 22 Ch. D. 511; 48 L. T. 95; 31 W. R. 369—C. A.

**Action on Collateral Bond.**]—When a mortgage debt is secured by a collateral bond, the remedy on the bond is, under s. 8 of the Real Property Limitation Act, 1874, barred by the lapse of twelve years since the last payment of

interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mortgage. *Sutton* v. *Sutton* (22 Ch. D. 511) followed. *Fearnside* v. *Flint*, 52 L. J., Ch. 479; 22 Ch. D. 579; 48 L. T. 154; 31 W. R. 318.

In 1867 T. P. mortgaged an estate to L. and A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. and A. a joint and several bond in the penal sum of 400*l.*, reciting that the 1,000*l.* had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrear, and in 1880 the mortgagees entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. and A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874:—Held, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property Limitation Act, 1874, s. 8. *Powers, In re, Lindsell* v. *Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

—— **Remedy in Equity.**]—Where a bond is entered into as a collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee takes possession, and remains in possession upwards of twenty years, without taking interest, otherwise than by receipt of rents and profits. Quære, whether his remedy on the bond is not barred in equity as well as at law by the Statute of Limitations. *White* v. *Hillacre*, 3 Y. & Coll. 597; 4 Jur. 102.

**Covenant by Mortgagor and Surety to pay Mortgage Debt on Demand — No Right of Action against Surety until Demand.**]—Where a mortgage contained joint and several covenants by a surety and the mortgagor to pay the debt "on demand," and "in the meantime from the date" of the deed to pay interest, and a proviso for redemption if the mortgagor should "on demand" pay the debt and interest from the date of the deed:—Held, that the demand was a condition precedent, and that no right of action accrued against the surety until demand made. *Brown's Estate, In re, Brown* v. *Brown*, 62 L. J., Ch. 695; [1893] 2 Ch. 300; 3 R. 463; 69 L. T. 12; 41 W. R. 440.

**Mortgage of Legacy—Collateral Bond—Payment of Interest by Surety.**]—In 1824 S., who was entitled to a legacy charged upon land devised to a tenant for life, mortgaged it to B.; and at the same time S., and the tenant for life as surety, gave a bond to B. as collateral security for the amount. S. died in 1847, and the tenant for life in 1851. In the administration of the testator's estate, B. claimed to be paid the amount (legacy and interest) due to him; and thereupon the widow and legal personal representative presented a petition praying that the legacy might be ordered to be paid to her, on the ground that the Statute of Limitations had barred the right of B. to recover the sum due on the mortgage. The widow alleged that no interest was paid by S. after 1828, but B. that he had received, previous to and in 1846, interest in part from the tenant for life and surety:—Held, upon both branches of the case, the operation of the Statute of Limitations, and the acknowledgment by a co-obligor of a bond, that the mortgagee was entitled to the legacy, and that the petition must be dismissed, but without costs. *Seager* v. *Aston*, 26 L. J., Ch. 809; 3 Jur. (N.S.) 481; 5 W. R. 548.

**Conveyance to Creditor in Trust to pay Debt—Prior Term in Trustees for Payment of Debts—Administration Suit.**]—A testator devised his real estate to trustees for a term of 5,000 years, to raise the deficiency of his personal estate to pay his debts and legacies, which term was to cease on the performance of the trusts. Subject thereto, he devised it to his son in fee. In 1807 the son conveyed his estate to a creditor (A.), in trust, by sale or mortgage, to raise and pay the debt. In 1811 a suit was instituted to administer the testator's real and personal estate, but A. was not made a party until 1841. He took no steps to realise his security, and obtained no payment or acknowledgment. The estate was sold, and the surplus was in court:—Held, in 1857, that A.'s claim was barred by the Statute of Limitations, and that it was not protected either by the prior term or the pending litigation. *Humble* v. *Humble*, 24 Beav. 535; 3 Jur. (N.S.) 1289.

**Statute does not begin to run against Mortgage Debt so long as Trust to sell and pay Debt subsists.**]—See *Bennett* v. *Cooper*, col. 281.

**Arrears of Interest on Mortgage.**]—Under the statute 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land whose mortgage debt and interest are secured also by a bond, or covenant, is entitled, in a foreclosure suit, to charge the mortgaged estate with arrears of interest accruing within twenty years before the institution of the suit. *Du Vigier* v. *Lee*, 2 Hare, 326; 12 L. J., Ch. 345; 7 Jur. 299.

Semble, if the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrears of interest. *Ib.*

A canal company conveyed, under their common seal, the canal works and rates to mortgagee, to hold, &c., until repayment of certain money borrowed, and interest. There was no covenant to repay:—Held, under the modern Statutes of Limitations, that, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

Under s. 42 of the 3 & 4 Will. 4, c. 27, a mortgagee, irrespective of a covenant to pay or a term to secure the payment, is entitled to six years' arrears of interest. *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; 30 L. J., Ch. 646; 7 Jur. (N.S.) 1005; 4 L. T. 460; 9 W. R. 629.

So far as a covenant to pay affects the land, it is limited to six years. *Ib.*

Where a term is created on an express trust to secure principal and interest, the 22nd section of the 3 & 4 Will. 4, c. 27, does not operate as a bar, and a mortgagee's right is not confined to six years. *Ib.*

The case is not altered where the term, though in 1819 a dry satisfied term, was in that year clothed with an express trust, and assigned for the benefit of the mortgagee. *Ib.*

Nor is such a term merged under 8 & 9 Vict. c. 112. *Ib.*

Where there is an agreement to assign a term on an express trust to secure principal and interest, which can be enforced in equity, although the deed is not executed, the court will consider such assignment as if it had been executed, and make a decree for a general account not limited to six years. *Ib.*

Where there is a mortgage of land, and a covenant by the mortgagor, for himself and his heirs, to pay the mortgage-money and interest, if there has been no payment for a long period, the land is only charged with six years' arrears of interest under the 3 & 4 Will. 4, c. 27, s. 42, but twenty years' arrears may be recovered by an action on the covenant under the 3 & 4 Will. 4, c. 42, s. 3. *Elvy* v. *Norwood*, 1 De G. & Sm. 240; 21 L. J., Ch. 716; 16 Jur. 493.

In such a case, in a suit by the heir of the mortgagor to redeem, the mortgagee may tack the personal liability on the covenant as against the heir. Secus, if the suit were by the mortgagor, semble. *Ib.*

A mortgagee, notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay. *Sinclair* v. *Jackson*, 17 Beav. 405.

The interest on money secured by mortgage of land and by covenant being sixteen years in arrear, the mortgagee filed his bill of foreclosure against the heir of the mortgagor, raising no question of liability on the covenant, or of any right of tacking. A decree was made to take an account of what was due on the mortgage. Under the Statute of Limitations, twenty years' arrears could be recovered on the covenant, but six only as against the land. The master refused to allow the plaintiff to tack his two claims:—Held, on exceptions, that he was right. *Ib.*

Whether the right to tack in such a case would be different in a suit for foreclosure, from what it is in a suit for redemption, quære. *Ib.*

When money is secured by an ordinary mortgage by covenant and bond, the mortgagee, in a suit to foreclose, can only recover six years' arrears of interest, but the case is different when there is a trust to secure it. *Round* v. *Bell*, 30 Beav. 121; 31 L. J., Ch. 127; 7 Jur. (N.S.) 1183; 5 L. T. 15; 9 W. R. 846.

A mortgagor's estate had been administered in equity. The mortgagee, who also had a covenant and a bond from the mortgagor for securing repayment of the money, did not in that suit rely upon his covenant or bond. The mortgagor and mortgagee died. The mortgage-money, with more than twenty years' arrears of interest, was due and owing. The representatives of the mortgagee filed a bill to foreclose the equity of redemption:—Held, that, as there was no trust created to secure the repayment of the mortgage-money, and as the mortgagee might in the administration suit have recovered as a specialty creditor the amount of the arrears of interest, he was not entitled to claim more than six years' arrears of his interest in the foreclosure suit. *Ib.*

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the 3 & 4 Will. 4, c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest. *Chinnery* v. *Evans*, 11 H. L. Cas. 115; 10 Jur. (N.S.) 855; 11 L. T. 68; 13 W. R. 20.

A mortgagee presented a petition in the Landed Estates Court, for the sale of a minor's estate, which he did not proceed upon. A reference was afterwards made to the master, to inquire what charges affected the minor's estate, and the principal and interest due thereon:—Held, that the mortgagee was entitled to six years' interest from the date of filing his charge under the order, and not from the date of filing his petition in the Landed Estates Court. *Fitzmaurice, In re*, 15 Ir. Ch. R. 455.

A. and B., reversioners after a life interest in C., mortgaged their property and covenanted that interest in arrear should be capitalised, and bear interest after the same rate; and C. also assigned her life interest as a part of the security:—Held, that the covenant was good and valid; and that the mortgagee was not limited to six years' interest. *Clarkson* v. *Henderson*, 49 L. J., Ch. 289; 14 Ch. D. 348; 43 L. T. 29; 28 W. R. 907.

In the case of a mortgage of reversionary personal estate, where there is no covenant for payment of interest after the date stipulated in the deed for the repayment of the capital with interest, the court will allow to the mortgagee in a redemption or foreclosure action interest by way of damages, at the rate fixed by the deed to be paid up to the date stipulated for repayment of the capital, during the whole period, not exceeding twenty years, during which no interest has been paid; and there is no analogy between a mortgage of personal estate and one of real estate to induce the court to limit the amount of arrears of interest recoverable to six years. *Mellersh* v. *Brown*, 60 L. J., Ch. 43; 45 Ch. D. 225; 63 L. T. 189; 38 W. R. 732.

Sect. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. *Marshfield, In re, Marshfield* v. *Hutchings*, 56 L. J., Ch. 599; 34 Ch. D. 721; 56 L. T. 694; 35 W. R. 491.

After the sale of an estate by a trustee for a mortgagee, under a power of sale:—Held, in a suit by the mortgagor to recover the surplus money, that the mortgagee could not, under the 3 & 4 Will. 4, c. 27, retain more than six years' arrears of interest out of the purchase-money. *Mason* v. *Broadbent*, 33 Beav. 296.

**Arrears of Interest on Mortgage of Turnpike Tolls.**]—See *Mellish* v. *Brooks*, col. 150.

See also as to arrears of interest on mortgages, B, XI., post (col. 322).

**Strangers to Mortgagor working mortgaged Mines by Permission of Mortgagee.**]—Where B. and C. were permitted by a mortgagee not in possession of the mortgaged property (coal mines) to enter upon the working of the mines, sell the property and receive the value, in taking an account of the quantity and value of the coal wrought by B. & Co. more than six years before the bill was filed by the permission of the mortgagee, but who were strangers to the mortgagor:—Held, that the Statute of Limitations did not apply. *Hood* v. *Easton*, 2 Jur. (N.S.) 729; 4 W. R. 575.

This decision was afterwards questioned on appeal, but no judgment was given. *S. C.*, 2 Jur. (N.S.) 917; 4 W. R. 786.

**Possession of Mortgagor's Agent adverse to Mortgagor after his Bankruptcy—Subsequent Acknowledgment immaterial.**]—In 1828 the plaintiff mortgaged freehold property to B., and in 1832, being about to reside abroad, he gave a full power of attorney to the defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the plaintiff settled accounts with the defendant, shewing a large balance due to the defendant, which the plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the defendant continued to receive the rents and profits. In 1849 the defendant took a transfer himself of B.'s mortgage, to which the plaintiff was not a party. In 1865 the defendant wrote a letter to the plaintiff expressing his readiness to settle all accounts. In 1877 the plaintiff's bankruptcy was annulled, and the plaintiff brought an action against the defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The defendant pleaded the Statute of Limitations:—Held, that on the plaintiff's bankruptcy the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee; and that even if the assignee would have been entitled to call upon the defendant to account, the plaintiff did not, on the annulment of the bankruptcy, succeed to the assignee's right; that the plaintiff's estate as mortgagor having ceased on the bankruptcy, the letter written to him in 1865 could not operate as an acknowledgment either of his title or that of the assignee to the equity of redemption, so as to take the case out of the Statute of Limitations; that as the assignee was barred by the statute the plaintiff was also barred, notwithstanding the annulment of the bankruptcy. The action was therefore dismissed with costs. *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

—— **Acknowledgment after Twenty Years' adverse Possession.**]—Whether an acknowledgment of the title of the mortgagor is effectual to take the case out of the Statute of Limitations, if it is not made till after the time limited by the statute has expired, quære. *Ib.*

**Statute not a Bar to Claim by Mortgagee, as Trustee for Mortgagor, to Balance of Proceeds of Sale in Solicitor's Hands.**]—See *Bell, In re, Lake* v. *Bell*, col. 205.

**Assignment of Annuity to secure particular Debt—Mortgage of Leaseholds to secure general Balance—Payments in Excess of Debt.**]—S., being indebted to his bankers in 1826, assigned to them an annuity of 20*l.* a year, payable during three lives and the lives and life of the survivors and survivor, for securing 200*l.*, part of his balance. S., in 1828, mortgaged to them the equity of redemption of a leasehold estate for securing his general balance of 1,500*l.* Interest was paid on the mortgage up to 1832, first, to the bankers (who became bankrupt in 1828), and afterwards to their assignees, who received the annuity until 1847, when the annuity expired; and the money thus received was more than enough to pay the 200*l.* In 1834, the first mortgagee of the leasehold estate entered into possession of the property, and remained in possession. In 1853, S. filed a bill against the mortgagee for redemption:—Held, that the payments of the annuity having exceeded the 200*l.*, must be taken to have been made in reduction of the general balance due on the mortgage, and having been made within twenty years, the same took the case out of the operation of the 3 & 4 Will. 4, c. 27, ss. 40, 42. *Staley* v. *Barrett*, 26 L. J., Ch. 321; 5 W. R. 188—L.JJ.

**Action for Account by second against first Mortgagee of Ship—No express Trust.**]—See *Banner* v. *Berridge*, col. 45.

**Distribution of Personalty by Executors without providing for Mortgage Debt.**]—See *Gale, In re, Blake* v. *Gale; Hyatt, In re, Bowles* v. *Hyatt*; and *Marsden, In re*, cols. 51, 52; and *Leahy* v. *De Moleyns*, col. 220.

**Solicitor employed to invest Money on Mortgage—When Statute a Defence to Action for Negligence.**]—See *Dooby* v. *Watson*, col. 58.

**Assignment of Forged Mortgage Deed.**]—See *Bell* v. *Holbeck*, col. 122.

### 10. Vendor and Purchaser.

**Possession under Agreement to Purchase—Tenancy at Will—Purchaser not a Cestui que Trust within 3 & 4 Will. 4, c. 27, s. 7—Continuance in Possession by Widow.**]—If a person who has agreed to purchase real property is let into possession, he is a tenant at will, and such tenancy at will is determined by his death; and if after his death his widow, who is also devisee of his real estate, continues in possession, this is not a continuance of his tenancy at will, so as to prevent the operation of the statute. *Doe* d. *Stanway* v. *Rock*, 4 Man. & G. 30; Car. & M. 549; 6 Jur. 266.

The proviso as to cestuis que trustent contained in s. 7 of 3 & 4 Will. 4, c. 27, applies only to cases of declared and express trusts, and not to a person holding under an agreement to purchase. *Ib.*

—— **Statute does not run against Vendor during.**]—A., in 1819, agreed to purchase lands of B. for 670*l.*, and paid a deposit of 10*l.* The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so, at Michaelmas, in 1819. A. continued in possession, and neither paid any more of the purchase-money nor any rent or interest; and in 1822, A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters:—Held, that these facts were no bar to B. in ejectment, brought within twenty years after Michaelmas, 1839; as A., coming in under an intended purchase, was, in equity, the owner of the land, with a liability to pay the purchase-money; and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will. *Doe* d. *Counsell* v. *Caperton*, 9 Car. & P. 112.

G., under whom the defendant claimed, was let into possession twenty-two years before action, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure

act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase-money for some years, but never completed the purchase:—Held, that even after a lapse of twenty years his possession was not adverse to P.'s title; held, also, that it did not lie in the mouth of G., or any claiming under him, to raise as an objection to P.'s title, that the commissioners of inclosure had made no formal award. *Doe* d. *Milburne* v. *Edgar*, 2 Scott, 732; 2 Bing. (N.C.) 496; 1 Hodges, 437; 5 L. J., C. P. 147.

**Conveyance of Wife's Land by Husband and Wife.**]—If husband and wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine, the wife, if she survives, and if not, her heir may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years. *Jumpsen* v. *Pitchers*, 13 Sim. 327. And see 1 Coll. 13; 13 L. J., Ch. 166.

**Purchase from Trustee—Time does not run against Remainderman till entitled in Possession.**]—In the case of a purchase from a trustee, time will run from the conveyance, unless the party was a mere trustee on express trusts. *Thompson* v. *Simpson*, 1 Dr. & War. 459.

In 1770 the lands of X. were by deed conveyed to Y., his heirs and assigns, upon the trusts therein mentioned, that is to say, to the owner thereof G. T. for life, remainder to his son H. T., his heirs and assigns. In 1771, upon the marriage of H. T. with L. N. he covenanted to convey the lands of X., amongst other, within six months after the celebration of the marriage, upon trust that the same should go and be vested in the issue of H. T. by L. N., and that such issue should also be entitled to a further sum of 1,000*l.*, to be charged on all other the real and personal estates of H. T., not therein comprised, but in such shares and proportions as H. T. should by deed or will appoint; and in default thereof, as L. N. in case she survived H. T. should by deed or will appoint, and failing such direction, in equal shares. In 1793 H. T. and L. N. levied fines of the lands of X. in which F. M. was demandant. In 1794 H. T. and the co-heirs of T. levied fines again of those lands in which F. M. was also demandant; in Hilary term, 1794, recoveries were suffered of the same lands, F. M. being tenant to the præcipe, and H. T. and his eldest son and heir-at-law R. T., who had attained his age of twenty-one years, were both vouched. In April, 1794, H. T. and F. M. sold the lands of X. to T. S.; subsequent to this sale, R. T., the eldest son of H. T., died. In 1820 H. T., who survived L. N., died without having executed his power of appointment, leaving M. N. T. his eldest surviving son. In 1837 M. N. T. and the other children of H. T. and L. N. filed their bill, praying an execution of the articles of 1771 as to the lands of X., and seeking to set aside the sale so made to T. S.:—Held, that the plaintiffs were within time, and not bound by any Statute of Limitation, and that the 3 & 4 Will. 4, c. 27, s. 25, did not apply until the time when the party seeking the remedy himself became entitled in possession. *Ib.*

**On Informal Conveyance by Tenant for Life having a Remainder in Tail, Time does not run in favour of Purchaser in Possession, until Expiration of Estates preceding Remainder.**]—See *Mills* v. *Capel*, col. 172.

**So, on an Informal Conveyance by a Tenant in Tail.**]—See *Morgan* v. *Morgan*, col. 171.

**Where a Tenant for Life conveys away his Estate, the Remainderman has Twelve, instead of Six, Years from the death of the Tenant for Life in which to bring his Action for Possession.**]—See *Pedder* v. *Hunt*, col. 175.

**Conveyance operating as Disseisin of Co-Heir—Executory Trusts under Agreement for Settlement inoperative as against Purchaser.**]—By marriage articles the husband agreed to settle out of the lands of K., in favour of A., his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife, and in failure of issue male, on the issue female. And in case A. should survive and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and, in failure of the eldest son on the daughters of the said marriage. There was no male issue of the marriage, but female issue B., C. and D.:—Held, that the lands of K. should be settled on them as tenants in common in tail. No settlement was executed, and the lands descended to A., B., C. and D., subject to the trusts of the articles of 1763, when B., C. and D. went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent conveyances for value. In 1847 the lands were covenanted to be sold:—Held, in a suit for specific performance against the purchaser, that the legal title of A. and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a court of law would not notice the executory trust of the articles, and the several conveyances operated as disseisins. *Stewart* v. *Conyngham* (*Marquis*), 1 Ir. Ch. R. 534.

**Sale of Mine—Covenants for Title and quiet Enjoyment—Whether Subsisting Lease of Coal a continuing Breach—Subsidence subsequent to Sale caused by prior Workings.**]—The defendant, being seised in fee of land and coal beneath it, in 1844 let the coal, by a written agreement, to lessees for a term of twenty-five years, with power to enter and work and carry away the coal across the land, and all other powers fit and necessary for the working and carrying. The lessees entered and worked and carried away coal, and after they had ceased, the defendant, in 1845, conveyed by deed a portion of the land to J., a purchaser, who had previously been through the workings, but was not shewn to have any knowledge of the agreement or its terms. By the deed the defendant covenanted with J., his appointees, heirs and assigns for title, for quiet enjoyment, and against incumbrances. In 1846 J. appointed the portion of land to the plaintiff, a purchaser who afterwards built houses thereon, and who had no knowledge of the workings until the land and houses subsided, in 1865. The subsidence was caused by the workings which had been carried on before the conveyance to J. In 1848 the lessees entered the mine and took fire-clay, which they had no right to take, and also fragments of coal of nominal value, but these acts

did not contribute to cause the subsidence. In 1867, the plaintiff, as appointee of J., sued the defendant on the covenants, the declaration alleging as breaches of the covenants for title and quiet enjoyment, that after the plaintiff became seised, the lessees entered and worked, whereby the damage was caused:—Held, that the benefit of the covenants passed to the plaintiff as appointee. *Spoor* v. *Green*. 43 L. J., Ex. 57; L. R. 9 Ex. 92; 30 L. T. 393; 22 W. R. 547.

Held, also, that the variance between the declaration and the proof as to the time of working was fatal. *Ib.*

Held, also, per Bramwell, B., that, assuming the agreement to be a breach of the covenant for title, it was not a continuing breach, and that the action was barred by the Statute of Limitations. Contra, per Kelly, C.B., that the true cause of action was the subsidence, and that the Statute of Limitations was no bar, and that the plaintiff, therefore, would, but for the variance, be entitled to the damages caused by the subsidence; also that, so long as the agreement subsisted, there was a continuing breach which rendered the land of less value; and that the acts of the lessees in 1848 constituted a breach of the covenant for quiet enjoyment; and that the plaintiff was entitled to nominal damages. *Ib.*

**Contract to Repurchase.**]—Semble, that the 3 & 4 Will. 4, c. 27, would not apply to the case of a contract to repurchase an estate in twenty-five years, or at any time during the life of another. *Alderson* v. *White*, 2 De G. & J. 97; 4 Jur. (N.S.) 125; 6 W. R. 242.

**Fraudulent Misrepresentation—Demurrer.**]—Demurrer to a bill charging fraud in a misrepresentation of the value of an estate to vendor, on the ground that the transaction was twenty-seven years old, and had been confirmed by a deed twenty-three years since, disallowed. *Deloraine* v. *Browne*, 3 Bro. C. C. 633.

**Time does not run in favour of Purchaser of Mortgaged Lands if Interest on Mortgage paid.**]—See *Muskerry, In re*, col. 216.

**Sale of part of Mortgaged Premises and Re-conveyance of rest to Mortgagor—Time runs in favour of Purchaser against Mortgagor's Equity of Redemption.**]—See *Blake* v. *Foster*, col. 212.

**If Mortgagee purchases the Equity of Redemption and enters, Time will not run against those in Remainder to the Vendor.**]—See *Raffety* v. *King*, col. 210.

**Title of Heir to Customary Tenement barred by Possession of Purchaser from Devisee.**]—See *Collard* v. *Hare*, col. 240.

**Knowledge of Purchaser that one Share of Estate vested in Trustees for Infants—Infants not barred by Statute.**]—See *Young* v. *Harris*, col. 245.

**Vendor of House with Inscription on Wall stating that it belongs to another—Good Objection to Title, notwithstanding Vendor's long Possession.**]—See *Phillipson* v. *Gibbon*, col. 264.

**Action by Annuitant against Purchaser of Estate charged.**]—See *Harrisson* v. *Duignan*, col. 274.

**Land subject to Rent-charge sold—Purchaser indemnified by Vendor—No Rent paid by Purchaser—Statute does not run in favour of Land sold.**]—See *Dublin* v. *Trimleston*, col. 277.

**Acknowledgment by Purchaser's Solicitor that Purchase-money unpaid.**]—See *Toft* v. *Stevenson*, col. 286.

**Arrears of Interest on unpaid Purchase-money.**]—See *Toft* v. *Stevenson*, col. 329.

### 11. Executors, Administrators, Devisees, Legatees, and Heirs.

*See also* ante, **A**, IV. 6, col. 47, *and* **A**, VI. 3, col. 81.

By 3 & 4 Will. 4, c. 27, s. 3, *the right to recover any land or rent of a deceased person, if he shall have continued in possession until his death and shall have been the last person entitled who was in possession, shall be deemed to have first accrued at the time of his death. By s. 6, an administrator's title shall be deemed for the purposes of the statute to date from the death.*

**Administrator de bonis non—Property by mistake in Possession of Heir.**]—The Statute of Limitations is no bar to a claim made by the administrator de bonis non of an intestate, where property has been taken possession of by his heir at law, being also his administrator under a mistake as to its real nature. *Reed* v. *Fenn*, 35 L. J., Ch. 464; 14 W. R. 704.

**Administration—Trusts of Realty.**]—Length of time, how far a bar in equity to an account. Though stale accounts are discouraged, yet an administratrix who is to see to the execution of a trust out of real estate, cannot take advantage of length of time elapsed. It lies on her to shew the trust executed. *Pomfret* v. *Windsor* (*Lord*), 2 Ves. 483.

—— **Chattel Interest in Land—Running of Time.**]—Under the Statute of Limitations, 1833 (3 & 4 Will. 4, c. 27), s. 6, time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration. *Williams, In re, Davies* v. *Williams*, 56 L. J., Ch. 123; 34 Ch. D. 558; 55 L. T. 633; 35 W. R. 182.

—— **Retrospective Operation of Statute—"Present Right to Receive."**]—The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover a personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st of December, 1860, the time fixed by the section for commencement of the operation of the enactment. Accordingly, a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of

twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator. *Johnson, In re, Sly* v. *Blake*, 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502.

—— **Part Payment.**]—Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute. *Ib.*

**Action on Bond by Assignee in Insolvency of Obligee against Administrator of deceased Obligor.**]—See *Sturgis* v. *Darell*, col. 318.

**"Present Right to Receive" Legacy—Lunacy of Executor—Same Hand to Pay and Receive.**]—By a will of a testator who died in 1827, of which W. was sole executor, a legacy was bequeathed to E., who died in 1830, having bequeathed her residuary personal estate to W. E.'s will was proved in 1835 by W., who was afterwards found to be a lunatic from the 3rd December, 1840. On the 12th October, 1848, administration with the will annexed of the testator's estate during the lunacy was granted to M. W. died in 1857, and in December, 1858, a bill was filed for the administration of his estate. The legacy had never been paid. The Statute of Limitations, which applies to the recovery of legacies, passed in 1833:—Held, that a present right to receive the legacy, within 3 & 4 Will. 4, c. 27, s. 40, did not accrue to any one until the administration granted to M. in October, 1848; and hence, that the right to sue for the legacy was not barred. *Binns* v. *Nichols*, 35 L. J., Ch. 635; L. R. 2 Eq. 256; 14 W. R. 727.

Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the statute can arise. *Ib.*

**Devise subject to Legacies, not a Trust—"Present Right to Receive."**]—A devise subject to legacies does not create a trust for payment so as to take the case out of the 3 & 4 Will. 4, c. 27, s. 40. *Proud* v. *Proud*, 32 Beav. 234; 32 L. J., Ch. 125; 7 L. T. 553; 11 W. R. 101.

The existence of prior charges upon the property upon which a legacy is charged will not prevent "a present right to receive" from accruing within the act. *Ib.*

**Assent to Gift of Residue by Executor.**]—An executor, by assenting to a bequest of residue, does not thereby constitute himself a trustee of the fund so as to prevent the operation of the Statute of Limitations. *Rowe, In re, Jacobs* v. *Hind*, 58 L. J., Ch. 703; 61 L. T. 581—C. A.

**Assent to Legacy by Executor—Implied Trust.**]—The provision of s. 8 of the Real Property Limitation Act, 1874, limiting the time for bringing an action or other proceeding to recover any legacy to a period of twelve years next after the accruer of a present right to receive the same, is not prevented from applying by the circumstance that the executor has assented to the legacy, or that the legacy is coupled with an implied trust. *Davis, In re, Evans* v. *Moore*, 61 L. J., Ch. 85; [1891] 3 Ch. 119; 65 L. T. 128; 39 W. R. 627—C. A.

**Possession of Farm under Bequest in Will not adverse to Legacies charged on it—Possession of Executor named in, but not proving, Will.**]—D. M., who died in 1873, by his will appointed X. and Y. his executors, bequeathed his farm of 140 acres, held from year to year, to his widow, and bequeathed certain legacies charged thereon. Neither executor proved. The widow went into possession, managed the farm, supported her family, and paid off some of the legacies. In May, 1880, the widow (by arrangement with X. and with the landlord's consent) surrendered the farm to the landlord, and was thereupon reinstated as tenant of portion (sixty acres), the remainder being let to X. as tenant from year to year. In 1887 H. M., a legatee, obtained letters of administration (X. and his co-executor being cited but not appearing), and now by writ dated January 29, 1892, brought ejectment on title against the widow and X. X. defended, pleading the Statute of Limitations. On new trial motion:—Held, that the widow having entered under the will to carry out its intentions could not rely upon the statute, and that therefore X. could not rely upon any portion of the widow's possession to assist his title. Per Holmes and Gibson, JJ., that X., being the executor named in, though he did not prove, the will, could not rely upon his own possession as a defence under the statute. *Molony* v. *Molony*, [1894] 2 Ir. R. 1.

**Right against Realty, when Debt barred against Personalty.**] — Semble, that if the remedy of a creditor against the personal estate is barred, while his remedy against the real estate has been kept alive, the real estate can be made liable, although there is no legal personal representative. *Boatwright* v. *Boatwright*, 43 L. J., Ch. 12; L. R. 17 Eq. 71; 29 L. T. 603; 22 W. R. 147.

**Charitable Legacies—No Trust where no Fund set apart—Admission of Assets.**]—A testatrix gave property, consisting partly of realty and partly of personalty, over which she had a power of appointment, and also all her own property, to three gentlemen, whom she also appointed her executors, upon trust to pay the income to her daughter for life, and after her daughter's death upon trust to pay several charitable legacies, and she constituted her executors residuary legatees. On a bill, filed nearly thirty years after her death, to obtain payment of one of the legacies:—Held, that the legacy was barred by the statute, and that there was no trust so as to take it out of the operation of the statute, inasmuch as there had been no fund set apart for the payment of it. *Cadbury* v. *Smith*, L. R. 9 Eq. 37; 24 L. T. 52; 18 W. R. 105.

The executors paid the amount of one of the charitable legacies as a gift from themselves, but they obtained a receipt for the amount, releasing them from all liability in respect of the legacy:—Held, notwithstanding the release, that this was not an admission of assets to pay all the legacies. *Ib.*

After the death of one of the executors, his representatives paid the surviving executor 700*l.* as his share of the residuary estate :—Held, that this did not amount to an admission of assets for payment of the legacies in full, but only to an admission that there would have been so much money applicable towards payment of the legacies if they had not been barred by the statute. *Ib.*

**Lunacy of Executor.**]—A legatee, after the lapse of twenty-three years, sent in a claim for his legacy. The surviving executrix had, during part of the time, been a lunatic :—Held, that her lunacy was no bar to the statute running. *Boldero* v. *Halpin, Hawes, Ex parte*, 19 W. R. 320.

**Claim for unpaid Legacy—Recovery of Principal, but only Six Years' Interest.**]—A testator gave a fund to his executrix for her life, subject to the immediate payment thereout of a legacy to be divided amongst the children of P., to whom he also gave the fund after the death of the executrix. He died in 1847. One of P.'s children, of whom there had been five, was last heard of in 1845. The executrix, W., retained one-fifth of the legacy. She became lunatic in 1851, whereupon the fund was carried to an account entitled "The account of W. and the children of P.," and the income of the whole was applied for the benefit of the lunatic. To a petition presented in 1871 by the four surviving children, for payment of the fifth share, which remained unpaid out of the fund, and for the payment of the interest thereon out of another fund belonging absolutely to the lunatic, it was objected that the Statute of Limitations was a bar :—Held, that the statute was no bar to the claim for the principal, but was a bar to the claim for more than six years' interest. *Walker, In re*, 41 L. J., Ch. 219 ; L. R. 7 Ch. 120 ; 25 L. T. 775 ; 20 W. R. 171.

**Interest on Legacies.**]—See *Dinsdale* v. *Dudding ; Hughes* v. *Williams ; Holland* v. *Clarke ;* and *Gough* v. *Bult*, col. 329.

**Legacies charged on Real Estate.**] — Held, under the circumstances of the case, to be payable, notwithstanding the lapse of more than forty years from the testator's death to the filing of the bill, the statute 3 & 4 Will. 4, c. 27, not being applicable. *Ravenscroft* v. *Frisby*, 1 Coll. 16 ; 13 L. J., Ch. 153.

**Legacy charged on Land, although a Trust, is within the Statute.**]—See *Knox* v. *Kelly*, col. 280.

**Legacies payable out of Personalty.**]—The 40th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) applies to legacies payable out of personal estate as well as to legacies charged on real estate. *Sheppard* v. *Duke*, 9 Sim. 567 ; 8 L. J., Ch. 228 ; 3 Jur. 168.

**Charge of Debts on Realty in Executor's Will —Statute-barred Legacy not included.**] — An executor who had possessed assets sufficient to pay a legacy died leaving it unpaid, but having by will charged his real estate with payment of his debts. The legacy, as such, was barred by time, the twenty years having elapsed at the filing of the bill :—Held, that it could not be claimed as a debt under the charge. *Pigott* v. *Jefferson*, 12 Sim. 26 ; 5 Jur. 196.

**Debt kept out of Statute by Devise for Payment of Debts.**]—See *Rendell* v. *Carpenter*, col. 95.

**Devise in Trust to sell and divide the Produce —Whether Claim against Executor's Estate for Share of Produce barred by Statute.**]—A testator devised his real estate to trustees, upon trust to sell, and divide the produce amongst certain persons, of whom A. was one. He appointed A. and B. his executors, who proved the will in 1816. A. died in the following year, and administration to his estate was taken out by D. in 1850. B., the other executor, died in 1849, after appointing C. his executor. The administrator of A. filed a claim against the executor of B. for A.'s share of the purchase-money of the original testator's real estate. The court refused to decide, on a claim after so long a time, whether the plaintiff was barred by the statute, but dismissed the same, with costs, without prejudice to a suit by bill. *Pawsey* v. *Barnes*, 20 L. J., Ch. 393 ; 15 Jur. 943.

Whether the share was a sum charged on or payable out of land within the 40th section of the statute 3 & 4 Will. 4, c. 27, quære. *Ib.*

**Right in Remainder to Legacy—When Statute runs against.**]—When a legacy, charged upon the residuary real estate, was bequeathed to trustees, for B. for life, and after his death for his children, and there was not, during his life, from 1806 to 1863, any payment made on account of the legacy, by any trustee capable of giving a discharge for it :—Held, that the Statute of Limitations did not begin to run against the children until the death of B. *Carroll* v. *Hargrave*, Ir. R. 5 Eq. 23.

**Legacy charged on Realty if Personalty deficient—No Trust if Personalty sufficient.**]—A bill for a legacy stated that the testatrix, who died in 1805, by her last will, made in 1803, directed that as to a sum of 10,000*l.* charged by settlement on real estate (and payable to her, her executors and administrators, after the death of Mrs. O., but the interest thereof to be payable out of the rents and profits during the lifetime of Mrs. O.), her trustees should raise so much thereof as should be sufficient to pay her debts and legacies, after applying whatever money and other personal estate she should die possessed of in discharge thereof :—Held, upon demurrer, that the charge on the real estate for debts, &c., being only contingent upon the event of the personal estate of which the testator died possessed proving insufficient, and there being no allegation that the said personal estate was deficient, it did not appear that the realty was at all liable, nor that there was any trust thereof to prevent the operation of the Statute of Limitations against the plaintiff's demand. *Cocking* v. *Golding*, 4 Ir. Eq. R. 169.

**Suit against Executor for Account of Money bequeathed on Trust, not a Suit for a Legacy.**]—A suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been saved by the executor from the testator's personal estates, and the interest of which had for a time been applied upon the trusts of the will, is not a

suit to recover a legacy, within the meaning of the Statute of Limitations. 3 & 4 Will. 4, c. 27. *Phillipo* v. *Munnings*, 2 Myl. & C. 309.

**Bequest of Residue, a Legacy.**]—A residue bequeathed by will is clearly within the provisions of the statute 3 & 4 Will. 4, c. 27, s. 40. *Prior* v. *Hornihlow*, 2 Y. & Coll. 200.

In 1780 the interest of a sum of money was bequeathed to A. for life, and after her decease the principal to her daughter, B. Between 1784 and 1795, proceedings in chancery, in which A. and B. were parties, were instituted against the executor, and a decree for an account was obtained, which was not acted upon. From that time till 1828, no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the executor, and from circumstances it appeared probable, that the legacy was paid by the executor many years ago to A. and B. jointly, or to one of them with the consent of the other:—Held, nevertheless, that payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an executor:—Held, also, that A. not dying till 1830, B.'s claim was not barred by Statute of Limitations. *Ib.*

Semble, that a residue is a legacy within the meaning of the 3 & 4 Will. 4, c. 27, s. 40. *Christian* v. *Devereux*, 12 Sim. 264.

**Claims by Legatees—Fund set apart to provide Annuity.**]—When a fund is set apart to answer an annuity, the Statute of Limitations cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee, whose legacy was payable on the testator's death. *Bright* v. *Larcher*, 27 Beav. 130.

A testator who died in 1822, by will, gave to his brother B. a legacy of 100*l.*, to be paid "as soon as conveniently may be after my decease." He then gave an annuity of 50*l.* to H., to be payable out of his real estate, until one of the testator's nephews should attain twenty-one, and on the happening of that event, he directed his real estate to be exonerated from the annuity, and his real and personal estate sold, and the annuity to be paid out of the income of the produce. He declared that after the nephew attained twenty-one, the annuity should be charged only on his personal estate. In 1839 the nephew came of age, and the real estate was sold, and the whole income paid to H. in part of her annuity, until 1856, when she died. In 1858 B., the legatee, filed a bill for payment out of the trust fund, alleging that the personalty was not sufficient, but no personal representative of the testator was made a party. Romilly, M.R., dismissed the bill on the grounds that the legacy was not charged on real estate, and that it was barred by the 3 & 4 Will. 4, c. 27:—Held, on appeal, that the personal estate was the primary fund, which there was no evidence was sufficient; that there was no personal representative of the testator before the court, and that by lapse of time the bill came too late. *S. C.*, 28 L. J., Ch. 5 Jur. (N.S.) 1233; 7 W. R. 658—L.JJ.

**Claim to Share of Residue.**]—Parties claiming a portion of the residue held not barred after twenty years' delay, either by statute or by laches, the fund still existing as a trust fund, and all parties having acted under a misconception of rights. *Downes* v. *Bullock*, 25 Beav. 54.

**Legacy for Life or absolute in Particular Events—Time does not run during Legatee's Life.**]—By will, dated in 1829, a testator gave to A. 800*l.* "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees might think fit"; and if not, then the interest was to be paid to A. for life, with remainder to his son, if he should have any. The testator died the same year. In 1831 A. went to America, where he died intestate and unmarried in 1854. No part of the legacy or interest was ever paid to A., or applied for his benefit. In 1856 A.'s administrator filed a suit for the legacy, with interest since the testator's decease:—Held, that the Statute of Limitations was no bar. *Lord* v. *Lord*, 3 Jur. (N.S.) 485.

**Bequest of Residue in Trust for Children—Legacy or Trust—Laches.**]—In 1783 a testator bequeathed the residue of his estate upon trust for his five children equally at twenty-one, of whom the plaintiff was one. In 1799 the plaintiff attained twenty-one, and in 1800 married. Disputes arose as to the amount of her share. In 1807 one of the trustees, D., wrote to the husband to state that the share of the wife amounted to 1,139*l.*, "which sum I have placed out so as to pay you 5*l.* per cent. interest; the principal you can have at any time by giving notice. I shall be glad to hear from you in respect to this." The husband never answered the letter. In 1829-30 the plaintiff attempted to enter into correspondence with D. (then the surviving trustee), but D. refused to answer her inquiries, stating that he would answer the husband only, whom he considered the proper person. In May, 1844, D. died, leaving the defendant his sole executor. In October, 1844, the husband, ignorant of D.'s decease, addressed him on the subject. The defendant opened the letter, and, as soon as he understood the claim, utterly rejected it. In 1850 the defendant finished distributing his testator's estate. In 1855 the plaintiff's husband died, and thereupon she filed a bill against the defendant, as the executor of the last surviving trustee, claiming the 1,139*l.*, and interest since 1807, as her chose in action, coming to her by survivorship. There was not the slightest evidence that either principal or interest had ever been received:—Held, that such a suit, if a suit for a legacy, was barred by laches, by analogy to the statute; if a bill for enforcing a trust, it ought to be a bill by the husband's representative, as for his fund reduced into possession in 1807, and in such case ought also to be barred by laches. *Freeman* v. *Dowding*, 2 Jur. (N.S.) 1014.

**Executor constituting himself Trustee for Legatee.**]—An executor, in his residuary account, stated that he had retained in trust the amount of A.'s legacy. He afterwards paid over the residue:—Held, that the executor had constituted himself a trustee for A., and that his remedy for recovery was not barred by the Statute of Limitations, or the lapse of time. *Tyson* v. *Jackson*, 30 Beav. 384.

Held, also, that the legal personal representative of the testator was not a necessary party to a suit to recover the legacy against the assets of the executor. *Ib.*

**Legatee of Reversionary Interest not barred during Life Interest of Executor.**]—When an executor takes, under his testator's will, a life interest in a term, the legatee of a reversionary interest, commencing on the determination of that life interest, may, upon its determination, and on assent having been given, sue to recover the land, even though the executor might himself have been barred by the Statute of Limitations. *Quinton* v. *Frith*, Ir. R. 2 Eq. 396.

**Residuary Legatee precluded by Certificate in Administration Suit from setting up Statute.**]—In an administration suit instituted by a residuary legatee more than twenty years after the testator's death, the chief clerk's certificate found that certain legacies remained unpaid; and, by the order on further consideration, liberty was given to any persons claiming to be entitled to the legacies to apply as to their payment. The legatees, who were not parties to the suit, having applied under the order for payment of their legacies:—Held, that the residuary legatee was precluded by the certificate and order from setting up the Statute of Limitations. *Prowse* v. *Spurgin*, 37 L. J., Ch. 251; L. R. 5 Eq. 99; 17 L. T. 590; 16 W. R. 413.

**Time a Bar to re-opening Accounts between Executor and Residuary Legatee unless Breach of Trust proved against Executor.**]—Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held that the onus was on the residuary legatee to prove that the conduct of the executor was a breach of trust, as it was alleged to be by retainer of the assets in trade; and that the onus was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced. *Portlock* v. *Gardner*, 1 Hare, 594; 11 L. J., Ch. 313; 6 Jur. 795.

**Right of Residuary Legatee to recover Assets, if possessed by Executor within Twenty Years.**]—More than twenty years after the death of a testator, the representative of one of his executors, and the residuary legatee under his will, filed a bill against the representative of his co-executor, to recover residuary assets of the testator, alleged to have been possessed by the co-executor. The plaintiffs are barred by the statute 3 & 4 Will. 4, c. 27, s. 40, as to assets possessed by the executor more than twenty years before the filing of the bill; but they are not barred as to assets possessed by him since that time. *Adams* v. *Barry*, 2 Coll. 290.

**Neglect of Executors to convert Leaseholds—Time does not run against Remaindermen during Estates for Life.**]—Where the testatrix directed her whole property to be converted, and the executors allowed the successive tenants for life to receive the rents of leasehold until the determination of the lease, after whose deaths the plaintiffs as remaindermen filed a bill for a general account:—Held, that they were not barred by the lapse of time in not having filed their bill until their interests came into possession, and that the defendants were liable for the value of the lease at the time when it ought to have been converted, viz. one year after the testatrix's death, regard being had to the actual enjoyment had under it, it being no answer that by defect of title in the lessor, the lease was invalid. *Mehrtens* v. *Andrews*, 3 Beav. 72.

**Distribution of Personalty by Executors without providing for Mortgage Debt.**]—See *Gale, In re*, *Blake* v. *Gale*; *Hyatt, In re*; and *Marsden, In re*, cols. 51, 52; and *Leahy* v. *De Moleyns*, col. 220.

**Executor's Right to an Account.**]—See *Smith* v. *O'Grady*, col. 54.

**Customary Tenement—Possession of Purchaser from Devisee—Equitable Title of Devisee's Heir barred.**]—A testatrix devised a customary tenement to J. without words limiting the inheritance. Upon her death the dormant surrenderee, in whom the legal estate was, surrendered the fee to J., and J. died more than forty years before the filing of the bill, having surrendered the tenement to a purchaser, who had notice of the will of the testatrix:—Held, that the equitable title of the heir which accrued on the death of J., was barred by length of time. *Collard* v. *Hare*, 2 Russ. & M. 675.

**Claim under Will barred by Possession under Compromise.**]—A. devised lands to M., with a recommendation that these and other lands should be settled in such manner as to continue in the male line of the family, and in their name and blood to go to the several branches in succession according to seniority, and in the usual course of limitation in family settlements. A. died in 1776, leaving M. his heir-at-law. M. treated the lands as his own property, never made a settlement, and died in 1816, intestate, and without issue, leaving H. and C. his co-heiresses-at-law, and also the co-heiresses of A. At the death of M., X. was the person who, if a settlement had been made giving successive life estates to the brothers and nephews of A. in esse at the time of his death, with remainders in tail to their issue male, would have been entitled to the first estate in possession as tenant for life, with remainder to his first and other sons in tail. H. and C. disputed X.'s claim, but a compromise was made, which was carried out by a deed of 1820. By this deed, which recited that X. was the only surviving male descendant entitled under the trusts of A.'s will, and that he would be entitled (if at all) to an estate for life, with remainder to his first and other sons in tail male, leaving the reversion in H. and C., who conveyed the lands to X. for life, remainder to his first and other sons in tail male; remainder to X. in fee; and X. granted annuities to H. and C., and undertook to indemnify them against certain debts. X. died without issue male, in 1834, having devised the lands to the respondents. The petitioner claimed to be entitled, under the limitations in the will of A.:—Held, that the claim was barred by the Statute of Limitations. *Malone* v. *O'Connor*, 9 Ir. Ch. R. 459.

**Possession of Younger Sons, of Property acquired subsequently to Will, adverse to Heir.**]—A testator, after appointing certain settled estates to his eldest son, gave all his other real and personal estate, charged with his debts, to his executors, in trust, for his six younger sons absolutely. After the date of his

will, a freehold estate was conveyed to him, and he died in 1791, without having republished his will, leaving his eldest son of full age. After the death of the testator, the younger sons entered into receipt of the rents of the subsequently acquired property, and continued in such receipt, without any adverse claim having been made, until 1819, when the eldest son died, leaving an infant heir. From 1819 no claim was made on behalf of the infant, and the younger sons continued in the uninterrupted receipt of the rents. In 1839 the subsequently acquired property was sold under a decree in a suit instituted by a judgment creditor of the testator, to which the infant heir of the eldest son was a party. The heir of the eldest son died after the lands were sold, and after attaining majority, and no bill of revivor was filed against the next heir. The purchaser objected to the title, on the ground that the title of the testator's heir was not shewn to be extinguished, and that there was no person to convey the legal estate:—Held, that a good title was made out under the recent Statute of Limitations (3 & 4 Will. 4, c. 27). *Scott* v. *Nixon*, 6 Ir. Eq. R. 8; 3 Dr. & War. 388; 2 Con. & L. 185.

Held, also, that it was no objection to the title that the facts constituting adverse possession were proved by affidavits, and in the absence of the heir. *Ib.*

The circumstance that the property was in lease when the adverse possession commenced, and that an arrear of rent was allowed to accumulate for several years, does not prevent the statute from running. *Ib.*

**Heir barred as to Realty disposed of by Testator's Trustees before Heir ascertained.**]—A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trust as to the personal estate. In 1847 a supplemental bill was filed, raising questions on the will, as to the real estate, in which the heir, who was then unknown, was interested; and in 1849 another supplemental bill was filed to bring the heir, who was then ascertained, before the court:—Held, that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate as being, in the events that had happened, undisposed of and held by the trustees, in trust for him. *Simmons* v. *Rudall*, 1 Sim. (N.S.) 115; 15 Jur. 162.

**Notice by Creditor of Claim in answer to Executor's Advertisement does not stop Statute running.**]—See *Stephens, In re, Warburton* v. *Stephens*, col. 26.

**Action by Residuary Legatees against Trustee for Breach of Trust in Nonpayment of Legacy—Trustee Act, 1888, s. 8.**]—See *Swain, In re Swain* v. *Bringeman*, col. 44.

**Right of Simple Contract Creditors against Devisees barred in Six Years.**]—See *Dunne* v. *Doran*, col. 54.

**Statute-barred Simple Contract Creditor excluded from Devise in Trust for Payment of Debts.**]—See *Magennis* v. *Fallon*, col. 53.

**Statute-barred Debt set off against Legacy.**]—See *Courtney* v. *Williams*, col. 51.

**Acknowledgment of Debt by Executrix will not deprive Devisee of Benefit of Statute.**]—See *Putnam* v. *Bates*, col. 119.

**Executors who are Devisees in Trust cannot subject the Realty to Statute-barred Debt.**]—See *Briggs* v. *Wilson*, col. 119.

**Admission by Trade Agent of Executor to Legatee, not an Acknowledgment.**]—See *Whitehouse* v. *Abberley*, col. 117.

**Acknowledgment by Executors, who are also Trustees of Realty, not necessarily binding on Realty.**]—See *Fordham* v. *Wallis*, col. 134.

**Payment of Interest on Debt by Devisee for Life sufficient to bind Remaindermen.**]—See *Hollingshead, In re*, col. 134, and *Roddam* v. *Morley*, col. 282.

**Devise to Sons for Life, Remainder to Heir of Survivor—Conveyance in Fee by surviving Son—Action for Possession by Heir against Purchaser more than Six, but within Twelve, Years from Vendor's Death.**]—See *Pedder* v. *Hunt*, col. 175.

**As to Trusts created by Will.**]—See **B**, II. 7, ante (col. 180).

**Mortgage of Legacy—Collateral Bond with Surety—Payment of Interest by Surety.**]—See *Seager* v. *Aston*, col. 224.

**Action by Heir of Mortgagor to Redeem—Arrears of Interest.**]—See *Elvy* v. *Norwood*, col. 225.

**Possession by Father of Son's Property continued after Son's Majority—Action by Son against Devisees of Father for Account.**]—See *Thomas* v. *Thomas*, col. 245.

**Possession of Father adverse to Adult Heir of Mother, but not to Infant Co-Heir.**]—See *Hobbs, In re*, col. 252.

**Occupation of Tenant without Payment of Rent—Subsequent Occupation of Heir of Tenant paying Rent to Tenant's Devisee.**]—See *Hawksbee* v. *Hawksbee*, col. 257.

**When Possession Adverse to Executors, &c.**]—See **B**, III. 3, post (col. 257).

**Entry of, and Receipt of Rents by, Executor considered to be as Bailiff.**]—See *Pelley* v. *Bascombe*, col. 272.

**Covenant to Pay Charge—Devise of Land subject to Charge to Tenant for Life of Charge—Claim against Personal Estate of Testator barred by Twelve Years' Possession of Land.**]—See *England, In re, Stewart* v. *England*, col. 277.

**Contingent Interest in Land devised to Wife for Life, Remainder to Son subject to Charge—Statute runs against Charge on Death of Wife, though Contingency not happened.**]—See *Owen, In re*, col. 280.

**Acknowledgment not binding on Co-Devisee.**]—See *Dickenson* v. *Teasdale*, col. 285.

**Payment of Interest by Personal Representative of Debtor—No Acknowledgment of Specialty Creditor's Claim on Land as against Mortgagees.**]—See *Coope* v. *Cresswell*, col. 284.

**Admission of Bond Debt by Executors, in Action by Stranger to Bond, sufficient.**]—See *Moodie* v. *Bannister*, col. 282.

**Acknowledgment by Debtor's Devisees in Trust.**]—See *Blair* v. *Nugent*, col. 299; *Francis* v. *Grover*; and *St. John* v. *Boughton*, col. 284.

**Acknowledgment by Executors to Legatee's Husband.**]—See *Holland* v. *Clark*, col. 286.

**Action by Heir and Next of Kin alleging concealed Illegitimacy against those in Possession—"Reasonable Diligence"—"Any Person dying Intestate."**]—See *Jennens, In re, Willis* v. *Howe*, col. 308.

**Action by Tenant for Life, who has paid off Bonds of Testator, against Tenant in Tail and Legatees.**]—See *Morley* v. *Morley*, col. 319.

12. PERSONS CLAIMING UNDER LANDS CLAUSES AND OTHER ACTS.

**Possessory Title sufficient.**]—A person shewing title by adverse possession for twenty-six years after the expiration of a term for 192 years to land taken under the provisions of the Lands Clauses Act, 1845, will, in the absence of any claim by, or evidence of the existence of, the reversioner, be deemed to be the owner of the land, and entitled to the purchase-money under the Lands Clauses Act, 1845, s. 79. *Metropolitan Street Improvement Act, 1877, In re, Chamberlain, Ex parte*, 49 L. J., Ch. 354; 14 Ch. D. 323; 42 L. T. 358; 28 W. R. 565.

**Purchase-Money of Land compulsorily taken in Court—Petition for Payment out—Running of Statute—Fraud and Misrepresentation.**]—In 1814 W. died intestate seised of a freehold estate. On his death his widow entered into possession, and continued to receive the rents until 1829. W.'s heir-at-law died in 1822. In 1829 the property was taken under an act of parliament, and the purchase-money was paid into court. Upon a petition in 1829, by the widow and J., the heir of the heir-at-law of W., the rents were ordered to be paid to the widow for her life, and then to J. for his life. The widow died in 1834, and J. died in 1863. Upon a petition by those claiming under the will of J. for payment of the money out of court, a claim was made by the devisees of the heir-at-law of W., who alleged fraud and misrepresentation by the petitioners in 1829:—Held, that their claim was barred by lapse of time, and that they could not set up the case of fraud upon the petition; but leave was given them to file a bill, the order upon the petition not to be drawn up for ten days. *Breach, Ex parte*, 10 Jur. (N.S.) 982; 12 W. R. 769.

**Ownership of Land compulsorily taken Doubtful—Retention of Purchase-Money—Time no Bar to True Owner.**]—See *Cator* v. *Croydon Canal Co.*, col. 201.

**Superfluous Land.**]—See *Norton* v. *L. & N. W. Ry.*, col. 265.

13. PERSONS UNDER DISABILITIES.

*See also* ante, **A**, IV. 9 (col. 60), **A**, IV. 10 (col. 62), *and* **A**, IV. 13 (col. 65).

By the Real Property Limitation Act, 1874, ss. 3, 5, 9 (replacing or amending ss. 16, 17, 18, of 3 & 4 Will. 4, c. 27), *any infant, person under coverture, or of unsound mind, or person claiming through them, may recover any land or rent within six years from the ceasing of the disability, or from the death of the person under disability, but, at all events, within thirty years from the right accruing. By s.* 4, *no time is to be allowed by reason of the plaintiff's absence beyond seas. By* 3 *& 4 Will.* 4, *c.* 27, *s.* 18, *no further time is to be allowed through another person's disability on death of one under disability.*

**Statute Retrospective.**]—Sect. 16 of 3 & 4 Will. 4, c. 27, is so far retrospective as to extend to a case where the first person under disability died before the passing of the act. *Devine* v. *Holloway*, 14 Moore, P. C. 290; 4 L. T. 190; 9 W. R. 642.

Sect. 16 is applicable to cases of residence in Ireland before the passing of the statute, if the controversy has not arisen till after the passing of it. *Hasell, Ex parte*, 3 Y. & C. 617; 3 Jur. 1101.

**19 & 20 Vict. c. 97, s. 10, Retrospective.**]—See *Pardo* v. *Bingham*, col. 60.

**Infancy.**]—See *Scott* v. *Nixon*, col. 150.

—— **Before the Statute.**]—Before 3 & 4 Will. 4, c. 27, s. 16, when the ancestor died, leaving a son and a daughter infants; and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad within age:—Held, that the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years; more than twenty years having, in the whole, elapsed since the death of the person last seised. *Doe* d. *George* v. *Jesson*, 6 East, 80; 2 Smith, 236; 8 R. R. 408.

—— **Sale of Real Estate of which Infants Part Owners—Purchaser with Notice of Infants' Interest—Infants not Barred.**]—Real estate was held in undivided shares by several persons as tenants in common in fee, and all of such tenants in common, except the holders of one share, were sui juris, and owners of the legal and equitable estates and interests in their respective shares in their own right. The remaining share was vested in trustees upon trusts to apply the income or such part thereof as they should think expedient for the benefit of two infants during minority, and for them absolutely upon their attaining twenty-one. In 1868 the property was by a deed, to which all the owners who were sui juris were parties, as were also nominally the infants, conveyed to a purchaser for value, with notice of the infants' interest; and the deed contained a declaration that N. (who was a party thereto for that purpose) should stand possessed of a sum representing the infants' share of the purchase-money upon trusts for their benefit during their infancy, and if within one month after coming of age they should execute the deed, or otherwise convey their interest to the purchaser, then in trust for them absolutely, but if not, then in trust for the purchaser absolutely. The infants came of age in 1884 and 1885 respectively, but did not execute the deed or otherwise convey their interest as aforesaid. The purchaser and his assigns having been in possession since the date of the deed, an action was brought in 1889 by a person claiming under one of the infants to recover her share from assigns of the purchaser. The defendants

contended that, at the time of the conveyance of 1868, the infants had no estate, the share in dispute being vested in trustees, with discretionary powers for their benefit merely; that those trustees were barred by lapse of time, under the Real Property Limitation Act, 1874, and that consequently the infants (and those claiming under them) were also barred, and could not recover the share:—Held, that the purchaser under the deed of 1868 having entered into possession with full notice and knowledge of the infant's rights, the claim was not barred by the statute. Semble, that he would also be treated as not being in adverse possession at all, but merely in right of the infants, and not, therefore, as in a position to set up the statute against them or their assigns. *Young* v. *Harris*, 65 L. T. 45.

—— **Entry of Father upon Infant Son's Real Estate—As Guardian, not as Trespasser.**]—In 1832 an infant became entitled to real estate in fee, and his father entered into possession. In 1836 he attained his majority. In 1852 the father died, having continued in possession of the property down to the time of his death. In 1854 he filed a bill against the devisees of his father for an account of the rents and profits:—Held, that the entry of his father in 1832 must be taken to have been as his guardian and not as a trespasser; and the statute, therefore, could not be set up successfully. *Thomas* v. *Thomas*, 2 Kay & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1160; 4 W. R. 135.

—— **Possession by Guardian as Bailiff for Infant.**]—See *Tinker* v. *Rodwell*, and *Hobbs, In re*, col. 251; and *Pelley* v. *Bascombe*, col. 272.

—— **Time runs against Infant Devisee from Full Age and Testator's Death, not from Discovery of Will.**]—A testator (whose will was not discovered for fifteen years after his death) died in 1847, leaving his devisee an infant, who attained full age in 1852:—Held, in an ejectment brought in 1869 by the devisee against the grantees of the heir-at-law, that by the lapse of twenty years from the death of the testator, and of ten years from the time of the devisee's attaining full age, his right was barred by the statute. *Lambert* v. *Browne*, Ir. R. 5 C. L. 218.

—— **Neglect to enter when of Age.**]—An infant who neglects to enter six years after he comes of age, is as much barred by the Statute of Limitations from bringing a bill for an account of profits, as he is from an action of account at common law. *Lockey* v. *Lockey*, Pre. Ch. 518.

—— **Infant claiming through Mother as Tenant in Tail barred, if no Possession by either for Twelve Years.**]—See *Murray* v. *Watkins*, col. 171.

—— **Marriage during Infancy—Ten Years from Removal of Second Disability.**]—When the person to whom the right to make an entry or to bring an action for the recovery of land accrues is under a disability, and before the removal of that disability the same person falls under another disability, the 3 & 4 Will. 4, c. 27, s. 16, preserves his right to bring an action until ten years after the removal of the latter disability. *Borrows* v. *Ellison*, 40 L. J., Ex. 131; L. R. 6 Ex. 128; 24 L. T. 365; 19 W. R. 850.

In 1833 the plaintiff became entitled to land, which the defendant then entered into possession of, and continued to occupy until action brought. At the time when the plaintiff's title accrued she was an infant; she married under age, and continued under coverture until the time of bringing her action in 1870. In an action by herself and her husband in her right to recover the land:—Held, that the action was maintainable notwithstanding that more than twenty years had elapsed since the title accrued, and more than ten years since the removal of the disability of infancy. *Ib.* See also *Pelley* v. *Bascombe*, col. 272.

**Coverture—Adverse Possession for Forty Years during.**]—Land was devised in 1774 by a man to his wife in fee, and after having married again, she lived on the property with her second husband for nine or ten years, and then went to reside elsewhere, and they were never afterwards in possession, but under what circumstances they left was never explained. The wife died in 1828, before the husband, who survived until 1832:—Held, that the heir of the wife was barred by the adverse possession of above forty years; though the wife was always under the disability of coverture, and her husband had a tenancy by the curtesy during his life, and it was admitted that no fine had been levied. *Doe* d. *Corby* v. *Branston*, 4 N. & M. 664; 3 A. & E. 63; 1 H. & W. 162; 4 L. J., K. B. 166.

—— **Wife of Mortgagor entitled to Interest on Mortgage—Statute does not run, though Interest not paid.**]—See *Hawes, In re, Burchell* v. *Hawes*, col. 218.

—— **No Title by Possession under informal Conveyance by Husband and Wife of Wife's Land.**]—See *Jumpsen* v. *Pitchers*, col. 229; and *Corbett* v. *Barker*, col. 211.

**Absence and Parties Abroad.**]—The 3 & 4 Will. 4, c. 27, was adopted in New South Wales by a colonial act. In 1796 H. purchased lands in New South Wales, and afterwards left that colony, putting two servants, T. and R., in possession as tenants at will, who continued in possession until 1847, when other parties obtained possession under a title from T. and R. H. continued absent from the colony, and died in 1833. H.'s heir-at-law was then in America, and was residing there in 1857, when he brought an ejectment in the colony to recover possession of the lands:—Held, first, that T. and R. were tenants at will, and that such tenancy at will ended at H.'s death in 1833. *Hogan* v. *Hand*, 14 Moo. P. C. 310; 4 L. T. 565; 9 W. R. 673.

Held, secondly, that H.'s heir-at-law being beyond the seas when the right of entry accrued upon H.'s death, he was entitled to the benefit of s. 16 of the 3 & 4 Will. 4, c. 27, which, in the case of a person beyond seas at the time when his title accrued, saved his right for ten years after the twenty years given by the 2nd section, and that his action having been brought within thirty years, he was not barred. *Ib.*

N. died in 1830, in New South Wales, seised of real estate in that colony. E., his heir-at-law, lived in Ireland, and died there in 1837. J., the heir of E., and also of N., likewise lived in Ireland, and in 1856 went to New South Wales and brought an ejectment there to recover the land of which N. died seised. The 3 & 4 Will. 4, c. 27, had been adopted in the colony:—Held, that the 1 Jac. I. c. 16 (which had been introduced

into the colony by 9 Geo. 4, c. 83, s. 24), was repealed by 3 & 4 Will. 4, c. 27, and that J.'s right of action was barred by ss. 2 and 16. *Devine* v. *Holloway*, 14 Moo. P. C. 290; 4 L. T. 190; 9 W. R. 642.

A bill filed in 1850, to set aside for fraud a limitation under a deed of 1818, by which the reversion in lands was limited to the defendant for life, stated that the defendant went to America in 1822, to avoid service of subpœna, and there concealed herself, which prevented the grantor from taking proceedings to set aside the deed, and that the grantor devised the said lands to the use of the plaintiff for life, "with remainder as therein," and also devised the residue of his estate to the plaintiff absolutely:—Held, on demurrer, that lapse of time was not a bar to the plaintiff; and that she might, as devisee, maintain a suit to set aside the deed without making the heir-at-law of the grantor a party. *Johnston* v. *Howison*, 13 Ir. Eq. R. 463.

—— **Possessory Law of Jamaica—No Exception in favour of Absentees.**]—See *Beckford* v. *Wade*, col. 152.

**Lunacy.**]—A legatee, after the lapse of twenty-three years, sent in a claim for his legacy. The surviving executrix had, during part of the time, been a lunatic:—Held, that her lunacy was no bar to the statute running. *Boldero* v. *Halpin, Hawes, Ex parte*, 19 W. R. 320.

**Disability after Statute has commenced to run.**]—The time which is incurred in the lifetime of the ancestor, shall run against the infant. *Franco* v. *Alvares*, 3 Atk. 346.

Estate tail, to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability:—Held, that the statute 3 & 4 Will. 4, c. 27, ss. 21 and 22, commenced running against C. from the death of A., and that having commenced to run, C. was not saved from its operation under the 16th section, by being under disability when her right accrued in possession. *Goodall* v. *Skerratt*, 3 Drew. 216; 24 L. J., Ch. 323; 1 Jur. (N.S.) 57; 2 Eq. R. 295; 2 W. R. 152.

Though infancy may be an answer to the objection of the time in not coming to redeem a mortgage, yet where the time begins upon the ancestor, it shall run on against his infant heir, as in the case of a fine at common law. *St. John* v. *Turner*, 2 Vern. 418.

See also *Nevarre* v. *Rutton*, col. 250.

**As between Mortgagor and Mortgagee.**]—Sect. 16 of 3 & 4 Will. 4, c. 27, shewing the rights of persons under disability, such as absence beyond seas, does not apply as between mortgagor and mortgagee. *Kingman* v. *Rouse*, 50 L. J., Ch. 486; 17 Ch. D. 104; 44 L. T. 597; 29 W. R. 627.

Coverture is no excuse for not redeeming a mortgage, for if a woman become afterwards discovert, the Statute of Limitations will run from that time. *Anon.*, 2 Atk. 333.

Tenancy by curtesy is no excuse, for it is of no consequence to a mortgagee who has the equity of redemption; if such tenants do not make use of their right, they shall be barred. *Ib.*

See *St. John* v. *Turner*, supra; and *Hawes, In re, Burchell* v. *Hawes*, col. 218; *Forster* v. *Patterson*, col. 210; and *White* v. *Ewer*, col. 211.

**Disability of one Coparcener does not save Title of Others.**]—See *Roe* d. *Langdon* v. *Rowlston*, col. 165.

**The Time of the Disabilities must be Stated in the Plea.**]—See *Blewitt* v. *Thomas*, col. 250.

**In Equity.**]—See *Cholmondeley* v. *Clinton*, col. 258.

### 14. Crown.

*See also* ante, **A**, IV. 1 (col. 39), *and* **A**, VI. 8 (col. 85).

By 9 Geo. 3, c. 16, and 24 & 25 Vict. c. 62, *the right of the crown is barred after sixty years.*

The rights of the crown are not barred by any Statute of Limitations, unless it is expressly named therein, and this rule extends to cases where the right of the crown is merely nominal. *Reg.* v. *Bayly*, 1 Dr. & War. 213; 4 Ir. Eq. R. 142.

The 8 Geo. 1, c. 4 (Statute of Limitations), does not extend to crown bonds or recognizances, although the crown is but a trustee in them for a subject. A demurrer taken to a plea of payment founded on that statute, put in to a scire facias on a receiver's recognizance, was therefore allowed. *Ib.*

**Adverse Possession.**]—Where an entire manor or other district has been in charge to the crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns for burning limestone found within the district, and of cottages for the purpose of such occupation, and the sale of the lime so produced, do not amount to such an adverse possession as to displace the title of the crown to the district, although they may have been continued for above sixty years. *Doe* d. *King William IV.* v. *Roberts*, 13 M. & W. 520; 14 L. J., Ex. 274.

—— **Land in British Honduras.**]—Held, in an information of intrusion relating to land in British Honduras, that the defendants having shewn sixty years' adverse possession therefrom before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the crown, such information must be dismissed. *Att.-Gen. for British Honduras* v. *Bristowe*, 50 L. J., P. C. 15; 6 App. Cas. 143; 44 L. T. 1—P. C.

Although British Honduras was formally declared to be a British colony, and formally annexed to British dominions by a proclamation of her majesty, dated the 12th May, 1862, yet grants of land having been made therein by the crown as early as 1817:—Held, that the territorial sovereignty of the crown must be deemed to have been acquired in or before that year. *Ib.*

—— **Onus probandi.**]—The title of the crown to lands, of which it has been out of possession for twenty years, may be tried in an information of intrusion itself, and need not be first found by inquest of office, the only effect of the 21 Jac. 1, c. 14, being to throw the onus of proving title in the first instance, in such case, upon the crown. *Att.-Gen.* v. *Parsons*, 2 M. & W. 23; 1 Tyr. & G. 980; 5 D. P. C. 165; 6 L. J., Ex. 9.

**Purchase of Crown Lands.**]—A conveyance of a manor by the commissioners of woods and

forests on the part of the crown does not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, more than twenty years before the conveyance, without leave of the crown. *Doe* d. *Watt* v. *Morris*, 2 Scott, 276; 2 Bing. (N.C.) 189; 1 Hodges, 215; 4 L. J., C. P. 285.

**Returns of Revenue.**]—Returns of any particular subject-matter by auditors in their accounts of the crown revenue are sufficient proofs of its having been kept in charge to protect the claim of the crown from the operation of the 9 Geo. 3, c. 16, although they have returned "Nihil," and the claim has not been put in suit thereon for more than sixty years. *Att.-Gen.* v. *Eardley* (*Lord*), 8 Price, 39; 1 Daniel, 271; 22 R. R. 697.

So, if the auditors make due returns, to the office of commissioners for auditing the public accounts, of the rents and other profits of lands forming part of the crown revenue, those returns constitute a putting in charge within that statute, so as to save the right of the crown from the operation of that act; although the auditors have for more than sixty years received nothing in respect of such revenue, and though the crown within that time had not instituted any suit or proceeding to recover any part of it. *Att.-Gen.* v. *Maxwell*, 8 Price, 76, n.

## III. POSSESSION.

### 1. GENERALLY.

See 3 & 4 Will. 4, c. 27, ss. 3 (*Discontinuance of*), 10 (*Entry*), 11 (*Continual claim on or near the land*), 12 (*Joint Tenants*). *By s.* 13, *the possession of the heir's brother is adverse to the heir.*

**Mere Want of Possession not within Statute.**]—The 3 & 4 Will. 4, c. 27, s. 3, does not apply to cases of want of actual possession, but to those cases only where the owner has been out of it and another party has been in possession for the prescribed time; for there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to bring the case within the statute. *Smith* v. *Lloyd*, 9 Ex. 562; 2 C. L. R. 1008; 23 L. J., Ex. 194; 2 W. R. 271.

**Statute ceases to run immediately adverse Possession is discontinued, though rightful Possession not resumed.**]—See *Trustees and Agency Co.* v. *Short*, col. 268.

**Dispossession and Resumption of Possession.**]—See *Randall* v. *Stevens*, and *Doe* d. *Baker* v. *Coombes*, col. 271.

**Dispossession after Statute has run.**]—The plaintiff proved twenty years' possession; the defendant ten years' following the twenty:—Held, that the plaintiff was entitled to recover, as his earlier possession must prevail. *Doe* d. *Harding* v. *Cooke*, 7 Bing. 345; 5 M. & P. 181.

**Presumption of Seisin in Fee from Possession.**]—If no other title appears, a clear possession of twenty years is strong presumptive evidence of a fee. *Doe* d. *Barswell* v. *Barnard*, Cowp. 595.

But possession of land for any term less than twenty years by a feoffee, is not presumptive evidence of livery of seisin. *Doe* d. *Wilkins* v. *Cleveland*, 9 B. & C. 864; 4 M. & Ry. 666; 8 L. J. (O.S.) K. B. 74.

Proof of possession of land, and pernancy of the rents and profits, is primâ facie evidence of a seisin in fee. But proof of forty years' subsequent possession by a daughter, while a son and heir lived near and knew the fact, is much stronger evidence that the first possessor had only a particular estate. *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68; 15 R. R. 518.

**Possession for Statutory Period transfers Title.**]—See *Incorporated Society for Protestant Schools* v. *Richards*, and *Scott* v. *Nixon*, col. 149.

**—— Bar at Law and Equity to an Account.**]—After an ejectment, and twenty years' possession, the Statute of Limitations will bar an account both at law and in equity; for the jus possessionis is gone by the statute, and if once the statute begins to attach, incapacity will not avoid it. *Nevarre* v. *Rutton*, 1 Vin. Abr. 185, pl. 7; 2 Eq. Cas. Abr. 9, pl. 6.

**Actual or Legal Possession.**]—There is no difference between actual possession and legal possession in respect to limitation. *Magennis* v. *Fallon*, 2 Moll. 579.

**Forty Years' Possession—Disabilities.**]—Defendant pleaded forty years' possession without account or admission of any debt; to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture and other disabilities plaintiffs could not proceed: the plea was allowed. *Blewitt* v. *Thomas*, 2 Ves. J. 669.

**Possession of Receiver.**]—The possession of a receiver in a suit is primâ facie the possession of the parties who obtained his appointment; but the solicitors of the parties who had obtained the appointment of a receiver having written a letter to the solicitor of an outside incumbrancer stating that the balances of the rents would be paid to him:—Held, that the possession of the receiver thereby became the possession of the outside incumbrancer also, for the purpose of preventing the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 34, from running against him. *Penney* v. *Todd*, 26 W. R. 502.

**Possession of Receiver for Mortgagees, appointed by Mortgagor, Possession of second Mortgagee, though he receives nothing.**]—See *Knight* v. *Bowyer*, col. 216.

**Possession of Receiver for Court, Statute does not run during—Possession of Widow.**]—See *Dixon* v. *Gayfere*, col. 256.

**Possession of Agent.**]—The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams* v. *Pott*, 40 L. J., Ch. 775; L. R. 12 Eq. 149.

**Possession commencing as that of Agent continues to be so.**]—See *Lyell* v. *Kennedy*, and *Smith* v. *Bennett*, col. 204.

**Possession of Servants as Tenants at Will—On Death of Master Possession adverse to Heir.**]—See *Hogan* v. *Hand*, col. 246.

**Possession of Cestui que Trust.**]—The possession of the cestui que trust under the trusts of a settlement is the possession of the trustee and gives the trustee a seisin of the estate, which is not interrupted by the death of the cestui que trust, but immediately enures for the benefit of the person next entitled to the equitable interest; and notwithstanding the adverse possession of another party soon afterwards commenced, the court cannot presume such adverse possession to have commenced so instantaneously on the death of the first cestui que trust as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Parker* v. *Carter*, 4 Hare, 400.

**Trust for Sale barred by unlawful Possession of Person entitled to Share of Proceeds.**]—See *Bolling* v. *Hobday*, col. 183.

**Possession of Trustee, Possession of true Cestui que Trust.**]—See *Lister* v. *Pickford*, col. 182.

**Possession as Guests.**]—The owner of a house allowed his sisters to reside therein, and contributed to their support. He paid the rent and taxes and executed all necessary repairs:—Held, that the occupation was in the character of guests and not of tenants at will, and that the Statute of Limitations did not run as against the owner. *Peakin* v. *Peakin*, [1895] 2 Ir. R. 359.

**Possession by Father as Bailiff for Infant.**]—A father, in 1848, entered into possession of certain lands of gavelkind tenure as guardian of, and bailiff for, his infant child (the plaintiff), and continued in occupation of the same until his death in 1886, at which time his child had attained the age of forty. There had been nothing to change the character of his possession since entry. The defendant, who claimed through the father, remained in possession of the property until the commencement of this action in 1893:—Held, that the Statute of Limitations did not begin to run until the father's death in 1886, and that the action having been brought within twelve years from that date, the plaintiff's claim to the lands was not barred thereby. *Thomas* v. *Thomas* (2 K. & J. 79) explained and followed. *Tinker* v. *Rodwell*, 8 R. 1; 69 L. T. 591.

A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, Samuel and John. John was then an infant. He attained twenty-one in 1877, and died in May, 1884. On the mother's death the moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of John in 1884, his interest descended to his brother Samuel as heir of the mother. In February, 1884, the father had married a second wife, and in November, 1884, he died:—Held, that, as to that one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of John was not barred by s. 12 of the act 3 & 4 Will. 4, c. 27, and that his brother Samuel was entitled to that one-eighth. But held, that, as to Samuel's own one-eighth, the same presumption did not arise, and that, there being no evidence that the father had received the rents as agent for Samuel, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title of Samuel to that one-eighth was barred by the statute. Consequently, Samuel was entitled to three-eighths of the whole property and the remaining five-eighths passed under the father's will. *Hobbs, In re, Hobbs* v. *Wade*, 57 L. J., Ch. 184; 36 Ch. D. 553; 58 L. T. 9; 36 W. R. 445.

**Occupation of Heir's Stepfather—Occasional Residence of Heir—Execution of Mortgage by Heir.**]—See *Doe* d. *Groves* v. *Groves*, col. 163.

**Possession by Father assumed to be as Guardian, not as Trespasser.**]—See *Thomas* v. *Thomas*, col. 245.

**Possession by Executor and Uncle assumed to be as Bailiff for Heir, not as Stranger.**]—See *Pelley* v. *Bascombe*, col. 272.

**Possession by Trustees under void Deed.**]—Although trustees have in the first instance entered into possession of land conveyed to them in trust for a charity under a deed void under the law of mortmain, yet they may acquire a title by possession. *Churcher* v. *Martin*, 58 L. J., Ch. 586; 42 Ch. D. 312; 61 L. T. 113; 37 W. R. 682.

**Possession under void Appointment.**]—See *Doe* d. *Allen* v. *Blakeway*, col. 176.

**Glebe Land—Purchase of adjoining Land by Rector—Promiscuous Occupation by successive Rectors.**]—In 1846, H. W., the rector of the parish of C., purchased under the provisions of an inclosure act, a number of plots of waste land adjoining the glebe, removed the old boundaries, and occupied the ancient glebe and the new inclosures indiscriminately. H. W. died in 1850, and was succeeded by P. as rector. P. died in 1855, and was succeeded by B. Both P. and B. occupied the whole land, as H. W. had done previously. In 1862, B. built and laid out a school, cottage, and garden on one of the plots of land so purchased by H. W., and the school was placed under the management of a committee. On 12th Nov., 1883, the defendant, who was the grandson and had succeeded to the real estate of H. W., granted a lease of the school, cottage, and garden to B. and the churchwardens and their successors for ninety-nine years at five shillings a year, with a proviso for increase on a certain event. On 14th Nov., 1883, B. resigned the benefice, and was succeeded by the plaintiff, who had no notice of the lease till he had been in possession for three months. In April, 1886, the defendant distrained for two years' rent:—Held, that B. had not as rector acquired a title to the school, cottage, and garden by the Statute of Limitations, and consequently there was no want of title in the defendant. *Gibson* v. *Wise*, 35 W. R. 409.

Semble, that the lease of 12th Nov., 1883,

was a valid lease under 31 & 32 Vict. c. 44, s. 1. *Ib.*

**Gravel Pit filled up by Tenant of adjoining Owner—Title of Surveyors of Highways extinguished.**]—A gravel pit and a road to it were allotted by commissioners under an inclosure act to the surveyors of highways of a hamlet for the repair of its roads and ways. From 1837 to 1863 the surveyors ceased to take gravel from the pit or to use the road, and took no steps to assert their right to the pit or road, but got gravel for the repair of the highways from another pit two miles off, which they purchased from time to time from the plaintiff's father and from the plaintiff. The land allotted for the road and gravel pit was entirely surrounded by old inclosures belonging and land allotted to the plaintiff's predecessors in title. In 1837 the tenant of the greater part of the land in which the pit was situated filled up part of the pit, and from that time cultivated the surface as arable land, together with the adjacent parts of the field. In 1839 another tenant ploughed up the remaining portion of the pit, which abutted upon land in his occupation, and also the allotted road, which passed through other land in his occupation; and both continued to be cultivated by the plaintiff's tenants as arable land from that time till 1863. In 1844 the tenant of the plaintiff, who was in occupation of the surface of the greater part of the pit, was elected one of the surveyors of the highways, and held that office for one year:—Held, first, that actual possession of the gravel pit and road was taken by the tenants of the adjoining lands in 1837 and 1839, and therefore the title of the surveyors of highways to the gravel pit and road had, by the operation of 3 & 4 Will. 4, c. 27, ss. 2, 3, 34, become extinguished. *Smith* v. *Stocks*, 10 B. & S. 701; 38 L. J., Q. B. 306; 20 L. T. 740; 17 W. R. 1135.

Held, secondly, that the circumstance of the tenant occupying part of the pit being elected surveyor of highways after possession had been taken of it, did not interrupt the running of the period of limitation, as the character of his possession as tenant under the plaintiff was not altered during his year of office. *Ib.*

**Possession of Ditch belonging to another by making it part of Garden.**]—See *Marshall* v. *Taylor*, col. 268.

**Possession of Surface by Lessee of Minerals, Possession of Minerals.**]—Action for breaking and entering the plaintiff's closes, and digging minerals therein. A plea justified the trespasses by the defendant as assignee of a lease of the minerals for ninety-nine years granted by the owner in 1821. Replication, that the right to make an entry did not first accrue within twenty-one years. It appeared that from 1816 B. was in possession of the close under a lease, in which there was no reservation of the mines. In 1821 the owner granted a separate lease of the minerals to B. and P. for ninety-nine years, under whom the defendant claimed. In 1847 the mines were first worked:—Held, that B. was in possession of the mines before 1821, by reason of his being in possession of the surface as lessee under a lease, without reservation of the mines; and that such possession enured for the benefit of himself and P. on the granting of the lease of 1821, so as to make himself and P. possessed of the mines from 1821 under that lease, and not to leave the effect of that lease to be the granting of a mere interesse termini. *Keyse* v. *Powell*, 2 El. & Bl. 132; 22 L. J., Q. B. 305; 17 Jur. 1052.

Held, also, that although the plea confessed the possession to be in the plaintiff at the time of the trespass in 1847, yet that the defendant was not confined to rely upon the right of entry which accrued to him in 1821, but might rely on a supposed dispossession within twenty-one years before 1847, and his right of immediate entry thereupon. *Ib.*

**Possession of Land or Easement—Highway—Tunnel under.**]—By a local act power was given to road trustees, in whom the soil of the road was vested, to consent in writing to excavation or undermining of the road: this was repealed as from 1 November, 1871. By deed dated 12 July, 1871, the then road trustees, for valuable consideration, granted to defendants' predecessor in title a licence to construct a tunnel under the road. The tunnel was completed about July, 1872, and had ever since remained in the uninterrupted and exclusive possession of the defendants or their predecessor in title. No substantial alteration had been made in it for more than twelve years before the issue of the writ in August, 1891. Plaintiff, who was owner of the land on both sides of the road where the tunnel passed under, claimed to be entitled to the soil under the road at that place, and claimed an injunction restraining trespass by the defendants on his land. Semble, the plaintiff had not such a title to the soil under the road as to enable him to maintain the action:—Held, that whether this were so or not, the use of the tunnel by the defendants was not a mere easement, but as against the plaintiff amounted to exclusive possession and occupation, which having continued for more than twelve years, the action was barred by the Statute of Limitations. *Bevan* v. *London Portland Cement Co.*, 3 R. 47; 67 L. T. 615.

**Working into adjacent Mine.**]—The plaintiffs were seised in fee of lands to which their predecessors derived title, under a conveyance in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. The defendant, claiming title under a demise from a descendant of the grantor, had for more than twenty years worked from mines of his own under adjacent lands into, and had taken coals from, the mines under the plaintiffs' lands:—Held, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it. *Ashton* v. *Stock*, 6 Ch. D. 719; 25 W. R. 862.

Held, secondly, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction with an account for six years. *Ib.*

Possession of the surface by the lord of the manor is no answer to a plea of the statute in an

action of ejectment by him for the mines beneath the surface, the defendants having been in possession of the mines for more than twenty years. *Rich* d. *Cullen* v. *Johnson*, Stra. 1142.

**Possession of Wife's Share of Estate by Husband after her Death—Wife's Heir barred.**]—See *Hasell, Ex parte*, col. 150.

**Possessory Law of Jamaica.**]—See *Beckford* v. *Wade*, col. 152.

**Occupation of Tenant who has attorned to Claimant not Occupation of Claimant.**]—See *Doe* d. *Linsey* v. *Edwards*, col. 153.

**Possession under Agreement for Lease—Statute does not run against Owner till end of agreed Term.**]—See *Warren* v. *Murray*, col. 154.

**A Lessor's Interest does not become an Interest in Possession by his granting a new Lease during the Continuance of the old one.**]—See *Corpus Christi Coll., Oxford* v. *Rogers*, col. 157.

**Possession by Joint Tenant of more than his undivided Share in any Portion of the Land.**]—See *Murphy* v. *Murphy*, col. 165.

**Estate as Joint Tenants acquired by wrongful Possession of two jointly.**]—See *Ward* v. *Ward*, col. 166.

**Possession of Tenants in Common.**]—See *Doe* d. *Holt* v. *Horrocks; Culley* v. *Doe* d. *Taylerson*; and *Tidball* v. *James*, col. 166.

**Ancestor seised in Tail out of Possession for thirty years before Death—In Ejectment by Heir, Heir not bound to negative a Conveyance by Fine and Recovery.**]—See *Doe* d. *Smith* v. *Pike*, col. 172.

**Onus of Proof.**]—See *Cole* v. *Heydon*, col. 302.

**Conveyance in Fee by Tenant for Life with Remainder in Tail after intermediate Life Estate—Possession by Purchaser not adverse to Remainders over until Termination of Life Estates.**]—See *Mills* v. *Capel*, col. 172.

**Where the Fee is obtained under the Statute by Possession, it is subject to Trusts declared by a prior Deed.**]—See *Scott* v. *Scott*, col. 198.

**Proof of Possession.**]—See *Thorp* v. *Facey*, col. 217.

**Payment of Interest by Mortgagor, though he has not been in Possession, protects Mortgagee against Statute.**]—See *Doe* d. *Palmer* v. *Eyre*, col. 219.

**Possession of Prior Incumbrancer.**]—See *Chinnery* v. *Evans*, col. 220.

**Remainderman not bound to dispossess Tenant for Life on a Forfeiture.**]—See *Lewis* v. *Rees*, col. 263.

**Where Land is claimed under a Will and Conveyance, the Possession of the Person so claiming is not adverse to those claiming under his Grantor.**]—See *Lewis* v. *Thomas*, col. 263.

**Possession of Wall by Inscription on it.**]—See *Phillipson* v. *Gibbon*, col. 264.

**As to when Time begins to run against an Annuitant who has never been in Possession.**]—See *Searle* v. *Colt*, col. 275.

**Lord of Manor never out of Possession.**]—See *Lloyd* v. *Bartlett*, col. 300.

**Copyholder in Possession of Part of Waste acquiring Freehold.**]—See *Att.-Gen.* v. *Tomline*, col. 302.

2. CONSECUTIVE.

**Whether Possession must be by same Person, or by Persons claiming through him.**]—Semble, that the effect of s. 34 of 3 & 4 Will. 4, c. 27, is to give title by possession for twenty years, but that such twenty years' possession must be either by the same person, or several persons claiming one from another. *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945; 18 L. J., Q. B. 306.

—— **By successive Trespassers.**]—Though under the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 34) the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right on any one of them who has not himself had twenty years' uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner. *Dixon* v. *Gayfere*, 17 Beav. 421; 23 L. J., Ch. 60.

After both the trustee and cestui que trust had been out of possession more than twenty years, an ejectment was brought by A. B., the heir of the trespasser, in the name of the trustee, and he obtained judgment. The trustee, disclaiming all personal interest, then instituted a suit, seeking to have the rights declared as between the rightful owner and the heir of the trespasser, and the court, by its receiver, took possession. A. B. afterwards instituted a suit against the trustee and the rightful owner, to recover the property:—Held, that, the court being in possession, the Statute of Limitations did not apply, so as to prevent the court's declaring who was entitled. *Ib.*

A. wrongfully entered, and died intestate; his widow entered:—Held, that the possession of the widow was not a continuance of that of her husband, it not being shewn that she was entitled to dower, and such a right not entitling her to enter into the whole estate. *Ib.*

A suit, dismissed as against the principal defendant, and which, though pleading as against the others, has yet been practically abandoned, does not prevent the operation of the Statute of Limitations. *Ib.*

—— **By Wife in Succession to Husband.**]—In ejectment, it appeared that the plaintiff's husband had been in possession as a tenant at will for eighteen years, ending in 1834, when he died, leaving a son (not a party to the action), and that she became possessed and remained in possession for thirteen years:—Held, that the plaintiff could not rely on the husband's possession except as prima facie evidence of a seisin in fee, on which supposition it was also evidence of title in his heir, which defeated the title of the

plaintiff, and that she could not insist on her own possession for thirteen years, as it was not derived from the husband's possession, although the possession by herself and her husband for more than twenty years consecutively would have entitled her to a verdict if she had been defendant in an ejectment brought by the real owner. *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945; 18 L. J., Q. B. 306.

A., purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will; the son occupied and built a cottage on the land; afterwards A. took a conveyance from the vendor, and some time after he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry:—Held, that an ejectment afterwards brought against her was barred by 3 & 4 Will. 4, c. 27, ss. 2 and 7; for that the tenancy at will was not determined by the father's taking a conveyance, and that, if it had, in point of law, been so determined by that event, or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will; and the tenancy altogether had continued more than twenty years from the end of the first year. *Doe* d. *Goody* v. *Carter*, 9 Q. B. 863; 18 L. J., Q. B. 305.

—— **By Son in succession to Father.**]—One, after occupying a house for several years as tenant from year to year, found no one to receive the rent for fifteen years before his death, and devised the house (with power of sale, under such conditions as might be thought expedient), for the benefit of his wife and children. His eldest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow died:—Held, that notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold and distributed according to the directions of the testator. *Hawksbee* v. *Hawksbee*, 11 Hare, 231.

See *Solling* v. *Broughton*, [1893] A. C. 556; *Trustees and Agency Co.* v. *Short*, col. 268; and *Willis* v. *Howe (Earl)*, col. 308.

**Widow of Tenant at Will continuing in Possession does not occupy as Tenant.**]—See *Doe* d. *Stanway* v. *Rock*, col. 228.

### 3. ADVERSE.

**Nature of.**]—Possession is adverse for the purpose of limitation when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant. *Des Barres* v. *Shey*, 29 L. T. 592; 22 W. R. 273.

**Possession not Adverse, when Rights of others recognised.**]—See *Incorporated Society* v. *Richards*, col. 149.

**Statute ceases to run against Owner immediately Adverse Possession is discontinued.**]—See *Trustees and Agency Co.* v. *Short*, col. 268.

**Entry and complete Ouster of Adverse Possessor stops the Statute, though Possession so taken not Shewn to have been Continued.**]—See *Worssam* v. *Vandenbrande*, col. 271.

**Since 3 & 4 Will. 4, c. 27.**]—By 3 & 4 Will. 4, c. 27, ss. 2, 3, the doctrine of non-adverse possession is done away with, except in cases provided for by s. 15; and an ejectment must be brought within twenty years after the original right of entry of the plaintiff (or of the party under whom he claims) accrued, whatever is the nature of the defendant's possession. *Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894; M. & H. 291; 2 Sm. L. C. 542; 7 L. J., Ex. 335.

**After Expiration of Title.**]—A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constituted such an adverse possession as created a bar to an entry or to an ejectment. *Doe* d. *Parker* v. *Gregory*, 4 N. & M. 308; 2 A. & E. 14; 4 L. J., K. B. 19.

As, where the husband of a tenant for life held over twenty years after her decease. *Ib.*

**Twenty Years' Possession Adverse to a Title extinguishes It.**]—See *Brassington* v. *Llewellyn*, col. 270.

**Effect of, in Equity.**]—Where there has been adverse possession not accounted for by some disability, as coverture or infancy, for twenty years, a court of equity ought not to interfere. *Cholmondeley* v. *Clinton*, Turn. & R. 107.

**Of Trustees, Mortgagees, and Lessees.**]—Adverse possession, as against an equitable estate, may create or defeat a right where the possessor has no duty to discharge for the party against whom possession is pleaded. The effect of adverse possession cannot be suspended during the continuance of long terms of years. Adverse possession of an equity of redemption for twenty years is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion, and disseisin, with respect to legal estate. *S. C.*, 4 Bligh, 1; 22 R. R. 83.

Acts done by a trustee or termor for years cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee. *Ib.*

**Possession of Trustee never Adverse to true Cestui que Trust.**]—See *Lister* v. *Pickford*, col. 182.

**Possession of Cestui que Trust not Adverse to Trustee.**]—See *Smith* d. *Dennison* v. *King*, col. 181.

**Person let into Possession by Cestui que Trust.**]—See *Melling* v. *Leak*, col. 181.

**Adverse Possession bars implied Trust.**]—See *Kingston* v. *Lorton*, col. 196.

**Trust for Sale barred by Adverse Possession of Person entitled to Share of Proceeds.**]—See *Bolling* v. *Hobday*, col. 183.

**On Death of Cestui que Trust in Possession, instantaneous Seisin of Person next entitled through Trustee.**]—See *Parker* v. *Carter*, col. 251.

**Possession of Purchaser with Notice not Adverse to Infant Cestui que Trust of undivided**

**Share of Estate.**]—See *Young* v. *Harris*, col 245.

**Possession of Mortgagee, who has purchased Interest of Tenant for Life of Equity of Redemption, not Adverse to Remaindermen.**]—See *Hyde* v. *Dallaway*, col. 211.

**Period at which Possession of Mortgagee becomes Adverse to Remainderman.**]—See *Blake* v. *Foster*, col. 212.

**Adverse Possession of Part only of Mortgaged Premises, no Bar to Equity of Redemption.**]—See *Burke* v. *Lynch*, col. 210.

**Possession, to bar Right to Redeem, must be Adverse.**]—See *Fenwick* v. *Reed*, col. 213.

**Where no Adverse Possession, at time of passing of 3 & 4 Will. 4, c. 27, Mortgagee had Five Years to Foreclose.**]—See *Wrixon* v. *Vize*, col. 206.

**Possession of Mortgagor—Acknowledgment of Mortgagee's Title.**]—See *Doe* d. *Jones* v. *Williams*, col. 207.

**Possession of Sub-Lessee of Lessee for Lives, after Sub-Lease expired, not Adverse to Lessor until Expiration of Lease, though original Lease surrendered and fresh one granted after Sub-Lease.**]—See *Ecclesiastical Commissioners* v. *Treemer*, col. 155.

**Possession under void Lease at Peppercorn Rent.**]—See *Magdalen Hospital* v. *Knotts*, col. 156.

**Lease to Trustees of Chapel—Nonpayment of Rent—Right of Reversioner to recover Possession.**]—See *Bunting* v. *Sargent*, col. 156.

**Allotment in respect of Property leased held Adversely to Lessor.**]—See *Ecclesiastical Commissioners* v. *Rowe*, col. 157.

**Lessee for Lives retaining Possession under Claim that one of the Lives in Existence, after second Lease granted to another.**]—See *Rex* v. *Axbridge*, col. 156.

**Begins against Lessor from Expiration of Lease, or from Payment of Rent to one claiming the Reversion.**]—See *Chadwick* v. *Broadwood*, col. 159.

**Of Wrongful Claimant.**]—An estate subject to a mortgage in fee being in settlement, with an ultimate limitation to the right heirs of S. R., A., on expiration of the previous estate, enters, claiming to be entitled under that limitation; he and (after his death) his son continue in quiet possession, paying interest on mortgage for twenty years. The devisee of the person really entitled under the limitation is barred by length of time. *Cholmondely* v. *Clinton*, 2 Jac. & Walk. 2, 192; 22 R. R. 84. Affirmed, 4 Bligh, 1; 22 R. R. 83.

**Statute continues to run in Favour of False Claimant in Possession as Heir, notwithstanding concealed Fraud subsequent to wrongful Entry.**]—See *Willis* v. *Howe*, col. 308.

**By Agents.**]—An agent cannot gain an adverse title unless he can very distinctly shew that what he has done is in respect of title, and not of his agency. *Att.-Gen.* v. *London Corporation*, 2 Macn. & G. 247; 2 H. & Tw. 1; 19 L. J., Ch. 314; 14 Jur. 205.

**Agent continuing to receive Rents after Owner's Death not in Possession Adverse to Heir.**]—See *Lyell* v. *Kennedy*, col. 204.

**Receipt of Rent by Person not entitled—Payment under Belief of Agency—Ratification by true Owner.**]—The owner in fee of lands, subject to a yearly tenancy vested in the defendant, devised the lands to G. for life, with remainder to the issue of G. as G. should appoint. G. received rent from the defendant until his (G.'s) death in 1872. G., by his will, appointed the lands to W. in fee, and devised other lands, of which he was the absolute owner, to M. upon active trusts. From 1872 to 1879 M. received rent from the defendant, his agents giving receipts for such rent as due to the "representatives" of G. W. died in 1879, having devised the lands to J. The defendant did not pay rent to any person after that date. In an action by M. and J. as co-plaintiffs, brought in the year 1888, for rent, and in which the defendants did not require any question to be left to the jury, the court being of opinion that there was evidence from which the jury might have found that the defendant, to the knowledge of M.'s agents, paid rent to them, under the belief that they were acting for the true owner, and that J., within a reasonable time, adopted and ratified their acts:—Held, that, under those circumstances, the acts of M. and his agents in receiving the rents did not dispossess W. or J. so as to put them to their action under the 2nd, 3rd, and 8th sections of the 3 & 4 Will. 4, c. 27. *Lyell* v. *Kennedy* (14 App. Cas. 437) applied. *McAuliffe* v. *Fitzsimons*, 26 L. R., Ir. 29.

**"Representative"—Meaning of.**]—The word "representative," when used with reference to ownership of land, is capable of distinct meanings, and its signification in each case must be determined as a question of fact. It may mean heir or devisee, executor or legatee deriving under an absolute owner, or, as in the present case, the successor to a person having only a limited estate. *Ib.*

**Possession of Intestate's Brother not Adverse to Infant Daughters.**]—A father seised of land made a will, invalid as to real estate, whereby he appointed his brother, to whom he was indebted, executor, and died, leaving two infant daughters. The uncle entered upon the real estate and kept down the interest on a mortgage, and laid out considerable sums on improvements:—Held, that the possession of the uncle could not be treated as having been adverse to his nieces. *Pelley* v. *Bascombe*, 34 L. J., Ch. 233; 11 Jur. (N.S.) 52; 13 W. R. 306—L.JJ.

**By Widow to Exclusion of Heir.**]—L. R. died seised of freehold premises, leaving a widow and a son (by her), R. R., his heir-at-law, twelve years old. The widow entered into receipt of the rents, and two years afterwards married again, and went to reside on the premises, which she occupied with her second husband during his life, and from his death until her own, the whole

period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises after her death belonged to R. R., but she left a will devising the property to H., her son by her second husband, and describing it as having descended to her from her mother. After her death, H., then in possession, promised that he would sign an agreement to rent the premises under R. R., but he never did sign it:—Held, that a jury was not bound to find an adverse possession of the widow during the fifty years. *Doe* d. *Roffey* v. *Harbrow*, 3 A. & E. 67, n.; 1 N. & M. 422.

A., forty-five years ago, inclosed a piece of ground from the waste, and built a cottage on part of it; he died twenty-nine years ago; and, after that, his widow and daughter lived on the premises till the death of the former, a month before the trial:—Held, in ejectment by A.'s eldest son, that his claim was barred unless the jury was satisfied that his mother held the premises by his permission, and not adversely. *Doe* d. *Pritchard* v. *Janney*, 8 Car. & P. 99.

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife:—Held, that though B. could not recover in ejectment as the heir of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as his heir on her death in 1838. *Doe* d. *Bennett* v. *Long*, 9 Car. & P. 773.

When a widow continued to reside in a freehold house of which she was seised for more than twenty years after her husband's death:—Held, that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. *Doe* d. *Hickman* v. *Haslewood*, 1 N. & P. 352; 6 A. & E. 167; W. W. & D. 116; 6 L. J., K. B. 96; 1 Jur. 1138.

A husband, by will in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his death, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value:—Held, that the widow had acquired a good title by adverse possession. *Paine* v. *Jones*, 43 L. J., Ch. 787; L. R. 18 Eq. 320; 30 L. T. 779; 22 W. R. 807.

Declarations made by a widow in the possession of premises for more than twenty years, that she held them for her life only, and that after her death they would go to the heirs of her husband, are admissible to negative the fact of her having had twenty years' adverse possession. *Doe* d. *Human* v. *Pettet*, 5 B. & Ald. 223.

**By Husband to exclusion of Wife's Heir.**]—A., thirty years back, died seised of a cottage, leaving a son, B., and a daughter, C. At his death, C., his daughter, then unmarried, took possession of it, and afterwards married D., and after his death, W. After her death W. remained in possession sixteen years:—Held, that the son of B., who was the heir of C. as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it. *Doe* d. *Tranter* v. *Wing*, 6 Car. & P. 538.

**Possession of Father Adverse to Adult Heir of Mother, but not to Infant Co-Heir.**]—See *Hobbs, In re*, col. 252.

**Lease in Wife's Name—Possession by permission of Wife no Bar to Husband.**]—A lease for years was granted to a married woman living apart from her husband, under the supposition that she was a feme sole. A third party had obtained and held possession for more than twenty years by permission of the lessee:—Held, in ejectment by the husband's representative, that it was not a misdirection to put it as a question, whether the possession had been adverse as against the wife, instead of as against the husband. *Doe* d. *Wilkins* v. *Wilkins*, 5 N. & M. 434; 1 H. & W. 574; 4 A. & E. 86.

**Of Daughter as against Son.**] — Where a daughter entered into occupation of premises on the death of her mother, to whom they had belonged till then, and held them without interruption for twenty years, but the mother had left a son, who was living during the whole time of the daughter's occupation:—Held (in an ejectment brought before 3 & 4 Will. 4, c. 27, came into operation), that it could not be presumed from this circumstance alone that the sister's occupation was virtually that of the brother. *Doe* d. *Draper* v. *Lawley*, 13 Q. B. 954.

**Purchaser from Tenant for Life holding over—Tenant by Sufferance to Heir.**]—S. devised his estate to his wife for life, and died seised, leaving his widow and two sons him surviving. After his death the widow and the younger son, by deed, conveyed the estate in fee to H., without the privity of the eldest son and heir-at-law of the testator; H. continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children; six years after H. entered into possession, the eldest son and heir-at-law of S. devised all his real estate to his wife and to his younger brother, in trust for the life of the wife, and then to his children, and died three years afterwards, without ever disturbing H.'s possession:—Held, that the trustees might maintain ejectment to recover the possession of the estate, notwithstanding the quiet enjoyment of H. for twenty-two years. *Doe* d. *Souter* v. *Hall*, 2 D. & R. 38.

**Abandonment of Possession by Owner—Heir barred.**]—Land was devised in 1744 by a man to his wife in fee; and, after having married again, she lived on the property with her second husband for nine or ten years, and then went to reside elsewhere, and they were never afterwards in possession, but under what circumstances they left was never explained. The wife died in 1828, before the husband, who survived until 1832:—Held, that the heir of the wife was barred by the adverse possession of strangers for above forty years; though the wife was always under the disability of coverture, and her husband had a tenancy by the courtesy during his life, and it was admitted that no fine had been levied. *Doe*

d. *Corby* v. *Branston*, 4 N. & M. 664; 3 A. & E. 63; 1 H. & W. 162; 4 L. J., K. B. 166.

**As against Remainderman's Devisee, only on Expiration of Particular Estate.**]—M., seised in fee of an undivided moiety of an estate, by her will made many years before her death, devised the same to her nephew and two nieces as tenants in common. One of her nieces having died in her lifetime, leaving an infant daughter, she, by another will, but which she never executed, devised the estate to her nephew, her surviving niece, and that infant. Upon the death of M., her nephew and surviving niece covenanted to carry her unexecuted will into effect, and to convey one-third of the estate to a trustee, to convey to the infant when she attained twenty-one, or to her issue, if she died before twenty-one leaving any, or otherwise to themselves again; but no conveyance was ever executed in pursuance of the deed. The infant died under age and without issue, but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the nephew brought above twenty years after the death of the nephew, but within twenty years after the death of the infant:—Held, that the adverse possession began only after the latter event, and, therefore, that the action was maintainable. *Doe* d. *Colclough* v. *Hulso*, 5 D. & R. 650; 3 B. & C. 757; 27 R. R. 470.

**Of Assignee of Tenant for Life, as against Trustee of Estate, not till Death of Assignor.**]—See *Fausset* v. *Carpenter*, col. 168.

**Possession of Tenant for Life after Forfeiture.**]—Where a tenant for life executes a tortious conveyance, committing a forfeiture, under which, however, he takes equally a life estate and continues in possession, the remainderman entitled to claim on the forfeiture may, if he choose, treat the possession of the wrong-doing tenant for life as possession under the first settlement, and not under his own unlawful conveyance. *Lewis* v. *Rees*, 3 Kay & J. 132; 26 L. J., Ch. 101; 3 Jur. (N.S.) 12; 5 W. R. 96.

**Possession of Tenant in Tail after Forfeiture not Adverse to Remainderman.**]—See *Astley* v. *Essex*, col. 173.

**Possession under Conveyance and Will not Adverse to those claiming through Grantor.**]—Where M. D., with whom A. J., a person of unsound mind, and who had come into possession of lands, resided, and continued to do so until her death, obtained a will and conveyance of part of the lands to himself in fee, and for thirteen years prior thereto, and for ten years after, received the rents:—Held, that having founded his title on those instruments, he was to be deemed as claiming under, and not adversely to, those claiming under A. J. *Lewis* v. *Thomas*, 3 Hare, 26.

**Possession of one Co-owner.**]—R. died in 1791, possessed of an equity of redemption in the lands of A., held for a term of years under the see of Down, and left two sons, H. W. K. and T. K. H. W. K. entered into possession of the lands of A. and obtained renewals of the lease thereof in his own name; he also executed mortgages thereof, and applied the rents in discharge of some of his father's debts, and acted as sole owner until his death in 1809. In 1802 he obtained letters of administration to his father, and no claim was set up by T. K. during the life of H. W. K. to the lands:—Held, that such possession was not adverse against T. K., and did not establish a title to the entail lands, as against the representatives of T. K., who were entitled to the moiety thereof. *Scott* v. *Knox*, Longf. & T. 381; 4 Ir. Eq. R. 397.

A partition by parol cannot be questioned after separate possession for twenty years. *Paine* v. *Ryder*, 24 Beav. 151.

**After one Tenant in Common has received Rents of Entirety for Twenty Years, Acknowledgment of the other's Title immaterial.**]—See *Sanders* v. *Sanders*, col. 167.

**Enjoyment of Rents of the Entirety by Four Tenants in Common bars the Fifth.**]—See *Burroughs* v. *M'Creight*, col. 166.

**Rent of Intestate's Estate paid by Tenant to younger Son—Acts of Ownership by elder Son.**]—In ejectment for lands, it appeared that, in 1788, G. purchased the estate in fee, of which he died seised and intestate in 1790, leaving two sons, J. and E., and in 1812 J. died intestate, leaving a son, J. In 1788 C. was tenant in possession, and so continued until the time of the trial. From the death of the purchaser, C. paid his rent (with the exception hereinafter mentioned) to E., the younger son, until 1817, when he died, leaving two sons, J. G. (who received the rent from 1817 until the time of his death in 1825), and the defendant. The eldest son of the purchaser received in 1804 a half-year's rent from C., and in 1805 sold and cut down timber on the estate. In June, 1813, J. employed an agent to demand of C. the rent in arrear, when he answered that his connection as tenant with J. G. had ceased for several years. In 1820 an action of ejectment was commenced:—Held, that there was no adverse possession to bar the recovery of the lessor of the plaintiff in ejectment. *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; 8 L. J. (O.S.) K. B. 321.

**Inscription as to Ownership on Wall of House.**]—The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, and obtained a reference as to title. The objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson* v. *Gibbon*, 40 L. J., Ch. 406; L. R. 6 Ch. 428; 24 L. T. 602; 19 W. R. 661.

Held, that the vendor was to blame, as he

might, with reasonable diligence, have informed himself of this defect before selling, and that, therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs. *Ib.*

**Obliteration of Boundary — Possession by Cultivation.**] — A railway company in 1838 bought part of a field under the powers of their act, and erected a post-and-rail fence on the boundary. They then made a ditch within the fence, and threw up a bank on which they planted a quickset hedge at the distance of 4ft. 6in. from the fence. As the hedge grew up the fence was allowed to fall into decay, and about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge and the site of the fence was occupied and cultivated with the remainder of the field, partly as an arable field and partly as garden ground, the railway company in no way interfering with it except that their workmen went over it to trim the hedge:—Held, that the circumstances conclusively shewed the strip between the hedge and the line of the post-and-rail fence to be superfluous land within the meaning of the Lands Clauses Consolidation Act, 1845, s. 127, and that it had therefore vested in the owner of the rest of the field, and moreover (notwithstanding *Searby* v. *Tottenham Ry.*, infra), that the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the company under the Statute of Limitations. *Norton* v. *L. & N. W. Ry.*, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173; 44 J. P. 22—C. A.

A field adjoining a public road was separated from it only by a hedge and bank. The trustees who, under an act of parliament, constructed the road upwards of fifty years before the commencement of the suit, made the hedge and bank, and also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up and obliterated, and had never been re-opened by the trustees; but a ditch about a foot wide had been subsequently made by the occupier of the field, and that also had become obliterated. The owners of the land had always included the hedge in their leases, and the tenants had held and used the strip within the hedge as part of their field for much more than twenty years, and had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—Held, that these circumstances were not sufficient to constitute an adverse possession, and to give the owners of the land a title under the Statute of Limitations to the site of the three-feet ditch. *Searby* v. *Tottenham Ry.*, L. R. 5 Eq. 409.

**Title under Lands Clauses Act as Owner by adverse Possession.**]—See *Metropolitan Street Improvement Act, In re, Chamberlain, Ex parte*, col. 243.

**Of Land required for a Railway.**]—The mere fact that land of a railway company is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has exclusive adverse possession for twelve years becoming thereby entitled to the land under the statutes of limitations. *Bobbett* v. *S. E. Ry.*, 51 L. J., Q. B. 161; 9 Q. B. D. 424; 46 L. T. 31; 46 J. P. 823. Affirmed on evidence, W. N. 1882, 92.

**Of Mines—No Knowledge by Owner, of wrongful Working.**]—By an inclosure act it was provided that it should be lawful for the lord of the manor for the time being from time to time to come upon the commons and waste lands intended to be inclosed, to search for and raise any coal and ironstone being in or under the commons and waste lands. The commissioners allotted certain plots of land to S. and E., which afterwards vested in the defendant, who in 1845 worked the coal under one of the plots of land, in 1847 under a second, in 1848 under a third, in 1849 under a fourth, and in 1855 under a fifth. The plaintiffs, who claimed the coal under the lord of the manor at the time of the inclosure act, commenced, in 1867, an action for working the coal:—Held, that the action was maintainable, for that the acts of trespass committed more than twenty years before suit could not be relied upon as constituting a possession adverse to the plaintiffs, there being no sufficient evidence that the then owner of the mines was aware that the acts of trespass were being committed. *Dartmouth (Earl)* v. *Spittle*, 24 L. T. 67; 19 W. R. 444.

The plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. The defendant, claiming title under a demise from a descendant of the grantor, had for more than twenty years worked from mines of his own under adjacent lands into, and had taken coals from, the mines under the plaintiffs' lands:—Held, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction with an account for six years. *Ashton* v. *Stock*, 6 Ch. D. 719; 25 W. R. 862.

**Ignorance of Owner that Possession taken, immaterial.**]—See *Rains* v. *Buxton*, col. 268.

**Non-adverse Possession at passing of 3 & 4 Will. 4, c. 27.**]—By a marriage settlement a husband became entitled to the moiety of an estate in fee, which moiety originally belonged to his wife. During the coverture, the other moiety descended to the wife, as heiress-at-law to her brother. The wife afterwards died in the husband's lifetime without issue; and the husband, from the time of her death, in 1815, till a sale of the estate in 1828, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person:—Held, that this was a case falling within 3 & 4 Will. 4, c. 27, s. 15, and that, notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse, the heir-at-law of the wife, not having made his claim within five years after the passing of the act, was barred by the statute. *Hasell, Ex parte*, 3 Y. & C. 617; 3 Jur. 1101.

W. permitted J. to occupy land, of which he was seised in fee, for twenty years previously

to J.'s death in 1831; W. died in September, 1833, and the defendant, who was his son and heir-at-law of J., occupied till 1836. On ejectment brought by the devisees of W., it was found by the jury that the possession of J. was not adverse to W.:—Held, that the right of action in the devisees was not barred by 3 & 4 Will. 4, c. 27, ss. 2 & 7, but was saved by s. 15, being brought within five years from the passing of the act. *Doe* d. *Burgess* v. *Thompson*, 1 N. & P. 215; 5 A. & E. 532; 2 H. & W. 451; 6 L. J., K. B. 57.

**Statute continues to run though adverse Occupant becomes Tenant.**]—See *Dixon* v. *Baty*, col. 155.

**Payment by Tenant of Annuity due from Landlord, whether Payment of Rent.**]—See *Doe* d. *Newman* v. *Godsill*, col. 158.

**Separate Possession of Coparceners in Tail under Agreement for Partition not adverse to Heir.**]—See *Doe* d. *Millett* v. *Millett*, col. 165.

**Possession under Agreement to Purchase.**]—See *Doe* d. *Counsell* v. *Caperton*, and *Doe* d. *Milburn* v. *Edgar*, col. 228.

**Under supposed Devise—Receipt of Rents from Lessee sufficient, though allowed to fall in Arrear—Proof of, by Affidavit.**]—See *Scott* v. *Nixon*, col. 241.

**Devisee who enters upon the Land cannot set up Statute against Legacies charged on It.**]—See *Molony* v. *Molony*, col. 234.

**As against Crown.**]—See *Doe* d. *Williams* v. *Roberts*, col. 248.

**Of Waste, as against Commoner.**]—See *Hawke* v. *Bacon*, col. 301.

**Of Waste, as against Lord.**]—See *Hodgson* v. *Hooper*, col. 301.

**As against Church.**]—See *Runcorn* v. *Doe* d. *Cooper*, col. 305; and *Roe* d. *Pellatt* v. *Ferrars*, col. 304.

**Discovery in Aid of Ejectment—Abatement of Ejectment—After Twenty Years' adverse Possession, Revivor of Bill of Discovery disallowed.**]—See *Bampton* v. *Birchall*, col. 332.

4. DISCONTINUANCE OF.

**What amounts to.**]—Acts of user committed upon land which do not interfere, and are consistent with the purpose to which the owner intends to devote it, do not amount to a dispossession of the owner, and are not evidence of discontinuance of possession by him within the meaning of 3 & 4 Will. 4, c. 27, s. 3. *Leigh* v. *Jack*, 49 L. J., Ex. 220; 5 Ex. D. 264; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488—C. A.

**By original Owner of Ditch.**]—Where the boundary between the premises of two adjoining landowners is marked by a hedge and a ditch, semble, the presumption that the latter belongs to the owner of the former applies only to a ditch which is known to be artificial, and not to one which is or may be a natural watercourse. Where on the evidence the ditch was shewn to have at one time belonged to the same party as the hedge:—Held, nevertheless, that evidence that the other party had laid out as part of his garden the land covering the site of the ditch, and had enjoyed it as such for more than twelve years, while the original owner had not, unequivocally as of right, done any act except emptying his sewage into a drain which ran along the old ditch, was sufficient to establish a dispossession of the original owner, and the acquisition by the other party of a title under the Statute of Limitations. *Leigh* v. *Jack* (5 Ex. D. 264) distinguished. *Marshall* v. *Taylor*, 64 L. J., Ch. 416; [1895] 1 Ch. 641; 12 R. 310; 72 L. T. 670—C. A.

**By another taking Possession, though without Owner's Knowledge.**]—Under the Statute of Limitations (3 & 4 Will. 4, c. 27), the right to land is extinguished, in the absence of fraud, after a discontinuance of possession for the period enacted in the statute, although the owner so discontinuing possession was unaware that adverse possession had been taken. If A. has occupied a cellar under the ground of B. for sixty years, this is, in the absence of fraud, a discontinuance of possession on the part of B. within the meaning of the statute, though B. was ignorant of such occupation. *Rains* v. *Buxton*, 49 L. J., Ch. 473; 14 Ch. D. 537; 43 L. T. 88; 28 W. R. 954.

**Possession of Surface no Evidence of Property in Minerals.**]—See *Rich* d. *Cullen* v. *Johnson*, col. 255.

**By Intruder before Title acquired.**]—The Statute of Limitations (3 & 4 Will. 4, c. 27) does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The act applies not to want of possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. *Trustees and Agency Co.* v. *Short*, 58 L. J., P. C. 4; 13 App. Cas. 793; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132—P. C.

**Railway—Derelict Line—User by Public.**]—A railway company constructed under their statutory powers a railway through certain quays, and one of the clauses of their act provided that the line should be so constructed as not to unnecessarily interfere or inconvenience the general traffic on the quays or the roads leading therefrom and thereto. After 1875 the railway company never made any use of this line. There was evidence that the public, including the occupiers of the quays, passed over the line as they wished, and a tenant of the owner of the lands compulsorily taken for the construction of the line was in the habit of carting coal and salt, in which he dealt, over the railway:—Held, that no title had been acquired under the Statute of Limitations by the original owner or the occupiers of the quays. *Duffy's Estate, In re*, [1897] 1 Ir. R. 307. Affirmed in C. A.

**Yearly Tenant paying Rent to supposed Agent—Subsequent Ratification by Owner—Owner not dispossessed.**]—See *McAuliffe* v. *Fitzsimons*, col. 260.

**Discontinuance of Receipt of Fee Farm Rent, What amounts to.**]—See *Adnam* v. *Sandwich*, col. 277.

## IV. ENTRY.

### 1. Right of.

**Statute does not commence to run against Remainderman till Death of Tenant for Life, notwithstanding Forfeiture.**]—An estate was settled on a tenant for life and remainderman in tail, with a name and arms clause that in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession the estate should go over as if he were dead. C. entered into possession as tenant in tail, and did not comply with the condition; he remained in possession for more than twenty years after he had forfeited the estate:—Held, that he did not acquire a title by adverse possession, but that under 3 & 4 Will. 4, c. 27, s. 4, the right of the remaindermen to enter commenced on his death. *Astley* v. *Essex* (*Earl*), 43 L. J., Ch. 817; L. R. 18 Eq. 290; 30 L. T. 485.

At the death of the tenant for life the next remainderman was in India and was ignorant of the clause until after the twelve months expired:—Held, that his ignorance did not prevent the forfeiture operating on his interest. *Ib.*

The 3 & 4 Will. 4, c. 27, s. 4, extends to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures, of which the heir-at-law only can take advantage. *Ib.*

**Devise over in either of Two Events—Time runs from Happening of First.**]—A father devised lands to his son A.; and, in case his son either married or took up with a Roman Catholic, or in case he died without a lawful heir, then he directed that all he had devised to A. should go to his, the testator's, son B. Both events happened:—A. took up with a Roman Catholic after the testator's death, and died without a lawful heir. A few months after the happening of the second event, but more than twenty years after the happening of the first event, B. brought an ejectment against the devisee of A.:—Held, that 3 & 4 Will. 4, c. 27, s. 20, deprived B. of the benefit of the new right of action which accrued on the happening of the second event; and that as more than twenty years had elapsed from the happening of the first event, when B. was bound to have asserted his title, he could not maintain the ejectment. *Clarke* v. *Clarke*, Ir. R. 2 C. L. 395.

**Tenant at Will in Possession under Agreement for Lease—No effective Right of Entry by Owner till End of Agreed Term.**]—See *Warren* v. *Murray*, col. 154.

**No Right of Entry on Determination of Tenancy at Will by Grant of Lease to Another.**]—See *Hogan* v. *Hand*, col. 162.

**None during Tenancy at Will.**]—See *Turner* v. *Doe* d. *Bennett*, col. 162.

**Right of Entry at End of First Year of Tenancy at Will.**]—See *Day* v. *Day*, col. 163.

**Grant in Fee by Tenant for Life—Right of Entry of Issue in Tail, When accruing.**]—See *Doe* d. *Daniel* v. *Woodroffe*, col. 172.

**Right of Entry of Heir of Lessee for Lives, who is also Heir of Reversioner, barred by Adverse Possession—No new Right on Determination of Lease.**]—See *Doe* d. *Hall* v. *Moulsdale*, col. 179.

**Infant neglecting to Enter within Six Years after of Age.**]—See *Lockey* v. *Lockey*, col. 245.

**Heir beyond Seas when Right of Entry accrued.**]—See *Hogan* v. *Hand*, col. 246.

**Grant of Lease of Minerals to Lessee of Surface—Not a mere Interesse Termini, though Mines not worked.**]—See *Keyse* v. *Powell*, col. 254.

**On Death of Cestui que Trust in Possession, Seisin of Trustee enures instantaneously for benefit of Person next entitled under Trust.**]—See *Parker* v. *Carter*, col. 251.

**Right of Entry of Lord of Manor barred by Statute.**]—See *Lidiard and Broadley, In re*, col. 300.

**—— After Licence to inclose Waste.**]—See *Hodgson* v. *Hooper*, col. 301.

**—— For Forfeiture.**]—See *Whitton* v. *Peacock*, col. 300.

**Exception of Concealed Fraud applies to Legal, as well as Equitable, Right.**]—See *Vane* v. *Vane*, col. 309.

**Reply of Statute to Defence of Right of Entry in Action of Trespass.**]—See *Jones* v. *Jones*, col. 332.

### 2. Effect of.

*By 3 & 4 Will. 4, c. 27, ss. 10, 11, no mere entry on land, or continual claim on or near it, is to have the effect of possession so as to preserve any right.*

**Of no Effect, after Statute has run.**]—The effect of the 3 & 4 Will. 4, c. 27, ss. 2—4, as to land, is, that after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or revested by a re-entry after that period, upon the doctrine of remitter, because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry; and the express provision in the statute, that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. *Brassington* v. *Llewellyn*, 27 L. J., Ex. 297. *S. C.*, at nisi prius, 1 F. & F. 27.

One whose title to real estate is barred by (3 & 4 Will. 4, c. 27) the Statute of Limitations, if he subsequently makes an entry, is not thereby remitted to his former title. *Bryan* v. *Cowdal*, 21 W. R. 693.

**When Entry, without Continuance in Possession, stays the Statute.**]—If there is an adverse possession of land, that adverse possession will be interrupted (so as to cause the statute to cease to run as against the true owner) by the true owner entering upon the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And as a matter of law it is unnecessary for the true owner to go on and shew that he

continued in possession. *Worssam* v. *Vandenbrande*, 17 W. R. 53.

**Inclosure of Waste—Merely Formal Entry by Lord.**]—A., more than twenty years ago, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the encroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, A.'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut and that a portion of the fence should be removed. All this was done in the absence of A. The lord and his steward then retired, and nothing more was done:—Held, that the acts so done by the lord did not amount to a dispossession of A., and a re-umption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time. *Doe* d. *Baker* v. *Combes*, 9 C. B. 714; 19 L. J., C. P. 306.

—— **Ejectment Proceedings—Actual Entry, What amounts to.**]—In 1830 A. inclosed about six acres of waste land, and built a cottage thereon, and was allowed to remain in possession, without any acknowledgment or payment of rent, till 1845, when the steward of the owner of the fee served him with a declaration and notice in ejectment; whereupon A. consented to give up four acres of the land, on his being allowed to continue in possession of the cottage and the other two acres until his death. A. died in 1861:—Held, that that which took place in 1845 amounted to an actual entry, and operated as a determination of the original tenancy at will, and the creation of a new tenancy; and consequently that the period of limitation prescribed by 3 & 4 Will. 4, c. 27, was to be reckoned from that time. *Locke* v. *Matthews*, 13 C. B. (N.S.) 753; 32 L. J., C. P. 98; 9 Jur. (N.S.) 874; 7 L. T. 824; 11 W. R. 343.

**Ejectment Proceedings, not pursued, of no Effect.**]—An ejectment and confession of lease, entry, and ouster, without further proceeding, is not such an actual entry as will be sufficient to avoid a fine or statute of limitation. *Sterling* v. *Penlington*, 9 Mod. 248.

**Resuming Possession after Entry by Owner.**]—Before the passing of 3 & 4 Will. 4, c. 27, A. was let into possession of land as tenant at will to B. He never paid rent after that statute passed, and before twenty-one years B. entered and turned A. out. A. immediately afterwards resumed possession, but no fresh tenancy at will commenced, and he paid no rent:—Held, that B. might enter at any time before the lapse of twenty years from such resumption of possession by A., though after the lapse of twenty-one years from the first letting him into possession, and was not barred by ss. 2, 7 and 10. *Randall* v. *Stevens*, 2 El. & Bl. 641; 1 C. L. R. 642; 23 L. J., Q. B. 68; 18 Jur. 128.

**Entry presumed to be on behalf of Infants.**]—In 1833 A. died intestate as to his real estate, but having appointed by will, never proved, his brother B. his executor, and leaving two infant daughters his heirs in coparcenary. In 1834 one of the daughters, while an infant, died, whereupon her moiety of her father's real estate descended upon her surviving sister, who married during infancy, and was still under the disability of coverture. Upon the death of A., B. entered into possession of the whole of A.'s real estate, and received the rents from that period up to his death in 1858. B. during his possession paid the interest on a mortgage created by A. Considerable sums had also been laid out in improvements by B. Upon B.'s death his widow continued in possession of A.'s real estate, and she paid off and took a transfer to herself of the mortgage. In 1860 a bill was filed by the surviving daughter of A. and her husband against B.'s widow and administratrix and his infant heir for an account of the rents of A.'s real estate from his death in 1833. B.'s infant son, by his answer, claimed the benefit of the Statute of Limitations (3 & 4 Will. 4, c. 27) as to the whole of A.'s real estate, but at the bar the right of the female to the moiety of the lands which descended upon her from her father was admitted:—Held, that the entry of B., who was named as the executor in A.'s will, and was the uncle of his infant daughters, could not be considered as that of a stranger, and an account was directed of the rents of A.'s real estate received by B. as bailiff from A.'s death up to his death in 1858, and by B.'s widow, as mortgagee in possession since the death of B.; and an inquiry was also directed as to the sums laid out in improvements by B. *Pelley* v. *Bascombe*, 33 L. J., Ch. 100; 9 Jur. (N.S.) 1120; 11 W. R. 706. Affirmed, 34 L. J., Ch. 233; 11 Jur. (N.S.) 52; 13 W. R. 306.

In 1832 the plaintiff, then an infant, became entitled to real estate in fee, and his father entered into possession. In 1836 he attained his majority. In 1852 the father died, having continued in possession of the property down to the time of his death. In 1854 he filed a bill in equity against the devisees of his father, for an account of the rents and profits:—Held, that the entry of the father in 1832 must be taken to have been as guardian of the infant, and not as a trespasser, and the Statute of Limitations, therefore, could not be set up. *Thomas* v. *Thomas*, 2 Kay & J. 79; 25 L. J., Ch. 159; 1 Jur. (N.S.) 1160; 4 W. R. 135.

Entry will not be construed as tortious if it can be construed rightful. *Ib.*

When a father has entered upon the estates of his infant children, the presumption is that he entered as their guardian and bailiff. *Ib.*

Semble, entry by a stranger might not have this effect. *Ib.*

If the father retain possession after the children attain twenty-one, such possession will be considered to be continued in the character in which he entered, so that an account will be directed, not from the filing of the bill, but if necessary from the time of entry. *Ib.*

In an adverse suit, in the nature of an ejectment suit, against a person in no fiduciary relation to the plaintiff, this account is only directed from the time of filing the bill. *Ib.*

**Entry of Issue in Tail Effective, though claiming as Devisee for Life—Entry by one Coparcener not Operative as to the Other.**]—See *Doe* d. *Daniel* v. *Woodroffe*, col. 172.

**Entry by Mortgagee, Time runs against Remainderman from.**]—See *Harrison* v. *Hollins*, col. 212.

**Entry as Reversioner under Settlement by Person not entitled.**]—See *Cholmondeley* v. *Clinton*, col. 259.

## V. CHARGES ON LAND.

*See also* ante, **B**, II. 9, col. 206, *and* post, **B**, XI., col. 322.

*See* 37 & 38 Vict. c. 57, s. 8. *By s.* 10, *the limit of time for recovering any money or legacy charged on land is to apply, notwithstanding an express trust.*

**Rent-Charge or Annuity.**]—N., being entitled under his marriage settlement to certain lands, and also to a reversionary interest in government stock by deed, granted to B., for valuable consideration, an annuity for N.'s life charged on the lands and stock, covenanted with B. to pay the annuity, and granted the lands to a trustee to secure it. In 1856 N. became entitled, in possession, to the stock, and the trustees of the settlement transferred it into court, under the Trustee Relief Act, to the credit of the trusts of the settlement. The annuity was paid until 1867. In 1879 N. died; in 1885, on the distribution of the fund, a claim was lodged by B.'s executors for the arrears of the annuity accrued between 1867 and 1879:—Held, that the claim was barred by the Statutes of Limitations (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57). *Nugent's Trusts, In re*, 19 L. R., Ir. 140.

By an indenture executed in 1833, real estate was conveyed to trustees and their heirs upon trust as to one moiety that immediately after the death of M. C. they should out of the moiety and the rents and profits thereof pay unto J. M., and to his heirs and assigns, or permit him or them to receive it, an annuity of 8*l.* half-yearly. M. C. died in 1857. No payment was ever made in respect of the annuity, and the annuitant first made a claim in 1884. The chief clerk had certified that he was entitled to a perpetual annuity. On summons to vary the certificate:—Held, that by s. 1 of the act 37 & 38 Vict. c. 57, no proceedings to recover any "rent" (which, inasmuch as by s. 9 the act must be construed with the 3 & 4 Will. 4, c. 27, meant by the interpretation clause of that act, any annuity charged upon land) could be taken after twelve years from the time when the right first accrued; therefore if there had not been any trust, those twelve years having elapsed, none of the past instalments of the annuity could be recovered, and that the effect of s. 10 of the 37 & 38 Vict. c. 57, was that no payment of the annuity which became due before the application was made was recoverable, the remedy being only the same as if there had not been any trust. *Hughes* v. *Coles*, 53 L. J., Ch. 1047; 27 Ch. D. 231; 51 L. T. 226; 33 W. R. 27.

An annuity given by will and charged on all the testator's real and personal estate is within 37 & 38 Vict. c. 57, s. 8, and is barred by nonpayment of the gales for twelve years. *Dower* v. *Dower*, 16 L. R., Ir. 264.

A rent-charge is a "rent" within the Real Property Limitation Act, 1833, and the owner thereof is barred from the remedy of distress after the right to recover the rent-charge has become extinguished by nonpayment during the period limited by the statute. And the statute is not prevented from running by the fact that the land subject to the rent-charge is in the possession of a statutory corporation. *Jones* v. *Withers*, 74 L. T. 572—C. A.

An action upon a covenant in an indenture granting an annuity or a rent-charge issuing out of land may be brought within the period of twenty years limited by 3 & 4 Will. 4, c. 42, s. 3, and is not barred by 3 & 4 Will. 4, c. 27, s. 42, which limits the recovery of arrears of rent within six years. *Strachan* v. *Thomas*, 4 P. & D. 229; 12 A. & E. 536; 9 L. J., Q. B. 399; 4 Jur. 1183.

The 3 & 4 Will. 4, c. 27, s. 42, limiting the period within which an action may be brought "to recover any land or rent" does not apply to an action on a covenant to pay a rent charged on land. *Manning* v. *Phelps*, 10 Ex. 59; 24 L. J., Ex. 62.

Three annuities, charged upon an estate, were granted in 1814. No payment had been made in respect of them since March, 1815. In January, 1855, a bill was filed for an account of the rents and profits of the estate, and payment of the arrears of the annuities:—Held, that the 3 & 4 Will. 4, c. 27, s. 42, did not operate as a bar. *Knight* v. *Bowyer*, 26 L. J., Ch. 769; 3 Jur. (N.S.) 968. Affirmed, 27 L. J., Ch. 520; 4 Jur. (N.S.) 569; 6 W. R. 565—L. JJ.

Arrears of an annuity charged on a reversionary interest in land are recoverable more than six years after the same became payable, the 3 & 4 Will. 4, c. 27, s. 42, having no application so long as the interest is reversionary. *Wheeler* v. *Howell*, 3 Kay & J. 198.

But an annuity bequeathed out of personalty is not within the 3 & 4 Will. 4, c. 27, s. 42. *Ashwell's Will, In re*, 1 Johns. 112.

Account of arrears of an annuity decreed against a purchaser with notice, the length of time not being sufficient to raise a presumption of satisfaction. *Wynn* v. *Williams*, 5 Ves. 130.

A. grants an annuity to a trustee for B. for his life, and in the conveyance enters into a personal covenant with B. for payment of same; A. subsequently sells subject to said annuity:—Held, on a bill filed by B. against the purchasers to raise the arrears thereof (A. or his personal representative not being a party to the cause), that though there was an obligation imposed on the purchaser to indemnify A., yet that the court would not thus indirectly enforce this obligation, and thereby in effect evade the operation of the Statute of Limitations, and accordingly the account was limited to a period of six years prior to the filing of the bill. *Harrisson* v. *Duignan*, 2 Dr. & War. 295; 1 Con. & L. 376; 4 Ir. Eq. R. 562.

After the sale by the court of lands, upon which an annuity was charged, part of the purchase-money was retained, and the dividends thereof were applied in part payment of the annuity which they were insufficient to discharge in full:—Held, that the annuitant was entitled at any time to resort to the corpus to pay the portion of the annuity remaining unpaid, and that the Statute of Limitations did not apply. *Belton's Estate, In re*, [1894] 1 Ir. R. 537.

—— **Charged on Estate in Jamaica.**]—See *Pitt* v. *Dacre*, col. 152.

**Annuity under a Will.**]—An annuitant claiming under a will, who has never received the annuity, is barred from his remedy of distress or action by 3 & 4 Will. 4, c. 27, when more than twenty years have elapsed since the right to the annuity first accrued to him. *James* v. *Salter*, 4 Scott, 168; 3 Bing. (N.C.) 544; 5 D. P. C. 496; 3 Hodges, 70; 6 L. J., C. P. 171; 1 Jur. 135.

**Trust to Pay Annuities out of Rents, or Proceeds of Sale, of Real Estate.**]—A testator, who died in 1795, devised his real estates to trustees, in trust to sell, and out of the interest of the proceeds, and out of the rents of the estates till they should be sold, to pay certain annuities. No payments had been made in respect of any of the annuities for more than twenty years before the bill was filed; but the trustees entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about eleven years prior to the filing of the bill:—Held, that the plaintiff's right to the annuities was not barred by the Statute of Limitations. *Ward* v. *Arch*, 12 Sim. 472.

**Possession of the Estate charged taken by Second Annuitant—First Annuitant barred by Length of Time.**]—By an indenture dated in April, 1810, an annuity was granted to S. charged upon real estate, and by an indenture dated in April, 1820, the same property was charged by the same parties with an annuity payable to A. This annuity was void for want of a proper memorial, but until the filing of the bill it had been always treated as a valid annuity, and in September, 1821, A., under a proviso in his annuity deed, entered into possession and receipt of the rents and profits of the estate, and remained in undisturbed possession of them till his death in 1829, when his personal representative took possession. In 1835 S. died, and in November, 1839, his personal representative filed a bill to set aside A.'s annuity, and to establish his own. The bill alleged that S. had received payment of his annuity down to October, 1820, and that A. had obtained possession of the premises under misrepresentation. These allegations, however, were not proved against A., nor was it proved that he ever had notice of S.'s title, but the allegation of payment was admitted by the grantors of the annuity, who were co-defendants with A. in the suit. Under these circumstances, and considering that S. had never been in possession of the property:—Held, that the bill must be dismissed with costs as against A. on the ground of length of time. *Searle* v. *Colt*, 1 Y. & Coll. C. C. 36.

Quære, whether where an annuitant, who has never been in possession, claims to enforce his security, the twenty years against him should not, under the 3 & 4 Will. 4, c. 27, begin to run from the date of the annuity deed, and not from the date of the last payment. In this case the deed was thirty years old, and no payment was proved at all, nor any alleged for the last fifteen years, and the court dismissed the claim on the joint effect of laches and the statute. *Ib.*

**Time runs against Annuities, where no Trust.**]—Where, in execution of a power, cestui que trust appoints trustees to convey to use of A., and charges estate with annuities, it is a conveyance of the legal estate to A., and not a trust, so that length of time will run against annuities, if not demanded. *Weston* v. *Bowes*, 9 Mod. 309.

**Periodical Sums charged on Land—Tithes.**]—The statute and decree of 37 Hen. 8, c. 12, provided that the inhabitants of the city of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates:—Held, that these payments imposed were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 1), and that that statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action. *Payne* v. *Esdaile*, 58 L. J., Ch. 299; 13 App. Cas. 613; 59 L. T. 568; 37 W. R. 273; 53 J. P. 100—H. L. (E.)

**Tithe Rent-Charge — "Composition" — "Rent."**]—A tithe rent-charge under the Irish Tithe Commutation Act (1 & 2 Vict. c. 109) is not a "composition" within s. 1 of the Statute of Limitations (3 & 4 Will. 4, c. 27), but a "rent" within s. 2 of the statute, and therefore, where a tithe-rent charge was transferred by act of parliament from a spiritual corporation sole to a lay corporation:—Held, that at the time of the transfer the period of limitation against the transferees should be reckoned from the time when the right to enter, distrain or bring an action first accrued to the former spiritual corporation sole through whom they claimed. *Irish Land Commission* v. *Grant*, 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357—H. L. (Ir.)

—— **Decree for Arrears stays statute.**]—A civil bill decree for arrears of tithe rent-charge, obtained within twelve years before action, though unsatisfied, saves the tithe rent-charge from being barred by the Statute of Limitations. *Irish Land Commission* v. *Junkin*, 24 L. R., Ir. 40.

**Covenant to pay Rent or Royalty—Arrears.**]—A lease, dated in 1859, of mines contained a covenant by the lessees to pay a rent or royalty in respect of minerals from other lands carried by, or by the authority of, the lessees over the surface of the mining ground. In 1883 an action on the covenant was brought to recover royalties in respect of minerals so carried since 1866:—Held, that the act 37 & 38 Vict. c. 57, s. 8, did not apply; but that on the ruling in *Hunter* v. *Nockolds* (1 Mac. & Gor. 640), the plaintiff was entitled to an account of the royalties become payable since 1866. *Darley* v. *Tennant*, 53 L. T. 257.

**Copyhold Quit-Rent—Nonpayment.**]—A quit-rent payable in respect of a copyhold tenement is liable to be barred under the Statutes of Limitation on nonpayment or non-acknowledgment for twelve years. *Howitt* v. *Harrington (Earl)*, 62 L. J., Ch. 571; [1893] 2 Ch. 497; 3 R. 568; 68 L. T. 703; 41 W. R. 664.

A defendant in replevin avowed the taking of the goods for arrears of an ancient quit-rent issuing out of a tenement held of him as lord of a manor by fealty and rent. The last payment was made on the 25th of January, 1825, for rent due on the 4th of October, 1824. The distress was made on the 13th of May, 1845:—Held, that by the operation of 2 & 3 Will. 4, c. 27, ss. 2, 3, and 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made, and that the limitation need not be pleaded specially, but was available under a plea of non tenuit. *De Beauvoir* v. *Owen*, 5 Ex. 166; 19 L. J., Ex. 177—Ex. Ch.

**Discontinuance of Receipt of Rent, What is—Former Owner of Land continuing to pay Fee-farm Rent instead of Purchaser.**]—To bring a

person rightfully entitled to a rent within s. 3 of the Statute of Limitations (3 & 4 Will. 4, c. 27), so as to divest him of his rights, there must be a discontinuance of the receipt by him, either by not applying for payment, or omitting to enforce his remedies with knowledge that the payment has not been made. *Adnam* v. *Sandwich* (*Earl*), 46 L. J., Q. B. 612; 2 Q. B. D. 485.

In 1812 lands, subject to a fee-farm rent, were sold by C. to E., and subsequently became vested in the plaintiff. From 1812 to 1872 C. and his successors in title continued regularly to pay the fee-farm rent, notwithstanding that they had ceased to hold any of the lands out of which the rent issued. During this time neither the defendant nor his predecessors had any notice that C. had parted with his interest in the lands by the sale in 1812. In 1872 the successors of C. declined to continue payment of the rent in question, and the defendant in 1874 applied to the plaintiff, the then owner, for the two years' arrears. The plaintiff declined to pay the rent, and denied her liability to do so. Accordingly a distress was levied, whereupon the plaintiff replevied and brought an action, alleging that the receipt of the rent having been discontinued for more than twenty years, the defendant's title to the rent was barred by 3 & 4 Will. 4, c. 27, ss. 2, 3:—Held, that the defendant was entitled to judgment, on the ground that there had been no discontinuance of the receipt of the rent within the meaning of the statute. Also, because, on the above facts, the fair presumption was that the continual payment had been made by C. and his successors under some arrangement entered into at the time of the purchase by E. in 1812, to which the latter was a party, and by which his successors were bound. *Ib.*

Lands subject to an ancient rent were sold in 1766, and the purchaser indemnified against it by the vendor, who held other lands similarly charged, and whose representatives continued to pay it, no payment being made by the owner of the sold lands since 1766:—Held, that the receipt of the rent was not discontinued as to the sold lands, and the Statute of Limitations did not begin to run. *Dublin* (*Archbishop*) v. *Trimleston* (*Lord*), 12 Ir. Eq. R. 251.

**Plea of Nonpayment of Rent-Charge.**]—To a bill filed for payment of a rent-charge, one of the defendants pleaded twenty-six years' possession, without accounting for or paying over to the plaintiff any part of the rents and profits. Plea allowed, but, under the circumstances, ordered to stand over till a co-defendant had answered, pleaded, or demurred. *Baldwin* v. *Peach*, 1 Y. & Coll. 453.

**Devise in Fee of Lands charged to Tenant for Life of Charge.**]—The owner of lands subject to a charge, and who had covenanted to pay the charge, devised the fee simple of the lands to the tenant for life of the charge. The tenant for life entered into possession of the lands and continued in possession for more than twelve years without making any claim upon the personal estate of the testator:—Held, that the claim was barred as against the personal estate. *England, In re, Stewart* v. *England*, 65 L. J., Ch. 21; [1895] 2 Ch. 820; 12 R. 539; 73 L. T. 237; 44 W. R. 119—C. A.

**Statute does not run while Land charged in Possession of Owner of Charge.**]—In 1773 a tenant for life paid off a charge of 25,000*l.* affecting the settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive:—Held, that notwithstanding more than twenty years had elapsed, and that there had been no part payment or acknowledgment, the charge still existed in favour of his representatives, and had not been defeated by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40):—Held, also, that the statute cannot be applied to a case where there is no assignable person liable to pay the charge—no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent, out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest. *Burrell* v. *Egremont* (*Earl*), 7 Beav. 205; 13 L. J., Ch. 309; 8 Jur. 587.

**Nonpayment by Trustees of Income of Sum charged—Remaindermen not barred.**]—A charge on lands was vested in 1793 in trustees for husband and wife for life, then to pay the principal to the children, but there was no power to trustees to give discharges. No payment was made after 1826, and the surviving parent died in 1845:—Held, that the charge was not barred by the statute. *M'Carthy* v. *Daunt*, 11 Ir. Eq. R. 29.

**Charge in Settlement—When Statute begins to run against Remainderman.**]—See *Carroll* v. *Hargrave*, col. 177.

**Arrears of Interest on Charge paid out of Produce of Sale of Estate—Statute does not run against Remainderman's Right to be recouped out of Assets of Tenant for Life till Tenant for Life's Death.**]—In 1827 C. became entitled to an estate as tenant for life in possession, with remainder to his first and other sons, in tail male, and remained in possession till November, 1867, when he died intestate and unmarried. C. during the whole of his possession was a lunatic, and the estate was managed by his committee. The rents were brought into court in the lunacy matter, and invested, and the accumulations of them formed the principal part of the assets of C., which had since his death been transferred in an administration suit, in which the vice-chancellor directed that a certain sum should be set apart, in order to meet the demand of the plaintiff. In 1836 a portion of the estates, of which C. was tenant for life, was sold in a cause, to pay paramount incumbrances which affected the whole estate. The incumbrances were paid out of the proceeds of the sale, and the payments included an arrear of interest which had accrued during the possession of C. In that cause the inheritance was represented by the then first remainderman in tail male in esse, who was the eldest brother of the plaintiff, and who died in 1846 without issue male. Upon the death of C., in 1867, the plaintiff succeeded to the estate as tenant in tail male, and in 1869 instituted a suit to be recouped out of the assets of C. the sum which had been paid out of the proceeds of the sold lands on foot of arrears of interest which ought to have been paid by C. out of the rents of his life estate:—Held, that the claim formed a charge or lien on the estate of the tenant for life, and might be enforced as such against his assets, which consisted chiefly of the surplus rents of the life estate; and that such a claim came within

the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40), and would be barred by the lapse of twenty years after a present right to receive the money had accrued to a person capable of giving a discharge for it; but that a present right to receive the principal did not accrue till the death of C., the tenant for life, and that, therefore, the claim was not barred by that section. *Kirwan* v. *Kennedy*, 3 Ir. R. Eq. 472.

Held, also, that the merely lying by, during a tenancy for life, by persons who could not until its termination have received the money, and who, possibly, might not ever have become entitled to the possession of the estate, did not constitute laches, and that there was not any evidence of acquiescence. *Ib.*

**Arrears of Interest in respect of Sums charged on Land.**]—See **B**, XI. post (col. 322).

**Right to distrain on any Part of Estate charged kept alive by Payment from Occupier of One Part.**]—Where a rent-charge had been received from the occupier of one part of the premises charged down to the present time, and then, for the first time, had been levied by distress on the occupier of another part, which for more than twenty years had been in a separate ownership, and the owner or occupier of which had never paid the rent before:—Held, that the right to distrain for the rent on that portion of the premises charged was not barred by 3 & 4 Will. 4, c. 27. *Woodcock* v. *Titterton*, 12 W. R. 865.

**Charge in Son's Will of Father's Debts on Son's Realty.**]—A., who had a life interest in certain estates, gave a bond to a creditor, and a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets, real or personal. B., his son, the first tenant in tail of the estates, entered into possession, and expressed, in letters to the creditor, a wish to pay his father's debts, but would not give any security for them. B. made a will, in which, reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said, "And in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father, A., which remain unpaid at the time of my decease, upon all my real estates wheresoever." He then directed his trustees to stand seised of all his estates, "subject, in manner aforesaid, to the payment of all my just debts, and to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustees under the son's will:—Held, that the debts of the father which were not barred by the statute at the death of the father were charges on the real estates of the son. *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

**Debts charged on Testator's Real and Personal Estate—Creditor barred as against Realty Twelve, but as against Personalty Six, Years after Debt incurred.**]—See *Stephens, In re, Warburton* v. *Stephens*, col. 26.

**Devise in Trust for Sale and Payment of Debts.**]—See *Rendell* v. *Carpenter*, col. 95.

**Legacy charged on Contingent Remainder in Land—"Present right to receive."**]—Where a legacy is charged upon a contingent remainder in land in exoneration of the personal estate, and the charge is to take effect after the death of a tenant for life, the "present right to receive" accrues to the legatee at the death of the tenant for life, and not on the happening of the contingency. *Owen, In re*, 63 L. J., Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 55.

**Legacy charged on Real Estate.**]—When a legacy, charged upon the residuary real estate, was bequeathed to trustees, for B. for life, and after his death for his children, and there was not during his life, from 1806 to 1863, any payment made on account of the legacy, or any trustee capable of giving a discharge for it:—Held, that the Statute of Limitations did not begin to run against the children until the death of B. *Carroll* v. *Hargrave*, Ir. R. 5 Eq. 123.

Where lands were devised, charged with the payment of a legacy, the trust, although an express one, is within the 40th section of the 3 & 4 Will. 4, c. 27, and not within the 25th section of that act. The subject of the two sections is different, the 25th relating to lands and rent, the 40th to money charged upon land. *Knox* v. *Kelly*, 6 Ir. Eq. R. 279.

See *Ravenscroft* v. *Frisby; Sheppard* v. *Duke; Pigott* v. *Jefferson*, col. 235; *Proud* v. *Proud*, col. 233; and *Cocking* v. *Golding*, col. 236.

**Paving Expenses—Charge upon Premises—Action to enforce, When barred.**]—By the Local Government Act, 1858, s. 62 (corresponding to s. 257 of the Public Health Act, 1875), it was provided that where a local board incurred expenses for which the owner of the premises in respect of which the same were incurred was liable, such expenses should be a charge upon the premises in respect of which the same were incurred. A local board having completed paving works within the above section in 1875, apportioned the amount among the owners of the premises in respect of which the works were done in 1886, and in 1888 commenced an action against the owners to enforce the charge of the amount of the expenses upon the premises:—Held, that the amount of the expenses became a charge upon the premises at the date of the completion of the works, and that the twelve years prescribed by the Real Property Limitation Act, 1874, commenced to run from that date, and that therefore the action was barred. *Hornsey Local Board* v. *Monarch Investment Building Society*, 58 L. J., Q. B. 418; 23 Q. B. D. 149; 37 W. R. 556; 53 J. P. 774. Affirmed, 59 L. J., Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85—C. A.

**Money due on Bond.**]—Money due on a bond by an ancestor is not a sum of money payable out of land within s. 40. *Roddam* v. *Morley*, 1 De G. & J. 1; 26 L. J., Ch. 438; 3 Jur. (N.S.) 449; 5 W. R. 510.

**Action against Surety on Bond for Payment of Mortgage Debt not an Action to Recover Money secured on Land.**]—See *Powers, In re, Lindsell* v. *Phillips*, col. 318.

**Claim against Inheritance by Tenant for Life who has Paid Bonds.**]—See *Morley* v. *Morley*, col. 319.

**Equitable Charge.**]—Equitable charge on real estates not barred by length of time without demand, though considerable and though at length brought forward under circumstances not favourable, yet not equivalent to or affording presumption of release; account of interest against tenant for life decreed and not limited to six years. *Stackhouse* v. *Barnston*, 10 Ves. 453.

In 1816 A. mortgaged an estate to B., and covenanted to pay the mortgage-money; and, in July, 1817, A. and B., as his surety, conveyed the property to C., on trust to sell and pay, first, a debt due from A. to C., which A. and B. also covenanted to pay; and, secondly, to pay B.'s debt. In August following A. executed to B. an equitable charge on other property. In 1834 C. sold the estate, and applied the produce in part payment of his demand. In 1842 a bill was filed by B. against A. to realise the equitable charge:—Held, that until the trust of the deed of July, 1817, was exhausted in 1834, the covenant in the deed of 1816 subsisted wholly unaffected by time; that the debt and the personal remedy to recover it subsisted at the time the bill was filed; and that the equitable charge was therefore then operative. *Bennett* v. *Cooper*, 9 Beav. 252; 15 L. J., Ch. 315; 10 Jur. 507.

**Right to share in Produce of Sale of Real Estate.**]—A testator devised his real estate to trustees upon trust to sell, and divide the produce amongst certain persons, of whom A. was one. He appointed A. and B. his executors, who proved the will in 1816. Whether the share was a sum charged on or payable out of land within the 40th section of the statute 3 & 4 Will. 4, c. 27, quære. *Pawsey* v. *Barnes*, 20 L. J., Ch. 393; 15 Jur. 943.

**Before 3 & 4 Will. 4, c. 27.**]—The Statute of Limitations did not bar a demand for a rent-charge. *Cupit* v. *Jackson*, M'Clel. 495; 13 Price, 721; 28 R. R. 735.

The Statute of Limitations as to rents extended only to customary rents between landlord and tenant, and not to rent arising by grant or a will whereof the commencement may be shewn. *Collins* v. *Goodall*, 2 Vern. 235.

**Charges prior to Statute not affected by It.**]—See *Peyton* v. *M'Dermott*, col. 150.

**Devise of Rent-charge to Appointee of Owner of Land—Statute does not run till Appointment.**]—See *Att.-Gen.* v. *Perse*, col. 24.

**Payment by Tenant of Annuity due from Landlord, whether Payment of Rent.**]—See *Doe* d. *Newman* v. *Godsill*, col. 158.

**Where Charge is Subject of express Trust, Statute not applicable.**]—*See* **B**, II. 7, ante (col. 180). (*See, however*, 37 & 38 Vict. c. 57, s. 10.)

**Mortgage of reversionary Interest.**]—*See Hugill* v. *Wilkinson*, col. 222.

**Covenant to pay in Mortgage.**]—See *Sutton* v. *Sutton*, col. 222.

**Mortgage secured by collateral Bond.**]—See *Fearnside* v. *Flint*, col. 223.

**As to when a Payment in respect of a Charge is an Acknowledgment that will bind the Land.**]—*See* **B**, VI., post (col. 282).

**Judgment Debts are Sums charged on Land.**]—See *Henry* v. *Smith*, col. 330.

**Interest on Judgment charged on Part of Lands.**]—See *Kirkwood* v. *Lloyd*, col. 315.

**Judgment not a Sum charged on or Payable out of Land.**]—See *Kealy* v. *Bodkin*, col. 330.

## VI. ACKNOWLEDGMENT.

*See also* ante, **A**, VII. 1, col. 89, *and* **A**, VII. 3, col. 125.

By s. 5 of 3 & 4 Will. 4, c. 42, *an action on an indenture, specialty, or recognizance, may be brought within twenty years after an acknowledgment by writing or part-payment or part satisfaction. By* 19 *&* 20 *Vict. c.* 97, *s.* 14, *part payment by one co-debtor is not to bind another. As to acknowledgments of debts secured by mortgage, judgment, or lien, or charged upon land, or of legacies, by writing or part payment, see* 37 *&* 38 *Vict. c.* 57, *s.* 8. *As to acknowledgments by writing of arrears of rent-charge, and of interest on legacies, &c., see* 3 *&* 4 *Will.* 4, *c.* 27, *s.* 42. *As to acknowledgments in writing of the title of the person entitled by the person in possession, see* 3 *&* 4 *Will.* 4, *c.* 27, *s.* 14.

**By whom made.**]—The acknowledgment provided for by s. 5 of the 3 & 4 Will. 4, c. 42, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. *Moodie* v. *Bannister*, 4 Drew. 433: 28 L. J., Ch. 881; 5 Jur. (N.S.) 402; 7 W. R. 278.

Therefore an admission of a bond debt contained in an answer of the executors of the obligor in a suit to which the obligee was not a party is sufficient to take the bond debt out of the operation of the statute. *Ib.*

**By Tenant for Life.**]—Payment by a devisee for life of interest on a specialty of his testator, in which the heirs were bound:—Held, to be an acknowledgment made "by the party liable by virtue of such specialty," within the meaning of the 5th section of the 3 & 4 Will. 4, c. 42, and as such, sufficient to keep the right of action alive in its integrity against all parties interested in remainder. *Roddam* v. *Morley*, 1 De G. & J. 1; 26 L. J., Ch. 438; 3 Jur. (N.S.) 449; 5 W. R. 510.

A., by his will, in 1826, settled the greater part of his lands on F. for life, with remainders over in strict settlement, and died in 1827, leaving M. his executor, with ample means to pay all debts, and charging the debts, in exoneration of his principal lands, on particular funds. At the time of his decease he was indebted on bond to R. F., the tenant for life, paid the interest on the bond up to his decease in 1847, since which no interest had been paid, or any acknowledgment made of the debt. On a bill in 1855 against the executor and devisees in remainder under the will of J.:—Held, that the payment of interest by the tenant for life was sufficient to take the case out of the statute. *Ib.*

A bond debt, by which the heir is bound, is

not a debt charged upon or payable out of land within s. 40 of the 3 & 4 Will. 4, c. 27, but an action upon it is simply a personal action, and is barred by the 3 & 4 Will. 4, c. 42, ss. 3, 4, 5. *Ib.*

By a settlement of 1813, a sum of 500*l.* was charged on lands, payable on the death of the settlor, who died in 1846. At that time the lands were limited to R. D. for life, with remainder to J. D. in tail. No interest was paid, nor was there any acknowledgment of the charge by any one until the 12th of May, 1873, when R. D., without the consent or knowledge of J. D., paid the person then entitled to the charge the amount thereof, and six years' interest, and took an assignment of the charge to a trustee for himself. On the 19th of May, 1873, R. D. and J. D. joined in disentailing the lands. No notice of the charge, or the recent assignment of it, was taken in the disentailing deed. In an action brought in 1879, to raise the charge by a sale of the lands:—Held, that J. D. was not bound by the payment of interest in 1873, and that the charge was barred by the Statute of Limitations (3 & 4 Will. 4. c. 27), s. 40. *Becher* v. *Delacour*, 11 L. R., Ir. 187.

Where tenant for life of a mortgaged estate by deed admitted the payment of interest on the mortgage, this was not a sufficient acknowledgment of the debt as against the remainderman to prevent the Statute of Limitations from operating. *Gregson* v. *Hindley*, 10 Jur. 383.

Semble, also, that where a debt has been due for more than twenty years, a general allegation that all interest has been paid is not sufficient to support a proof that interest was paid during the twenty years. *Ib.*

An acknowledgment, by a tenant for life of a settled estate, of an arrear of interest due on a mortgage affecting the inheritance is binding after the death of the tenant for life on the person entitled in remainder, to save the bar of the 3 & 4 Will. 4, c. 27, s. 42. *Fitzmaurice, In re*, 15 Ir. Ch. R. 445.

A minor's estate was subject to a mortgage on which more than six years' interest was due. On a reference to the master to inquire what charges affected the minor's estate, and the principal and interest due thereon, it appeared that certain payments had been made for interest generally:—Held, that the payments should be appropriated to the interest which accrued within six years. *Ib.*

**Payment of Interest by Devisee for Life binds Remainderman.**]—See *Hollingshead, In re*, col. 134.

**Timber cut by Tenant for Life—Account rendered within Six Years.**]—See *Hony* v. *Hony*, col. 167.

**Bonds not kept alive against Inheritance by Tenant for Life paying Them off.**]—See *Morley* v. *Morley*, col. 319.

**By Personal Representative.**]—Under 3 & 4 Will. 4, c. 27, s. 5, where creditors of a testator had a claim against land as against mortgagees of an equitable life estate devised by the will, and interest on the debt had been regularly paid by the testator's legal personal representatives, who also had the legal estate in the land:—Held, that this payment did not operate to prevent the statute from running in favour of the mortgagees. *Coope* v. *Cresswell*, 36 L. J., Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.

**Payment by Administrator not reviving Right to sue for Administration.**]—See *Johnson, In re, Sly* v. *Blake*, col. 233.

**By Trustees.**]—Where an estate is devised to a trustee in trust to sell and pay debts, and subject thereto in trust for A., an acknowledgment of a debt in writing, signed by the trustee or his agent, is sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment. *St. John (Lord)* v. *Boughton*, 9 Sim. 219; 7 L. J., Ch. 208; 2 Jur. 413.

The testator gave an annuity to A., and charged the same upon all his freehold and leasehold estates. He afterwards devised his freehold estates to trustees (who were also his executors) upon trust, subject to the charge, to and for the use of his grandson and his heirs. The trustees being in possession of the estates paid the annuity to A. during the minority of the grandson, and within twenty years before the filing of the bill by A. against the grandson:—Held, that such payment of the annuity by the trustees prevented the claim of A. to the annuity from being barred by the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 2, 3). That the grandson was not a trustee for the annuitant within the 25th section of the statute 3 & 4 Will. 4, c. 27, or otherwise, and that under the 42nd section of the same statute the annuitant was not entitled to recover the arrears of the annuity for more than six years before the filing of the bill. *Francis* v. *Grorer*, 5 Hare, 39; 15 L. J., Ch. 99; 10 Jur. 280.

**By Agents.**]—Payment of interest on an Irish mortgage made by a receiver appointed over the estates mortgaged, is within the terms of the 3 & 4 Will. 4, c. 27, s. 40, payment by an agent of the party liable. *Chinnery* v. *Evans*, 11 H. L. Cas. 115; 10 Jur. (N.S.) 855; 11 L. T. 68; 13 W. R. 20.

The words in s. 40, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment, and the signing an acknowledgment. *Ib.*

The payment of interest on a mortgage by a mere stranger would not be a payment within 3 & 4 Will. 4, c. 27, ss. 40, 42. *Ib.*

A payment of principal or interest of money charged on lands by a person expressly or impliedly authorised to make it is equivalent to payment by the party liable, so as to prevent the operation of the Statute of Limitations; but a payment by a stranger will not. *Homan* v. *Andrews*, 1 Ch. Rep. 106.

Parties being seised of the lands A. and B., subject to a term to pay off incumbrances, conveyed A. to a purchaser, and B. to trustees, to indemnify and protect A. from all charges and incumbrances; and W., the owner of B., subject to the trust, subsequently covenanted to pay the interest of one of the charges:—Held, that payments by W. were payments by an agent to save the bar of the statute as against the purchaser of A. *Ib.*

But, semble, the payment of interest by the owner of B., after the expiration of twenty years, would not revive the right to proceed against A. *Ib.*

On the death of a mortgagor in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs, and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realise his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval:—Held, that the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf. *Ames* v. *Mannering*, 26 Beav. 583.

**By Devisee of one Moiety of Estate.**]—Real estate was devised to two persons in equal moieties, charged, as to each moiety, with the payment of half the testator's debts. There was also a general charge of all his real estate for payment of debts:—Held, that the payment of interest by the devisee of one moiety did not keep the debt alive as against the devisee of the other moiety. *Dickenson* v. *Teesdale*, 1 De G. J. & S. 52; 32 L. J., Ch. 37; 9 Jur. (N.S.) 237; 7 L. T. 655.

**By Surety.**]—Judgment was obtained by V., on a joint bond and warrant of attorney, against A. and B. in 1815, A. being the principal debtor. On the 16th of March, 1820, A. wrote to V.'s agent, "You have enclosed 250*l.* to my credit, on account of V.'s interest." In the account-book kept by V.'s agent (since dead), appeared an entry by the agent, of the 17th of March, 1820, charging himself with a bill for 50*l.*, drawn by A., and 100*l.* in cash from A. In 1822 V.'s attorney applied by letter to B., the surety, calling for payment of the amount of the above debt, and B., on that occasion, wrote to V.'s attorney the receipt of his letter, "applying for payment of his, B.'s, and A.'s joint bond"; and soon after B.'s agent wrote a letter to V.'s attorney, inclosing a proposal of terms upon which the matters should be arranged by A., and said, "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839 against the tenant for life, under a settlement of 1817, of the estates of B.:—Held, that there was sufficient payment and acknowledgment to take the case out of the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Vincent* v. *Willington*, Longf. & T. 456.

Quære, does that statute repeal the 8 Geo. 1, c. 4 (Irish). *Ib.*

In 1824, S., who was entitled to a legacy charged upon land devised to a tenant for life, mortgaged it to B.; and at the same time S., and the tenant for life as surety, gave a bond to B. as collateral security for the amount. S. died in 1847, and the tenant for life in 1851. In the administration of the testator's estate, B. claimed to be paid the amount (legacy and interest) due to him; and thereupon the widow and legal personal representative presented a petition praying that the legacy might be ordered to be paid to her, on the ground that the Statute of Limitations had barred the right of B. to recover the sum due on the mortgage. The widow alleged that no interest was paid by S. after 1828, but B. that he had received, previous to and in 1846, interest in part from the tenant for life and surety:—Held, upon both branches of the case, the operation of the Statute of Limitations, and the acknowledgment by a co-obligor of a bond, that the mortgagee was entitled to the legacy, and that the petition must be dismissed, but without costs. *Seager* v. *Aston*, 26 L. J., Ch. 809; 3 Jur. (N.S.) 481; 5 W. R. 548.

**By Executors to Legatee's Husband.**]—H. died in 1811, having bequeathed a legacy to a woman who afterwards married the plaintiff. In December, 1825, the two executors of H. gave the plaintiff a written acknowledgment whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy, and 50*l.* for interest. In 1835 the plaintiff's wife died:—Held, that the written memorandum amounted to an acknowledgment taking the claim to the legacy out of the operation of the statute. *Holland* v. *Clark*, 1 Y. & Coll. C. C. 151.

**Payments by Executors under Will not taking Legacies out of Statute.**]—See *Cadbury* v. *Smith*, col. 234.

**Admission by Trade Agent of Executor to Legatee not an Acknowledgment.**]—See *Whitehouse* v. *Abberley*, col. 117.

**By Purchaser's Solicitor after Time expired.**]—In 1811 the vendor contracted to sell lands; the vendee entered, but did not pay his purchase-money. The vendor became bankrupt. In 1834 the solicitor of the purchaser (or of those claiming under him) wrote to the solicitor for the assignees of the vendor, that the purchase-money was lying idle:—Held, sufficient to take the case out of the statute 3 & 4 Will. 4, c. 27, s. 40; and that a bill, in 1844, for specific performance by the assignees against the purchaser was not too late. *Toft* v. *Stephenson*, 1 De G. M. & G. 28; 21 L. J., Ch. 129; 15 Jur. 1187. Reversing 1 Hare, 7. And see *S. C.*, 5 De G. M. & G. 735.

**By Mortgagor.**]—A foreclosure action is an action for the recovery of land, and is therefore not within s. 40 of 3 & 4 Will. 4, c. 27, but is within ss. 2 and 21, and consequently within the supplementary enactment of 1 Vict. c. 28. *Harlock* v. *Ashberry*, 51 L. J., Ch. 394; 19 Ch. D. 539; 46 L. T. 356; 30 W. R. 327—C. A.

A payment to come within the 1 Vict. c. 28, must be a payment of principal or interest and must be made by the mortgagor or some person bound to pay principal or interest on his behalf. *Ib.*

So the word "paid" in 3 & 4 Will. 4, c. 27, s. 40, involves by implication the addition of "by the person liable to pay." Therefore a payment of rent made by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Ib.*

—— **In Mortgage Deed.**]—A mortgage deed was dated the 27th October, 1827, but was not executed until the 23rd August, 1834, and it contained a covenant by the mortgagor admitting the title to be in the mortgagee, his heirs, and assigns:—Held, that this was a sufficient acknowledgment of title to enable the mortgagee to recover within twenty years of the execution of the deed. *Jaynes* v. *Hughes*, 10 Ex. 430; 3 C. L. R. 188; 24 L. J., Ex. 115; 3 W. R. 65.

—— **Recital in Deed—Second Mortgagee not bound.**]—An acknowledgment by a mortgagor of

more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the Statute of Limitations (3 & 4 Will. 4, c. 27). *Bolding* v. *Lane*, 1 De G. J. & S. 122; 32 L. J., Ch. 219; 9 Jur. (N.S.) 506; 11 W. R. 386.

Therefore where a mortgagor was, but a second mortgagee was not, a party to a transfer of a first mortgage, the interest on which was, and was in the transfer recited to be, upwards of six years in arrear:—Held, that notwithstanding this recital, the second mortgagee was entitled to redeem the first mortgagee, on payment of principal and six years' arrears only of interest. *Ib.*

The words in s. 42 of 3 & 4 Will. 4, c. 27, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced. *Ib.*

—— **Recital in Deed—Payment of Interest by Assignee.**]—A mortgagor assigned the equity of redemption by a deed, which contained a recital that all the interest had been paid within twenty years of the commencement of the action, and a covenant by the assignee to pay the principal and future interest to the mortgagee, and to indemnify the mortgagor in case of default. The mortgagee was no party to the deed, but continued to receive the interest upon the mortgage from the assignee of the equity of redemption:—Held, that the recital in the deed was evidence of an acknowledgment by part payment of interest within twenty years. *Forsyth* v. *Bristowe*, 8 Ex. 716; 22 L. J., Ex. 255; 17 Jur. 675; 1 W. R. 356.

Held, also, that the payment of the interest by the assignee of the equity of redemption was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. *Ib.*

In an action on a mortgage deed of houses, executed in 1824 by the defendant in favour of the plaintiff's testator, to secure payment of 400*l.* and interest, the plaintiff gave in evidence a deed executed by the defendant within twenty years before action brought, but to which deed the testator was no party. The deed, after reciting that the defendant had executed a mortgage of the houses to the testator, for securing to him 320*l.* and interest, stated that he conveyed that and other property to trustees on trust to sell, and out of the proceeds to pay off all the mortgages and other incumbrances affecting the property, and then to pay the creditors, with an ultimate trust as to the surplus:—Held, that this was not an acknowledgment within s. 5, so as to take the case out of the operation of s. 3. *Howcutt* v. *Bonser*, 3 Ex. 491; 18 L. J., Ex. 262.

—— **After Assignment of Equity of Redemption—Payment of Interest by Person not shewn to be Agent of Party liable—Entry in Mortgagee's Diary of Receipt of Interest, Admissibility of.**]—N., a solicitor, lent money to S., a client, on equitable mortgage, and on the 12th of February, 1866, an account was settled between them as to the amount due. After this there were no entries relating to S. in N.'s ledger. In July, 1878, S. assigned the mortgaged property to his two nephews, subject to all incumbrances. In a diary kept by N., who had since died, was an entry dated the 10th of September, 1878, of the receipt of money from S. for interest. There was nothing else to shew payment of interest after 1866. S., in 1863, mortgaged other property to A., a client of N. N. paid interest on the mortgage and charged S. with it in account till 1866. After this N. went on paying interest to A., who believed that it came from S., but it was not shewn that N. had ever acted as solicitor to S. after 1866, nor was there anything shewing that N. was authorised to make the payments as agent for S.:—Held, that assuming the entry to be admissible in evidence, as to which the court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shewn to be agent of the assignees, and that this could not take the case out of the statute as against the assignees, and that the payments of interest after 1866 did not take the case out of the Statute of Limitations. On appeal:—Held (without pronouncing any opinion on the question arising under the Statute of Limitations, and assuming the entry to be admissible), there was no evidence to connect the entry with the property in question. *Newbould* v. *Smith*, 14 App. Cas. 423; 61 L. T. 814—H. L. (E.) See *S. C.*, 55 L. J., Ch. 788; 34 W. R. 690—C. A.

—— **Payment by other than Mortgagor or Agent.**]—The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being surety only, H. being bound to pay principal and interest, and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all:—Held, in a suit for foreclosure, that the period of limitation prescribed by s. 30 of c. 84 of the Consolidated Statutes of New Brunswick ran in respect of both mortgages from the date of the last payment of interest by H. *Lewin* v. *Wilson*, 55 L. J., P. C. 75; 11 App. Cas. 639; 55 L. T. 410—P. C.

—— **Payment by One of Two Mortgagors.**]—The Mercantile Law Amendment Act, 1856, s. 14, does not apply to a personal action brought to recover money secured by a mortgage of land. *Bailie* v. *Irwin*, [1897] 2 Ir. R. 614.

—— **Payment of Interest by Mortgagor keeps alive Remedy against Surety on collateral Bond.**]—See *Powers, In re, Lindsell* v. *Phillips*, col. 318.

**By Mortgagee.**]—Acknowledgment of mortgage-title within twenty years of bill filed maintains equity of redemption. *Hodle* v. *Healey*, 6 Madd. 181; 1 Ves. & B. 536; 22 R. R. 270. S. P., *Rayner* v. *Oastler*, 6 Madd. 274.

A mortgagor mortgaged estate X. by a deed containing a borrowing clause. On a further loan he mortgaged Y. to secure the entire money borrowed:—Held, that a conveyance of X. by the mortgagee's representatives, treating it as a mortgage only, was, under the old law, a sufficient acknowledgment to keep alive the right to redeem Y. *Ball* v. *Riversdale* (*Lord*), Beat. 550.

A mortgagor will be entitled to redemption against a mortgagee, who, after more than twenty years' possession, makes admissions which prove that he has all along considered himself only as mortgagee. *Cutler* v. *Cremer*, 1 L. J. (O.S.) Ch. 108 ; 6 Madd. 253.

In 1814 A. mortgaged an estate to B. in fee, and subsequently, but in the same year, granted an annuity out of the estate to C. By a deed of even date with the grant of the annuity, A. conveyed the estate to a trustee to secure payment of the annuity. Only the first two quarterly payments of the annuity were made. In 1839 B. transferred his mortgage to D., who then entered into, and ever since continued, in possession of the estate. In 1856 C.'s representative claimed to be paid his annuity out of the estate, and asked D. for an account of the rents of it. D., in reply, wrote as follows: "I deny . . . the claims of your client. I need only add, that if he were entitled to the account, it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest on the first charge referred to in your letter." On a bill filed in 1858 by C. against D., for a decree for the redemption of the estate :—Held, that although the deed of even date with the grant of the annuity would prevent A., and any one claiming through him, from setting up the Statute of Limitations, still, as D. claimed under the original mortgagee, and as the letter written by D. was no acknowledgment within s. 28 of the 3 & 4 Will. 4, c. 27, of C.'s right to redeem, the bill must be dismissed. *Thompson* v. *Bowyer*, 9 Jur. (N.S.) 863 ; 9 L. T. 12 ; 11 W. R. 975.

A letter from the mortgagee in possession, in answer to a letter from the grandfather of the infant heir of the mortgagor (the purport not known), in which although vaguely he acknowledged the infant granddaughter's title as heiress, and expressing his readiness to settle when she came of age :—Held, a sufficient acknowledgment of the right, to an agent, to save the statute, and that the infant heiress when she came of age, had a right to redeem any time within twenty years from the date of the letter. *Trulock* v. *Roby*, 12 Sim. 402.

Redemption decreed against the heir of mortgagee, and a purchaser with notice, upon acknowledgment of mortgage, within twenty years before the bill, in transaction with other persons, not with the heirs of the mortgagor. *Hansard* v. *Hardy*, 18 Ves. 455.

Mortgage, though never so old, is redeemable if interest has been paid. *Floyer* v. *Lavington*, 1 P. W. 268.

A mortgage after forty years' possession by mortgagee was held to be redeemable upon the foot of a stated account, and an agreement for turning interest into principal. *Conway* v. *Shrimpton*, 5 Bro. P. C. 187 ; 1 Bro. P. C. 309 ; 15 Vin. Abr. 468, pl. 6.

If an equitable mortgagee enters into the receipt of the rents of the mortgaged estates, such receipt is, primâ facie, a payment within the meaning of the proviso in the Statute of Limitations. *Brocklehurst* v. *Jessop*, 7 Sim. 438.

Length of time pleaded in bar to a redemption of a mortgage, being made in 1713, the mortgagor's solicitor appearing to have settled an account in 1730, in order to pay off the mortgage : —Held, that would save the right of redemption. *Anon.*, 2 Atk. 333.

Quære, whether since the late Statute of Limitations (3 & 4 Will. 4, c. 27, s. 28), the bar created by twenty years' possession by a mortgagee is defeated by his having kept accounts of the rents received by him. *Baker* v. *Wetton*, 14 Sim. 426 ; 9 Jur. 98.

—— **Retrospective Operation of Statute.**]—In 1816 the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833 the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 28) was passed, and barred all suits for redemption after twenty years' possession by the mortgagee, and no acknowledgment in the meantime of the right of redemption given to the mortgagor or his agent in writing, signed by the mortgagee. In 1845 the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee :—Held, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828, and therefore that the suit, as to that estate, was barred. *Batchelor* v. *Middleton*, 6 Hare, 75.

—— **Recitation in Deed.**]—A. mortgaged an estate to B. for 1,000 years ; B. died, having bequeathed the mortgage to his widow ; she also died, and in 1822 her personal representatives entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage and conveyed the terms to C., subject expressly to the equity of redemption of A., or his legal representatives : —Held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable. *Lucas* v. *Dennison*, 13 Sim. 586 ; 7 Jur. 1122.

Where purchaser of an equity of redemption had the legal estate conveyed to him by a deed, dated the 24th August, 1796, in which it was recited that the purchaser had some time since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th January, 1816 :—Held, that the recital was acknowledgment of the mortgage title within twenty years from the filing of the bill. *Price* v. *Copner*, 1 Sim. & S. 347 ; 1 L. J. (O.S.) Ch. 178.

—— **By one of two joint Trustee Mortgagees.**] —Two joint mortgagees of lands, who appeared on the face of the mortgage to be trustees of a settlement, had been in possession of the property for more than twenty years, but within twenty years before the institution of a redemption suit one of them had acknowledged in writing the mortgagor's title :—Held, that such recognition by one of the joint mortgagees did not operate as an acknowledgment within the statute, and that the equity of redemption was barred. *Richardson* v. *Younge*, 40 L. J., Ch. 338 ; L. R. 6 Ch. 478 ; 25 L. T. 230 ; 19 W. R. 312.

—— **After Time expired.**]—In 1828 the plaintiff mortgaged freehold property to B., and in 1832, being about to reside abroad, he gave a full power of attorney to the defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the plaintiff settled accounts with the defendant, showing a large balance due to the defendant, which the plaintiff agreed to secure by mortgage of his real estates when required. In 1845 the plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the defendant continued to receive the rents and profits. In 1849 the defendant took a transfer himself of B.'s mortgage, to which the plaintiff was not a party. In 1865 the defendant wrote a letter to the plaintiff expressing his readiness to settle all accounts. In 1877 the plaintiff's bankruptcy was annulled, and the plaintiff brought an action against the defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The defendant pleaded the Statute of Limitations:—Held, that on the plaintiff's bankruptcy the defendant ceased to be the agent and attorney of the plaintiff, and did not become the agent of the assignee; and that even if the assignee would have been entitled to call upon the defendant to account, the plaintiff did not, on the annulment of the bankruptcy, succeed to the assignee's right; that the plaintiff's estate as mortgagor having ceased on the bankruptcy, the letter written to him in 1865 could not operate as an acknowledgment, either of his title or that of the assignee, to the equity of redemption, so as to take the case out of the Statute of Limitations; that as the assignee was barred by the statute, the plaintiff was also barred, notwithstanding the annulment of the bankruptcy. The action was therefore dismissed with costs. *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361.

Whether an acknowledgment of the title of the mortgagor is effectual to take the case out of the Statute of Limitations, if it is not made till after the time limited by the statute has expired, quære. *Ib.*

In 1776 B., who was entitled to two-third parts of an estate, mortgaged the same to R., who was entitled to the other third part. In 1782 R. entered into possession, and continued in possession until his death in 1805. By his will R. devised the property to his son R., in tail, with remainders over. In 1812 the persons entitled under B.'s will commenced proceedings for the purpose of redeeming the two-third parts, and in 1814 a compromise was made, and by indentures of lease and release, the two-thirds were conveyed to R., the younger, in fee. R., the younger, died without issue:—Held, that the right of mortgagors to redeem was revived by the acknowledgment, in 1814, of R., the younger, the tenant in tail; and that by the conveyance to him he had acquired the absolute interest in the two-thirds, as against the remaindermen under R.'s will. *Pendleton* v. *Booth*, 1 De G. F. & J. 81; 29 L. J., Ch. 265; 6 Jur. (N.S.) 182; 8 W. R. 101.

Whenever, after twenty years' possession by a mortgagee, there is an acknowledgment of the mortgage title, the right of redemption is restored, the effect of which is to alter the character of the property, as assets of the mortgagee, from real estate, which it had acquired after the end of twenty years, and to restore to it the character of personalty. *S. C.*, 1 Giff. 35; 5 Jur. (N.S.) 840.

There is no authority or sound principle for the proposition that an acknowledgment by a tenant in tail of the mortgaged estate does not completely restore the right of redemption. *Ib.*

After a mortgagee had been more than twenty years in possession of property mortgaged, the mortgagor's solicitor wrote a letter asking when the mortgagee would see him on the mortgagor's claims. The mortgagee wrote back to the solicitor, "I do not see the use of a meeting, unless some party is ready to pay me off." The mortgagor filed a bill to redeem:—Held, affirming a decree at the Rolls, that this was a sufficient acknowledgment in writing of the title of the mortgagor to his solicitor acting as his agent, to bring the case within the 28th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Stansfield* v. *Hobson*, 3 De G. M. & G. 620; 22 L. J., Ch. 657; 1 W. R. 216. And see *Trulock* v. *Roby*, 12 Sim. 402; col. 289.

—— **Evidence of.**]—Bill for the redemption of a mortgage, after twenty years, upon the evidence of a conversation proved by one witness only, dismissed. His honour, however, of opinion that parol evidence was admissible in such cases. *Reeks* v. *Postlethwaite*, G. Coop. 161. S. P., *Whiting* v. *White*, G. Coop. 1; 2 Cox, 290.

Equity of redemption barred by possession for twenty years, unless circumstances are proved by the mortgagor showing an acknowledgment of his title by the mortgagee within that period, as accounts delivered by the mortgagee; if by parol evidence, it must be clear and unequivocal; accounts kept by the mortgagee's receiver in a distinct book, and delivered to the mortgagor, but without authority, will not have the effect. *Barron* v. *Martin*, 19 Ves. 327.

**Where three Estates in one Mortgage.**]—The payment of money to a mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. *Chinnery* v. *Evans*, 11 H. L. Cas. 115; 10 Jur. (N.S.) 855; 11 L. T. 68; 13 W. R. 20.

Therefore, if estates A., B. and C. are included in one mortgage, and the owner of A. pay the interest, the mortgagee is not barred by 3 & 4 Will. 4, c. 27, s. 40, and 7 Will. 4 & 1 Vict. c. 28, from his remedy against B. and C. *Ib.*

**Mortgagor and Mortgagee—Principal and Surety—Payment of Interest.**]—If s. 8 of the Real Property Limitation Act, 1874, applies to an action brought against a surety on a covenant in a mortgage deed for payment of the debt with interest, the payment of interest by the mortgagor prevents the statute from running in favour of the surety. *Frisby, In re, Allison* v. *Frisby*, 59 L. J., Ch. 94; 43 Ch. D. 106; 61 L. T. 632; 38 W. R. 65—C. A.

Per Cotton, L.J.:—Sect. 8 is applicable to an action against a surety as well as to one against the mortgagor. Per Bowen, L.J., and Kay, J.:—The section does not apply to a personal action unless brought against the mortgagor or his representatives. *Ib.*

**Mortgage—Receipt of Policy Moneys.**]—In 1870 C. being entitled to the reversion in fee of certain lands assigned them by way of mortgage (subject to the existing life estate) to the mortgagee to secure 5,000*l.* Under another mortgage of other property securing this loan, C. took out a policy on his own life for 2,000*l.*, and assigned it to the mortgagee. In 1874, upon C.'s death, the proceeds of this policy were received and applied by the mortgagee in reduction of the mortgage debt:—Held, that the receipt of the policy moneys was a part-payment within the twelve years and therefore that the mortgage debt was kept alive. *Conlan's Estate, In re*, 29 L. R., Ir. 199.

**By Mortgagors and Mortgagees.**]—*See also* **B**, II. 9, ante, col. 206.

**Trust Deed to receive and accumulate Income, and thereout pay Premiums on Life Policies.**]—S., being indebted to divers persons, including two judgment creditors, by deed assigned his life-interest in certain property to a trustee, to receive the annual income, and thereout to effect and maintain certain policies on the debtor's life, and to accumulate the residue of the annual income. The deed declared that on S.'s death the money secured by the policies was to be divisible amongst the creditors, all of whom were parties to the deed. The trustee received the income, and paid thereout the premiums on the policies during the life of the debtor. S. died thirty years after the making of the deed; during his life no payment was made in respect of their debts to either of the judgment creditors:—Held, that the payments on account of the premiums were, by the terms of the deed, payments on account of principal and interest in respect of the debts, so as to prevent the operation of the Statute of Limitations, and that the judgment creditors were entitled to be paid their debts out of the amount of the policies. *Scott* v. *Synge*, 27 L. R., Ir. 560—C. A.

**Bond.**]—Action by an administrator of B. on a bond made by A. to B., dated 5th of December, 1812. The condition recited that B. had agreed to advance to A. the produce of the sale of stock in the funds without any other advantage than B. would have been entitled to if the stock had remained in his name; that B. had sold the stock and paid the produce to A., and that it had been agreed that the stock should be replaced and transferred to B., and the condition was, that if A., before the 5th of June following, purchased stock, and transferred it to B., and paid to B., in lieu of dividends, such sums as B. would have been entitled to receive for dividends if the stock had continued in his name, at such times and in such proportions, and in such manner as the dividends would have been payable to B. if the stock had not been sold, then the bond to be void. Breach, first, that A. did not on the 5th of June, or since, purchase the stock and transfer to B. or to his administrator; secondly, that the dividends, if the stock had remained in B.'s name, would have been payable half-yearly, and the first and only one of such dividends before the 5th of June would have been payable on the 5th of January, 1813; that on the 11th of September, 1824, B. died; that if the stock had continued in his name, or his administrator's, the dividends would have been paid half-yearly, and that there was a large sum payable in lieu of such dividends, and due after B.'s death, and that the stock had not been transferred, and A. had failed to pay the sum due in lieu of dividends. Plea, that the causes of action did not accrue within twenty years next before action. Replication, as to the first breach, that while the stock remained untransferred, and the money was due in lieu of the dividends, on the 10th of September, 1824, A. made an acknowledgment to B. that the stock remained untransferred, by A. making satisfaction to B. on account, and that the action was brought within twenty years after such acknowledgment; and as to the other causes of action, that they did accrue within twenty years. Rejoinder, as to the first part of the replication, a traverse of the bringing of the action within twenty years after the acknowledgment, and issue thereon; and as to the second part of the replication, issue was joined. It was proved that B. had, since the advance, agreed to board and lodge with A., that the amount was to be deducted from the interest of the money which A. had borrowed, and that a settlement should be made every six months. B. had boarded and lodged with A. till B.'s death, but no settlement had ever taken place, though frequently demanded by B.:—Held, first, that supposing the issue raised upon the rejoinder cast upon the plaintiff the burthen of proving that the acknowledgment was made within twenty years before action, there was sufficient evidence to entitle the plaintiff to a verdict. *Blair* v. *Ormond*, 17 Q. B. 423; 20 L. J., Q. B. 444; 15 Jur. 1054.

Held, secondly, that the bond was not within the 3 & 4 Will. 4, c. 42, s. 5, and that the replication, therefore, was no answer to that part of the plea which related to the first breach. *Ib.*

But held, thirdly, that the part of the condition which stipulated for the payment from time to time of the sums payable in lieu of the dividends, still remained in force, as to so much as had accrued due within twenty years before action, the penalty of the bond not having been insisted upon in respect of sums accruing due earlier. *Ib.*

—— **Receipts for Interest indorsed on Bond by Obligee.**]—See *Rose* v. *Bryant*; *Barrington* v. *Searle*; and *Gleadow* v. *Atkin*, col. 321.

**Acknowledgment of Title, what is.**]—Construction of a document given in evidence as an acknowledgment of title. See *Fursdon* v. *Clogg*, 10 M. & W. 572.

Whether a writing amounts to an acknowledgment of title is a question for the court, and not for the jury to decide. *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295.

A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows: "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises; yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for twenty-one years." The bargain subsequently went off, and no rent was paid nor lease executed:—Held, that this letter was not an acknowledgment of title. *Ib.*

In 1818, the plaintiff's father and the defendant's grandfather became seised as tenants in common of a meadow. The meadow was then

in the possession of the defendant's grandfather, who had previously held it under a lease. The plaintiff's father became possessed in 1826, and so continued till his death, in 1836. In 1837, Newton, who was proved to be a land agent, who received the defendant's rents and managed his property, wrote the following letter to the plaintiff's agent: "Sir, Mr. P. (the defendant) is now in possession of his two-thirds of the meadow, who will, no doubt, accept a lease (three lives) for Ley's (the plaintiff's) one-third, at a fair rack-rent. You must be aware Mr. P. is bound to pay rent for Ley's one-third during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. (Signed) J. Newton. Will you favour me with the terms of a lease for the one-third of the meadow, that I may lay it before Mr. P." No answer was shown to have been given to this letter, but the defendant continued in possession of the land down to 1857, when an ejectment was commenced:—Held, that the letter was not a sufficient acknowledgment of the plaintiff's title. *Ley* v. *Peter*, 3 H. & N. 101; 27 L. J., Ex. 239; 6 W. R. 437.

T. M., by his will in 1773, after charging his "unsettled real estate" with his debts and legacies, gave the rest and residue of his said unsettled real estate to his wife Jane M. for life, with remainder to the Incorporated Society for Promoting Protestant Charter Schools in Ireland and their successors for ever. In 1774 T. M. died. In 1801 Jane M., who had paid off the charge and legacies thrown upon the unsettled estate, sold all her interest of what kind soever in that estate to J. N. R. In 1811 Jane M. died. In 1820 and 1821, the Incorporated Society claimed the estates from J. N. R. J. N. R., in a correspondence which he had with the society, whilst he did not admit the right of the society to the estate was free from doubt, always stated that he was ready to account, and had no further claim against the estate than what would appear due on foot of such an account. In 1822 J. N. R. died, and by his will devised T. M.'s estate amongst others as his own upon certain trusts:—Held, that there was in the correspondence which passed between J. N. R. and the society a sufficient acknowledgment in writing to bring the case within the 14th section of the 3 & 4 Will. 4, c. 27. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177. And see *S. C.*, Sau. & Sc. 559.

Where mortgagees of the works and tolls of a harbour company agreed, in 1818, that, on the exchequer loan commissioners making an advance of money under the provisions of the acts of parliament regulating them, the tolls of the harbour should be applied, first, in paying interest on the commissioners' advances; secondly, in paying interest on prior mortgages; and thirdly, in reduction of the principal till it was paid off, the tolls being insufficient to keep down the interest on the advances, they sold the subject of their security to a railway company, with notice of the agreement. In 1833, before the sale to the railway company, one of the mortgagees wrote to the treasurer of the harbour company, complaining of nonpayment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus after payment of expenses, but that he was at all times willing to give information to the mortgagees, or to any other gentleman who had embarked property in the undertaking:—Held, that the agreement and the correspondence took the case out of the Statute of Limitations, both as to principal and interest. *Jortin* v. *S. E. Ry.*, 6 De G. M. & G. 270; 24 L. J., Ch. 343; 1 Jur. (N.S.) 433; 3 Eq. R. 281; 3 W. R. 190.

**Receipt of Rent—Acknowledgment after Title Obtained.**]—T. and J. became entitled in possession to a freehold as tenants in common in 1833. In 1879, persons claiming under J. brought an action for sale or partition. The defendant, who claimed under T., alleged that T. was in receipt of the rents of the entirety from 1833 to 1864, without accounting, and claimed the benefit of the Statute of Limitations. The parties entered into admissions, which stated that T. received the rents of the entirety from 1833 till his death in 1877, and that T. paid to the solicitors of J.'s mortgagees a moiety of the rents due in November, 1864, and continued to pay to them a moiety of the rents till his death. The admissions did not state, nor was there any evidence whether T. did or did not account for a moiety of the rents before 1864:—Held, by Malins, V.-C., that the acknowledgment by T. of J.'s title, though after twenty years' adverse possession, excluded the operation of the Statute of Limitations, and that the plaintiffs were entitled to judgment. But held, by the court of appeal, that where a tenant in common has gained by the statute an adverse title to another share of the property, no payment of rent or acknowledgment by him can restore the title which has been extinguished by the statute. Held, further, by the court of appeal, that the payment of a moiety of the rents to persons claiming under J. from 1864 to 1877, raised a presumption that a similar payment was made previously, and that as the admissions did not negative this inference the defence on the Statute of Limitations could not be supported. *Sanders* v. *Sanders*, 51 L. J., Ch. 276; 19 Ch. D. 373; 45 L. T. 637; 30 W. R. 280—C. A. Affirming, on different grounds, 50 L. J., Ch. 367; 44 L. T. 171; 29 W. R. 413.

**Statement by Deceased Tenant to Agent of Landlord, Evidence of Payment of Rent.**]—See *Doe* d. *Spencer* v. *Beckett*, col. 162.

**Payment by Tenant cannot be treated as on Account of Rent, if not so made.**]—See *Att.-Gen.* v. *Stephens*, col. 153.

**Performance of Services in lieu of Payment of Rent.**]—See *Doe* d. *Edney* v. *Benham*, col. 153.

**Acknowledgment of Title, after Decree establishing it Barred.**]—Decree establishing a charge carried into execution, though not proceeded on for forty years, there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington* v. *O'Brien*, 1 Ball & B. 173.

**Letter from Deceased Debtor to Judgment Creditor.**]—A debtor wrote to X. a letter, which was not to be opened till his death, and to be considered as his will, in which he directed X. and other creditors named to be paid as soon as X. could get funds in hand. In a suit to administer the debtor's assets, the Statutes of Limitations were relied on against X., whose demands, by judgment and simple contract, were more than

twenty years old at the debtor's death :—Held, they were not barred. *Clinton* v. *Brophy*, 10 Ir. Eq. R. 139.

**Judgment Barred before 3 & 4 Will. 4, c. 27.**]—Where a judgment was barred by the operation of the 8 Geo. 1, c. 4, before the passing of the 3 & 4 Will. 4, c. 27, it is not resuscitated by an acknowledgment in writing given after the passing of the latter act. *Clonecurry* (*Lord*) v. *Piers*, 3 Jo. & Lat. 573 ; 9 Ir. Eq. R. 407.

**Payment of Interest on Statute-barred Judgment.**]—In 1792 C. obtained a judgment against B., which was never revived or re-docketed, but interest was paid within twenty years before the proceedings by the creditor. In 1812 B. entered into a recognizance to abide the decree to be pronounced in a cause of *Latouche* v. *O'Brien*, but in which, though revived, a decree had not been pronounced. In 1816 B.'s heir granted an annuity for valuable consideration charged on the lands which he inherited. The lands being sold, a fund remained in court, consisting partly of the surplus of the purchase-money, and partly of rents received in the cause, and partly of dividends of stock purchased by the two former sums. An order having been made in May, 1844, to report priorities and distribute these funds amongst the creditors, pursuant to the 102nd general order and report thereon :—Held, that the judgment was to be postponed to the annuity. That payment of interest on the judgment, within twenty years prior to the order, was sufficient to take it out of the Statute of Limitations, though more than twenty years had elapsed between the obtaining of the judgment and the payment. The annuity, by gaining priority over the judgment under Moore's Act, does not carry up the recognizance so as to give it priority over the judgment, no provision being found in that act similar to that in the Registry Act, and the judgment being only effected to the extent of the annuitant's claim against the land. That it was possible there might be a decree in the revived suit of *Latouche* v. *O'Brien*, and if so, the recognizance would be a subsisting charge, and would have priority over the annuity as against the surplus produce of the sale, but would not attach upon the rents or dividends. *Latouche* v. *O'Brien*, 10 Ir. Eq. R. 113.

**Payment of Interest, what amounts to.**]—In 1833, trustees of a marriage settlement lent to the husband, at interest, some of the money settled to the separate use of his wife, on the security of a joint bond of the husband and the defendant. No interest was paid, but on the 31st October, 1847, it was arranged between the trustees and the husband and wife that she should give the trustees her receipt for the interest up to that date, which she accordingly did. She afterwards from time to time gave receipts for each half-year's interest up to November, 1860. No money ever passed :—Held, that the transaction amounted to a payment or a satisfaction of the interest, so as to take the case out of the 3 & 4 Will. 4, c. 42, s. 5. *Amos* v. *Smith*, 1 H. & C. 236 ; 31 L. J., Ex. 423 ; 7 L. T. 66 ; 10 W. R. 759.

S., in 1841, executed a mortgage of leasehold property to J., to secure 300*l.* and interest. S. paid no interest on the mortgage from the date of its execution, but kept down the interest on 300*l.*, a sum of money which J. was liable to pay under a bond which he had entered into for the benefit of S. The court presumed the payment of interest on the bond was made under an arrangement for that purpose, and that J.'s debt was not barred by the Statute of Limitations. *Jones* v. *Rhind*, 17 W. R. 1091.

Freeholds and leaseholds were mortgaged in 1822. The mortgagor devised and bequeathed his residuary estate upon trust to pay his debts, including mortgage debts, and afterwards on trust for H. A beneficial tenant for life under the will of the mortgagor in a moiety of a freehold not comprised in the mortgage, and also interested in the residue under the will of H. paid interest on the mortgage down to her death in 1859 :—Held, that such payment prevented the Statute of Limitations being a bar to the mortgagee's proceeding, either against the property comprised in the mortgage or on the covenant for repayment against the estate of the mortgagor. *Pears* v. *Laing*, 40 L. J., Ch. 225 ; L. R. 12 Eq. 41 ; 24 L. T. 19 ; 19 W. R. 653.

S., indebted to bankers in 1826, assigned to them an annuity of 20*l.* a year, payable during three lives and the lives and life of the survivors and survivor, for securing 200*l.*, part of his balance. S., in 1828, mortgaged to them the equity of redemption of a leasehold estate for securing his general balance of 1,500*l.* Interest was paid on the mortgage up to 1832, first, to the bankers (who became bankrupt in 1828), and afterwards to their assignees ; and they received the annuity until 1847, when the annuity expired, and the money thus received was more than enough to pay the 200*l.* In 1834 the first mortgagee of the leasehold estate had entered into possession of the property, and remained in possession. In 1853 S. filed a bill against the mortgagee for redemption, and the assignees were made parties :—Held, that the payments of the annuity having exceeded the 200*l.* must be taken to have been made in reduction of the general balance due on the mortgage, and having been made within twenty years, the same took the case out of the operation of the 3 & 4 Will. 4, c. 27, ss. 40, 42. *Staley* v. *Barrett*, 26 L. J., Ch. 321 ; 5 W. R. 188—L.JJ.

**What Payments Sufficient.**]—The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made. *Harlock* v. *Ashberry*, 51 L. J., Ch. 394 ; 19 Ch. D. 539 ; 46 L. T. 356 ; 30 W. R. 327.

**Conveyance by Lessor of Part of the Land leased—Whole Rent paid, as before, to Lessor—Not a Payment to a Person "Wrongfully claiming to be entitled to" the part sold.**]—See *Laybourn* v. *Gridley*, col. 159.

**Payment of Interest on Part of Sum secured.**]—S., being indebted to P. in 2,300*l.*, by sundry securities affecting his real estate, joins P. in 1775 in assigning all his said securities to L. as security for 1,800*l.* then lent by L. to P. The interest on said 1,800*l.* was regularly paid by S. and his heirs to L., but no interest on the surplus of the 2,300*l.* was paid either to P. or L. since 1775 :—Held, that the payment of the interest on the 1,800*l.* preserved the right to demand the interest on the surplus, notwithstanding the lapse

of time, and that under the circumstances no presumption of the surplus having been paid could arise. *Loftus* v. *Swift*, 2 Sch. & Lef. 642.

**In Answer to a Suit.**]—An answer in chancery put in within twenty years, by the person through whom a defendant in ejectment claims, in the course of a chancery suit between him and the plaintiff with reference to the same property, and containing an admission by him of the then plaintiff's title, is a sufficient acknowledgment of the plaintiff's title to prevent the action being barred. *Goode* v. *Job*, 1 El. & El. 6; 28 L. J., Q. B. 1; 5 Jur. (N.S.) 145; 7 W. R. 7. See *Moodie* v. *Bannister*, 4 Drew. 433; 28 L. J., Ch. 881; 5 Jur. (N.S.) 402; 7 W. R. 278.

In December, 1821, A. and B., creditors of D., deceased, jointly advanced a sum of money to save leaseholds of D. from eviction for nonpayment of rent. As between themselves, the money was advanced in equal moieties. To a bill filed by B. against A. and the devisee, in trust of D., to raise the sum so advanced, the trustees, in April, 1824, put in an answer admitting the payment of the salvage money. In a suit instituted in January, 1844, for a sale of D.'s estate, A. filed a charge on foot of his salvage claim:—Held, that the acknowledgment contained in the answer of April, 1824, was sufficient to take the claim out of the bar of the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 40. *Blair* v. *Nugent*, 3 Jo. & Lat. 673; 9 Ir. Eq. R. 404.

**To One of Several Claimants.**]—A payment by way of compromise to one of several claimants to a charge on real estates, was held to take the case out of the Statute of Limitations, in favour of other claimants. *Young* v. *Waterpark* (*Lord*), 8 L. J., Ch. 214.

**Where two Sums secured by one Bond.**]—When two separate sums are secured by one bond, a payment in respect of one sum does not prevent the statute running in respect of the other. *Ashlin* v. *Lee*, 44 L. J., Ch. 174; 31 L. T., 721; 23 W. R. 287. Affirmed, 44 L. J., Ch. 376; 32 L. T. 348; 23 W. R. 458.

By an agreement the sum of 1000*l.*, part of the purchase-money of real estate, was secured by a bond. The arrangement was, that the sum of 750*l.* was to be paid to a person named on a given event, and the remaining 250*l.* to another person on another event. The event on which the 250*l.* became payable happened more than twenty years before filing the bill, and it was alleged that that sum had never been paid. The event on which the 750*l.* became payable happened within the twenty years, and the sum of 750*l.* was then paid:—Held, that the payment of the 750*l.* did not prevent the 250*l.* being barred by the statute. *Ib.*

**Return in Insolvent's Schedule.**]—A return made by an insolvent in his schedule is a sufficient acknowledgment, within the 42nd section of 3 & 4 Will. 4, c. 27. *Barrett* v. *Bermingham*, Fl. & K. 566; 4 Ir. Eq. R. 537.

**In Affidavit in Answer to Petition for Receiver.**]—When, in an affidavit by the respondent in a petition for a receiver on a judgment, he denied that the sum claimed by the petitioner was due, but stated, "that the entire sum due on foot of the judgment, &c., is 474*l.* 8*s.*, besides costs, which this deponent is advised he is not liable to":—Held, that he was thereby precluded from insisting on the Statute of Limitations as a bar to the full amount of that sum; this being a sufficient acknowledgment within 3 & 4 Will. 4, c. 27, s. 40. *Tristram* v. *Harte*, Longf. & T. 186; 3 Ir. Eq. R. 386.

**Must be Pleaded.**]—To a plea of the statute upon a mortgage deed, the plaintiff, in order to take the case out of the statute by an acknowledgment in writing under s. 5, must reply such acknowledgment, and that the action was brought within twenty years. *Kempe* or *Kent* v. *Gibbon* or *Gibbons*, 9 Q. B. 609; 16 L. J., Q. B. 120; 11 Jur. 299.

But he need not set out the acknowledgment in his replication. *S. C.*, 12 Q. B. 662; 17 L. J., Q. B. 298; 12 Jur. 697.

**Form of Reply of.**]—See *Forsyth* v. *Bristowe*, col. 332.

**Time runs from.**]—See *Burroughs* v. *M'Creight*, col. 166.

**That Freehold in Lord, by Persons licensed to enclose Waste.**]—See *Hodgson* v. *Hooper*, col. 301.

**Revivor of Judgment against Heir not effective against Estate that had been Sold.**]—See *Kirkwood* v. *Lloyd*, col. 315.

## VII. COPYHOLD LAND.

**Treated as Freehold, effect of.**]—Land anciently copyhold was for upwards of 100 years treated as freehold without any claim being made on the part of the lord of the manor; and the only intimation that the land was copyhold was in recitals to that effect and a covenant to surrender contained in deeds of recent date to which the lord was neither party nor privy. Semble, that the lord's right of entry was barred by the Statute of Limitations. *Lidiard and Broadley, In re*, 58 L. J., Ch. 785; 42 Ch. D. 254; 61 L. T. 322; 37 W. R. 793.

**Right of Entry of Lord.**]—The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. *Whitton* v. *Peacock*, 3 Myl. & K. 325.

The lord of the manor is said to be never out of possession; and that whatever is built on the waste is his, even after sixty years' possession by the tenant. *Lloyd* v. *Bartlett*, 6 Vin. 123, pl. 1.

Sed quære, after twenty years' possession, which is a bar to an ejectment. *Ib.*

The defendant, who shared with others a right of way over a piece of land, the property in which was in the lord of the manor, used a portion of the same, amounting to about three-quarters of the whole, in all respects as if it was properly part of his farm, ploughing it up from time to time and raising produce thereon. Such user was uninterrupted, and was continued for twenty years and more. As to the remaining quarter, which was not in any way fenced off from the above, it remained in its original condition, and was used for the purposes and in the manner that the whole was originally intended to be used:—Held, that a good title, as against the lord of the manor, to the soil and minerals underlying the soil of three-quarters of the strip

of land had been thus acquired; but that nothing had been done to disturb the original rights in the soil, and minerals underlying the soil, of the remaining one quarter of the piece of land. *Seddon* v. *Smith*, 36 L. T., 168.

The right of a lord of a manor to seize quousque does not accrue until after three proclamations to the tenant to come in and be admitted, or until after the latter has refused; but such refusal must be deliberate, and not a mere failure to be admitted. Consequently, where a tenant came in, but was not admitted through some defect in his title, the right did not accrue to the lord. Until such right accrues, the statute does not run against the lord. *Beighton* v. *Beighton*, 64 L. J., Ch. 796; 13 R. 743; 73 L. T. 86; 43 W. R. 685. See also *Ecclesiastical Commissioners* v. *Parr*, 63 L. J., Q. B. 784; [1894] 2 Q. B. 420; 9 R. 542; 71 L. T. 65; 42 W. R. 561.

**Enclosure of Waste.**]—Against a writ of ayel, after forty-five years' possession, a perpetual injunction was granted. *Knight* v. *Adamson*, 2 Freem. 106.

A common that has been enclosed for thirty years shall not afterwards be thrown open. *Silway* v. *Compton*, 1 Vern. 32.

After fifty years' quiet possession, equity will not interpose in a question of right of common, until after one or more verdicts at law. *Anon.*, Gilb. Eq. Rep. 183.

Twenty years' adverse possession of a waste inclosed is a bar to the entry of a commoner. *Hawke* v. *Bacon*, 2 Taunt. 156.

In 1781, a lord of a manor, with the consent of the tenants of the manor, granted to certain persons licence to enclose a piece of the waste, and that they and their heirs should hold the same in trust for the purpose of building a workhouse, rendering to the lord of the manor the yearly rent of 5*s.* for the same for ever. The churchwardens and overseers entered into possession, and built a workhouse, and used it as such until 1836. The yearly rent was paid from 1781 to 1791, and from 1825 to 1836. In 1835, the persons to whom the licence was granted in 1781 being dead, notice was given to the officers of the parish, by the steward of the manor, to nominate other persons for the purpose of admission, to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a fine on their admission. In 1840 the parish officers, in conformity with a resolution of the inhabitants in vestry assembled, surrendered the premises into the hands of the lord of the manor, and the latter took possession, and afterwards conveyed the premises to the defendant. In an action by the churchwardens and overseers to recover the premises:—Held, that the grant of the licence in 1781 did not manifest an intention to convey a freehold estate, and that the admission of fresh trustees in 1840, and the payment of the 5*s.*, were acknowledgments that the freehold was in the lord of the manor, and that the land was held by his permission; and therefore the possession was not adverse at the time of the passing of 3 & 4 Will. 4, c. 27. *Hodgson* v. *Hooper*, 3 El. & El. 149; 29 L. J., Q. B. 222; 6 Jur. (N.S.) 911; 3 L. T. 149; 8 W. R. 637.

Held, also, that the first tenancy being a tenancy at will, the admission in 1835, being inoperative to convey a copyhold estate, operated to create a fresh tenancy at will; and therefore the right of entry of the lord would not be barred until twenty years after. *Ib.*

In an action of ejectment to recover a portion of the waste of a manor, the plaintiff proved that he was lord of the manor, and that for fifty years prior to his title accruing the manor was vested in tenants for life:—Held, that the possession of the defendant during those fifty years would not bar the plaintiff's claim or raise a presumption of a possession by the defendant prior to the particular estates for life. *Cole* v. *Heydon*, 1 L. T. 439.

If a statute for allotting waste lands within a manor directs all disputed claims to be tried by a feigned issue, and limits the time of bringing such action to six months; an action brought against a copyholder within time, if abated by his death, must be revived against the heir, within six months after the plaintiff has notice of the descent, though the heir is not admitted till long after the time. *Knight* v. *Bate*, Cowp. 738.

Under an inclosure act in 1774, a lane was set out as a public way over land in a manor. From 1778 to 1892 the lane was let by the vestry of the parish every Easter to persons who paid for the hire of it and depastured it:—Held, that the parish had gained a title to the lane by the statute, subject to the public right of way. *Haigh* v. *West*, 62 L. J., Q. B. 532; [1893] 2 Q. B. 19; 4 R. 396; 69 L. T. 165.

—— **Encroachment on Waste by Copyhold Tenant.**]—A copyhold was surrendered in 1809 to a trustee for the Crown for military purposes. In 1808 the then lord of the manor had granted to M., the governor of an adjoining fort, a licence to inclose part of the waste adjoining the copyhold, and to occupy it at a yearly rent during his life if he so long continued governor, which he ceased to be in 1811. Nothing further was shown as to the title to the land included in the licence, except that at the commencement of this action in 1874 the Crown had been in possession of it as inclosed ground, as well as of the original copyhold, for more than forty years. Since 1811 there had been repeated admittances of trustees for the Crown to the original copyhold, in which it was described by metes and bounds not including the close L. comprised in the licence. In 1874 the lord of the manor, without the consent of the Crown, granted a licence to get coprolites out of close L. at a royalty, and received 222*l.* for royalties. The Crown brought an action for an injunction and damages. Fry, J., held, that close L. had become an accretion to the copyhold tenement, and was of copyhold tenure, but the decree only granted an injunction and an inquiry as to damages, without any declaration of the rights of the parties. The chief clerk having certified that the damages payable to the Crown were 222*l.*, and Fry, J., having approved of his finding, the lord appealed on the ground that the damages were excessive. The tenant who held close L. under the Crown had separately received full compensation for surface damage, and the land had been restored to its original condition:—Held, by the court of appeal, that, assuming the doctrine that encroachments made by a lessee enure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close L. having been made by licence from the lord was not an encroachment, and that the subsequent admittances did not treat close L. as part of the copyhold tenement. *Att.-Gen.* v. *Tomline*, 15 Ch. D. 150; 43 L. T. 486—C. A.

Whether that doctrine does apply to copyholds, quære. *Ib.*

—— **Measure of Damages.**]—Whether, if close L. had been copyhold, a finding which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites could have been sustained, quære. *Ib.*

—— **Crown acquiring Freehold.**]—Held, that the Crown had under the Statute of Limitations acquired a freehold title to close L., and that as the coprolites, therefore, belonged to the Crown, the damages were not excessive. *Ib.*

—— **Purchase of Manor from Crown—Waste inclosed more than twenty years before Conveyance.**]—See Doe d. *Wall* v. *Morris*, col. 249.

—— **Entry by Lord.**]—See Doe d. *Baker* v. *Coombes*, col. 271.

**Suit for Admittance.**]—When the lord had seized copyholds quousque, and had held them for nearly forty years:—Held, that a bill by the heir of the former tenant to compel admittance by the lord was a suit to recover land within 3 & 4 Will. 4, c. 27, ss. 2, 3, and that the right of the heir was barred by that statute. *Walters* v. *Webb*, 39 L. J., Ch. 677; L. R. 5 Ch. 531; 18 W. R. 587.

On a bill to be admitted to a copyhold, for the purpose of trying the right of it, the court will not interfere where the plaintiff is barred by the Statute of Limitations, or where he does not shew a primâ facie title, with a reasonable prospect of success. *Widdowson* v. *Harrington* (*Earl*), 1 Jac. & Walk. 532.

**Heriot Customs.**]—To an action for seizing two beasts of the plaintiff the defendant pleaded that they were taken as customary heriots, and the plaintiff replied a discontinuance of taking heriots for more than twenty years, and that the right to heriots then accrued to the lord within the meaning of the Statute of Limitations (3 & 4 Will. 4, c. 42):—Held, that the replication was bad. *Zouche* v. *Dalbiac*, 44 L. J., Ex. 109; L. R. 10 Ex. 172; 33 L. T. 221; 23 W. R. 564.

—— **Action to recover Court Rolls.**]—The lord of a manor granted a lease of a manor to A. B., to hold for three lives, and deposited with A. B. the court rolls. In 1820 the lease expired by the death of the survivor of the lives. In 1822 the grantor, by letter, requested A. B.'s representative to deliver up the court rolls. No notice was taken of this letter, nor was any further application made by the grantor till the year 1844, when he filed a bill against A. B.'s representatives to recover the court rolls and title deeds of the manor. The defendant by his answer relied on the Statute of Limitations:—Held, that the bill was filed too late. *Wells* (*Dean and Chapter*) v. *Dodington*, 2 Coll. 73; 14 L. J., Ch. 304; 9 Jur. 768.

**Attornment of Tenant to one who claims the Land, but has never been Admitted.**]—See *Doe* d. *Linsey* v. *Edwards*, col. 153.

**Copyhold Quit-rent barred by Nonpayment.**] See *Howitt* v. *Harrington*, col. 276.

## VIII. ECCLESIASTICAL AND CHARITABLE PROPERTY.

*By 3 & 4 Will. 4, c. 27, s. 29, any suit to recover land or rent by ecclesiastical or eleemosynary corporations sole must be brought within two incumbencies and either six years, or so many more than six as will make sixty in all, after a third appointment.*

*By s. 30, an action to enforce a right to present to a benefice must be brought within three adverse incumbencies, or, if that is less than sixty years, within so many more years as will make sixty.*

**Tithes.**]—The 3 & 4 Will. 4, c. 27, s. 2, enacts that no person shall bring an action to recover any land (which by s. 1 includes tithes) but within twenty years next after the right to bring such action has accrued to him or some person through whom he claims:—Held, that this statute does not operate to prevent a tithe-owner from recovering tithes as chattels from an occupier, although none had been set out for twenty years, but that it is confined to cases where there are two parties, each claiming an adverse estate in the tithes. *Ely* (*Dean and Chapter*) v. *Cash*, 15 M. & W. 617; 15 L. J., Ex. 341.

The right to tithes, as against an ecclesiastical corporation aggregate, is barred under 3 & 4 Will. 4, c. 27, s. 2, by nonpayment for twenty years. *Ely* (*Dean and Chapter*) v. *Bliss*, 5 Beav. 574; 11 L. J., Ch. 351.

**Time runs against Tithe Rent-charge transferred to the Irish Land Commission from the Time when the former Owner's Right of Action first accrued.**]—See *Irish Land Commission* v. *Grant*, col. 276.

**Bill and Decree for Arrears of Tithe Rent-charge.**]—See *Irish Land Commission* v. *Junkin*, col. 276.

**Tithes in respect of Houses in City of London barred.**]—See *Payne* v. *Esdaile*, col. 276.

**Lease to Rector containing Grant by him of Tithe—Receipt of Tithe, but not of Rent, by Lessor, after Lease expired.**]—S. demised lands to a rector for forty years, at a certain rent; in the lease, the rector, after covenanting for payment of the rent, further granted to S. the tithe of oats of the parish; the lease also contained a proviso for re-entry, in case the rent should be in arrear, or S., his heirs, &c., should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of S. that the rector should quietly enjoy the lands, under the covenants, grants and agreements contained in the lease. After the expiration of the lease, the rector continued to hold the land, but withheld the rent for more than twenty years; the heirs of S. at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of S., the latter being portionists of the tithes of the parish:—Held, that the possession of the land by the rector was not adverse, so as to let in the operation of the statute. *Roe* d. *Pellatt* v. *Ferrars*, 2 Bos. & P. 542.

**Incumbent of Church.**]—An adverse possession for twenty years is no bar to the church, except as against the same incumbent who submits to it. *Runcorn* v. *Doe* d. *Cooper*, 8 D. & R. 450; 5 B. & C. 696; 4 L. J. (o.s.) K. B. 281.

**Lease by Dean of Deanery Lands—Allotment in respect of Lands leased—Right of Ecclesiastical Commissioners to recover Allotment, when Barred.**]—An allotment under an inclosure act (described as 137 A) was made in respect of premises held by a person under lease from a dean, the property leased being that of the dean in right of his deanery. By the 29th section of 3 & 4 Will. 4, c. 27, a dean could recover possession of such land within the term of sixty years from the time when the right of action first accrued. By the 3 & 4 Vict. c. 113, deanery lands, after the death of any dean then in possession, passed to the ecclesiastical commissioners; and the 57th section of that statute declared that "the ecclesiastical commissioners shall for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them as aforesaid, and of recovering the rents and profits thereof, have and enjoy all rights, powers, and remedies at law and in equity which belonged, or belong, or would belong, or have belonged to the holder of the deanery, &c., in respect of which such profits and emoluments, &c., respectively are, by or under the provisions of this act, to be paid or accrue to and be vested in the said commissioners." Renewals of the original leases had been made, but the allotment 137 A was never referred to in them. It had been in 1821 purchased from the representatives of the original allottee, the title of the dean to it had never been asserted, and it was, in that way, held adversely to him. The dean died in 1854, and the commissioners then came into possession, under the statute, of the property of the deanery. In 1877 the commissioners brought an action to recover the allotment:—Held (Lord Blackburn, diss.), that under the words of the 57th section the commissioners had the same time within which to enforce their claim to the property that the dean would have had under the 29th section of 3 & 4 Will. 4, c. 27. There is a legal continuity between the rights, powers, and remedies of the dean, and those of the commissioners. His right of action was transferred to them by statute, and was not barred by the mere fact of the transfer. *Ecclesiastical Commissioners* v. *Rowe*, 49 L. J., Q. B. 771; 5 App. Cas. 736; 43 L. T. 353; 29 W. R. 159—H. L. (E.)

Per Lord Blackburn: There are no words in the 57th section of 3 & 4 Vict. c. 113, which, as to time, render the 29th section of the 3 & 4 Will. 4, c. 27, applicable to the commissioners. *Ib.*

Held, also, that the right of action to recover the land accrued at the surrender of the lease current when the allotment was made. *Ib.*

**Statute runs against Corporation from Date of Lease.**]—See *Magdalen Hospital* v. *Knotts*, col. 156.

**Lease to Trustees of Chapel—Nonpayment of Rent—Right of Action of Reversioners not extinguished.**]—See *Bunting* v. *Sargent*, col. 156.

**Charitable Trust—Attorney-General suing on behalf of Beneficiaries.**]—See *St. Mary Magdalen, Oxford*, v. *Att.-Gen.*, col. 199.

**Devise of Lands charged with Annuities to Charities.**]—See *Commissioners of Charitable Donations* v. *Wybrants*, col. 200.

**Premises charged with Trust to support Curate for Chapel.**]—See *Att.-Gen.* v. *Davis*, col. 200.

**Charitable Legacy barred.**]—See *Cadbury* v. *Smith*, col. 234.

**Possession by Trustees for Charity under void Deed.**]—See *Churcher* v. *Martin*, col. 252.

**Occupation with Glebe of Adjoining Land purchased by Rector—School built on the Land by Rector's Successor—No Title acquired as against Heir.**]—See *Gibson* v. *Wise*, col. 252.

## IX. CONCEALED FRAUD.

*See also* ante, **A**, VII. 2, col. 121.

*By 3 & 4 Will. 4, c. 27, s. 26, in cases of concealed fraud, the right to sue for the land or rent is to be deemed not to have accrued till the fraud was, or with reasonable diligence might have been, known; but the section is not to make a suit maintainable against a bonâ fide purchaser for valuable consideration.*

**Discoverable by reasonable Diligence.**]—To prove that a fraud was concealed within the meaning of 3 & 4 Will. 4, c. 27, s. 26, it is not sufficient to show that the party was in such an imbecile or an uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary. *Manby* v. *Bewicke*, 3 Kay & J. 342.

Where M. D., with whom A. J., a person of unsound mind, and who had come into possession of lands, resided, and continued to do so until her death, obtained a will and conveyance of part of the lands to himself in fee, and for thirteen years prior thereto, and for ten years after, received the rents:—Semble, that the obtaining the execution of such instruments from a party in that state of mind, was a fraud within the 3 & 4 Will. 4, c. 27, s. 26. *Lewis* v. *Thomas*, 3 Hare, 26.

A person whose legal title to lands is barred by 3 & 4 Will. 4, c. 27, may, if he has been deprived by a concealed fraud, recover by a suit in equity under s. 26, but he is bound to show with the utmost strictness that he is entitled to the privilege given by that section. *Chetham* v. *Hoare*, 39 L. J., Ch. 376; L. R. 9 Eq. 571; 22 L. T. 57.

Therefore, where a plaintiff sued to recover property to which his predecessor, as he alleged, became entitled in 1769, and insisted that a register book containing a certificate of marriage,

forming the principal link in his title, had been fraudulently mutilated in order to prevent him or his ancestors from obtaining evidence of the marriage:—Held, that, by reasonable diligence, evidence of the marriage might have been ascertained within twenty years after the alleged fraud had been committed, and that he had not brought his case within that section. *Ib.*

—— **Pleading.**]—In a case of concealed fraud within s. 26 of the Statute of Limitations (3 & 4 Will. 4. c. 27), it is not enough to prove a concealed fraud; the plaintiff must show that he or some person through whom he claims has been by such fraud deprived of the land sought to be recovered, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought. In such an action general averments of fraud are not sufficient; the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation, and excluding other possible causes. *Lawrance* v. *Norreys* (*Lord*), 59 L. J., Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708—H. L. (E.)

—— **Continuous adverse Possession of Land—When Statute commences to run.**]—The plaintiff, by his statement of claim in an action for recovery of land brought in 1892, alleged that he was the heir-at-law of J., who died intestate in 1798, and that, on the death of J., his real estate was wrongfully taken possession of by the mother of G. C., in the name of G. C., as the heir-at-law—as the mother falsely alleged—of J.; that G. C. died an infant in 1805, whereupon G. C.'s mother continued to hold possession in the name of a supposititious child, R. C., on the false pretence that such child was a brother of G. C., and as such was heir-at-law of J.; that both R. C., and afterwards the defendant, who claimed as a volunteer under R. C., remained in possession knowing the above facts, and fraudulently concealed the same from the true heir of J.; that the plaintiff and his predecessors had been deprived of the estate by the said concealed fraud, which had not, and could not with reasonable diligence have been discovered until 1879; and that the plaintiff, at the time of such discovery, was an infant, and only attained twenty-one in 1887. The defendant moved to have the action dismissed as frivolous or vexatious; and, in support of his application, adduced evidence to show that the allegation that R. C. was a supposititious child had been publicly made in 1853:—Held, (a) that the allegations in the statement of claim as to the entry in 1798 on behalf of G. C. did not show a case of concealed fraud within s. 26 of 3 & 4 Will. 4, c. 27, but only a wrongful entry under a false claim as heir-at-law; (b) that the statute began to run as against the plaintiff and his predecessors in 1798, and that, as possession adverse to the plaintiff and his predecessors had been held ever since, the operation of the statute was not suspended by what was alleged to have been done in 1805; (c) that the plaintiff or his predecessors knew, or might with reasonable diligence have known, the alleged concealed fraud more than twelve years before action brought; and, accordingly, that the action should be dismissed as frivolous or vexatious. *Lawrance* v. *Norreys* (supra) followed; *Trustees, Executors, and Agency Co.* v. *Short* (13 App. Cas. 793) distinguished. *Willis* v. *Howe* (*Earl*), 62 L. J., Ch. 690; [1893] 2 Ch. 545; 2 R. 427; 69 L. T. 358; 41 W. R. 433—C. A.

J. died in 1798, having devised freeholds to A., who predeceased him, and directed payment of his debts, but having made no further dispositions. M., the heiress-at-law and one of the next of kin, died in 1799. In 1880 the plaintiff, claiming through M., brought an action against the persons respectively in possession of J.'s real and personal estate, to establish his title to the real and part of the personal estate, alleging that C., through whom the defendant in possession of the real estate claimed, had entered, on the death of M., as heir-at-law of J., knowing himself to be illegitimate, which fact had always been concealed from the plaintiff's predecessors, and had only in the year 1879 become known to the plaintiff, and could not with reasonable diligence have been earlier discovered by the plaintiff or his predecessors; that administration had, in 1798, been granted to persons (now represented by other defendants), who untruly alleged themselves to be the next of kin of J., and who, knowing the personal estate to be impressed with a trust for the true next of kin, had kept separate accounts thereof, and constituted themselves express trustees thereof, and that with such knowledge separate accounts of the same had ever since been kept by those wrongfully in possession thereof. The defendants respectively demurred, relying as to the real estate on 3 & 4 Will. 4, c. 27:—The court allowed the demurrer as to the real estate, holding that even assuming the concealed fraud, it did not appear that it might not, by "reasonable diligence," have been discovered by the plaintiff's predecessor when C. entered. *Jennens, In re, Willis* v. *Howe* (*Earl*), 50 L. J., Ch. 4; 43 L. T. 375; 29 W. R. 70.

**When Time begins to run.**]—Where the facts constituting fraud are in the knowledge of the party, and he lies by for twenty-five years, he cannot get relief. *Blennerhassett* v. *Day*, 2 Ball & B. 118.

In cases of fraud, time, in order to bar the remedy, will not begin to run till the party acquires a knowledge of the facts constituting the fraud. *Ib.*

Cause of action within meaning of Statute of Limitations arises when party has a right to apply to a court of equity; as where reversion alleged to have been fraudulently obtained, descends in equity to heir by death of ancestor. It seems that the time of limitation begins to run from the time when the fraud is discovered, either in life of ancestor, or upon descent. *Whalley* v. *Whalley*, 3 Bligh, 2.

Length of time, of more than twenty years, bars even in case of fraud, if the party seeking relief has become, within any reasonable period, cognisant of the facts. It is a common mistake to suppose the time only begins to run from the notice of the fraud; for if there is the full period of twenty years, it is immaterial that during much of that time there was no notice. *Byrne* v. *Frere*, 2 Moll. 157.

**Time does not run till Facts constituting Fraud known.**] — See *Trevelyan* v. *Charter*, col. 19.

**Though Fraud held to give rise to a Trust, Time runs if Fraud was known.**] — Where a

trust has been created by the acts of the parties themselves, time is no bar to a suit relating to any transaction that has taken place in connection with the trust property; but where a trust has been created otherwise, as, for example, by its having been founded on a decree of the court, on the ground of fraud, time is a bar, from the moment when the fraud is discovered; secus, if the party to be affected by the fraud has not discovered it. *Clanricarde* (*Marquis*) v. *Henning*, 30 Beav. 175; 30 L. J., Ch. 865; 7 Jur. (N.S.) 1113; 5 L. T. 168; 9 W. R. 912.

**Illegal Working of adjoining Mine.**]—The plaintiffs, the owners of coal mines, discovered in 1872 that the defendant more than six years previously had, when working an adjoining colliery, worked a large quantity of the plaintiff's coal by breaking their boundary. There had been no subsidence of the surface or anything to put the plaintiffs on inquiry, and the defendant, in plans which he kept of the workings in his own mine, had not marked the illegal workings:—Held, that the omission in the plans was not sufficient to constitute a case of concealed fraud so as to entitle the plaintiffs to an account and damages. *Dawes* v. *Bagnall*, 23 W. R. 690.

**Omission in Bankrupt's Schedule.**]—In 1825 a debtor, on his insolvency, omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853 his assignee filed a bill in equity against the assignees under a subsequent bankruptcy and others, for the recovery of the property:—Held, that the claim was not barred by the statute, there having been a concealed fraud. *Sturgis* v. *Morse*, 24 Beav. 541. Affirmed on appeal, 3 De G. & J. 1.

**Sales by Life Tenant.**]—Fraudulent sales had been made by a tenant for life; his son died in his lifetime; the tenancy for life continued to exist for above thirty-five years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem:—Held, that he was not barred by the lapse of time. *Bandon* (*Earl*) v. *Becher*, 3 Cl. & F. 479.

**Succession by Illegitimate Son—"Bonâ fide Purchaser"—Knowledge of Purchaser's Agent.**]—In a case of concealed fraud a purchaser for value is not entitled to the protection of the proviso at the end of s. 26 of the 3 & 4 Will. 4, c. 27, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud had been committed. *Vane* v. *Vane*, 42 L. J., Ch. 299; L. R. 8 Ch. 383; 28 L. T. 320; 21 W. R. 252.

By the words a "bonâ fide purchaser" in s. 26 is meant a person who has given full value for the property. *Ib.*

The section applies where the person who has been kept out of possession by a concealed fraud has had all along a legal right to enter as well as where he has had only an equitable right. *Ib.*

A plaintiff alleged in his bill that his father married A. in 1797. Three weeks before the marriage his mother A. had borne a son B., but the fact of his having been born before wedlock was carefully concealed, and he was brought up as a legitimate son and heir-apparent to his father's title and estates, to which he eventually succeeded. B. married C. in 1823, before his father's death, and he died in 1842, leaving D. his eldest son and heir. In 1866 the plaintiff, who was the eldest son born after the marriage of his father to A., discovered the fact of B.'s illegitimacy, and also that that fact was known to B., and also to the father of C. upon the negotiation for the marriage of B. and C. He prayed a declaration of his title, and an account of rents and profits against D.:—Held, that the bill sufficiently alleged a concealed fraud, which the plaintiff could not with reasonable diligence have known sooner; that C. must be taken to have had notice of B.'s illegitimacy through the communication thereof to her father upon the negotiation for a settlement on her marriage with B.; and that her son D., claiming through the same marriage settlement, was equally affected with the same notice. *Ib.*

**Bill to set aside Fraudulent Decree and Conveyance—Plea of Statute.**]—R. seised in fee of lands, demised the same in 1696 to T., a papist, for lives; T. died in 1727, when W., his eldest son, also a papist, became seised as special occupant; in 1741 he conveyed all his interest to M., in consideration of 500*l.* M. died in 1750, leaving C., respondent's wife, and his heir-at-law, and F., who obtained administration. W. died in 1751, leaving an infant daughter A., and B. his widow, who entered and received the rents. Appellants intermarried in 1770, during the minority of A., who became of age in 1772; and in 1778 appellants filed their bill, charging that W. was almost an idiot, and was imposed upon by K., for whom M. was only a trustee; that no consideration was paid; that the consideration pretended was made up for false accounts by K., who being an attorney, had alarmed W., by telling him that his interest was discoverable under the popery laws, and that therefore he must convey to some protestant to protect it, though K. knew that the original demise in 1696 was prior to the Popery Acts. That in 1741 K. filed a bill in the name of D., as a protestant discoverer against W., praying to be decreed the benefits of the demise in 1696, and of the renewals, on an allegation that X., the father of W., had by his will in 1727 devised his interest to papists. K. proceeded in the cause, prepared the answers of all the defendants, and in 1742 the court decreed in favour of D. the protestant, which decree was drawn up by K., who caused it to be inserted; that depositions were read at the hearing, though by the registrar's minutes it appeared that none were taken in the cause. In 1742 D. assigned the decree to M. in trust for K., who purchased the inheritance of the lands. Appellants, after adducing many evidences of fraud and inadequacy of consideration, prayed that the decree in 1742 might be set aside for fraud, and a renewal of the original lease of 1696. Respondents, by their answers, insisted on the fairness of the transaction, which they explained, and insisted on the Statute of Limitations as to matters of account, and on length of time since the original purchase. Whereupon the court dismissed the bill, and their decree of dismissal was on appeal affirmed by the lords. *Mulcahy* v. *Kennedy*, 1 Ridgw. P. C. 331.

**No Time-protected Fraud in Equity.**]—Length of time may bar in equity; twenty years' possession

bars an equity of redemption, but no time can cover a fraud. *Pickering* v. *Stamford* (*Lord*), 2 Ves. J. 280; 4 Bro. C. C. 214.

Under particular circumstances of fraud, imposition, and delay, a court of equity will decree an account of rents and profits of an estate after an adverse possession of fifty years. *Stackpoole* v. *Davoren*, 1 Bro. P. C. 9.

## X. JUDGMENT AND SPECIALTY DEBTS.

*See also* ante, **A**, VI. 14, col. 89.

*By* 3 & 4 *Will.* 4, *c.* 42, *s.* 3, *actions of debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, and of debt or scire facias upon any recognizance, are to be brought within twenty years. By* 37 *&* 38 *Vict. c.* 57, s. 8, *any proceeding to recover money secured by a mortgage, judgment, or lien, is to be brought within twelve years (instead of twenty, which was the period fixed by* 3 *&* 4 *Will.* 4, *c.* 27, *s.* 40).

**Judgments.**] — A creditor, by judgment of Hilary term, 1813, filed a bill in 1837, against the heir and personal representative of the conusor, for payment of the judgment. The heir, who was also the personal representative of the conusor, by his answer relied on the 3 & 4 Will. 4, c. 27, s. 40. The judgment had not been revived, nor was any payment on account of the principal or interest thereof made, or any acknowledgment in writing of the right of the plaintiff thereto given by the conusor or his real or personal representative, subsequent to the rendition thereof:—Held, that the bill should be dismissed with costs. *O'Hara* v. *Creagh*, 3 Ir. Eq. R. 179; 1 Longf. & T. 65.

Case in which a suit, and decrees therein, were held not to save the bar of the statute 3 & 4 Will. 4, c. 27, s. 42. *Hutchins* v. *O'Sullivan*, 11 Ir. Eq. R. 443.

—— **Not restricted to those constituting Charge on Land.**]—By s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), "No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same," &c.:—Held, that the expression "judgment" in the section refers to judgments generally, and is not restricted to judgments which operate as charges upon land. *Hebblethwaite* v. *Peever*, [1892] 1 Q. B. 124; 40 W. R. 318.

Notwithstanding the act 27 & 28 Vict. c. 112, judgments come within s. 8 of the Real Property Limitation Act, 1874, and in the absence of part payment or acknowledgment in writing, are barred by the lapse of twelve years. *Jay* v. *Johnstone*, 62 L. J., Q. B. 128; [1893] 1 Q. B. 189; 4 R. 196; 68 L. T. 129; 41 W. R. 161; 57 J. P. 309—C. A.

—— **Before 3 & 4 Will. 4, c. 27.**]—Upon a bill filed by a creditor one day before the statute 3 & 4 Will. 4, c. 27 came into operation to enforce a judgment of twenty-eight years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period:—Held, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound, under the circumstances, to show to demonstration that the judgment had not been satisfied. *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 662; 7 L. J., Ex. Eq. 42; 1 Jur. 940.

—— **Erroneous Decree Reversed — Original Claim not Barred.**]—A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree; as between the plaintiff creditor and the debtor, there is no presumption from lapse of time, in such a case, and upon such state of the pleadings, that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. *Hamilton* v. *Houghton*, 2 Bligh, 169; 21 R. R. 65.

—— **Puisne Judgment Creditor's Claim preserved by being made Party to Mortgage Cause.**]—In a mortgage cause begun prior to the new rules, a supplemental bill, making a puisne judgment creditor a party, was filed within twenty years of the rendition of his judgment. The decree was obtained, and his charge was filed after the twenty years had expired:—Held, that the suit was one the pendency of which prevented the operation of s. 40 of the Statute of Limitations (3 & 4 Will. 4, c. 27). *Joyce* v. *Joyce*, 10 Ir. Eq. R. 128.

—— **Irregular Proceedings commenced to enforce Judgment preserve Right.**]—Proceedings up to a custodiam, under which, however, no money was received, irregularly taken by a person equitably entitled to judgment (under an assignment, no memorial of which was ever registered), are sufficient to prevent the bar of the statute 8 Geo. 1, c. 4, set up in a suit afterwards instituted by the same person to recover the judgment. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

—— **Time runs against Judgment during Mortgagee's Suit against same Debtor.**] — A mortgagee's suit for foreclosure and sale, instituted in 1811, during the lifetime of a debtor, is not such a suit as prevents the Statute of Limitations running against a judgment creditor of that debtor, inasmuch as the judgment creditor could not have instituted such a suit. The doctrines of *Sterndale* v. *Hankinson* (1 Sim. 393; 27 R. R. 210), and similar cases, observed on. *Bennett* v. *Bernard* (10 Ir. Eq. R. 584) re-argued on the questions respecting the voluntary settlement, and Statute of Limitations, and partly reversed. *Bennett* v. *Bernard*, 12 Ir. Eq. R. 229.

—— **Statute does not run against Judgment Creditors when there is a Stay of Proceedings.**]—See *Baylee* v. *Browne*, col. 34.

—— **No Limitation in case of Decree to Account.**]—Twenty years in analogy to law, may be limitation to bar a claim under a decree for payment of money, but it appears there is no limitation of revivor of decree to account. *Onge* v. *Trueloch*, 2 Moll. 31.

—— **Decree not Prosecuted — Judgment on Covenant—Charge on Fund in Court.**]—In 1804 F. instituted a suit in equity to recover damages for breach of covenant out of the real and personal estate of B., the covenantor, and obtained a decree in 1820, directing a reference or an issue to ascertain the amount of the damages; but instead of prosecuting the decree, F. brought an action on the covenant, and in 1822 obtained judgment therein. Shortly afterwards F. died. In 1841 administration of his effects was obtained, and in the same year his personal representative filed a bill of revivor, but without obtaining an order to revive. He in the same year filed a charge on foot of his demand under an order of reference in 1841, made in another cause instituted in 1796, to carry the trusts of the will of B. into execution; in which cause a sum of money had been impounded to meet, amongst others, the claim of F., the reference being to ascertain what were the charges affecting that fund:—Held, that the case was not within the 3 & 4 Will. 4, c. 27, and that the demand of F.'s administrator was not barred. *Bermingham* v. *Burke*, 2 Jo. & Lat. 699; 9 Ir. Eq. R. 86.

—— **More than Twelve Years Old—Right to issue Execution.**]—Execution cannot be issued on a judgment where for twelve years there has been neither payment on foot thereof nor acknowledgment. *Evans* v. *O'Donnell*, 18 L. R. Ir. 170—C. A.

—— **As against Personalty.**]—The 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. *Watson* v. *Birch*, 15 Sim. 52; 16 L. J., Ch. 188; 11 Jur. 198.

—— **Separate Judgments on Joint and Several Bond.**]—A payment made within twenty years of interest upon one of separate judgments, obtained upon a joint and several bond, will prevent the recovery upon foot of another of such judgments from being barred by 3 & 4 Will. 4, c. 42, s. 3. *Kingston (Earl), In re*, Ir. R. 3 Eq. 485.

—— **No Proceedings taken on Judgment against Estate — Subsequent Purchaser not Bound.**]—In a creditor's suit the debts and costs were paid by the sale of one of two devised estates; and the court directed the master to settle the proportion which was to be borne by the other devised estate. The devisee of the first-mentioned devised estate was entitled for life only, and he being an ignorant person and a day labourer, no proceedings were had under this direction for twenty-six years, at the end of which time the other devised estate was sold; the year following the tenant for life died, and his son, who was entitled in remainder, filed a bill to charge the purchaser of the other devised estate with the proportion which it ought to have contributed towards the debts and costs, and a decree was made by the Master of the Rolls accordingly, upon the ground of lis pendens, which was held to amount to equitable notice of the charge: on appeal the decree was reversed by the Lord Chancellor on the ground that there was no lis pendens at the time of the purchase. *Kinsman* v. *Kinsman*, 1 Russ. & M. 617; Taml. 399; 9 L. J. (o.s.) Ch. 276.

—— **Annuity secured by.**]—In 1817 a tenant for life of freehold estates, subject to long outstanding terms, granted a personal annuity to the plaintiff, secured by warrant of attorney, on which judgment was forthwith entered up and docketed. Afterwards, in 1818 and 1819, he created other incumbrances, two of which were by demises of the estate. The plaintiff did not sue out any elegit till 1822, when he did so. The inquisition being duly returned, he commenced an action of ejectment, which he discontinued in consequence of the outstanding terms. In a suit, to which the plaintiff was no party, the priorities of the other incumbrances were determined. The plaintiff, within twenty years from the last payment of the annuity, filed his bill against all the other parties, to have it declared that he was entitled to stand as first incumbrancer; that the decree, &c., might be altered; or that the plaintiff might be at liberty to proceed at law, and that the defendants might be restrained from setting up the terms; one of the defences was, that the plaintiff's annuity was usurious. The court held that the plaintiff was not barred by the proceedings in the suit, and retained the bill for a year, giving the plaintiff leave to bring an action for the recovery of the freehold, and restraining the defendants from setting up the terms; and also (though not specifically asked by the bill) from setting up the Statute of Limitations. The court also refused to interfere with the application of the rents in the meantime, or to grant inquiries as to the validity of the plaintiff's charge, holding that primâ facie credit was to be given to the judgment, and that if the defendants had any equitable case to make against the judgment, they ought to adopt proceedings of their own to establish that case. *Smith* v. *Effingham (Earl)*, 7 Beav. 357; 8 Jur. 479.

—— **Time runs against Creditors from Administration Decree.**]—An ordinary administration decree in a legatee's suit operates as a judgment in favour of creditors; so that time under the Statute of Limitations begins to run from the date of the decree. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235.

—— **No Adjudication in Bankruptcy on Statute-barred Judgment.**]—A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bankruptcy against the debtor, though within the twelve years a suggestion has been entered on the roll under the Common Law Procedure Act, 1852, s. 129. *Tynte, Ex parte* and *In re*, 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.

—— **Revivor of.**]—A scire facias on a judgment is not a mere continuation of a former suit, but creates a new right. A judgment was obtained in 1813. It was revived by a scire facias in 1828. A bill was filed in 1838, in the Court of Exchequer in Ireland, against the

representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40:—Held, that the scire facias created new rights, and the plea was no bar to the suit. *Farrell* v. *Gleeson*, 11 Cl. & F. 702.

A judgment of revivor in scire facias on a judgment, confers on the conusee a new present right to receive the amount of the original judgment, within the meaning of the 3 & 4 Will. 4, c. 27, s. 40, and the twenty years commence to run from the date of the revivor, and not from the date of the entry of the original judgment. *Crofts* v. *Hewson*, 2 Jones, 499.

In 1813 A. obtained a judgment against B. A. died, and in the year 1824 his executors revived the judgment. In 1833 B. died, leaving C. his heir-at-law. In Hilary term, 1836, the judgment was again revived. It did not appear that, for twenty years previous to the last revival, any payment or acknowledgment had been made on foot of the judgment, within the express terms of 3 & 4 Will. 4, c. 27, s. 40:—Held, that the judgment of revivor in 1836 was conclusive, and that the period of limitation should be reckoned, not from the original judgment, but from the last revival. *Kealy* v. *Bodkin*, Sau. & Sc. 211. And see *Ottiwell* v. *Farrant*, *id.* 218, n.

Notwithstanding the 3 & 4 Will. 4, c. 27, s. 40, the revival of a judgment by scire facias within twenty years is sufficient to enable a party to proceed, at law or in equity, for recovery of the sum thereby secured, although more than twenty years have elapsed since the rendition of the original judgment. *Ryan* v. *Cambie*, 2 Ir. Eq. R. 238.

In 1779 J. F. mortgaged several lands to A., the only prior incumbrance on which was a judgment of Hilary term, 1778, for 800*l.*, which soon after became vested in A. by assignment. In 1796 B. obtained a judgment against J. F. for 1,200*l.*, soon after which J. F. died, having no estate whatever, except these lands, which he devised in trust for payment of his debts. In 1798 A. filed a bill for foreclosure, in which B. was made a co-plaintiff. In 1779 a receiver was appointed. The suit having abated in 1802, was not revived until 1823, when B., being applied to, denied all knowledge of the previous existence of the suit, and having refused to be made a co-plaintiff, he was made a defendant. Upon a decree to account pronounced in 1825, both judgments were proved in the office. In 1826, after the death of the receiver, B. filed a cross bill insisting that A.'s claim on foot of the judgment was barred by the statute of 8 Geo. 1, c. 4:—Held, that the judgment was not barred by the statute. *Armitage* v. *Forbes*, Hayes, 222.

—— **Not effective against Land sold.**]—A revivor against the heir of the conusor of a judgment, and the terre-tenants of one estate of which he had been seised, does not keep the judgment from being barred by the Statute of Limitations as regards the owners of another estate which had been previously sold by the conusor. *Martin* v. *M'Causland* (3 Ir. L. R.) is not law. *Kirkwood* v. *Lloyd*, 12 Ir. Eq. R. 585; 11 Ir. Eq. R. 561.

A judgment was assigned to a trustee for the benefit of the tenants for life in possession of the lands charged with A., who, in 1817, caused the trustee to declare a trust for the daughter of one of them, with provisoes that no proceedings should be taken on the judgment until the latter attained age or married, and that it should not be called in until the other tenant for life died:—Held, that, up to 1817, the same person being the hand to pay and receive the interest amounted to a payment of it, so as to prevent the Statute of Limitations applying, but that it began to run in 1817. *Ib.*

The case of *Cummins* (*Executors*) v. *Finn*, deciding that a judgment being held in trust for the person in possession of the lands charged may be replied, as a retainer of the interest, in answer to a plea of the Statute of Limitations at law, cited and approved of. *Ib.*

A charge to pay interest on a judgment, made on other property by an owner of lands liable to the judgment, is not sufficient to prevent the statute running in favour of the owner of other lands originally charged with it; and, though the payment of interest by the one owner before twenty years elapses would keep it alive against the other, quære, if a payment after the twenty years will set it up again. *Ib.*

The question, on an objection to title resting on an old incumbrance, is whether it may be binding on the purchaser; and therefore a purchaser was discharged in consequence of judgments more than sixty years old, against a former owner of the estate, which were in force against other lands, though the only matter to keep them out of the Statute of Limitations against the purchaser was doubtful evidence of payment of interest nineteen years before they could have been barred. *Ib.*

Certain persons, described in the rental as tenants at will, having been in possession of part of the lands sold for several years, the purchaser objected that they had acquired estates by virtue of the Statute of Limitations. Rent had been recently levied from, or paid by, some under coercion of attachment, or distress, and others had admitted, but not in writing, that they were tenants:—Held, that as to the former the payments prevented an operation of the statute; but as to the other, the admissions, not being in writing, could not be relied on as estoppels in answer to the statute. *Id.* 599.

—— **Foreign Judgments.**]—See *Dupleix* v. *De Roven*, and *Reimers* v. *Druce*, col. 89; and *Don* v. *Lippmann*, col. 38.

**Covenant.**]—To an action of covenant six years is not a good plea of limitation. *Hartshorne* v. *Watson*, 5 Scott, 506; 4 Bing. (N.C.) 178; 6 D. P. C. 404; 7 L. J., C. P. 138; 2 Jur. 155.

A deed of sale of beds of coal contained a covenant to pay the purchase-money partly in cash and partly in promissory notes. In an action for breach of covenant for not paying the notes when due:—Held, that the nonpayment of the notes was a breach of the covenant, and that, therefore, it was a bad plea, that the causes of action did not accrue within six years before action. *Dixon* v. *Holroyd*, 7 El. & Bl. 903; 27 L. J., Q. B. 43; 3 Jur. (N.S.) 213; 5 W. R. 688.

—— **By Lessee of Mines to pay Rent or Royalty for Minerals carried over Surface—Arrears.**]—See *Darley* v. *Tennant*, col. 276.

—— **Action on, for Rent-Charge not an Action for Recovery of Land or Rent.**]—See *Strachan* v. *Thomas*, and *Manning* v. *Phelps*, col. 274.

—— **Statute does not affect Covenant to pay a Mortgage, so long as a Trust to sell and pay Debt subsists.**]—See *Bennett* v. *Cooper*, col. 281.

—— **By Surety in Mortgage Deed to pay on Demand—No Right of Action until Demand.**]—See *Brown* v. *Brown*, col. 10.

**Bond—Breach of Conditions.**]—The 3 & 4 Will. 4, c. 42, s. 3, constitutes a bar to an action on a writing obligatory in those cases only where every breach of the condition has taken place more than twenty years previously to the commencement of the action. *Sanders* v. *Coward*, 3 D. & L. 281; 15 M. & W. 48; 15 L. J., Ex. 97; 10 Jur. 186.

Action, on the obligatory part only, upon two bonds dated in 1828 and 1829. Plea, that the causes of action did not accrue within twenty years. Replication, that the causes of action did accrue within twenty years. The first bond stated that M. and the defendant bound themselves, and each of them, to the plaintiff in 300*l.* The condition (after reciting that M. had agreed with the plaintiff for the sale to him, for 150*l.*, of an annuity of 20*l.* to be paid to the plaintiff during the joint and several lives of the plaintiff and his wife, and his survivor; that M. had requested the defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150*l.* had been paid to M.) was for payment of the annuity by M. or the defendant, or either of them, by equal half-yearly payments, during the joint and several lives of the plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10*l.* The plaintiff suggested that, in 1851, two-and-a-half years' arrears were due in respect of each annuity, and were still unpaid. At the trial, it appeared that M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the condition twenty years before action, and that the arrears suggested were still due:—Held, that a new cause of action arose upon each successive breach of the condition; that, on the record as it stood, the plaintiff was entitled to prove at the trial breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations. *Amott* v. *Holden* or *Holder*, 18 Q. B. 593; 22 L. J., Q. B. 14; 17 Jur. 318.

To a declaration on a bond not setting out any condition, plea, that the debt and cause of action did not accrue within twenty years. At the trial the bond and condition were produced, when it appeared that the bond had been executed more than twenty years, but that the condition was for the payment of the money after the death of a party who was proved to have died within twenty years:—Held, that the plea was disproved. *Tuckey* v. *Hawkins*, 4 C. B. 655; 16 L. J., C. P. 201; 11 Jur. 919.

—— **Securing Two Sums on different Conditions.**]—When two separate sums are secured by one bond, a payment in respect of one sum does not prevent the statute running in respect of the other. *Ashlin* v. *Lee*, 44 L. J., Ch. 174; 31 L. T. 721; 23 W. R. 287. Affirmed, 44 L. J., Ch. 376; 32 L. T. 348; 23 W. R. 458.

By an agreement the sum of 1,000*l.*, part of the purchase-money of real estate, was secured by a bond. The arrangement was, that the sum of 750*l.* was to be paid to a person named on a given event, and the remaining 250*l.* to another person on another event. The event on which the 250*l.* became payable happened more than twenty years before filing the bill, and it was alleged that the sum had never been paid. The event on which the 750*l.* became payable happened within the twenty years, and the sum of 750*l.* was then paid:—Held, that the payment of the 750*l.* did not prevent the 250*l.* being barred by the statute. *Ib.*

—— **By Sureties for Payment of Mortgage Debt—Payment of Interest by Mortgagor.**]—In 1867 T. P. mortgaged an estate to L. and A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. and A. a joint and several bond in the penal sum of 400*l.*, reciting that the 1,000*l.* had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrear, and in 1880 the mortgagees entered into possession. E. P. died in 1883, without having made any payment or given any acknowledgment. L. and A., as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874:—Held, that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property Limitation Act, 1874, s. 8. Held, further, that if the remedy on the bond had been barrable by the lapse of twelve years under that section, the payments of interest by the mortgagor would have prevented the bar. Held, therefore, that L. and A. were entitled to rank as creditors against the estate of E. P., and that if his representatives did not admit assets, an administration order must be made. *Sutton* v. *Sutton* (22 Ch. 511); *Fearnside* v. *Flint* (22 Ch. D. 579); and *Cockrill* v. *Sparks* (1 H. & C. 699), distinguished. *Powers, In re, Lindsell* v. *Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

—— **Action on.**]—In 1831 an obligee of a bond brought an action upon it against the obligor. After notice of trial, the action abated by the death of the obligor in 1835. The obligor left a will, which was not proved. In 1857 administration of the goods and effects of the obligor, with his will annexed, was granted to the defendant. In 1852 the obligee petitioned the Insolvent Debtors Court, and his effects vested in the provisional assignee, who commenced an action on the bond against the defendant in 1859:—Held, that the right of action was not barred by the 3 & 4 Will. 4, c. 42, s. 3. *Sturgis* v. *Darell*, 4 H. & N. 622; 28 L. J., Ex. 366. Affirmed, 6 H. & N. 120; 29 L. J., Ex. 472; 6 Jur. (N.S.) 1351; 8 W. R. 653; 2 L. T. 808—Ex. Ch.

The same equitable construction which has

been given to the 21 Jac. 1, c. 16, should be put on that of the 3 & 4 Will. 4, c. 42, as regards actions on specialties. *Ib.*

—— **Executed in India—Action in England.**]—Specialty debts in India have no higher legal value nor greater efficacy than simple contract debts; and the same period of limitation, viz., three years, bars the remedy for both, but:—Held, by Lopes, J., that where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; and, therefore, as the English Statutes of Limitations apply, the remedy is not barred until after the lapse of the period of twenty years prescribed by 3 & 4 Will. 4, c. 42, s. 3, as the limitation for actions on contracts under seal. *Alliance Bank of Simla* v. *Carey*, 49 L. J., C. P. 781; 5 C. P. D. 429; 29 W. R. 306; 44 J. P. 735.

—— **Collateral—Mortgage Debt.**]—When a mortgage debt is secured by a collateral bond, the remedy on the bond is, under s. 8 of the Real Property Limitation Act, 1874, barred by the lapse of twelve years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mortgage. *Sutton* v. *Sutton* (22 Ch. D. 511) followed. *Fearnside* v. *Flint*, 52 L. J., Ch. 479; 22 Ch. D. 579; 48 L. T. 154; 31 W. R. 318.

—— **Mortgage Debts secured by.**]—See **B, II. 9**, ante, col. 206.

—— **Payment of, by Tenant for Life—Incumbrance on Estate.**]—A party, being indebted by bond, devised real estate to his son for life, with remainder, subject to a term for the payment of legacies, to his grandson in tail, and died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life and his assignee for value filed a bill against the tenant in tail and the legatees, alleging that the tenant for life had paid off the bonds, and seeking to stand in the shoes of the obligees as against the inheritance. The tenant in tail pleaded the statute, the other legatees did not:—Held, that the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, and that the bonds themselves being more than twenty years old, the presumption was that they had been satisfied. *Morley* v. *Morley*, 5 De G. M. & G. 610; 25 L. J., Ch. 1; 1 Jur. (N.S.) 1097; 4 W. R. 75.

—— **For Payment of Money at future Date not a "Specialty Debt now owing."**]—In 1886 bonds for payment of money were given by B., with warrants of attorney to confess judgment. The conditions were, to pay the principal upon the death of B. with interest on the first bond from the day of its date, and on the latter from the day of the death of the obligor. The obligees were T., a son of the obligor, and C., in whom the bonds were vested as trustees of the marriage settlement of G., upon trusts for the benefit of the children of the marriage. In 1807 the real estates of B. were settled upon T., one of the obligees, subject to a term of 300 years, for raising 5,000*l.*, which was to be applied in satisfying a debt, and the remainder was to go towards payment of "judgment and specialty debts then owing by B." The obligor died in 1816, leaving his son T. his executor, who survived his co-trustee C., and died in 1836. On the death of T., B. came into possession of the estates. On a bill filed by the children of G. against B. and his children, who were entitled to the estates subject to the term, and also against the owners of the term, praying for an account, and payment of the amount due on the bonds, and that the same might be decreed to be well charged on the lands included in the term:—Held, that the bonds did not come within the description of "judgment and specialty debts now due and owing," and therefore were not a charge upon the estate subject to the term, but that the children of G. were entitled to be paid out of the general assets of the obligor, of which the money to be raised by the term formed part. *Burrowes* v. *Gore*, 6 H. L. Cas. 907; 4 Jur. (N.S.) 1245; 6 W. R. 699.

Held, also, that the statute was no bar to the right of the cestuis que trustent, the children of G., to sue upon the bonds, although the obligees were barred, inasmuch as B. was their trustee, and his was the hand to pay and the hand to receive. *Ib.*

T. being the trustee of the bonds and the personal representative of B., the right of the cestuis que trustent did not accrue until the death of G. in 1846, and therefore the statute did not apply. *Ib.*

—— **Personal Claim against Executor on.**]—See *Thorne* v. *Kerr*, col. 51.

—— **Father's Debts charged on Son's Realty by Son's Will—Action by Obligee of Bond.**]—See *O'Connor* v. *Haslam*, col. 279.

—— **Joint and Several—Appointment of Receiver over Estate of one Obligor.**]—A tenant for life and remainderman executed a joint and several bond with warrant of attorney for confessing judgment thereon, and several judgments were entered up against them by the obligee of the bond. A receiver over the tenant for life's estate was extended to the judgment against the father, and remained in receipt of the rents up to a period within twenty years of the present proceeding, but no payment was ever made on foot of the said judgment:—Held, that the extension of the receiver to the matter of the judgment did not prevent the Statute of Limitations from running in favour of the remainderman. *Greene's Estate, In re*, 13 L. R., Ir. 461—C. A.

—— **Money due on.**]—See *Roddam* v. *Morley*, col. 280.

—— **Before 3 & 4 Will. 4, c. 42—Presumption of Payment—Defendant Abroad.**]—Payment of money secured by a bond was not to be presumed, although more than twenty years had elapsed since an acknowledgment that any sum was due upon it, if the obligee, ever since that acknowledgment, had resided abroad. *Newman* v. *Newman*, 1 Stark. 101.

—— **Receipts for Interest indorsed on Bond by Obligee.**]—Indorsements on a bond, acknowledging the receipt of interest, or payment of part of the principal, were not evidence against the obligor, to prove that the bond was on foot, without showing that they were on the bond recently after their dates, and at a time when

their purport was contrary to the interest of the obligee. *Rose* v. *Bryant*, 2 Camp. 321.

The producing a receipt for interest within twenty years, indorsed on a bond by the obligee, was sufficient to take off the presumption of payment, though no proof was given when such receipt was written and signed. *Barrington (Lord)* v. *Searle*, 3 Bro. P. C. 593; 2 Stra. 826.

Where in an action on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of interest by the obligor to A., equal in amount to the interest that would become due on the bond:—Held, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligor in trust for A., was admissible to connect the payment of interest with the bond. *Gleadow* v. *Atkin*, 1 C. & M. 410; 3 Tyr. 289; 2 L. J., Ex. 153.

**Receiver's Recognizance.**]—The Statute of Limitations is not pleadable to a scire facias on a receiver's recognizance. *Reg.* v. *Bayly*, 1 Dr. & War. 213; 4 Ir. Eq. R. 142.

A recognizance to the crown is not within the operation of the 8 Geo. 1, c. 4. *Ib.*

The period from which the twenty years specified in that statute are to be reckoned is the issuing of the writ, and not the day upon which it bears teste. *Ib.*

**Debt due from a Receiver.**]—A sum of money due from a receiver whether the amount has been ascertained or not, was held, so long as the recognizance exists, to be a debt of record. *Seagram* v. *Tuck*, 50 L. J., Ch. 572; 18 Ch. D. 296; 44 L. T. 800; 29 W. R. 784.

**Calls.**]—The proper limitation to an action by an incorporated company against one of its members for calls under 8 & 9 Vict. c. 16, is twenty years by 3 & 4 Will. 4, c. 42, s. 3, and not six years under 21 Jac. 1, c. 16, s. 3. *Cork and Bandon Ry.* v. *Goode*, 13 C. B. 827; 22 L. J., C. P. 198; 17 Jur. 555; 1 W. R. 410.

**Transfer of Shares.**]—By a deed of settlement of a company it was provided, that whenever any shares should be transferred to a new holder, the responsibility of the previous holder in respect of such shares should cease, but that he should not be released from his proportion of losses (if any) sustained by the company up to the period of his ceasing to be such shareholder:—Held, that a transferor of shares was liable in respect of losses that accrued prior to the date of the transfer, though the liability being by way of specialty, a holder who transferred his shares more than twenty years before the date of the winding-up was entitled to the benefit of the statute. *Horsey, Ex parte*, L. R. 2 Eq. 167; 14 L. T. 47; 14 W. R. 417.

**Debenture Stock—Interest—Statutory Right.**]—Where debenture stock is issued by a company formed by a special act which incorporates the provisions of Part III. of the Companies Clauses Act, 1863, the right to interest on such stock, being a statutory right, is not barred for twenty years. *Cornwall Minerals Ry., In re*, 66 L. J., Ch. 561; [1897] 2 Ch. 74; 76 L. T. 832; 46 W. R. 5; 61 J. P. 345, 535.

**Penalties under Private Act.**]—The 32 Geo. 3, c. lxxiv. s. 8, imposes duties to be paid by the master or owner for every ship or vessel of a certain burthen passing from, to, or by Ramsgate. By s. 16, if any master or owner shall elude or avoid payment of the duties, he shall stand charged to be liable to payment of the same, and the same are to be recovered as penalties imposed by the act. By s. 72, penalties are recoverable by action. A party was sued for duties under this act, which he had not paid:—Held, that the action being on a specialty, the period of limitation was twenty years, under 3 & 4 Will. 4, c. 42, s. 3. *Shepherd* v. *Hills*, 11 Ex. 55; 25 L. J., Ex. 6.

**Action by Borough against County Council to recover Expenses in carrying out Act not an Action for Debt on a Statute.**]—See *Salford* v. *Lancashire County Council*, col. 40.

**Specialty Creditors barred, notwithstanding Bill filed.**]—A bill filed not on behalf of all creditors of a testator against his personal representative does not keep alive against him the demand of specialty creditors, and a demand in such a case held barred by lapse of time. *Busby* v. *Seymour*, 1 Jo. & Lat. 527; 7 Ir. Eq. R. 433.

Where a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part-payment of their debts, and that there was money in court available for payment of the remainder:—Held, that he was barred by the Statute of Limitations from proving his debt before the master, and receiving payment ratably with the other creditors. *Berrington* v. *Evans*, 1 Y. & Coll. 434.

**Trusts Relating to.**]—See **B**, II. 7, ante (col. 180).

**Acknowledgment of.**]—See **B**, VI., ante (col. 282); *Hollingshead, In re*, col. 134; and *Forsyth* v. *Bristowe*, col. 332.

**Arrears of Interest on.**]—See **B**, XI. (infra).

## XI. ARREARS OF RENTS AND INTEREST.

*See also* ante, **B**, II. 9 (col. 206), *and* **B**. V. (col. 273).

By 3 & 4 Will. 4, c. 27, s. 42, *no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered more than six years after the same is due, except where a prior incumbrancer has been in possession. By* 3 *&* 4 *Will.* 4, *c.* 42, *s.* 3, *actions of debt for rent upon an indenture of demise, of covenant or debt upon any bond or other specialty, and of debt or scire facias upon any recognizance, are to be brought within twenty years. By* 37 *&* 38 *Vict. c.* 57, *s.* 10, *the limit of time for recovering any arrears of rent or of interest in respect of any money or legacy charged on land is to apply, notwithstanding an express trust.*

**Construction of 3 & 4 Will. 4, c. 27, s. 42, and c. 42, s. 3.**]—The 3 & 4 Will. 4, c. 27, s. 42, has

reference only to the land on which a demand is secured, the object being to relieve land from arrears of charges beyond six years: and this object is not affected by the terms of the 3 & 4 Will. 4, c. 42, s. 3, which relates to a different subject, namely to personal actions only. *Hunter* v. *Nockolds*, 1 Mac. & G. 640; 1 Hall & Tw. 644; 19 L. J., Ch. 177; 14 Jur. 256.

The 3 & 4 Will. 4, c. 42, s. 3, is to be treated as an exception out of the 42nd section of 3 & 4 Will. 4, c. 27, and the construction of the two acts, taken together, is, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of land or rent shall be recovered by any distress, action, or suit, other than and except in actions upon covenant or debt upon specialty, in which case the limitation is twenty years. *Ib.*

The 42nd section of the 3 & 4 Will. 4, c. 27, is not repealed by 3 & 4 Will. 4, c. 42. *Humfrey* v. *Gery*, 7 C. B. 567.

A. was, from the 2nd of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B., his committee, had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* per annum payable on the 29th of September and 25th of March, created by letters patent of Hen. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto:—Held, that the case was governed by 3 & 4 Will. 4, c. 27, s. 42, and consequently that neither the lunatic nor his committee was entitled to recover any arrears of the rent after the expiration of six years from the 29th September, 1831. *Ib.*

The limitation in actions for arrears of rent under an indenture is governed by 3 & 4 Will. 4, c. 42, s. 3. *Paget* v. *Foley*, 3 Scott, 120; 2 Bing. (N.C.) 679; 2 Hodges, 32; 5 L. J., C. P. 258.

**—— Saving where prior Creditor in Possession.**]—The saving in 3 & 4 Will. 4, c. 27, s. 42, that the time during which a prior creditor is in possession shall not count, does not extend to give the claimant arrears of interest or rent, as the case may be, for six years previous to the commencement of such creditor's possession. The operation of it is, that if it continues for more than six years, interest or arrears, as the case may be, may be recovered for all that time. *Montgomery* v. *Southwell*, 2 Con. & L. 263; 3 Dr. & War. 171.

Semble, that the six years for which interest or arrears of rent are recoverable by s. 42 of 3 & 4 Will. 4, c. 27, are to be counted back, even in a creditor's suit, from the time of filing the charge of the creditor, not being plaintiff. *Ib.*

The prior incumbrance referred to in the exception in the statute 3 & 4 Will. 4, c. 27, s. 42, is one which affects the stock or interest upon which the subsequent incumbrance is also a charge. *Vincent* v. *Going*, 1 Jo. & Lat. 697; 7 Ir. Eq. R. 463.

**Arrears of Rent.**]—Account of rent of an estate held of trustees. The Statute of Limitations being insisted on, only ordered for six years before bill filed. *Hervey* v. *Ballard*, 4 Bro. C. C. 468.

Neglect to enforce payment of rent deprives a lessor, by the express terms of the Statute of Limitations, from recovering more than six years' arrears of rent; but, as to accruing payments, the legal principle is, that the right is constantly renewed, and therefore the doctrine of laches would not apply. *Archbold* v. *Scully*, 9 H. L. Cas. 360; 7 Jur. (N.S.) 1169; 5 L. T. 160.

It is well established that so long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by nonpayment of rent, for however long a time. *Ib.*

The 24th section of the 3 & 4 Will. 4, c. 27, only bars equitable rights so far as they would have been barred if they had been legal rights. *Ib.*

Account of rents directed at the suit of the issue in tail for six years previously to the filing of the bill. *Gibbons* v. *Snape*, 1 De G. J. & S. 621.

**Administration Action—Account of Rents, directed not limited to Six Years.**]—See *Obee* v. *Bishop*, col. 83.

**Arrears of Rents received by Mortgagee of deceased Tenant for Life—No fiduciary relation to Remaindermen.**]—In 1859 a suit for administration was instituted by a tenant for life under a will of leaseholds, who subsequently mortgaged her life interest. The mortgagee obtained, under an order made in 1860, liberty to enter, and did enter, into possession of the rents for the purpose of keeping down the interest on her mortgage, and paying the balance to the tenant for life. In March, 1866, the tenant for life left her home, and was never heard of afterwards. On a petition presented in 1875 by the persons entitled in remainder, it was held that, under the circumstances, the tenant for life must be taken to have died soon after June, 1866. On a petition presented by the same parties for an account of arrears of rent received by the mortgagee:—Held, that the petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, and that they were, therefore, entitled to an account of rents; but that there was no fiduciary relation between the mortgagee and the petitioners, and, therefore, they were only entitled to arrears for six years before the filing of the petition. *Hickman* v. *Upsall*, 46 L. J., Ch. 245; 4 Ch. D. 144; 35 L. T. 919; 25 W. R. 175—C. A.

**Rents received in Error by Devisee of other Property, suit by Heir for.**]—The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of the title-deeds, and an account:—Held, that the suit was maintainable for the rents received during her continuance in possession; that as the defence of the Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued; and that the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee. *Monypenny* v. *Bristow*, 2 Russ. & M. 117; 1 L. J., Ch. 88.

**Rents received in Error by Tenant pur autre vie after Title determined.**]—C. being in possession of property under a settlement for the residue of a term of ninety-nine years, determinable with the life of the settlor, who died in 1830, continued by mistake in possession till her own death in 1835. D., who became entitled on the death of the settlor under a deed of gift from him, discovered the mistake in 1839, by consulting that deed, which had been in his possession the whole time, and then sued the executors of C. for the rents received by her after 1830:—Held, that inasmuch as D. had been guilty of laches in not finding out the mistake earlier by the means which were in his power, he was entitled to an account only for the period allowed by analogy to the Statute of Limitations, which in this case was six years before the filing of the bill and an additional period during which he was abroad. *Denys* v. *Shuckburgh*, 4 Y. & Coll. 42; 5 Jur. 21.

Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it, and therefore the statute will run from the time of such receipt, and not from the time of such sale. *Ib.*

**Agent bound to account to Heir for all Rents and Profits received since Owner's Death.**]—See *Lyell* v. *Kennedy*, col. 204.

**Covenant to pay Rent or Royalty by Lessee of Mine in respect of Minerals carried over Surface—Arrears.**]—See *Darley* v. *Tennant*, col. 276.

**Additional Rent in lieu of Tithe Rent-charge.**]—The Statute of Limitations (3 & 4 Will. 4, c. 27, s. 42) does not apply to additional rent in lieu of tithe rent-charge as between landlord and tenant. *Warburton, Ex parte*, 10 Ir. Eq. R. 206.

**Arrears of Rent-charge—Collateral Covenant for Payment.**]—The limitation prescribed by 3 & 4 Will. 4, c. 27, s. 42, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred. *Manning* v. *Phelps*, 10 Ex. 59; 24 L. J., Ex. 62.

**Action on Covenant for Rent-charge not within Limit as to Actions for Recovery of Land or Rent.**]—See *Strachan* v. *Thomas*, col. 274.

**Arrears of Annuity.**]—Arrears of an annuity are recoverable for more than six years if there is a term to secure it. *Snow* v. *Booth*, 8 De G. M. & G. 69; 25 L. J., Ch. 417; 2 Jur. (N.S.) 244; 4 W. R. 345. *But see now* 37 & 38 Vict. c. 57, s. 10.

Interest not allowed on the arrears of an annuity, and the discretion of the court on the question is not affected by the statute 3 & 4 Will. 4, c. 42, s. 28. *Powell's Trust, In re*, 10 Hare, 134.

An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. *Roch* v. *Callen*, 6 Hare, 531; 17 L. J., Ch. 144; 12 Jur. 112. And see *Hunter* v. *Nockolds*, 19 L. J., Ch. 177; col. 323.

**Arrears of Annuity, where Land not held in Trust to pay.**]—See *Cunningham* v. *Foot*, col. 190.

**Action by Annuitant against Purchaser of Estate charged.**]—See *Harrisson* v. *Duignan*, col. 274.

**Devisee of Estate charged with Annuity not a Trustee for Annuitant, and, therefore, not more than six years recoverable.**]—See *Francis* v. *Grover*, col. 284.

**Arrears of Interest on Mortgage.**]—Where a debt is secured by a bond and a covenant of the debtor, as well as by a mortgage of his lands, the mortgagee will be entitled, under 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, to carry back the interest account in a suit to foreclose the mortgage for a period of twenty years. *Du Vigier* v. *Lee*, 2 Hare, 326; 12 L. J., Ch. 345; 7 Jur. 299.

A mortgagee, notwithstanding the interest mortgaged is reversionary, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay. *Sinclair* v. *Jackson*, 17 Beav. 405.

A mortgagee in a suit to foreclose can only recover arrears of interest for six years next preceding the suit, though the principal and interest are secured by the covenant and bond of the mortgagor. *Round* v. *Bell*, 30 Beav. 121; 31 L. J., Ch. 127; 9 W. R. 846.

After the sale of an estate by a trustee for a mortgagee, under a power of sale, in a suit by the mortgagor, to recover the surplus money, the mortgagee cannot, under 3 & 4 Will. 4, c. 27, retain more than six years' arrears of interest out of the purchase-money. *Mason* v. *Broadbent*, 33 Beav. 296; 9 L. T. 565; 12 W. R. 1118.

Where a married woman, entitled, after the death of a tenant for life, to a share of a fund arising from moneys the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage, by deed acknowledged, of her reversionary estate, such mortgage containing a covenant by husband and wife to pay full interest:—Held, that the wife's estate was money payable out of land within 3 & 4 Will. 4, c. 27, s. 42; and that the mortgagee could not recover more than six years' arrears of interest on the mortgage on such an estate. *Bowyer* v. *Woodman*, L. R. 3 Eq. 313.

A canal company conveyed, under seal, the canal works and rates to a mortgagee, to hold, until repayment of certain money borrowed, and interest. There was no covenant to repay:—Held, that, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

Under 3 & 4 Will. 4, c. 27, s. 42, a mortgagee, irrespective of a covenant to pay or a term to secure the payment, is entitled to six years' arrears of interest. *Shaw* v. *Johnson*, 1 Drew. & Sm. 412; 30 L. J., Ch. 646; 4 L. T. 460; 9 W. R. 629.

So far as a covenant to pay affects the land, it is limited to six years. *Ib.*

*And see* **B**, II. 9, ante (col. 206).

—— **Where Express Trust is created.**]—When a term is created on an express trust to secure principal and interest, the 3 & 4 Will. 4, c. 27, s. 42, does not operate as a bar, and a mortgagee's right is not confined to six years. *Ib. See now* 37 & 38 Vict. c. 57, s. 10.

—— **Equitable Mortgagee.**]—A corporation agreed to purchase freehold premises subject to

an equitable mortgage, with an agreement to give a legal mortgage, and paid the money into court. The equitable mortgagee petitioned that out of the fund there might be paid to him the principal money then due and nineteen years' interest:—Held, that the petition must be treated as a suit within 3 & 4 Will. 4, c. 27, s. 42, and that the mortgagee was entitled only to his principal money and six years' interest. *Stead's Settlement Trusts, In re*, 45 L. J., Ch. 634; 2 Ch. D. 713; 35 L. T. 465; 24 W. R. 698.

—— **When Mortgage is not a Charge on Realty.**]—A. was legatee in reversion after certain life interests of a testatrix's residuary personal estate. The estate consisted wholly or chiefly of 3,000*l.* invested on mortgage of real estate by the testatrix and continued on such investment by her trustees. A. mortgaged his interest in the 3,000*l.*, and after sixteen years (during which A. paid no interest on his mortgage) A.'s reversion fell into possession:—Held, that A.'s mortgagee was entitled as against the residuary estate to recover the whole arrears of interest, the mortgage by A. not being a charge on real estate within s. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27). *Smith* v. *Hill*, 47 L. J., Ch. 788; 9 Ch. D. 143; 38 L. T. 638; 26 W. R. 878.

Semble, however, that if it had been a charge on real estate, the fact of the interest being reversionary would not have prevented the operation of s. 42 in barring arrears of interest beyond six years. *Ib.*

—— **In Cases where no Action necessary.**]—The 3 & 4 Will. 4, c. 27, s. 42, does not apply to any case in which there is not strictly a suit or an action for the recovery of interest. *Edmunds* v. *Waugh*, 35 L. J., Ch. 234; L. R. 1 Eq. 418; 12 Jur. (N.S.) 326; 13 L. T. 739; 14 W. R. 257.

Therefore where, under a power of sale in a mortgage deed, the property mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the mortgagee, upon a petition by trustees of the parties beneficially entitled to the fund in court:—Held, that they were entitled to the full arrears of interest on the mortgage, the fund after sale having been in their possession, and no recovery by distress, suit, or action being requisite. *Ib.*

—— **Of Turnpike Tolls.**]—See *Mellish* v. *Brooks*, col. 150.

—— **Recital in Assignment of Mortgage of Interest due not a sufficient Acknowledgment.**]—See *Bolding* v. *Lane*, col. 287.

**Interest from filing of Charge in Cause.**]—Held, that the action or suit by which the arrears of interest "shall be recovered" under 3 & 4 Will. 4, c. 27, s. 42, was the charge filed in the cause, and not the scire facias, and therefore, that the party was entitled to six years' interest from the filing of the charge only. *Hutchins* v. *O'Sullivan*, 11 Ir. Eq. R. 443.

**Prior to Statute, Interest on Charge from filing of Bill only.**]—See *Peyton* v. *McDermott*, col. 150.

**Arrears of Interest during preceding Estate for life paid by Remainderman—Right to be recouped—Fund in Court.**]—A remainderman paid with his own money, after he came into possession, interest which had accrued, during the preceding estate for life, upon charges affecting the inheritance:—Held, first, that his executors were entitled, in 1870 (as against the personal representative of the tenant for life), to be recouped out of a fund in court, the produce of rents of the life estate brought in, in 1815, by a receiver appointed in an incumbrancer's suit instituted against the tenant for life. *Howlin* v. *Sheppard*, Ir. R. 6 Eq. 38.

Held, secondly, that the fund having remained in court, during the whole period from 1815 to 1870, in usum jus habentium, the claim of H.'s executor was not barred. *Ib.*

**Tenant for Life liable to account for more than six years' Interest on Charge.**]—See *Stackhouse* v. *Barnston*, col. 281.

**Arrears of Interest on Portion appointed under Settlement to Child and charged on Land.**]—By a marriage settlement of the year 1798, certain lands were limited to trustees to the use of A., the husband, and B., the intended wife, and the survivor of them, for their respective lives, with remainder to the issue of the marriage; and also to C. (a daughter of B. by a former marriage) in such shares as the survivor of them, the said A. and B., should appoint. In 1819, A. being the survivor, in pursuance of the power, appointed a certain sum to C., and limited a portion of the said lands to trustees to receive and levy, by sale or mortgage, the sum so appointed, and directed that the same should bear interest and be payable on the marriage of C., with a proviso that if the marriage of C. should take place in the lifetime of A., the said principal sum should not be raised until twelve months after the decease of A. On a bill filed by C. and her husband, after the death of A., against a son of A. and B., who had got into and continued in the possession of the lands since the year 1825, and disputed the validity of the original settlement of 1798:—Held, that the plaintiffs were within the 42nd section of the 3 & 4 Will. 4, c. 27, and therefore only entitled to six years' arrears of interest on their charge. *Burne* v. *Robinson*, 1 Dr. & Wal. 688.

**Reference as to Incumbrances directed in a Suit—Incumbrancer, not a Party, entitled to date back Arrears from Inquiry.**]—On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor a receiver was appointed, and at the hearing a reference as to incumbrances on the estate was directed. A statement of facts and claim carried in before the master under such inquiry by an incumbrancer, not a party to the suit, was held to take the charge as to the interest out of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42, and the incumbrancer was held to be entitled to arrears of interest for six years antecedent to the time of such claim. *Greenway* v. *Bromfield*, *Handley* v. *Wood*, 9 Hare, 201.

**Arrears of Interest on Purchase-money unpaid.**]—A contract for the sale of an estate made in March, 1811, stipulated that the purchase-money should be paid in on the 13th of May following. The purchase-money was not paid,

but the purchaser entered into possession, and he and persons claiming under him continued in such possession. In 1834, their agent signed a written acknowledgment of the vendor's title, sufficient to take his lien for the principal of the purchase-money out of the 3 & 4 Will. 4, c. 27, s. 40. In 1849, the assignees of the vendor filed a bill in equity, seeking to enforce the vendor's lien on the estate for the purchase-money:—Held, that the 42nd section did not apply to the arrears of interest, but that the whole was recoverable from the 13th of May, 1811. *Tyft* v. *Stevenson*, 5 De G. M. & G. 735.

**Interest on Legacies.**]—Upon the constructive admission of assets:—Held, that the residuary legatees were entitled to immediate payment of their legacies, and under circumstances with interest beyond the time allowed by the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40). *Dinsdale* v. *Dudding*, 1 Y. & Coll. C. C. 265.

Many of the provisions of the statute 4 Will. 4, c. 42, which were intended primarily for the courts of common law, will be adopted, mutatis mutandis, by the court of equity. *Hyde* v. *Price*, 8 Sim. 578. *S. C.*, nom. *Hart* v. *Cradock*, 6 L. J., Ch. 358. *S. C.*, C. P. Cooper, 193. And see the cases on the question of interest cited and discussed, C. P. Cooper, 193, n.

A. B. being seised in fee of four estates, mortgaged two of them, and subsequently settled the mortgaged estates and one of the others on himself for life, with remainder to his son in tail, and covenanted against incumbrances, but the settlement did not recite that there were any incumbrances. He afterwards mortgaged the fourth estate and took the benefit of the Insolvent Debtors Act. After this, a creditor, on certain bills of exchange, became a registered judgment creditor, and then filed a bill against the tenant in tail and the assignee under the insolvency and the other incumbrancers, praying a sale, in satisfaction of the judgment debt, and what might be paid by the plaintiff in satisfaction of prior incumbrances, subject to the estate and interest of the tenant in tail under the settlement. Among other incumbrances on the estates in question was a legacy of 800*l.*, subject to the payment of which the estates had been devised to A. B. The testator's death took place in 1810, and the bill was filed in 1843, at which time the legacy, and the arrears of interest thereon, remained unpaid:—Held, that the arrears of interest on such legacy could only be recovered from within six years from the filing of the bill. *Hughes* v. *Williams*, 3 Mac. & G. 683; 16 Jur. 415. And see *Chappell* v. *Rees*, 1 De G. M. & G. 393; 3 Mac. & G. 683; 16 Jur. 415.

Arrears of interest on a legacy are not recoverable beyond six years before the filing of the bill. *Holland* v. *Clarke*, 1 Y. & Coll. C. C. 151.

A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estates:—Held, that the legatee was not barred by the 42nd section of the Statute of Limitations (3 & 4 Will. 4, c. 27) from claiming interest on the legacy from the end of the first year after the testator's death. *Gough* v. *Bult*, 16 Sim. 323; 17 L. J., Ch. 486; 12 Jur. 859.

A testator gave a fund to his executrix for her life, subject to the immediate payment thereout of a legacy to be divided amongst the children of P., to whom he also gave the fund after the death of the executrix. He died in 1847. One of P.'s children, of whom there had been five, was last heard of in 1845. The executrix, W., retained one-fifth of the legacy. She became lunatic in 1851, whereupon the fund was carried to an account entitled "The account of W. and the children of P.," and the income of the whole was applied for the benefit of the lunatic. To a petition presented in 1871 by the four surviving children, for payment of the fifth share, which remained unpaid out of the fund, and for the payment of the interest thereon out of another fund belonging absolutely to the lunatic, it was objected that the Statute of Limitations was a bar:—Held, that the statute was no bar to the claim for the principal, but was a bar to the claim for more than six years' interest. *Walker, In re*, 41 L. J., Ch. 219; L. R. 7 Ch. 120; 25 L. T. 775; 20 W. R. 171.

—— **Express Trust.**]—See *Thompson* v. *Eastwood*, col. 194.

**Interest on Judgments.**]—A judgment upon a bond in a penalty conditioned for the payment of a principal sum with interest is "a sum of money charged upon or payable out of land or rent," within the meaning of s. 42 of the 3 & 4 Will. 4, c. 27, and that statute bars the recovery of all arrears of interest thereon, which have accrued due more than six years next before the commencement of a suit instituted after the 31st December, 1833, to enforce payment thereof out of the land or rent. *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 390.

Semble, that the statute is a similar bar to the recovery of interest thereon, by a proceeding against the person or personal chattels of the debtor. *Ib.*

A judgment is not a sum charged upon or payable out of land, within the meaning of 3 & 4 Will. 4, c. 27, s. 42. An application, therefore, to discharge an order for a receiver, under 5 & 6 Will. 4, c. 55, upon payment of the principal sum due upon the judgment, with six years' interest, was refused. *Kealy* v. *Bodkin*, Sau. & Sc. 211.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of the statute 3 & 4 Will. 4, c. 27, s. 42, and only six years' arrears of interest can be recovered upon such debts. *Henry* v. *Smith*, 2 Dr. & War. 381; 1 Con. & L. 506; 4 Ir. Eq. R. 502.

In relation to the Statute of Limitations, the rights of judgment creditors for arrears of interest as against the real and personal estates of their debtor, are equal and co-extensive. As far as the bar of the statute operates for the protection of the real estates to the same extent, the personal estate is protected. *Ib.*

The statute 3 & 4 Vict. c. 105, s. 26, enacts that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest, shall carry interest, &c. The interest thus given is subject to the limitations of the statutes 3 & 4 Will. 4, c. 27. s. 42. *Ib.*

On a reference to inquire the sum due for principal, interest and costs, on foot of a judgment, for which a receiver has been appointed, the respondent is entitled to the benefit of the Statute of Limitations, although not set up in shewing cause against the appointment of the receiver; and the petitioner is entitled only to

interest for six years from the date of the conditional order for the appointment of the receiver. *Dowell* v. *Burke*, 9 Ir. Eq. R. 83.

A judgment creditor of a tenant in fee in remainder, after an estate for life, is not entitled to recover out of the lands arrears of interest which accrue due during the existence of the tenancy for life, and more than six years before the commencement of the suit. *Vincent* v. *Going*, 1 Jo. & Lat. 697; 7 Ir. Eq. R. 463.

The period of limitation applicable to the recovery of interest upon a judgment is regulated by 3 & 4 Will. 4, c. 27, s. 42, and only six years' interest is recoverable out of the personal estate of the judgment debtor. *Breslin* v. *Hodgens* (Ir. R. 10 Eq. 260) not followed. *M'Donnell* v. *Fitzgerald*, [1897] 1 Ir. R. 556.

**After Delay in proceeding with Bill Account and Interest from Date of Bill of Revivor only.**]—See *Thornhill* v. *Glover*, col. 37.

**Charge, Interest on—Conveyance to Trustees to pay off Incumbrances—Incumbrancer not a Cestui que Trust.**]—See *Evans* v. *Bagwell*, col. 186.

**Appropriation of general Payment of Interest to Interest due within six Years.**]—See *Fitzmaurice, In re*, col. 283.

## XII. PLEADINGS AND PROCEDURE.

*See also* ante, **A**, VIII. (col. 144).

*By R. S. C.*, 1883, *Ord. XIX. r.* 15, *the Statute of Limitations must be pleaded.*

**Necessity of Pleading specially.**]—Where a Statute of Limitations extinguishes the right, and does not merely bar the remedy, the defence under such statute need not be pleaded specially; and, therefore, in replevin, evidence of the lapse of twenty years, under the 3 & 4 Will. 4, c. 27, ss. 23, 34, since the last payment of rent, may be given under a plea in bar of non tenuit. *De Beauvoir* v. *Owen*, 5 Ex. 166; 19 L. J., Ex. 177—Ex. Ch.

In an action for the recovery of real property, if the statement of claim shews on the face of it that the time within which the title to land must be asserted has gone by, the defence of the Statute of Limitations can be raised upon demurrer. *Dawkins* v. *Penrhyn* (*Lord*), 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173—H. L. (E.)

See *Burge, In re, Gillard* v. *Lawrenson*, col. 192.

**Replication of the Statute to Plea justifying Trespass—Rejoinder.**]—In trespass quare clausum fregit, the defendant in his plea, deduced title by an inclosure act to an allotment of land comprising the locus in quo, to T., a trustee for him. It then stated the entry and possession of T., until just before the time of the trespasses, gave express colour to the plaintiff, and stated his possession at the time of the trespass under a charter of demise, without livery, and justified the trespass as servant of T., and by his command. The plaintiff replied, that the defendant entered and committed the trespasses after the 1st December, 1833, and that the entry was made for the purpose of recovering the close, and that the supposed right to enter did not first come to T. or the defendant, or any person through whom he claimed the estate and interest in the close, at any time within twenty years before making that entry; and that by reason thereof the supposed right of T. and the defendant as his servant was extinguished:—Held, that the replication was sufficient, and that it was not necessary that it should shew what the defendant's title was, and how it was barred; and that, if the defendant wished to avail himself of the right of entry under 3 & 4 Will. 4, c. 27, s. 15, he ought to have rejoined it. *Jones* v. *Jones*, 4 D. & L. 494; 16 M. & W. 699; 16 L. J., Ex. 299; 11 Jur. 335.

**Admission in Plea that Possession in Plaintiff at time of alleged Trespass, Effect of.**]—See *Keyse* v. *Powell*, col. 254.

**Replication of Acknowledgment to Plea of Statute.**]—To a plea of the 3 & 4 Will. 4, c. 42, in an action upon a mortgage deed, the plaintiff, in order to take the case out of such statute by an acknowledgment in writing, under s. 5, must reply such acknowledgment specially. *Kempe* or *Kent* v. *Gibbon* or *Gibbons*, 9 Q. B. 609; 16 L. J., Q. B. 120; 11 Jur. 299.

But the plaintiff need not set out the acknowledgment in his replication. *S. C.*, 12 Q. B. 662; 17 L. J., Q. B. 298; 12 Jur. 697.

To an action on a deed the defendant pleaded the 3 & 4 Will. 4, c. 42, to which the plaintiff replied, that the defendant before suit made an acknowledgment that the debt remained unpaid and due to the plaintiff, within the true intent and meaning of the statute, and that the action was brought within twenty years next after such acknowledgment. The court directed this replication to be amended, as being so framed as to prejudice the fair trial of the cause; but refused to give the defendant the costs of the application, or to compel the plaintiff to specify the date of the acknowledgment on which he relied. *Forsyth* v. *Bristowe*, 8 Ex. 347; 22 L. J., Ex. 70; 17 Jur. 46.

**Demurrer to Bill in Equity in aid of Claim barred at Law.**]—The right to a real estate vested in possession in October, 1803, but the claimant did not pursue her right until December, 1833, and obtained judgment by default in 1834. In 1835 that judgment was reversed. A demurrer to a bill in equity to correct error in the latter judgment, allowed, on the ground that more than twenty years had elapsed since the right to the property accrued. *Plunkett* v. *Burlington* (*Lord*), 1 Jur. 376.

A plaintiff brought an action of ejectment against a person in possession, and afterwards filed a bill of discovery in aid of the action, and to restrain the defendant from setting up outstanding terms. By the death of the defendant the suit abated, and the benefit of the action at law became lost. After twenty years' adverse possession, the plaintiff having filed a bill of revivor, a demurrer thereto was allowed, on the ground that no effectual proceeding could now be had at law, and that the discovery and relief sought would, therefore, be useless. *Bampton* v. *Birchall*, 11 Beav. 38.

**Statute a bar to Discovery.**]—See *Cuthbert* v. *Creasy*, col. 178.

**Allegation in Bill of previous Proceedings, without stating Result.**]—An ejectment bill filed in 1842 stating that the plaintiff's alleged

right to the land accrued in 1812, that a bill had been filed in 1824 to recover the property, and that an ejectment had been brought in 1832, which was stayed until the plaintiff had paid the costs of a former ejectment; but it did not state the result of the suit or action:—Held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations. *Bampton* v. *Birchall*, 5 Beav. 67; 6 Jur. 815. *And see* 11 L. J., Ch. 200.

**Reply alleging concealed Fraud.**]—See *Gibbs* v. *Guild*, col. 121.

**In Action for Specific Performance.**]—See *Talmarsh* v. *Muggleston*, col. 151.

**Insufficient Plea of Statute by Purchaser from Lessee.**]—See *Chadwick* v. *Broadwood*, col. 159.

**Plea that Acts committed more than six years to Action for Account of Waste.**]—See *Simpson* v. *Simpson*, col. 168.

**Plea of Statute allowed in Action for Redemption.**]—See *Aggas* v. *Pickerell*, col. 211.

**Statement in Bill to redeem that Mortgagee entered shortly after Date of Deed—No Inference that Entry within five years from Deed.**]—See *Baker* v. *Wetton*, col. 213.

**Time of Disability must be stated in Pleading it.**]—See *Blewitt* v. *Thomas*, col. 250.

**Plea of Possession without accounting, to Claim for Rent-charge.**]—See *Baldwin* v. *Peach*, col. 277.

**Claim to Land based on concealed Fraud must state Facts shewing that Plaintiff was deprived of the Land by such Fraud.**]—See *Lawrance* v. *Norreys*, col. 307.

**Allegation of wrongful Entry under false Claim as Heir not an Allegation of concealed Fraud.**]—See *Willis* v. *Howe*, col. 308.

**Plea of Statute by Defendant Tenant-in-Tail enuring to Benefit of Defendant Legatees.**]—See *Morley* v. *Morley*, col. 319.

A. H. B.

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# LIQUIDATED DAMAGES.

*See* PENALTY.

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# LIQUIDATION.

**In Bankruptcy.**]—*See* BANKRUPTCY.

**In Winding-up.**]—See COMPANY.

# LIS PENDENS.

1. *Generally*, 334.
2. *Transactions pending Proceedings.*
   - *a.* In General, 336.
   - *b.* Alienation of Subject-matter, 337.
   - *c.* Notice, 342.
   - *d.* Staying Proceedings—*See* APPEAL—PRACTICE.

## 1. *Generally.*

**Doctrine as to.**]—The doctrine as to the effect of lis pendens on the title of an alienee, is not founded on any principles of courts of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties, but on those who derive title from them pendente lite, whether with notice of the suit or not. *Bellamy* v. *Sabine*, 1 De G. & J. 566; 26 L. J., Ch. 797; 3 Jur. (N.S.) 943; 6 W. R. 1.

**In what Cases.**]—When a suit has been instituted in order to obtain a specific property, and the object of the suit may be wholly baffled by a sale by the defendant if the suit is not registered, that is a case of lis pendens. *Plant* v. *Pearman*, 41 L. J., Q. B. 169; 26 L. T. 313; 20 W. R. 314.

The 7 & 8 Vict. c. 90, s. 10 (equivalent to 2 & 3 Vict. c. 11, s. 7), which requires that a lis pendens shall be registered to affect a purchaser, does not apply to a purchase made before the passing of the act. *Jennings* v. *Bond*, 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.

Where the question is not between a registered and unregistered deed, notice by lis pendens is not affected by the registration of the title-deed of the person sought to be affected thereby. *Ib.*

—— **How far applicable to Chattels.**]—The doctrine of lis pendens does not apply to personal property, except leaseholds, and possibly money in court. *Wigram* v. *Buckley*, 63 L. J., Ch. 689; [1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43 W. R. 147—C. A.

—— **Creditors' Administration Action—Real Estate specifically devised—Priority.**]—Where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, an action by a creditor for the administration of the real and personal estate is a lis pendens which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts. *Price* v. *Price*, 56 L. J., Ch. 530; 35 Ch. D. 297; 56 L. T. 842; 35 W. R. 386.

A creditor's action for general administration may be a sufficient lis pendens, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the lis, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for administration of the real and personal estate not being of itself a sufficient indication of

intention to make liable the specifically devised real estate. *Drew* v. *Norbury* (*Earl*) (3 Jo. & Lat. 267), and *Walker* v. *Flamstead* (2 Keny., part 2, p. 57), considered. *Ib.*

A general administration suit is a lis pendens, quoad lands afterwards sold under the decree in it. *Drew* v. *Norbury* (*Earl*), 3 Jo. & Lat. 267; 9 Ir. Eq. R. 171, 524.

—— **Winding-up Petition.**]—A petition to wind up a company does not constitute a lis pendens as against a contributory. *Thornton, Ex parte, Barned's Banking Co., In re*, 36 L. J., Ch. 190; L. R. 2 Ch. 171; 15 L. T. 523; 15 W. R. 292.

**Operation of, when Registered.**]—In a suit which had been registered as a lis pendens, a decree was made for administration of a testator's estate. The executrix subsequently deposited an asset of the testator with a bank as security for advances. The bank had no notice of the suit:—Held, that the bank had a good lien on the property deposited. *Berry* v. *Gibbons*, 42 L. J., Ch. 89; L. R. 8 Ch. 747; 29 L. T. 88; 21 W. R. 754.

A registered lis pendens does not of itself create an incumbrance upon property, apart from the subject-matter in respect of which the lis pendens is registered. It is the duty of a purchaser, when he has notice of a lis pendens, to look into it, and see if it does really constitute a charge on the property he is going to purchase. If the claim, in respect of which the lis pendens is registered, creates no incumbrance on the property, the lis pendens itself will not. *Bull* v. *Hutchens*, 32 Beav. 615; 2 N. R. 306; 9 Jur. (N.S.) 954; 8 L. T. 716; 11 W. R. 866.

Registration of a petition for sale by the second mortgagee as a lis pendens, has not the effect of notice to the first mortgagee, so as to affect the priority of further advances made by him in ignorance of such petition and registration. *Hawes, Ex parte, Byrne, In re*, 15 L. R., Ir. 373—C. A.

Interests of defendants inter se, arising out of the rights of the plaintiffs, protected by the doctrine of lis pendens. *Tyler* v. *Thomas*, 25 Beav. 47.

In a suit instituted by creditors for the administration of a testator's estate, the deficiency of the personal estate for payment of the debts was payable out of two real estates devised separately to A. and B. In 1846, the debts were ordered to be paid out of A.'s estate alone, without prejudice to his right of contribution against B.'s estate. In 1852 the suit was registered as a lis pendens, and two months afterwards B. mortgaged his estate to C., who had no notice of A.'s rights:—Held, that there was a lis pendens, as regarded A.'s rights, and that C.'s mortgage must be postponed to A.'s claims. *Ib.*

**Vacating Registration—Affidavit.**]—On an application under 30 & 31 Vict. c. 47, s. 2, by a defendant in a suit which had been registered as a lis pendens, and subsequently by consent dismissed for want of prosecution, the court ordered the registration to be vacated upon production of an affidavit of service of the notice of motion upon the solicitor of one of two plaintiffs who could not be found, and upon the solicitor of the trustee in bankruptcy of the other plaintiff. *Jervis* v. *Berridge*, 44 L. J., Ch. 164; 31 L. T. 426; 23 W. R. 43.

—— **Motion for.**]—An application under 30 & 31 Vict. c. 47, s. 2, for vacating the registration of a lis pendens after the determination of the litigation should be made by motion or otherwise in the matter of the act, and of the action, suit, or proceeding. *Clutton* v. *Lee*, 45 L. J., Ch. 684; 24 W. R. 607.

When an action which was registered as a lis pendens had been dismissed for want of prosecution, the court, on motion made ex parte on behalf of the defendant, under 30 & 31 Vict. c. 47, s. 2, to vacate the registration, made an order nisi, the plaintiff to shew cause within one week why the order should not be made absolute. *Pooley* v. *Bosanquet*, 7 Ch. D. 541; 26 W. R. 587.

—— **Application by Person not a Party to Action.**]—Where an action is improperly registered as a lis pendens against a person who is not a party thereto, the court has jurisdiction to vacate the registration under 30 & 31 Vict. c. 47, s. 2, notwithstanding that the action is being prosecuted bonâ fide by the plaintiff as against the defendant. *Schofield* v. *Solomon*, 54 L. J., Ch. 1101; 52 L. T. 679.

—— **When Ordered.**]—When the official liquidator had registered the winding-up as a lis pendens against a contributory, the court ordered him to vacate the registration. *Thornton, Ex parte, Barned's Banking Co., In re*, 36 L. J., Ch. 190; L. R. 2 Ch. 171; 15 L. T. 523; 15 W. R. 292.

### 2. Transactions pending Proceedings.

*See* 2 & 3 Vict. c. 11, s. 7.

#### a. In General.

A lis pendens cannot affect any particular person with a fraud, unless he has special notice of the title in dispute there. *Mead* v. *Orrery* (*Lord*), 3 Atk. 243.

Pending an information filed for the purpose of having new trustees of a charity appointed in the place of some who were dead, the surviving trustees took upon themselves, without the sanction of the court, to appoint new trustees:—Held, that though this was neither a contempt nor an act altogether void, yet it imposed upon the trustees the necessity of proving, by the strictest evidence, and at their own expense, that what had been done was perfectly right and proper; and the case not appearing altogether clear, the appointment was set aside, and the trustees were ordered personally to pay all the extra costs occasioned by their act. *Att.-Gen.* v. *Clack*, 1 Beav. 467; 3 Jur. 215.

Pending a suit to set aside agreements, defendants were bound to give plaintiff the benefit of those terms of agreement which were for his advantage. *Rowe* v. *Wood*, 2 Jac. & Walk. 559; 22 R. R. 208.

Payments made by an administrator de son tort, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, will not be allowed. *Layfield* v. *Layfield*, 7 Sim. 172; 4 L. J., Ch. 2.

An attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance

of the agreement, pending which suit the husband dies:—Held, that the widow was not entitled to dower; that she was bound to assign the term to the purchaser; and that he was bound to accept the title. *Mole* v. *Smith*, Jac. 490.

When the plaintiff has by tortious means got into possession of property pending a suit to establish his equitable title to it, the court will not stay legal proceedings against him for the recovery of possession. *Grafton* v. *Griffin*, 1 Russ. & M. 336.

### b. Alienation of Subject-Matter.

**Effect of.**]—The administratrix, and one of the next of kin of an intestate, pending a suit in which a decree was obtained against her as debtor to the estate of the intestate, by another of the next of kin, who was also his heiress-at-law, assigned for valuable consideration her interest in the assets to a purchaser, and in another cause, in which the administratrix of the intestate, together with the heirs-at-law, were declared entitled to a fund in court as part of his assets:—Held, that the assignee of the interest of the administratrix took subject to the demands of the heirs-at-law. *Hodgens* v. *Wheeler*, 1 Sau. & Sc. 443.

The doctrine of lis pendens applies to all alienations during the pendency of a suit, whether immediate by a party to the suit, or mediate, by persons purchasing from those claiming under parties to the suit. *Robertson* v. *Cox*, 2 L. J., Ch. 41.

Property was brought into a marriage settlement by the wife only, but a first life interest in three-eighths of it was given to the husband. She obtained a decree nisi for the dissolution of the marriage, but during the hearing of her suit, and before the decree nisi in it had in fact been pronounced, the respondent had given a charge on his life interest to his solicitors for the amount of the costs incurred in defending the suit:—Held, that, as at the time when such charge had been so given by him it had been uncertain whether the decree nisi would have been granted against him, the court, in an application to vary the settlement by extinguishing his life interest under it, could not interfere with the mortgage so executed by him in favour of his solicitors. *Wigney* v. *Wigney*, 51 L. J., P. 84; 7 P. D. 228; 47 L. T. 129; 31 W. R. 140.

A joint-stock company, established by act of parliament, vesting in them all property belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease. *Meux* v. *Maltby*, 2 Swan. 277.

If land is aliened pendente lite, though not prejudicial to plaintiff, yet alienee ought to be brought before court. *Daly* v. *Kelly*, 4 Dow, 435.

If there are vexatious alienations pendente lite, the court will restrain them. *Ib.*, 440.

Purchaser pendente lite from defendant in a real action, bound by judgment. *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305.

Purchaser pendente lite from defendant in a real action, bound by the judgment. *Metcalf* v. *Pulvertoft*, 2 Ves. & B. 205; 13 R. R. 63.

Assignee of equity of redemption pending suit for redemption is subject to decree. *Ib.*, 207.

Purchaser of estate charged with debts pendente lite by creditors, is bound by decree. *Ib.*, 207.

Effect of maxim, pendente lite nihil removetur, limited to rights and parties in that suit, not absolutely annulling a conveyance pendente lite. *Ib.*, 200.

Judgment confessed after bill of foreclosure is ineffectual against the plaintiff. *Ib.*, 204.

The court will pay no regard to a lease, taken pendente lite, of lands the subject of the suit. *Moore* v. *M'Namara*, 2 Ball & B. 187; 12 R. R. 73.

The court will not, on the motion of a creditor coming in under a decree directing a sale of lands devised for payment of debts, set aside a lease obtained pendente lite from the devisee under the will with a leasing power. *Ib.*, 186.

If heir convey estate to a stranger whilst there is a suit for establishing a will, and it is afterwards established, the grantee of the heir is bound. *Garth* v. *Ward*, 2 Atk. 174.

If, during suit to redeem, mortgagor assigns the equity of redemption, and there is a decree against him, the assignee is bound by it. *Ib.*

If heir-at-law, in a suit to establish a will, prevail to set it aside, he shall have the benefit of the evidence in that cause against a purchaser pendente lite. *Ib.*

Devise of lands charged with payment of debts, if the devisee sell pending a suit by creditors for sale and payment of debts, such alienation is void. *Walker* v. *Smallwood*, Amb. 676.

A person dealing with property after a bill filed, deals with it subject to the decree that may be pronounced. *Gaskell* v. *Durdin*, 2 Ball & B. 170. *See* 12 R. R. 73, n., 74.

An interest acquired in the subject-matter of the suit pendente lite is a nullity as against the plaintiff. *Ib.*, 169.

Purchasers pendente lite are bound by the decree. *Yeavely* v. *Yeavely*, 3 Ch. Rep. 48.

A decree by consent of a personal estate binds a purchaser for valuable consideration. *Wyndham* v. *Wyndham*, 3 Ch. Rep. 22; 2 Freem. 127.

The owner of an equitable interest in lands decreed to be sold, assigned that interest after decree. The assignee is bound by the decree and proceedings. *Osborne* v. *Casey*, 7 Ir. Eq. R. 636.

A lease granted by a mortgagor to a party, without notice, nineteen days after a bill filed by an equitable mortgagee, set aside, as a purchase pendente lite. *Perry* v. *Keane*, 6 L. J., Ch. 67.

Where lands (subject to a charge, to raise which the suit has been instituted) are let by the inheritor pendente lite, the court will consider the lands as in his possession; and, under an order to let the lands in his possession, will permit them to be let discharged of the leases. *Kenny* v. *Jessop*, 7 Ir. Eq. R. 494.

Injunction restraining vendor defendant to a bill for specific performance, from conveying the legal estate. *Echliff* v. *Baldwin*, 16 Ves. 267; 10 R. R. 178.

In general, during a suit for specific performance, the court will not restrain the owner

from dealing with his property. *Spiller* v. *Spiller*, 3 Swan. 557; 19 R. R. 276.

Third mortgagee having, pendente lite and after the first mortgagee had by his answer submitted (on payment of the money due to him) to assign to the plaintiff (the second mortgagee), obtained an assignment of the first mortgage, decreed to be entitled to hold the estate against the second mortgagee, till he should be paid what was due to him upon both, he having had no notice of the second mortgage when he advanced his money. *Belchier* v. *Butler*, 1 Eden, 522.

Third mortgagee buying in the first mortgage, pendente lite, shall exclude the second. *Robinson* v. *Davison*, 1 Bro. C. C. 63.

A leasehold estate is affected by an elegit or fieri facias, from the time it is lodged in the sheriff's hands; and if the debtor afterwards make an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession, notwithstanding such assignment. *Burden* v. *Kennedy*, 3 Atk. 739.

A conveyance established against a sequestration, and the sequestrators who had obtained possession, ordered to account to the alienee for rents and profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed from the subsequent rents, the balance of payments for interest, taxes, and repairs. *Hamblyn* v. *Ley*, 3 Swan. 301.

The court only removes fraudulent conveyances out of the way; but will not decree profits back, against the original debtor and owner of the estate, received pendente lite, in favour of judgment creditors from the filing of the bill. *Higgins* v. *York Buildings Co.*, 2 Atk. 107.

A sequestration prevails against a prior conveyance designed to defeat it; not against prior conveyances for valuable consideration, or bonâ fide. *Coulston* v. *Gardiner*, 3 Swan. 279.

Sequestration not defeated by a voluntary conveyance, pendente lite. *Witham* v. *Bland*, 3 Swan. 276.

A bankrupt, whose estate is in mortgage, conveys the equity of redemption to a third person after an act of bankruptcy, but before the commission and assignment. This shall not defeat the assignees. But where a bonâ fide purchaser for a valuable consideration, and without notice, has a contest with the assignees, this court will not take any advantage from him, and therefore will not compel a discovery; but a commission issued is notice of the bankruptcy. *Collet* v. *De Gols*, Forest, Cas. temp. Talbot, 65.

A purchase pendente lite, though without actual notice, and for a valuable consideration, yet shall be set aside; though in this case the rule of equity be hard, yet it is in imitation of the common law; where in a real action, if the defendant aliens pending the writ, the judgment will overreach the alienation; but as it is hard enough, in some cases, to make people take notice of a decree, it is harder still to oblige them to take notice of a pendency of a suit; and in case of a real purchase pendente lite, the plaintiff is to be held to strict proof; and if any flaw, at the hearing, be on the plaintiff's side, the court will not let him amend; but if the purchase, pendente lite, be fraudulent, and to elude the justice of the court, it ought to be highly discountenanced. *Sorrell* v. *Carpenter*, 2 P. W. 482.

A. brings an action against B. for lying with his wife; after which B. assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name, within ten days; then A. recovers 5,000*l.* damages, and brings his bill to set aside the deed as fraudulent, and made to defeat him of his recovery: but held not to be fraudulent, the plaintiff being no creditor at making the deed, and his debt recovered after founded in maleficio; but the others were real creditors, which it was conscientious to prefer: but for the surplus the plaintiff may come in. *Lewkner* v. *Freeman*, Pre. Ch. 105; 2 Freem. 236.

A., being decreed to pay a sum of money, or deliver possession of a house to B. by a certain day, conveys the house to a creditor in satisfaction of a real debt. This shall not defeat B. of the benefit of a decree. *Self* v. *Madox*, 1 Vern. 459.

Effect of judgments confessed by an administrator pendente lite. *Pigott* v. *Nower*, 3 Swan. 534. *Parker* v. *Dee*, *Ib.*, 529.

Proceedings under a sequestration for nonperformance of a decree, after an assignment by the defendant for valuable consideration. *Bird* v. *Littlehales*, 3 Swan. 299.

Under articles of 1760, estates were covenanted to be settled on A. for life, remainder to B. for life, remainder to the heirs of his body; the estates were subject to prior incumbrances. A. executed a trust deed for payment of creditors, and a bill was filed by one of the creditors by judgment against A., puisne to the articles of 1760, and under the directions of A. By an arrangement made in the course of the suit, but in pursuance of a private agreement, and without the sanction of the court, the lands were conveyed in fee farm by A. and B. to X., who had notice of the articles, the rent being reserved to B., the purchase-money being applied partly to discharge incumbrances prior to 1760. In a sale in the suit, X. afterwards purchased the fee-farm rent. The proceeds of the sale were paid to B., and otherwise without regard to the rights of his children, all parties apparently acting under a mistake as to the effect of the articles; a bill afterwards filed by A. and B. against X., impeaching the sale for fraud, was dismissed:—Held, on a bill by the son of B., claiming as remainderman in tail under the articles, that the fee-farm grant should be treated as a private sale, and set aside, but that the purchase under the decree should be upheld. *Fitzmaurice* v. *Sadleir*, 9 Ir. Eq. R. 595.

One of several cestuis que trustent having taken the benefit of the Insolvent Act, joins as a co-plaintiff, with two others of the cestuis que trustent, in a bill to carry the trust deed into execution, the assignee of the insolvent being a defendant, and the bill alleging that there is a surplus coming to the insolvent, after payment of all his debts. This is not a misjoinder of which advantage can be taken at the hearing, and semble, that it is no ground of demurrer. *Eades* v. *Harris*, 1 Y. & Coll. C. C. 230.

With respect to the effect which such assignments have upon the suit, there is no distinction between assignments pendente lite of equitable interests, by plaintiffs, and similar assignments by defendants. *Ib.*

A decree was made against A. B. setting aside, as fraudulent, a purchase by an agent from his principal; and a reconveyance, and the usual accounts of rents and purchase-money, were

directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property, pendente lite, and died before the accounts were completed; a supplemental bill was filed against the purchasers, and the heir and personal representatives of A. B.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances, pendente lite, being set aside:—Held, that the purchasers were entitled in this suit, as against their co-defendants, the personal representatives of A. B., to an order for the repayment of their purchase-money, and were entitled as against the plaintiff to an allowance for substantial repairs and lasting improvements, but that no greater relief could be given them in this suit. *Trevelyan* v. *White*, 1 Beav. 588.

The plaintiff, previous to his marriage with A.'s daughter, wrote a letter to A., inquiring what fortune his daughter was entitled to. A., in reply, wrote to the plaintiff, and stated that certain houses were entailed on his daughter, after his decease. A. died, leaving his daughter, his only child, and having devised all his real estates to his wife. It was then discovered that A. was tenant, in tail male, of the houses, with reversion to himself in fee. In January, 1816, the plaintiff and his wife filed a bill against A.'s widow (who was in possession of the houses) to have the houses conveyed to the plaintiff's wife, conformably to the representation in the letter, and for a receiver and an injunction to stay proceedings at law. An injunction was granted, and the widow having put in her answer, the injunction was, in January, 1818, continued. On the same day the plaintiff obtained an order to amend, but did not act upon it, or take any further proceedings, till May, 1820. In April, 1818, the widow mortgaged the houses for five hundred years to H., and in May, 1819, she sold an annuity to M., and secured it by a conveyance of the houses to trustees in fee; and in May, 1819, she sold and conveyed the houses, subject to the mortgage and annuity to W., in fee. H., W. and M. had not then any of them notice of the suit, or of the plaintiff's claim. In January, 1820, at which time M. had notice, the houses were purchased by M. and conveyed by him to H. and W. In May, 1820, the bill was amended. The widow having gone abroad without answering the amended bill, a decree was taken pro confesso against her in November, 1822. In December following, the plaintiff had notice of the conveyance to M., but did not make him a party to the suit, and opposed his attending the master upon the inquiries directed by the decree. In March, 1831, the plaintiff filed a bill against M., stating the proceedings in the original suit, and praying that M. might be decreed to convey the houses to the plaintiff's wife, and for a receiver. M. put in his answer, and relied on the delay in the proceedings of the original suit, the decree having been taken pro confesso, the want of notice in H. and W., and in himself when he purchased the annuity, and on the plaintiff not having made him a party to that suit; but the court, on motion, granted a receiver. *Landon* v. *Morris*, 5 Sim. 247; 2 L. J., Ch. 35.

Trust funds, of which A. was entitled to a share under a settlement, had been lent to B. on his covenant, and, as to part, secured by a mortgage. A. afterwards became executor of B. A suit was instituted by other parties interested in the trust funds to recover the funds out of B.'s estate, and generally for administration of his will. After a decree for accounts, A., with notice of the suit, assigned his share in the funds. He was subsequently found to be indebted, as executor to B.'s estate, beyond the amount of his share:—Held, that B.'s creditors were entitled to be paid out of the estate in priority to the assignees of A.'s share. *Irby* v. *Irby*, 4 Jur. (N.S.) 989; 6 W. R. 853.

**When a Fraudulent Conveyance.**] — *See* FRAUD.

### c. Notice.

A person in Ireland purchasing an annuity granted out of an annuity charged on an estate which was the subject of litigation in a suit in England, at the time of the purchase:—Held, to be a purchaser for a valuable consideration without notice, as the original annuity was not sought to be impeached in the suit. *Houlditch* v. *Wallace*, 5 Cl. & F. 629; 1 Dr. & Wal. 490.

Parties claiming under a marriage settlement subsequently to a decree to account are affected with notice, for they are purchasers pendente lite, a decree for an account being only a continuance of the litigation. *Higgins* v. *Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400.

Lis pendens is not notice of every equity which arises in the course of a suit. *Shalcross* v. *Dixon*, 7 L. J., Ch. 180.

A testatrix entitled, upon the decease of a tenant for life, to a sum of stock standing in the names of D. and L., as trustees, bequeathed such stock to P. and appointed D. her sole executor. In 1834, after the death of the testatrix, P. assigned all his estate and effects to L. and H. upon trust for his creditors. In 1838 P. assigned his interest in the stock to the plaintiff by way of mortgage, and the plaintiff thereupon gave D. notice of the incumbrance. No notice of the assignment of 1834 was given to D. until 1843:—Held, that a suit instituted by some of the creditors under the deed of 1834 to execute the trusts of such deed, as it did not give the plaintiff or the executor actual, so neither could it be held to give them constructive, notice of that instrument. *Holt* v. *Dewell*, 4 Hare, 446; 15 L. J., Ch. 14; 9 Jur. 1005.

A suit by a judgment creditor for an account of the real and personal estate of his debtor and the payment of his debts, is a sufficient lis pendens to affect an incumbrancer on the life estate of a defaulting executor in lands, the fee of which was subject to the judgment, with notice of an equity to have the life estate applied to answer the default of the executor. *Jennings* v. *Bond*, 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.

A person who, without notice of a suit, purchases from one of the defendants property which is the subject of it, is not in consequence of the pendency of the suit affected by an equitable title of another defendant, which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary, for any of the purposes of the suit, to give effect. *Bellamy* v. *Sabine*, 1 De G. & J. 566; 26 L. J., Ch. 797; 3 Jur. (N.S.) 943; 6 W. R. 1.

J. M.

# LITERARY SOCIETY.

**Dissolution — Distribution of Property—Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112).**]—Where a literary or scientific institution, not established for the purpose of gain, is dissolved by its members, its property ought to be given to some kindred institution, to be determined in manner prescribed in s. 30 of the Literary and Scientific Institutions Act, 1854, even if the rules contain a provision that the property of the society on its dissolution is to be divided among its shareholders, such a provision being contrary to the act. Such an institution is not a joint-stock company, although some of its members may be shareholders, and does not therefore come within the proviso in s. 30 of the act of 1854, which excepts from the operation of the section any institution "which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company." *Bristol Athenæum, In re*, 59 L. J., Ch. 116; 43 Ch. D. 236; 61 L. T. 795; 38 W. R. 396; 1 Meg. 452.

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# LIVERPOOL.

**Court of Passage.**]—*See* COURT.

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# LIVERY STABLE KEEPER.

*See* BAILMENT—LIEN.

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# LLOYD'S.

**Bonds.**]—*See* COMPANY.

**Customs as to Insurance.**]—*See* SHIPPING (INSURANCE).

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# LOAN SOCIETY.

*See* FRIENDLY SOCIETY.

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# LOCAL GOVERNMENT.

[BY J. RITCHIE.]

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## A. IN METROPOLIS.

*See* METROPOLIS.

## B. OUTSIDE METROPOLIS.

### I. AUTHORITIES.

#### 1. COUNTY COUNCIL.

##### a. Election.

**Mandamus for.**]—Where an election for a casual vacancy on a county council has been omitted to be held or been a void election, application should be made to the court for an order for a writ of mandamus for an election to be held on an appointed day, in accordance with the provisions of s. 70, sub-s. 2, of the Municipal Corporations Act, 1882, as incorporated into the Local Government Act, 1888. *West Sussex County Council, In re, Henderson, Ex parte*, 65 L. J., Q. B. 184; 73 L. T. 566; 59 J. P. 808.

**Corrupt and Illegal Practices — Incorporation of Provisions.**]—The effect of s. 75 of the Local Government Act, 1888, is to incorporate into that act ss. 13, 17, and 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884. *Walker, Ex parte*, 58 L. J., Q. B. 190; 22 Q. B. D. 384; 60 L. T. 581; 37 W. R. 293; 53 J. P. 260—C. A.

—— **Relief from Penalties — Appeal.**] — An appeal lies to the Court of Appeal against the refusal of a divisional court to make an order, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, exempting a candidate at an election of county councillors from penalties incurred by him through inadvertence, under s. 17, by reason of practices which are declared to be illegal by s. 13, such a matter not being a criminal matter within the meaning of s. 47 of the Judicature Act, 1883. *Ib.*

—— **Relief, when granted.**]—On the occasion of the first election of county councillors under the Local Government Act, 1888, a candidate inadvertently incurred a penalty for an illegal practice, and a divisional court refused to grant him relief, on the ground that ignorance of the provisions of the act was no excuse for a breach of them:—Held, that having regard to the difficulty of construing s. 75 of the Local Government Act, 1888, and to the fact that another divisional court had granted relief to other candidates under precisely similar circumstances, the exercise of the discretion by the divisional court might (with their assent on being informed of the decision of the other court), be overruled, and the relief granted. *Ib.*

On the occasion of the first election of county councillors under the Local Government Act, 1888, the court will be disposed to deal leniently with bonâ fide mistakes. When a candidate through inadvertence employed and paid twelve messengers to distribute an election address, the legal limit being two only, the court granted the relief prayed. *Darlington, Ex parte*, 53 J. P. 71.

Inadvertence in s. 20 of the Municipal Elections (Corrupt Practices) Act, 1884, means negligence or carelessness where the circumstances shew an absence of bad faith. *Lenanton, Ex parte*, 53 J. P. 263.

The court has no power to grant relief to a printer, who has been guilty of an offence relating to a "bill, placard, or poster" within s. 14 of the Municipal Elections (Corrupt Practices) Act, 1884. *Ib.*

A divisional court refused to make an order under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, allowing the employment of paid canvassers by a candidate at a county council election to be an exception from the provisions of the act which would otherwise (by s. 13) make the same an illegal employment:—Held, upon appeal from such refusal, that it was a matter in the discretion of the divisional court; but that (Fry, L.J., dissentiente) the fact that the election had taken place since the hearing in the divisional court and the applicant had not been elected constituted a change which entitled the Court of Appeal to take all the existing circumstances into their consideration, and to make the order. *Thomas, Ex parte*, 60 L. T. 728—C. A.

**Notice of Application for Relief.**]—Notice of application for relief should be given (1) to the opposing candidate or candidates, (2) to the returning officer, and (3) should be posted about the district and (4) advertisements should be inserted in the newspapers circulating in the district. No notice to the attorney-general is necessary. *Lenanton, Ex parte*, supra.

### b. Vesting and Exercise of Powers.

**Question submitted to High Court.**]—In a case stated under s. 29 of the Local Government Act, 1888, the court has no jurisdiction to decide questions of adjustment of liabilities under s. 62. *Salop County Council, In re*, 65 L. T. 416; 56 J. P. 213.

In stating a case under s. 29 of the Local Government Act, 1888, the facts which have actually arisen and the decision thereon, must be set forth; the High Court will not answer abstract questions as to the construction of the statute, unless arising out of facts which have actually occurred. *Cardigan County Council, In re*, 54 J. P. 792.

—— **Appeal.**]—The Court of Appeal has no jurisdiction to entertain an appeal from the decision of the High Court on questions submitted to it under s. 29 of the Local Government Act, 1888. *Kent County Council, In re*, 60 L. J., Q. B. 435; [1891] 1 Q. B. 725; 65 L. T. 213; 39 W. R. 465; 55 J. P. 647—C. A.

**Transfer of Right to use County "Property."**]—By an agreement between a private owner of certain rooms and the clerk of the peace, as trustees for the justices in quarter sessions, the justices in quarter sessions were permitted to use the rooms for the purpose of transacting their duties in quarter sessions, free of charge:—Held, that the use of the rooms by the county council free of charge was not transferred by s. 64 of the Local Government Act, 1888, to the county council. *Montgomeryshire County Council* v. *Pryce-Jones*, 57 J. P. 308—C. A.

**Executive Committee—Delegation of Powers to Sub-Committee.**]—Under schedule 6, clauses 5 and 6, of the Contagious Diseases (Animals) Act, 1878, a local authority may appoint an executive committee, which is to have all the powers of the local authority, except rating powers, and the executive committee may appoint sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions, and may from time to time revoke or alter any such delegation. The duly appointed executive committee of a county council (which, by virtue of the Local Government Act, 1888, is the local authority for the purpose of the Contagious Diseases (Animals) Act, made an order delegating to local sub-committees its power under the Contagious Diseases (Animals) Acts and under certain orders in council, including the Rabies Order, 1887. Subsequently to such delegation the executive committee, without expressly revoking the delegation, issued certain regulations under the Rabies Order, 1887, as to the muzzling of dogs and keeping them under control; no regulation under the Rabies Order, 1887, had been issued by the local sub-committee:—Held, that the delegation was not equivalent to a resignation by the executive committee of its own powers, that the delegated authority was subject to resumption at any time, and that the regulations were therefore valid. *Huth* v. *Clarke*, 59 L. J., M. C. 120; 25 Q. B. D. 391; 63 L. T. 348; 38 W. R. 655; 55 J. P. 86.

### c. Liability for Expenses.

**Salary of Justices' Clerk.**]—In a non-quarter sessions borough which has a separate commission of the peace, the county council is liable to pay the salary of the justices' clerk. *Cornwall County Council* v. *Truro Town Council*, 63 L. J., M. C. 60; 10 R. 595; 70 L. T. 354; 58 J. P. 299.

The county council, and not a town council of a borough within the county, is liable for the salary of the clerk to the justices of a borough having a separate commission of the peace, and all fees and costs payable to such clerk, and which are not excluded in the fixing of the salary, must be paid into the county fund. *Herefordshire County Council and Leominster Town Council, In re*, 64 L. J., M. C. 26; [1895] 1 Q. B. 43; 15 R. 77; 71 L. T. 576; 59 J. P. 348.

—— **Salaries of Recorder and Clerk of Peace—Fees to Clerk of Visiting Justices.**]—The liability, under charter or under the Municipal Corporations Acts, of boroughs having separate courts of quarter sessions to pay the salaries of their recorders and clerks of the peace out of borough funds is not in any way altered, as regards such boroughs containing a population of less than ten thousand, by any provisions of the Local Government Act, 1888. *Thetford Corporation* v. *Norfolk County Council*, 67 L. J., Q. B. 55; 77 L. T. 498.

The county council in which such a borough is included for administrative purposes is liable under s. 84 for the salary of the clerk to the borough justices at petty sessions; but the borough is liable for the fees to the clerk to the visiting justices of borough asylums. *Ib.*

**Local Grants—Current Charges in Aid.**]—Under s. 24 of the Local Government Act, 1888, the county council in substitution for the

Exchequer, are bound to pay out of the county fund local grants in respect of the period between the 24th September, 1888, and the 1st April, 1889, though the county councils did not come into existence until the latter date. *West Riding County Council, In re*, 54 J. P. 533.

**Maintenance of Borough Police—Contribution—Constables temporarily added from another Force.**]—The costs of the pay and clothing of the police of a borough (of which costs, by the Local Government Act, 1888, s. 24, sub-s. 2 (*j*), the county council are to pay one-half) include the cost of police belonging to another force and temporarily added to the borough force under s. 25 of the Police Act, 1890. *Reg.* v. *West Riding of Yorkshire County Council*, 64 L. J., M. C. 145; [1895] 1 Q. B. 805; 14 R. 391; 72 L. T. 520; 43 W. R. 386; 18 Cox, C. C. 141; 59 J. P. 340—C. A.

**Maintenance of Main Roads.**] — The maintenance of main roads throughout a county remains a "general county purpose" within the definition of s. 11, sub-s. 1, and s. 68 of the Local Government Act, 1888, and chargeable on the Exchequer Contribution Fund appropriated under that act for "general county purposes," although the county council may by resolution adopt the provisions of s. 20 of the Highways Act, 1878, and throw the expense of maintaining main roads on the hundreds. *Reg.* v. *Dolby*, 61 L. J., Q. B. 826; [1892] 2 Q. B. 736; 67 L. T. 619.

—— **Repayment to Urban Authority—Borrowed Money.**]—A county council is bound to repay the whole burden of the cost of maintaining main roads to the urban authority under s. 11 of the Local Government Act, 1888, but the council have only to defray that burden in the same way as the urban authority has done, and whether it be defrayed out of current rates, or by means of a loan. If the urban authority spread the cost over two or three years, the county council may do the same. *Marlborough Town Council* v. *Wilts County Council*, 58 J. P. 213.

**Repayment of Proportionate Amount of Contribution by Borough — Mandamus.**] — The justices of a county, as the local authority for the county, neglected between the years 1869 and 1878 to recoup to the plaintiffs, as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869, which they were bound to repay under s. 97 of that act. After the passing of the Local Government Act, 1888, the plaintiffs sued the defendants, as successors of the local authority for the county, to recover the sums which should have been recouped:—Held, that the only remedy against the justices would have been by mandamus to them to pay the amounts claimed out of moneys in their hands, or to levy a rate for the purpose; and that, as the Local Government Act, 1888, vests in the county council the property of the justices for the county subject to the same conditions and restrictions as if the act had not been passed, the defendants were not liable in the action. *Salford Corporation* v. *Lancashire County Council*, 59 L. J., Q. B. 576; 25 Q. B. D. 384; 63 L. T. 409; 38 W. R. 661; 55 J. P. 85—C. A.

—— **Action for Recovery of Rate, whether Maintainable—Extortion Colore Officii—Money Paid under Mistake of Law.**]—In pursuance of a resolution passed by the watch committee of a borough incorporated under the Municipal Corporations Act, 1835, the justices of the county provided police for the borough from 1869 to 1887. The expenses of such police for each half year were provided for in advance by a rate levied on the borough, and the sum so raised was, together with the sums collected from the other townships of the union in which the borough was situate, paid to the county treasurer by the guardians of the union in obedience to a precept addressed to them by the county justices. By the Municipal Corporations Act, 1835, the watch committee were required to appoint police for the borough, and on the 30th June, 1887, they withdrew the county police and appointed borough constables. At this date the county justices had in their hands a sum arising from a rate levied on the borough applicable for the future expenses of the police in the division in which the borough was situate, but there was no ascertained sum applicable exclusively to the police provided for the borough. In an action by the mayor and corporation (suing on behalf of all the ratepayers of the borough) and the guardians of the union against the council of the county, as successors of the county justices, to recover the amount overpaid by the borough:—Held, first, that the plaintiffs were not entitled to represent the ratepayers of the borough; secondly, that the remedy against the defendants (if any) was by mandamus; thirdly, on the merits, that the money was not recoverable on the ground of extortion colore officii, as it was paid under a voluntary arrangement; nor on the ground of a partial failure of consideration, as the proportion overpaid was not properly ascertainable. *Bootle-cum-Linacre Corporation* v. *Lancashire County Council*, 60 L. J., Q. B. 323—C. A.

**Stipendiary District—Rating.**]—A local act created a stipendiary justice's district, under which act the quarter sessions of the county could levy rates on the district in the same manner as was then authorised for making county rates. There are now two county boroughs under the Local Government Act, 1888, in the district:—Held, that the county council has the power to levy the rates on such part of the stipendiary district as is not included within either of the county boroughs, and that the liability of the county boroughs should be redeemed by an adjustment under s. 32 of the Local Government Act. *Staffordshire County Council, Ex parte*, 54 J. P. 72.

**Expenses of Quarter and Petty Sessions, how Payable.**]—Upon the true construction of the Local Government Act, 1888, a quarter sessions borough having in 1881 a population of 10,000 or upwards, and not being a county borough, which at the time of the passing of the act was exempt, in whole or in part, from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which it is situate were authorised to incur costs, retains the exemption, except as to costs incurred for the purpose of any powers, duties, or liabilities

of the justices of the borough transferred by the act to the county council, and as to the costs of felonies and offences, the costs attending the prosecution whereof are by law payable as in the case of a felony committed or supposed to have been committed in the borough, for which the parishes of the borough are liable to be assessed to and to contribute to the county fund. Such a borough, therefore, retains, with the exceptions stated, the power and duty to raise by a borough rate the expenses of the borough, quarter and petty sessions, and is pro tanto exempted from proportionate contribution to the expenses of county sessions. *Kent County Council, Ex parte*, 60 L. J., Q. B. 314; [1891] 1 Q. B. 389; 64 L. T. 421; 55 J. P. 248.

In the case of a borough having liberties, the exemption extends to the liberties. *Ib.*

Quarter sessions boroughs having in 1881 a population of less than 10,000 are, on the contrary, not exempted from any county contribution, and, as it could not have been the intention of the legislature to impose upon such boroughs the double burden of contributing their proportion of the county sessions expenses, and also defraying their own borough sessions expenses, the duty of paying the expenses of such borough sessions is transferred to the county council. *Ib.*

### 2. District Council, formerly Local Board.

#### a. Election.

##### i. *Qualification of Voter.*

**"As Owner."**]—At an election of members of a local board of health, several persons were nominated in September, 1871; one of the candidates was nominated by M.; and the nomination paper was signed by M., "being duly qualified as owner in the district." M. had sent in the notice required as owner fourteen days before the election in 1870, and had not sent in a notice since; but he was still qualified in respect of the same property as owner. He was also qualified to vote as a ratepayer:—Held, that in order to be entitled to vote as owner, the notice required must be sent before each election, and the nomination by M. as owner was therefore bad; but that as the 11 & 12 Vict. c. 63, s. 24, did not require any particulars of qualification, but only the signature of the person nominating, "as owner" might be rejected as surplusage, and, he being qualified as ratepayer, the nomination was good. *Reg.* v. *Morgan*, 41 L. J., Q. B. 55; L. R. 7 Q. B. 26; 25 L. T. 930; 20 W. R. 279.

##### ii. *Number of Members.*

**Election of New Members—Proper Constitution.**]—A local board of health, constituted under an order in council, consisted of nine members, one-third of the persons first elected to go out of office on 31st March, 1855. Before that day, three of the persons first elected ceased to be members, by reason of non-attendance. The local board selected these three to go out of office; and on 31st of March, three new members only were elected:—Held, under 11 & 12 Vict. c. 63, ss. 13, 18, that the board, consisting of the six members first elected, and of the three new members, was well constituted. *Howitt* v. *Manfull*, 6 El. & Bl. 736; 25 L. J., Q. B. 411; 2 Jur. (N.S.) 883; 4 W. R. 612.

—— **Notice of Vacancies.**]—Four members of a local board under the Public Health Act (11 & 12 Vict. c. 63), s. 13, having gone out of office, three at the expiration of their term of office, and one by resignation before the end of his term, four new members were elected at one election without distinction. Neither in the notice of election nor in the voting papers delivered to the electors, was any distinction made between the regular vacancies and the casual vacancy:—Held, that the election was invalid. *Reg.* v. *Rippon*, 45 L. J., Q. B. 188; 1 Q. B. D. 217; 34 L. T. 444; 24 W. R. 363.

**Casual Vacancy—Computation of Time.**]—The time specified by r. 65 of schedule II. of the Public Health Act, 1875, which provides that any casual vacancy on the board occurring "by failure duly to elect," shall be filled up by the board within six weeks, is to be computed from the day on which the retiring member goes out of office, and not from the day on which the election of a member to fill his place is held. *Reg.* v. *Cooban*, 56 L. J., M. C. 33; 18 Q. B. D. 269; 51 J. P. 500.

—— **Quorum—Lapse of Board—Informality.**]—Seven members of a local board constituted under the Public Health Act, 1875, and consisting of nine members, resigned, so that the quorum of three required by schedule I. r. 2, was not left. The two remaining members proceeded to fill up the vacancies. The board as thus constituted prescribed a building line under s. 155 of the act:—Held, by Pearson, J., that, as the resignations reduced the number of members to less than a quorum, the board had lapsed, that the two remaining members could not fill up the vacancies, that there was therefore no board, that the building line was therefore not well prescribed, and that schedule I. r. 9, to the act did not cure the defect:—Held, by the Court of Appeal, that the filling up of vacancies was "business" within the meaning of schedule I. r. 2, that the two members were not competent to transact it, and that the new members therefore were not duly elected; but that by schedule I. r. 9, the objection to the building line, founded on the fact that some of the members of the board were not duly elected, was removed. *Newhaven Local Board* v. *Newhaven School Board*, 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172—C. A.

##### iii. *Chairman's Duties.*

**Statute.**]—59 & 60 *Vict. c.* 22, *is the Chairmen of District Councils Act*, 1896.

**Omission—Penalty.**]—A chairman of a local board is required by 11 & 12 Vict. c. 63, s. 24, if the number of candidates exceeds the number of members to be elected, to cause voting papers of a certain form to be prepared and filled up; one of the blanks is for the number of votes as owner and as ratepayer respectively. At an election the chairman omitted to fill up the latter blanks:—Held, that the omission did not render the election illegal, but merely subjected the chairman to a penalty. *Reg.* v. *Lofthouse*, 7 B. & S. 447; 35 L. J., Q. B. 145; L. R. 1 Q. B. 433; 12 Jur. (N.S.) 619; 14 L. T. 359; 14 W. R. 649.

—— **Right to Complain of.**]—A relator, being a candidate, who complained of the illegality of the election on the above ground, having on former elections been himself elected on similar voting papers, is disqualified for applying for a quo warranto, after taking his chance of the election and being defeated. *Ib.*

**Certificate—How given.**]—An election of members of a local board of health, under 11 & 12 Vict. c. 63, ss. 21, 27, conducted by the statutory assistants of the chairman during his absence, and which is certified by him solely upon their report, is null and void. *Reg.* v. *Backhouse*, 7 B. & S. 911; 36 L. J., Q. B. 7; L. R. 2 Q. B. 16; 15 L. T. 240; 13 W. R. 846.

—— **When Impeachable.**]—After the election of a local board, under 11 & 12 Vict. c. 63, the chairman proceeded, under s. 27, to ascertain the number of valid votes for each candidate, and to cast up the votes; and he made his certificate as to who were the candidates elected. On the trial of a quo warranto information against one of the successful candidates, it appeared that the chairman had, by mistake, put down votes to one candidate which the voting papers shewed had been given to another; had omitted to reckon votes; and also had received as valid votes which were invalid, but as to which he had made no examination:—Held, that as to the first and second class of votes, the duty of the chairman was merely ministerial, viz. that of casting up the votes, and as to this his certificate could be impeached; but that as to the third class he had to exercise a judicial duty, and as to this therefore his certificate was conclusive. *Reg.* v. *Collins*, 46 L. J., Q. B. 257; 2 Q. B. D. 30; 36 L. T. 192—C. A. Affirming, 24 W. R. 732.

**Casting up Votes.**]—The duty of the chairman in counting up the votes, under the Public Health Act, 1848, s. 27, is ministerial, not judicial, and a quo warranto is the proper mode of trying the question whether he has made an erroneous calculation or not. *Reg.* v. *Collins*, 23 W. R. 325.

—— **Employment of Assessors.**]—At the election of members of a local board, under 11 & 12 Vict. c. 63, the chairman or a duly appointed deputy, must attend at the office of the board the day after the election, as returning officer, and perform in person the duties, which are judicial, of examining the votes, &c., as required by s. 27; and if assessors, appointed under s. 21, make the examination in the chairman's absence, and he sign the returns, &c., on their report only and not on personal inspection, the election is void. *Reg.* v. *Backhouse*, 36 L. J., Q. B. 7; L. R. 2 Q. B. 16; 15 L. T. 240; 13 W. R. 846.

The chairman of a local board of health in a non-corporate district being absent during an annual election of members, and being by reason of defect in his eyesight unable by personal examination to ascertain the validity of the votes, or to cast them up, conducted the election by two persons appointed by the local board before the election to assist and attend upon him for that purpose, and ascertained the validity of the votes by their examination, conducted in pursuance of his directions, and nothing occurred in the examination which had not been provided for by his directions, or which required his presence. On a quo warranto information against one of the persons so elected:—Held, that the election was void, but that the relator was not entitled to costs. *S. C.*, 7 B. & S. 911.

iv. *Regulation of Expenses.*

**Discretion of Board.**]—By 11 & 12 Vict. c. 63, s. 30, the local board of health has a discretion as to what is a reasonable remuneration for the person conducting the election of the board; and the court cannot review their decision upon an affidavit that the sum allowed was not reasonable. *Metcalfe, Ex parte*, 6 El. & Bl. 287; 2 Jur. (N.S.) 1245; 4 W. R. 490.

v. *Irregularities.*

**Fabrication of Voting Papers.**]—At an election of a member of a local board of health, the respondent was canvassing for one of the candidates. The wife of a voter, in the absence of her husband, promised his vote, and, not being able to write, placed a mark on his voting paper, which was in the form prescribed by schedule A. of the Local Government Act, 1848, which requires that, in the case of a voter who cannot write, a witness shall attest the voter's mark, and place the voter's initials against the name of the persons for whom the voter intends to vote. The respondent, believing that the wife was authorised to fill up the voting paper, and that he was not acting contrary to the act, attested the mark made by her, describing it as the mark of the voter, and placed the voter's initials against the name of the candidate. On an information under the Local Government Act, 1858, s. 13, sub-s. 5, for fabricating a voting paper:—Held, that in the absence of an unlawful intention on the part of the respondent, he had not fabricated a voting paper, within the meaning of the act. *Aberdare Local Board* v. *Hammett*, 44 L. J., M. C. 49; L. R. 10 Q. B. 162; 32 L. T. 20; 23 W. R. 617.

—— **Falsely assuming to act on behalf of Voter.**]—The respondent, a candidate at an election for members of a local board of health, called at the house of a voter to whom a voting paper had been sent, and asked her how she intended to vote, and to hand him the voting paper, which she did. He then inquired if she knew how to fill it up, and she replied in the affirmative. The respondent thereupon, without any authority, express or implied from the voter, wrote in pencil the initial of the voter against his own name. The voter objected to his doing so. The respondent left the voting paper with the voter, with her initials so written by him against his own name, but with no other mark upon it. The voter subsequently struck out the initials so written by the respondent, and placed her initials against the names of three other candidates, and signed her own name to the voting paper. It was found that the respondent so pencilled the initials of the voter with the intent of indicating on her behalf that she intended to vote for him, and of inducing and procuring her to vote for him. The respondent was successful at the poll. A petition was lodged against his return, on the ground of illegal practices, inter alia, of fabricating in whole or in part a voting paper, and of falsely assuming to act in the name or on behalf of a voter:—Held, that the act of the respondent did not amount to a fabrication in whole or in part

of the voting paper, nor to falsely assuming to act in the name or on behalf of the voter, within the meaning of r. 69 of sched. II., part 1, of the Public Health Act, 1875. *Gough* v. *Murdoch*, 57 L. T. 308; 35 W. R. 836; 51 J. P. 471.

—— **Recovery of Penalty—Party Aggrieved.**]—At an election for a member of a local board, V. and M. were the only candidates; M. was declared to be elected, he having obtained ninety-four votes and V. eighty-nine. V., without the consent of the attorney-general, preferred an information under the Public Health Act, 1875, sched. II. r. 69, against W., charging him with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that V. was not a "party aggrieved" within the Public Health Act, 1875, s. 253, and therefore that the consent of the attorney-general was requisite:—Held, that the dismissal of the information was wrong, for V. was a party aggrieved within the meaning of that statute. *Verdin* v. *Wray*, 46 L. J., M. C. 170; 2 Q. B. D. 608; 35 L. T. 942; 25 W. R. 274.

**Interference of Candidate.**]—W. was chairman of a local board, and it was his duty under 11 & 12 Vict. c. 63, s. 21, to conduct and complete the elections of members for the ensuing year, and by the same section if the chairman became unable to act, some other person was to be appointed by the local board to perform such of his duties as then remained to be performed. F. was appointed by the local board to act as returning officer in case of nomination of chairman as a candidate. W. published a notice, fixing day of election and day for receiving nomination papers. He received a nomination paper nominating himself, and afterwards continued to receive other nomination papers. More candidates were nominated than vacancies. W. filled up the form of voting paper and sent it to be printed, with directions for the printer to return it to F., and from that time forward everything was done by F. W. was elected, and returned by F. No improper motive was imputed to W., nor did his acts produce any inconvenience, or in any way influence the result of the election. The court, in the exercise of its discretion, refused leave to file a quo warranto. *Reg.* v. *Ward*, 42 L. J., Q. B. 126; L. R. 8 Q. B. 210; 28 L. T. 118; 21 W. R. 632.

**Name of withdrawn Candidate on Ballot-paper—Election Petition—Liability of Returning Officer to be made Respondent—Costs.**]—At an election of urban district councillors the ballot-papers, by a mistake of a clerk of the returning officer, contained the name of a candidate who had withdrawn. A petition having been presented to avoid the election of those candidates who had been elected by a majority of votes less than the number given to the candidate who had withdrawn:—Held, that the election of those candidates was void, and that, notwithstanding s. 11 of the Ballot Act, 1872, which provides a penalty for a returning officer who is guilty of any wilful misfeasance or any wilful act or omission in contravention of the act, the returning officer was rightly made a respondent, and that the court had power, although in the circumstances such power ought not to be exercised, to make an order for the payment of costs against the returning officer by whose negligence an election is avoided. *Wilson* v. *Ingham*, 64 L. J., Q. B. 775; 15 R. 488; 72 L. T. 796; 43 W. R. 621; 59 J. P. 614.

### b. Members.

#### i. *Qualification.*

**Disability by Contract—Penalty for Acting.**]—By r. 64 of sched. II. to Public Health Act, 1875 (38 & 39 Vict. c. 55), it is declared that any member of a local board who "in any manner is concerned in any bargain or contract entered into by such board," shall "cease to be such member, and his office as such shall thereupon become vacant;" and r. 70 imposes a penalty of 50*l.* on "any person who, not being duly qualified to act as member of the local board," "or being disabled from acting by any provisions of this act, acts as such member":—Held, by Brett and Cotton, L.JJ. (Bramwell, L.J., dissenting), that a member of such board, who having been concerned in a contract by the board, has thereupon ceased to be such member by force of r. 64, is a person disabled from acting as a member by a provision of the act within the meaning of r. 70, and consequently, that if afterwards he does so act, he is liable to the penalty of 50*l.* *Fletcher* v. *Hudson*, 51 L. J., Q. B. 48; 7 Q. B. D. 611; 46 L. T. 125; 30 W. R. 349; 46 J. P. 372—C. A.

—— **Acting as Mayor.**]—By a provisional order of the Board of Health, confirmed by statute, the 11 & 12 Vict. c. 63, was applied to a district wholly comprised within a single municipal borough, and the corporation was constituted by the council the local board of health. An alderman of the borough, after such confirmation, sold some iron to a party who had contracted to supply the local board with iron railings, and who purchased the iron for the purpose of performing the contract. He afterwards continuing to be an alderman, was elected mayor, and acted as such. An action was brought against him for penalties under 5 & 6 Will. 4, c. 76, ss. 28, 53, for having acted as mayor, while disqualified by being interested in a contract with the council:—Held, assuming a contract with such local board to be a contract with the council within the 5 & 6 Will. 4, c. 76, s. 28, and assuming also that a mayor elected when alderman is disqualified to act as mayor under s. 53, by reason of a disqualification as alderman, that nevertheless, this was not an interest in a contract within s. 28, and there was no liability to any penalty. *Le Feuvre* v. *Lankester*, 3 El. & Bl. 530; 2 C. L. R. 1426; 23 L. J., Q. B. 254; 18 Jur. 894; 2 W. R. 307.

—— **Work done by Member for Contractor—Penalty.**]—By the Public Health Act, 1875, sched. II. r. 64, a member of a local board who is in any manner concerned in any bargain or contract entered into by such board shall (except in certain cases) cease to be such member, and his office as such shall thereupon become vacant; and by r. 70 of the same schedule a penalty is imposed on a person who acts as such member when disabled from acting by any provision of the act. The defendant, a member of a local board, was employed by persons, with whom the board had contracted for the performance of certain works on the premises of the board, to do portions of the works so contracted for:—Held, that the defendant had been concerned in contracts entered into by the board within the

meaning of the act, and was therefore disqualified: and that, having acted as a member of such board since becoming so disqualified, he had incurred the penalty imposed by the act. *Nutton* v. *Wilson*, 58 L. J., Q. B. 443; 22 Q. B. D. 744; 37 W. R. 522; 53 J. P. 644—C. A.

—— **Lease to Member.**]—A person is not disqualified for membership of a local board, under the 64th clause of the second schedule to the Public Health Act, 1875, by reason of a lease by the board to him of a sewage farm containing covenants on the part of the board to supply, and on his part to use on the premises the sewage of the district. *Reg.* v. *Gasharth*, 49 L. J., Q. B. 509; 5 Q. B. D. 321; 42 L. T. 688; 28 W. R. 596; 44 J. P. 507.

**Recovery of Penalty by Party aggrieved.**]—By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that act shall not be "taken by any person other than by a party aggrieved," or by a local authority, without the consent of the attorney-general; and by sched. II. r. 70, a penalty of 50*l.* is imposed upon any person acting as member of a local board without qualification. The defendant, who was acting as chairman of a local board after disqualification, made a complaint to the members thereof as to certain conduct of the plaintiff, who was clerk to the board; the plaintiff, fearing that he might be dismissed from his office, resigned it, and sued the defendant to recover a penalty of 50*l.* for acting without qualification:—Held, that the plaintiff was not "a party aggrieved," within the meaning of the Public Health Act, 1875, s. 253, and that he could not sue for the penalty without the consent of the attorney-general. *Rochfort* v. *Atherley*, 1 Ex. D. 511. *S. C.*, nom. *Smith* v. *Fieldhouse*, 35 L. T. 602.

At an election for a member of a local board, V. and M. were the only candidates; M. was declared to be elected, he having obtained ninety-four votes and V. eighty-nine. V., without the consent of the attorney-general, preferred an information under the Public Health Act, 1875, sched. II. r. 69, against W., charging him with fabricating in part the voting paper of D., a person entitled to three votes at the election; but the justices dismissed it on the ground that V. was not a "party aggrieved" within the Public Health Act, 1875, s. 253, and therefore that the consent of the attorney-general was requisite:—Held, that the dismissal of the information was wrong, for V. was a party aggrieved within the meaning of that statute. *Verdin* v. *Wray*, 46 L. J., M. C. 170; 2 Q. B. D. 608; 35 L. T. 942; 25 W. R. 274.

B. was an inhabitant and ratepayer of Margate, and entitled to vote for members of the local board of health, and was in the habit of using the Margate pier. The defendant was one of the company of proprietors of that pier, established under a local act, and had been elected a member of the local board of health, and as such voted on a question in which the company was interested:—Held, that B. was not a party aggrieved within s. 133 of 11 & 12 Vict. c. 63, and could not sue the defendant for a penalty under s. 19, if any, incurred by his voting. *Boyce* v. *Higgins*, 14 C. B. 1; 23 L. J., C. P. 5; 2 C. L. R. 95; 18 Jur. 333; 2 W. R. 73.

A declaration, in a qui tam action, stated that the plaintiff and defendant were candidates for the office of commissioner under the Cheltenham Improvement Act; that the plaintiff could have been elected, but that the majority of votes was in favour of the defendant, who was thereupon elected, and acted as such commissioner without being duly qualified; whereby the plaintiff was aggrieved as a ratepayer, voter, and resident within the borough, and also as such candidate. The Cheltenham Act incorporates s. 15 of the Commissioners Clauses Act, 10 & 11 Vict. c. 16, which enacts, that every person who shall act as a commissioner without being duly qualified shall be liable to a penalty of 50*l.*, and such penalty may be recovered by any person. The Cheltenham Act also incorporates s. 133 of the 11 & 12 Vict. c. 63, which enacts that no proceedings for the recovery of any penalty under that act shall be taken "by any person other than by a party grieved, or the local board of health in whose district the offence is committed without the consent of the attorney-general; and if the application of the penalty be not otherwise provided for, one-half thereof shall go to the informer, and the remainder to the local board of health." The cause was tried and a verdict found for the plaintiff:—Held, first, that the plaintiff was not a party aggrieved by the defendant acting as such commissioner. *Hollis* v. *Marshall*, 2 H. & N. 755; 27 L. J., Ex. 235; 6 W. R. 365.

—— **Consent of Attorney-General.**]—Held, secondly, that the declaration was not authorised by s. 15 of the Commissioners Clauses Act, and under 11 & 12 Vict. c. 63, s. 133, it was bad in arrest of judgment, inasmuch as (the plaintiff not being a party aggrieved) it ought to have alleged the consent of the attorney-general. *Ib.*

Held, thirdly, that although the want of the consent of the attorney-general was an objection which might be taken by plea or demurrer, it was also a ground for staying the proceedings after trial. *Ib.*

By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that act shall not, "except as in this act is expressly provided," be taken by any person other than a party aggrieved, or a local authority, without the consent of the attorney-general; by r. 70 of sched. II. (which by s. 317 is to be read as part of the act) a penalty is imposed upon any person acting as a member of a local board without qualification, such penalty being by the same rule made recoverable by any person:—Held, that the provision of r. 70 that the penalty might be recovered by any person was an "express provision" of the act, within the meaning of s. 253, and that consequently in actions for penalties under that rule the consent of the attorney-general was not necessary. *Fletcher* v. *Hudson*, 49 L. J., Ex. 793; 5 Ex. D. 287; 43 L. T. 404; 45 J. P. 5—C. A.

**Omission of Name from Rate-book.**]—E. and R. were candidates for a place in a local board. The nomination was on March 25, and the votes for R. were 57 and for E. 52. The returning officer decided that R. was disqualified, as his name was omitted from the rate-book, and his son-in-law was rated instead of him:—Held, that the officer was justified in disqualifying R., or at least R. had led to the mistake, and the rule for quo warranto against E. was discharged. *Reg.* v. *Ellis*, 44 J. P. 748.

**Composition with Creditors—Time for filling casual Vacancy.**]—A candidate for election as member for a local board of health had assigned all his property by deed to a trustee for the benefit of those of his creditors who should sign the deed, no sum being mentioned in it as a composition to be paid on the debts therein scheduled as due to them, and the creditors signing the deed thereby discharged him from all debts due to them by him:—Held, that he was not disqualified under 38 & 39 Vict. c. 55, sched. II. r. 5, which provides that a person "who has entered into any composition with his creditors," shall be ineligible "so long as any proceedings in relation to such composition are pending," even though at the time of his election some of his creditors had signed the deed, while others did not sign it till after the election, for that the deed was not a composition with creditors. *Reg.* v. *Cooban*, 56 L. J., M. C. 33; 18 Q. B. D. 269; 51 J. P. 500.

**Non-attendance—Improper Constitution of Board—Enforcement of Rate.**]—The court will grant a mandamus to compel a justice to grant a warrant for payment of a rate made by a local board when payment thereof is refused on the ground that the board is not properly constituted, that being a matter to be determined in another way. *Reg.* v. *Derbyshire JJ.*, 4 W. R. 118.

Semble, that the board may select as retiring members those who at the time of election named in the order in council have by non-attendance ceased to be members. *Ib.*

ii. *Personal Liability.*

**For Expenses of Witness.**] — In an action against four members of a local board of health, for the plaintiff's expenses as a witness before a parliamentary committee in opposition to a gas bill:—Held, that they were not liable personally, as it appeared that the instructions to the plaintiff had been given, and the opposition to the bill had been entirely carried on, by the local board. *Bailey* v. *Cuckson*, 7 W. R. 16.

**Payment to Officer — Certiorari.**] — A municipal corporation having adopted a drainage scheme which had been drawn up by their surveyor, resolved that he should superintend the works, and that he should be paid a certain rate on the cost of the work, the whole remuneration not to exceed a fixed sum. Proceedings having been instituted against the surveyor to recover penalties under the Public Health Act, 1875, on the ground that he was interested in the contracts within the meaning of the section, the corporation resolved to contribute the sum of 300*l.* towards his legal expenses. Certain penalties having been recovered against the surveyor, a rule was obtained for a writ of certiorari to bring up the order of the corporation settling the remuneration of the surveyor and the order for the payment of the sum of 300*l.* in order that they might be quashed, on the ground that they were illegal and ultra vires, and that the corporation had no power to make them. This rule was made absolute, and the court further ordered that "the prosecutors (the mayor, aldermen, and burgesses) do pay the costs of and occasioned by the application." The court was now asked to make an order that certain members of the corporation should personally pay the costs of and occasioned by the writ of certiorari, the issuing thereof, and consequent thereon:—Held, that the members of the corporation who voted in favour of the resolutions for carrying on the legal proceedings were personally liable for the costs occasioned thereby. *Reg.* v. *Whiteley*, or *Vaile*, 58 L. J., M. C. 164; 23 Q. B. D. 483; 61 L. T. 253; 54 J. P. 134.

**Act done under the Provisions of the Public Health Act—Notice of Action.**]—The effect of the Public Health Act, 1875, which makes improvement commissioners under local acts urban sanitary authorities, is to reconstitute them as new bodies under the act, vesting in them as such new bodies the powers given by the local acts as well as those given by the Public Health Act; and such commissioners in subsequently doing any act in the exercise of the powers originally conferred by their local acts are acting under the Public Health Act, 1875, and consequently are entitled in respect of such act to any protection or privileges given by that act to members of local authorities acting under its provisions. *Lea* v. *Facey*, 56 L. J., Q. B. 536; 19 Q. B. D 352; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756—C. A.

A person who is in fact disqualified from being a member of a local authority but who acts in the bonâ fide belief that he is a member, is entitled to notice of action under s. 264 of the Public Health Act, 1875. *Ib. And see next case.*

**Non-delivery of Rate-book — Commitment—Limitation.**]—The commitment by two justices under 11 & 12 Vict. c. 63, s. 39, of a member of the town council and local board of a borough for non-delivery of a rate-book in his possession by virtue of his office as overseer and collector of the borough rates, is a civil and not a criminal proceeding, being in the nature of a distraint. The offence of non-delivery consists in continuing to retain the subject of the distraint. The limitation of six months by s. 11 of Jervis's Act (11 & 12 Vict. c. 43) will therefore not apply. Semble, per Lush, J., that such limitation will only apply where the object of the proceeding is punishment, and not merely coercion. *Mayer* v. *Harding*, 17 L. T. 140.

iii. *Personal Interest.*

**Effect of.**]—The presence at a meeting of a local board of a member having a personal interest in the matter before the board, and his taking part in the proceedings of the board thereon, do not vitiate such proceedings. *Aberdeen Ry.* v. *Blaikie* (1 Macq. H. L. 461), discussed and distinguished. *Murray* v. *Epsom Local Board*, 66 L. J., Ch. 107; [1897] 1 Ch. 35; 75 L. T. 579; 45 W. R. 185; 61 J. P. 71.

Although the presence of a person having a pecuniary interest at a meeting of a public body vitiates its proceedings where it is acting judicially, a local body acting in the capacity of surveyors of highways and performing the duties imposed upon it by the Local Government Act, 1894, s. 26, sub-s. 1, in reference to an obstruction to a public right of way, is not acting judicially, but is in the same position as a private individual protecting his own property. *Ib.*

### c. General Powers and Duties.

**Ownership of Property.**]—The words "council of such borough" in s. 310 of the Public Health Act, 1875, mean the mayor, aldermen, and burgesses acting by the council. The effect of the section, therefore, is that, when the district of a local board is incorporated as a borough, all the property of the board (including property acquired by them by purchase after the passing of the act) vests at once in the corporation, without the necessity of any conveyance or transfer. In such a case the Bank of England are bound, on the request of the corporation, to register in their corporate name government stock previously standing in the books of the bank in the name of the local board, without requiring any transfer to be executed. *Hyde Corporation* v. *Bank of England*, 51 L. J., Ch. 747; 21 Ch. D. 176; 46 L. T. 910; 30 W. R. 790.

**Land Acquired for Definite Purpose—Interim User.**]—Land acquired by a local authority under the Public Health Act, 1875, for a definite purpose may, in the interval before it is required for such purpose, be used in any lawful manner which does not substantially interfere with its immediate use when so needed for the purpose for which it was acquired; it is not necessary that during such interval the land should be kept in the same state in which it was when acquired. *Att.-Gen.* v. *Teddington Urban Council*, 67 L. J., Ch. 23; [1898] 1 Ch. 66; 77 L. T. 426; 46 W. R. 88; 61 J. P. 825.

**Delegation of Powers — To Committees.**]—Where a board constituted by an act of parliament is authorised by it to delegate any of its powers to a committee, the powers so conferred upon the committee must be exercised by them acting in concert; and it is not competent to the committee to apportion amongst themselves the duties so delegated to them; and one of them acting alone, pursuant to such apportionment, cannot justify his acts under the act of parliament. *Cook* v. *Ward*, 2 C. P. D. 255; 36 L. T. 893; 25 W. R. 593—C. A. Affirming 46 L. J., C. P. 554.

—— **To Bodies Corporate.**]—A local board of health acting under 11 & 12 Vict. c. 63, are not such trustees for paving, lighting, and other local purposes within the meaning of the 5 & 6 Will. 4, c. 76, s. 75, and 20 & 21 Vict. c. 50, s. 2, as are enabled thereby to transfer their powers, property, and liabilities to bodies corporate. *Swinford* v. *Keble*, 7 B. & S. 573; 35 L. J., Q. B. 185; L. R. 1 Q. B. 549; 12 Jur. (N.S.) 783; 14 L. T. 770; 14 W. R. 858.

—— **To Police of Right to Prosecute.**]—A local board, acting under an act which embodied the provisions of s. 259 of the Public Health Act, 1875, passed a resolution that in pursuance of the power vested in the board by s. 259 of the Public Health Act, 1875, the superintendent and the sergeants of the county police, for the time being acting within the district, be authorised as officers of the board to institute and prosecute all such proceedings as may be necessary under the specified clauses of the local act. In an information preferred by the superintendent of police, against the appellant for an offence under the act:—Held, that the local board had no power under s. 259 of the Public Health Act, 1875, to delegate the prosecution to the police, who are not officers of the board, nor under their control. *Kyle* v. *Barbor*, 58 L. T. 229; 16 Cox, C. C. 378; 52 J. P. 501, 725.

—— **To Waterworks Company.**]—A waterworks company is not, within the meaning of the Public Health Act, 1875, s. 52, able and willing "to supply water within the district of a local authority," unless it has both the necessary powers and the requisite supply of water. *Richmond Waterworks Co. and Southwark and Vauxhall Waterworks Co.* v. *Richmond Vestry*, 45 L. J., Ch. 441; 3 Ch. D. 82; 34 L. T. 480.

When company R. had the necessary powers but no water, and company S. had the requisite supply of water but no powers within the district, and company R. sold its plant to company S., and certain members of company S. bought all the shares in company R. with the intention of allowing company S. to exercise the powers of company R.:—Held, that the powers could not be so delegated, and that neither company was able and willing within the meaning of the act, and consequently that neither was entitled to notice under the Public Health Act, 1848, s. 75, or under the Public Health Act, 1875, s. 52, from a local authority desiring to construct waterworks. *Ib.*

**Appointments of Officers and Others.**]—The provision contained in 11 & 12 Vict. c. 63, s. 149, that whenever the consent, sanction, approval, or authority of the local board is required, the same shall (in case of a non-corporate district) be in writing and under their seal and the hands of five or more of them, does not mean that every act of the local board should be under their hands and seal, but such only as sanctions the acts of others; and, therefore, the appointments of clerk and surveyor to the board need not be under their hands and seal, and a resolution of the board directing their officers to take certain steps need not be under the hands and seal of the board. *Smith* v. *Hirst*, 23 L. T. 665.

—— **Employment as Witness.**]—A municipal corporation having, by transfer from a body of commissioners, power to purchase certain gas works, and being also a local board, took proceedings for the purpose of purchasing the works and assessing the price by arbitration. In pursuance of a resolution passed at a meeting of a sub-committee appointed for the management of the business, the report of which was adopted by the council, the plaintiff was employed as a witness on the arbitration to support the evidence of the valuer of the corporation. No appointment of the plaintiff under seal was made, but he acted as witness under the instructions of the valuer who was so appointed. In all these proceedings the corporation erroneously described itself as "acting as the local board," and its seal as "the seal of the local board"; but it did not appear that the seal of the local board was any other than the municipal seal. In an action by the plaintiff against the corporation for his services as a witness:—Held, that the corporation and the local board could not be treated as independent bodies; that the plaintiff's contract was in substance with the corporation; and that he was entitled to recover. *Andrews* v. *Ryde Corporation*, 43 L. J., Ex. 174; L. R. 9 Ex. 302; 23 W. R. 58.

—— **Dismissal.**]—A by-law of a local board of health, duly made and confirmed, forbade the

rescission of any resolution of the board, unless at a meeting where at least as many members were present as were present when such resolution was passed:—Held, that such by-law did not apply to the dismissal of the clerk to the board; for a resolution to effect this was not in the nature of a rescission of that by which he had been appointed, but was a new resolution in itself. *Richards, Ex parte*, 47 L. J., Q. B. 498; 3 Q. B. D. 368; 38 L. T. 684; 26 W. R. 695.

Such clerk, therefore, holding his office under the Public Health Acts, "at the pleasure of the board," could not obtain a quo warranto because of his dismissal by the resolution of a meeting consisting of fewer members than were present when he was appointed. *Ib.*

—— **Employment of Solicitor—Stopping up Highways.**]—The U. land company being desirous of diverting certain public footways on their estate in the parish of T., requested the T. local board of health to assent to such diversion, and to take the necessary steps to have the said footways closed. The T. local board assented, and instructed their solicitors to take the necessary steps, and this having been done, paid their bill of costs, and recovered the amount summarily as "expenses" within the meaning of s. 84 of the act of 1835:—Held, on a case stated, that the words of s. 144 of the Public Health Act, 1875, "may be done by or to the surveyor of the urban authority or by or to such other person as they may appoint," did not empower the local board to employ a solicitor to do the ministerial acts in question, and that therefore the solicitor's charges were not "expenses" payable by the land company under s. 84 of the act of 1835. *United Land Co.* v. *Tottenham Local Board*, 51 L. T. 364; 48 J. P. 726.

**Churchwardens.**]—Overseers in 3 & 4 Will. 4, c. 90, include churchwardens. *Reg.* v. *Rye JJ.*, 10 L. T. 525; 13 W. R. 142.

Overseers include churchwardens, although the parish is divided, and each part has separate elected overseers, the division not being under 13 & 14 Car. 2, c. 12, or 59 Geo. 3, c. 134. *Ib.*

**Promoting Bill in Parliament.**]—A rural sanitary authority has no power to charge the rates with the expenses of promoting a bill in parliament. *Cleverton* v. *St. Germain's Union*, 56 L. J., Q. B. 83.

A rural sanitary authority, being unable to acquire by purchase land and water rights necessary for the purpose of procuring a water supply for their district, which it was the duty of the authority to do under the Public Health Act, instructed their solicitor to promote a bill in parliament for the purpose of obtaining powers to purchase the land and water rights compulsorily:—Held, that the rural sanitary authority had no power to promote such bill, and that therefore their solicitor could not recover his costs from them. *Ib.*

**Register of Owners and Proxies—Poll.**]—The town council of a borough is not bound, under the Public Health Act, 1875, schedule II. r. 19, to keep a register of owners and proxies for the purpose of taking a poll in the borough with respect to the application under 35 & 36 Vict. c. 91, of the borough funds in opposing local and personal bills in parliament. *Ward* v. *Sheffield Corporation*, 56 L. J., Q. B. 418; 19 Q. B. D. 22.

**Suing or Presenting Petition.**]—A local board of health cannot sue or present a petition as a corporate body. Petitions may be presented in the name of their clerk, and moneys may be paid to their treasurer. *Llanelly Local Board, Ex parte*, 22 L. J., Ch. 419; 17 Jur. 107; 1 W. R. 159.

**Rural Authority—Lighting District—Order of Local Government Board.**]—The local government board having made an order under s. 276 of the Public Health Act, 1875, directing that the provisions of the first paragraph of s. 161 (respecting the powers of urban authorities for lighting their districts) should be in force within certain contributory districts of a rural sanitary authority, and that the rural authority should be invested with the powers, &c., of the urban authorities "under those provisions" the rural authority issued their precept under s. 230 for payment of the lighting expenses. A railway company who had property in one of the contributory districts claimed to be assessed at one-fourth only of the ratable value of their property under s. 211:—Held, that on the true construction of the order of the local government board, the rural authority was invested only with the power of an urban authority to incur lighting expenses, and not with the powers of rating of the urban authority, but were only entitled to issue the precept under their ordinary powers, and consequently the railway company must be rated at the full ratable value of their property. *Lancashire and Yorkshire Ry.* v. *Bolton Union*, 60 L. J., Q. B. 118; 15 App. Cas. 323; 63 L. T. 358; 54 J. P. 532—H. L. (E.)

**Giving of Consent.**]—By 11 & 12 Vict. c. 63, s. 149, whenever the consent or authority of the local board of health is required by the provisions of the act, the same shall be in writing, under their seal, and the hands of five or more of them:—Held, that this applies in the case of a general district rate imposed by a local board upon the inhabitants of the district, and that such a rate, if not under the seal of the board, and signed by five of its members, is invalid. *Reg.* v. *Worksop Local Board*, 5 B. & S. 951; 34 L. J., M. C. 220; 11 Jur. (N.S.) 1015; 10 L. T. 297; 13 W. R. 253. And see *S. C.*, 12 W. R. 710.

—— **Resolutions and Notices.**]—But a local board, after adopting resolutions by a committee to the same effect, may pass resolutions that certain streets shall be levelled, and serve notices upon the occupiers of the houses adjoining, and, upon their default, direct a surveyor to perform the works and apportion the expenses, although the resolutions of the committee are not approved by writing under the seal of the board and the hands of five of its members, and although not any of the resolutions and notices of the board are so authenticated, as the committee did not act, but merely advised proceedings, and the acts of the board themselves in passing resolutions and giving notices do not require to be authenticated by the seal and signatures. *Barnsley Local Board* v. *Sedgwick*, 36 L. J., M. C. 65; L. R. 2 Q. B. 185; 15 L. T. 569; 15 W. R. 514.

### d. Adoption of Local Boards.

#### i. *By what Places.*

**Place with known or defined Boundary.**]—By the Local Government Act, 1858 (21 & 22 Vict. c. 98), the act may be adopted in corporate

boroughs and places under the jurisdiction of a board of competent commissioners, and in all other places having a known or defined boundary, by a resolution of the owners and ratepayers, subject to appeal to the local government board:—Held, that interpreting the words "place having a known or defined boundary" in the statute, the word "place" is to be received with the widest possible signification, and is not restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships, or parishes, and may, therefore, consist of portions of different townships or parishes, and a place so composed has a "known or defined boundary," which has a physical, visible, and notorious boundary, so that there can be no mistake as to its limits. *Reg.* v. *Local Government Board, Taylor, Ex parte*, 42 L. J., Q. B. 131; L. R. 8 Q. B. 227; 21 W. R. 445.

Therefore, where the township of Grasmere contained certain small detached portions of the neighbouring townships of Rydal and Loughrigg, wholly surrounded by portions of the township of Grasmere, and included within the boundary of that township, the district so composed was held to be a place having a known or defined boundary within the statute, and an order of the local government board made under s. 17 of that act, and 34 & 35 Vict. c. 70, s. 2, for the adoption of the first-mentioned act by such district, was valid. *Ib.*

—— **Part of Parish outside a Borough.**]—When a borough is not co-extensive with a parish, the portion of the parish without the borough is not a place having a known or defined boundary within 21 & 22 Vict. c. 98, s. 13. *Reg.* v. *Hardy*, 9 B. & S. 926; 38 L. J., Q. B. 9; L. R. 4 Q. B. 117; 19 L. T. 352; 17 W. R. 173.

—— **District for Spiritual Purposes.**]—A district for spiritual purposes, formed under 6 & 7 Vict. c. 37, s. 9, is entitled, by resolution of its owners and ratepayers (without reference to the proceedings of townships out of which it is formed), to adopt the Local Government Act, 1858, as being a place with a "known or definite boundary" according to the provisions of the act. *Reg.* v. *Northowram and Clayton*, 7 B. & S. 110; 35 L. J., Q. B. 90.

**Seashore Boundary.**]—By 18 & 19 Vict. c. 121, s. 6, extra-parochial places, having a population of less than 200 persons, shall, for the purpose of the act, be attached to and form part of the adjacent place, having the largest common boundary with the extra-parochial place; and notice of vestry meetings for the election of a local authority, under and for the purposes of the act, shall be given in such extra-parochial places, and the householders within such places may attend such vestry meetings and vote on such elections:—Held, that, where the seashore forms the boundary of a parish, the portion of the shore below the high-water mark of medium tides is an extra-parochial place within this enactment. *Reg.* v. *Gee*, 1 El. & El. 1068; 28 L. J., Q. B. 298; 5 Jur. (N.S.) 1348; 7 W. R. 528.

**Settlement of Boundaries by Home Secretary.**]—A district not having any ascertained or defined boundary, and a portion of a parish, obtained from the secretary of state for the home department an order under 21 & 22 Vict. c. 98, s. 16, settling its boundaries for the purposes of that act, and subsequently adopted the act within the district. Afterwards the parish adopted the act. The court refused a mandamus to the secretary of state to publish the notice of the adoption of the act by the district, under s. 19, holding that s. 14 applied to places the boundaries of which were settled by an order of the secretary of state, and therefore that the district could not adopt the act unless the parish had refused to do so. *Matlock Bath District, In re*, 2 B. & S. 453; 31 L. J., Q. B. 177; 6 L. T. 243; 10 W. R. 537.

—— **Appeal to Home Secretary—Finality.**]—The ratepayers of a district petitioned the secretary of state to settle the boundaries with a view to the adoption of the act. An order was made setting out the boundaries, and a resolution was duly carried for the adoption of the act. An appeal was presented to the secretary of state by a ratepayer, on the ground that the boundaries, as set out, comprised land not included within the limits from which the petition proceeded. After inquiry into the circumstances, the secretary of state dismissed the petition, and ordered that the act should, after the expiration of one month from the date of the order, have the force of law within the district:—Held, that the court would not, after all this had been done, issue a certiorari to bring up the order for settling the boundaries of the district. *Todmorden District, In re*, 30 L. J., Q. B. 305; 4 L. T. 509. *S. C.*, nom. *Smith, Ex parte*, 1 B. & S. 412.

ii. *How Decided.*

**Meeting of Ratepayers—Declaration of Chairman.**]—When a meeting of ratepayers and owners of a place having a known and defined boundary is called for the purpose of adopting the provisions of the act, the chairman is the person to take the sense of such meeting, unless a poll is demanded. But if a poll is demanded, the functions of the chairman will thereupon cease, and such poll should be taken, and all things connected therewith carried out by the summoning officer. *Littleborough Local Board, Ex parte*, 22 L. T. 437.

—— **Appeal to Home Secretary.**]—The 21 & 22 Vict. c. 98, s. 18, empowers any ratepayer who disputes the validity of a vote for the adoption of the act, to appeal to a secretary of state, who may, after inquiry, issue such order thereon as he may deem requisite to determine the questions arising on such appeal, and as to the validity or invalidity of such vote. By s. 81, all orders made by a secretary of state in pursuance of the act shall be binding and conclusive, in respect of the matters to which they refer:—Held, that an order issued by the secretary of state upon an appeal to him by ratepayers, whereby he determined the validity of the vote appealed against, was binding and conclusive, by reason of s. 81, although it was doubtful, on the face of the order, whether his ratio decidendi was good. And therefore the court refused to issue a mandamus to the summoning officer of the district in which the vote had been taken, to summon a meeting of the ratepayers, and ascertain by a poll whether the act should be adopted. *Bird, Ex parte*, 1 El. & El. 931; 28 L. J., Q. B. 223; 5 Jur. (N.S.) 1009; 7 W. R. 476.

**Order in Council.**]—Upon the petition of the requisite number of inhabitants of a parish,

consisting of a township and three hamlets, the general board of health sent an inspector to inquire into and report, under 11 & 12 Vict. c. 63, s. 9, as to the application of the act to the parish. The inspector inquired as to the parish, and recommended the application of the act to the township; and public notice to that effect was appended to the report. The general board reported that the act should be applied to the parish, within its existing boundaries; and, by an order in council thereon, the act was ordered to be applied to and put in force within the entire parish:—Held, that the order was valid. *Barber* v. *Jessop*, 1 H. & N. 578; 26 L. J., Ex. 186; 5 W. R. 366.

### 3. Parish Council.

**Qualification of Electors—Statute.**]—60 Vict. c. 1, *amends the law as to qualifications for elections and as to the annual assembly of the parish meeting.*

—— **Freemen on the Parliamentary Register.**]—Freemen having no qualification to be on the parliamentary register of a borough other than as freemen are not entitled to be placed upon the lists of parochial electors authorised by the Local Government Act, 1894, whether resident or nonresident within the borough, nor is it the duty of the revising barrister or of the town-clerk of the borough under the provisions of the Registration Act, 1843, to allocate the freemen to particular parish lists formed under that or subsequent acts. *Hart* v. *Beard*, 65 L. J., Q. B. 157; [1896] 1 Q. B. 54; 73 L. T. 535; 44 W. R. 154; 1 Smith, 9.

—— **Married Woman—Ownership Qualification.**]—A married woman is not entitled, by reason of ownership of property within a parish, to have her name put upon the list of parochial electors. *Drax* v. *Ffooks*, 65 L. J., Q. B. 270; [1896] 1 Q. B. 238; 74 L. T. 43; 44 W. R. 393; 1 Smith, 40; 60 J. P. 214—C. A.

**Disqualification of Candidate—Partnership's Arrangement with Creditors.**]—A person who within five years before an election of parish councillors has been a member of a firm which has executed and registered under the Deeds of Arrangement Act, 1887, a deed of arrangement for the benefit of its creditors, is disqualified for election to the office of parish councillor. *Ward* v *Radford*, 59 J. P. 632.

**Irregular Demand of Poll—Defeat of Candidate elected at Meeting—Mode of questioning Result.**]—The mode of questioning the validity of a parish council election is by petition under the provisions of the Municipal Corporations Act, 1882, incorporated in the Local Government Act, 1894; or by an application to the county council under s. 48, sub-s. 5, and s. 80 of the Local Government Act, 1894. A mandamus will not be granted, at the instance of a candidate elected at a parish meeting, and whose return has been certified by the chairman, but who was not returned at a poll afterwards held, to the chairman to compel him to convene a meeting, to permit such candidate to make and sign the declaration of office, on the ground that the demand for the poll was wrongly made. Quære per Wright, J., whether an application to the county council can be made except in the case of the first parish election. *Reg.* v. *Miles, Cole, Ex parte*, 64 L. J., Q. B. 420; 15 R. 446; 72 L. T. 502; 43 W. R. 445; 59 J. P. 407.

**Vestry.**]—*See* Metropolis *and* Ecclesiastical Law.

### 4. Standing Joint Committee.

**Buildings for Quarter and Petty Sessions—Police Stations—Maintenance.**]—As between the county council on the one hand, and the standing joint committee of quarter sessions and county council on the other, the latter body has exclusive control of buildings and premises, within the purview of s. 30, sub-s. 3, of the Local Government Act, 1888, for the accommodation of quarter sessions, or justices out of session, or for the use of the police or clerks to justices. All questions as to the maintenance, repair, alterations, or improvement of such buildings and premises are to be determined by the standing joint committee. The county council has no power to place its veto upon the requirements of the standing joint committee made under s. 30. It is the duty of the county council to raise and pay such sums as the standing joint committee shall in their discretion deem it necessary to expend in and about such buildings and premises. *Somerset County Council, Ex parte*, 58 L. J., Q. B. 513; 61 L. T. 512; 54 J. P. 182.

**Constitution of Police Districts.**]—The powers conferred upon the justices in quarter sessions by ss. 3 and 27 of the Police Act, 1840, with respect to the determination of police districts, are vested by the Local Government Act, 1888, in the standing joint committee of the quarter sessions and county council. *Leicestershire County Council, Ex parte*, 60 L. J., M. C. 45; [1891] 1 Q. B. 53; 64 L. T. 25; 39 W. R. 160; 17 Cox, C. C. 205; 55 J. P. 87.

### 5. Determination of Differences.

**Statute.**]—59 Vict. c. 9, *is the Local Government (Determination of Differences) Act*, 1896.

**Arbitration of Local Government Board—Maintenance of Main Road—Dispute between County Council and Urban Authority—Contribution.**]—Where differences under the Local Government Act, 1888, are to be determined by the arbitration of the local government board, the mode of determining them is provided by s. 63, and not by s. 87, which is confined to cases of difference determinable by the local government board otherwise than by arbitration. Where differences are to be determined by arbitration of the local government board, the board are arbitrators within the meaning of the Arbitration Act, 1889, and a special case may be ordered to be stated under s. 19 of that act. *Kent County Council and Sandgate Local Board, In re*, 64 L. J., Q. B. 502; [1895] 2 Q. B. 43; 15 R. 452; 72 L. T. 725; 43 W. R. 601; 59 J. P. 456.

—— **Differences between District Councils.**]—In the case of differences between district councils, a provision in the order or scheme under s. 57 of the Local Government Act, 1888, that such differences may be adjusted by the county council, is not another mode of adjustment within s. 62, sub-s. 2, of that act. The mode of adjustment contemplated in s. 59, sub-s. 4,

is adjustment by the order or scheme itself. *Sowerby Urban Council and Mytholmroyd Urban Council, In re*, 74 L. T. 313.

## II. CONTRACTS BY AND WITH AUTHORITIES.

### 1. VALIDITY.

**General Principle.**]—A municipal corporation which is constituted a local board of health under 11 & 12 Vict. c. 63, may be sued on a contract entered into by them under their common seal, according to the provisions of that act. *Nowell* v. *Worcester Corporation*, 9 Ex. 457; 2 C. L. R. 981; 23 L. J., Ex. 139; 18 Jur. 64.

A local board of health is liable on contracts entered into by them, though the provisoes in s. 85 have not been complied with, those provisoes being only directory and not conditions precedent to the right to contract with third parties. *Ib.*

**Contracts under Seal—Value more than £10.**]—By 11 & 12 Vict. c. 63, s. 85, it is enacted, that "the local board of health may enter into all such contracts as may be necessary for carrying the act into execution; and every such contract whereof the value or amount shall exceed 10*l.*, shall be in writing, and sealed with the seal of the local board":—Held, that a contract which did not comply with this condition is not capable of being enforced. *Frend* v. *Dennett*, 4 C. B. (N.S.) 576; 27 L. J., C. P. 314; 4 Jur. (N.S.) 897.

—— **Exceeding £50.**]—By s. 174 of 38 & 39 Vict. c. 55, every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority. The defendants, an urban authority, verbally directed their surveyor to employ the plaintiff to prepare plans for offices. The plans were prepared by the plaintiff, and the defendants advertised for tenders for building the offices in accordance therewith, but when these were sent in, it was found that the plaintiff's plans were upon too expensive a scale, and the intended offices were not erected. There was no ratification under seal of the act of the plaintiff's surveyor in procuring the plans. At the trial the jury found that offices were necessary for the purposes of the defendants, and the plaintiff's plans were necessary for the erection of the buildings for which they were designed, and that the cost of the plans was 94*l.*:—Held, that, assuming the contract was founded on an executed consideration, the plaintiff could not recover, for s. 174 was imperative, and not directory, and applied to every contract for a sum exceeding 50*l.* entered into by an urban authority. Semble, that, as the plaintiff's plans did not enable the defendants to erect the offices required by them, they had not derived such a benefit as would entitle the plaintiff to sue upon an executed consideration. *Hunt* v. *Wimbledon Local Board*, 48 L. J., C. P. 207; 4 C. P. D. 48; 40 L. T. 115; 27 W. R. 123—C. A.

Sect. 174 of the Public Health Act, 1875, which directs a contract made by an urban authority to be under their common seal, if "the value or amount exceeds 50*l.*," applies only to a contract, the parties to which at the time of entering into it contemplate that it shall exceed that sum. *Eaton* v. *Basker*, 50 L. J., Q. B. 444; 7 Q. B. D. 529; 44 L. T. 703; 29 W. R. 597; 45 J. P. 616—C. A.

Scarlet fever having broken out, an urban sanitary authority appointed a committee under s. 200 of the Public Health Act, 1875. A medical man agreed verbally with the committee on behalf of the urban sanitary authority, to attend the patients at the rate of 5*s.* 3*d.* per cent. per day, and attended until the amount due was nearly 100*l.*:—Held (affirming the judgment of Stephen, J.), that the committee-men were not liable to pay the medical man. But held (reversing the judgment of Stephen, J.), that, although more than 50*l.* became due, it was not a contract "whereof the value or amount exceeds 50*l.*" within the meaning of the Public Health Act, 1875, s. 174, because, at the time of entering into it, the parties had not ascertained that it would exceed 50*l.*, and that the urban sanitary authority were liable to the medical man. *Hunt* v. *Wimbledon Local Board* (4 C. P. D. 48) distinguished. *Ib.*

—— **Executed and Executory Contracts.**]—The 174th section of the Public Health Act, 1875, which imperatively requires that every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, must be in writing and sealed with the common seal of such authority, applies not only to an executory but also to an executed contract, although made by an agent duly appointed under seal. The defendants, being an urban sanitary authority, by contract under seal duly employed P. to construct waterworks. One of the terms of such contract was, that if P. should make default the defendants' engineer might employ persons to finish it, and charge P. with the expense. P. made default, and the defendants' engineer, who had been appointed under seal, by contract in writing employed the plaintiffs not only to finish P.'s contract, but to execute certain additional works not specified therein. The plaintiffs executed such works, and the defendants had the benefit of them. The defendants, acting throughout as an urban sanitary authority, approved the contract of their engineer with the plaintiffs, but none of the provisions of the 174th section of the Public Health Act, 1875, were complied with in relation to such contract:—Held, that such contract was not binding on the defendants. *Young* v. *Leamington Corporation*, 51 L. J., Q. B. 292; 8 Q. B. D. 579; 46 L. T. 555; 30 W. R. 500; 46 J. P. 516—C. A. Affirmed, 52 L. J., Q. B. 713; 8 App. Cas. 517; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660—H. L. (E.)

—— **Agreement to Compromise.**]—An agreement between a local board and a person, against whom an action to restrain his interference with a public highway had been commenced by the local board, that the action should be settled by his paying the costs of the board (which exceeded 50*l.*), and undertaking not to build on the unbuilt land, the board agreeing not to proceed further as to pulling down the obstruction, is not a contract within the Public Health Act, 1875, necessary for carrying the act into execution (s. 173) so as to require to be sealed with the common seal of the local board under s. 174; and therefore such agreement, though not under seal, is capable of being enforced by the board. *Att.-Gen.* v. *Gaskill*,

52 L. J., Ch. 163 ; 22 Ch. D. 537 ; 47 L. T. 566 ; 31 W. R. 135.

—— **Alterations.**]—Where an urban authority enters into a contract in writing sealed with the common seal of such authority, pursuant to ss. 173 and 174 of the Public Health Act, 1875, with a contractor for the construction by him, e.g. of sewerage works, and the contract contains the usual power for the engineer, who has the control and supervision of the works, to vary, alter, enlarge or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority. An agreement between an urban authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the urban authority, is not a contract within s. 173 of the Public Health Act, 1875, necessary for carrying that act into execution, so as to require to be sealed with the common seal of the urban authority under s. 174 ; and therefore such agreement, though not under seal, is capable of being enforced against the urban authority. *Williams* v. *Barmouth Urban Council*, 77 L. T. 383—C. A.

—— **Petition is not a Deed.**]—A petition was presented by the plaintiffs and defendants to the Local Government Board, stating an agreement whereby the plaintiffs were to transfer to the defendants certain land forming part of the plaintiffs' district, on condition that the defendants should adopt a certain road and dedicate it as a public highway. The agreement referred to was not under seal, but the petition was sealed with the common seals of the plaintiffs and defendants. The cost of completing the road was estimated at over 50*l*. On action for specific performance of the agreement :—Held, that under s. 174 of the Public Health Act the agreement must be under seal, and that the petition, though under seal, was not a deed, and therefore was not a contract under seal within the section : —Held, further, that if the deed were valid, the local authority had no power to enter into an agreement for the dedication of a road or street as a highway. *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board*, 60 L. T. 172.

—— **Confirmation under Seal before Completion.**]—It is competent for an urban authority, honestly and for the advantage of their district, to confirm under their seal a previous contract not under seal for an amount exceeding 50*l*. before such contract is completely executed, so as to render the contract valid within s. 174 of the Public Health Act, 1875. *Melliss* v. *Shirley Local Board*, 54 L. J., Q. B. 408 ; 14 Q. B. D. 911 ; 52 L. T. 544. See *S. C.*, in C. A., infra, col. 374.

—— **Amount uncertain at Time of Contract.**]—A contract not under seal, made by an urban authority, whereof the value or amount in fact exceeds 50*l*., is invalid by reason of s. 174 of the Public Health Act, 1875, notwithstanding that at the time of entering into the contract it was uncertain what would be the value or amount of the contract when executed. *Eaton* v. *Basher* (7 Q .B. D. 529) distinguished. *Ib.*

**Contract over £50—Absence of Pecuniary Penalty—Validity.**]—The provision in sub-s. 2 of s. 174 of the Public Health Act, 1875, that every contract made by an urban authority whereof the value or amount exceeds 50*l*., "shall specify some pecuniary penalty to be fixed in case the terms of the contract are not duly performed," is obligatory, and not merely directory ; and if such penalty is not specified, an action on the contract against an urban authority cannot be maintained. *British Insulated Wire Co.* v. *Prescot Urban District Council*, 64 L. J., Q. B. 811 ; [1895] 2 Q. B. 463 ; 15 R. 633 ; 73 L. T. 383 ; 44 W. R. 224 ; 59 J. P. 552. Affirmed, 65 L. J., Q. B. 190 ; [1895] 2 Q. B. 538 ; 15 R. 636, n.—C. A.

**Binding Successors—Improvident Bargain—Change of Circumstances.**]—Under the Public Health Act, 1848, s. 48, the owner of land adjoining a district by deed agreed with the local board to do certain works and pay 10*l*. a year, and the board gave him leave to drain through their drain all sewage from the property and houses then belonging to the landowner, and from any houses thereafter to be erected on the property. Many more houses were afterwards erected, and the urban sanitary authority (which had succeeded the local board) were, under a new act of parliament, prevented from passing as before the sewage through the drain into the Thames :—Held, that the deed was not ultra vires, and that the board could bind their successors as to the sewage of houses not then in existence. *New Windsor Corporation* v. *Stovell*, 54 L. J., Ch. 113 ; 27 Ch. D. 665 ; 51 L. T. 626 ; 33 W. R. 223.

Held, that though the board were trustees for the ratepayers, they had exercised their discretion, and the agreement did not appear at the time improvident, and its turning out badly for them did not affect it :—Held, also, that the law being altered so as to prevent the discharge of sewage into the Thames was no ground for setting aside the deed. *Ib.*

**Binding upon Rates.**]—A board of health has no power to enter into a contract which can bind the rates of the particular district, unless such contract is made, and the engagements therein contained entered into, in the mode prescribed by the 11 & 12 Vict. c. 63. *Frend* v. *Dennett*, 5 L. T. 73.

A court of equity has jurisdiction to adjudicate upon the validity of such contract. *Ib.*

**Inconsistent with Act of Parliament.**]—By an agreement between the N. local board and the C. local board, it was agreed that the N. board should make a sewer and allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. board to pass into their sewers so as to discharge into the sewer to be made by the N. board. Under acts of parliament then in existence, the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an act subsequently passed similar powers were given :—Held, that the provisions of the agreement were overruled by the subsequent act, and that the N. board could not restrain the C. board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the N. district :—Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the

C. district had similar powers. *Newington Local Board* v. *Cottingham Local Board*, 48 L. J., Ch. 226; 12 Ch. D. 725; 40 L. T. 58.

**To pay Employés—Extra Work.**]—On a contract by a board of health to employ an engineer about works, and pay him 500*l.* during two years, he undertaking to do his best in order to complete the works within that period:—Held, that the board was not liable for refusing to allow him to carry on the works beyond that time, although the delay was caused by their fault or default, they paying him the whole 500*l.*; nor were they liable for any extra work not contracted for by deed. *Rutledge* v. *Farnham Local Board*, 2 F. & F. 406.

—— **Salary Unprovided for.**]—A local act for regulating the markets in a town, created trustees for carrying out its objects, vested property in them, and gave them power to levy tolls and rates, and to borrow money on mortgage of such tolls and rates. It was provided, that out of the first moneys received, the trustees should, in the first place, pay the costs and expenses of passing the act, and apply the remainder, at the discretion of the trustees, in payment of the rents and fines, and in the purchases and other expenditure pointed out by the act, including the payment of the salary to the organist of the church, and the several principal sums of money and interest borrowed on mortgage:—Held, in an action on the case, by the organist of the church, against the local board of health, for a breach of duty in simply refusing to pay his salary, that he and the board stood in the relation to each other of trustee and cestui que trust; and as the board had not, in the exercise of its discretion, specifically appropriated an amount as payable to the organist, no action could be maintained against the board for the recovery of the salary, the remedy being in equity. *Edwards* v. *Lowndes*, 1 El. & Bl. 81; 22 L. J., Q. B. 104; 17 Jur. 412.

**Indemnity to Contractor.**]—A local board of health for a non-corporate district gave notice to the owners of the premises fronting, adjoining, or abutting on certain streets, requiring them to sewer, level, pave, flag, and channel the same, which notices not being complied with within the specified time, the board entered into contracts with a third person for their performance; which contained provisions that the contractor was to be paid for the work when the money was collected from the owners of the adjacent properties: the work was done accordingly, but the owners having refused payment, justices before whom they were summoned for non-payment dismissed the summonses:—Held, that the contractor was entitled to sue the board of health for the work done by him under the contracts. *Worthington* v. *Sudlow*, 2 B. & S. 508; 31 L. J., Q. B. 131; 8 Jur. (N.S.) 668; 6 L. T. 283; 10 W. R. 621.

**Illegality—Contract by Officer or Servant.**]—Sect. 193 of the Public Health Act, 1875, provides that officers or servants employed by a local authority shall not in anywise be concerned or interested in any contract with such authority for any of the purposes of the act, and that, if any such officer or servant is so concerned or interested, he shall be incapable of afterwards holding or continuing in any office or employment under the act, and shall forfeit the sum of 50*l.*:—Held, that the effect of this section is to render such a contract illegal, and to prevent an officer or servant of a local authority from suing on the contract. *Melliss* v. *Shirley Local Board*, 55 L. J., Q. B. 143; 16 Q. B. D. 446; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214—C. A.

Semble, that if, after the making of a contract with a local authority, an officer of the authority became interested in it, s. 193 would not avoid the contract. *Ib.*

**Party to Sue.**]—A contract was entered into with the defendant by five persons named, who were members of a local board of health, for works to be done by the defendant. The five covenanted for themselves, their heirs, executors, and administrators, but the contract professed to be entered into by them for and on behalf of the local board:—Held, that the clerk to the local board was the proper person to sue for a breach of this contract by virtue of 11 & 12 Vict. c. 63, s. 138. *Cobham* v. *Holcombe*, 8 C. B. (N.S.) 815.

**Conveyance—Exemption from Stamp Duty.**]—The City of Bath Act, 1851, constituting the corporation of Bath the local board of health for the city, incorporates portions of the Public Health Act, 1848, but expressly excepts s. 151, which exempts from stamp duty, deeds, &c., executed by local boards for the purpose of that act. The Bath Act declares that the act shall be subject to the provisions of any subsequent act for amending the Public Health Act, 1848. The Local Government Act, 1858, is to be construed with and form part of the Public Health Act, 1848, and to take effect where the act of 1848 was already in force wholly or partially; and local boards formed under the later act are to have all the rights and liabilities of boards under the act of 1848. A subsequent act of 1861 provides that the act of 1858 shall extend to local boards constituted under local acts as well as under the general act of 1858, with this qualification, that provisions of the general act opposed to or restrictive of the provision of any local act, shall be of no force in the district for which the local act was passed:—Held, that a deed by which (in pursuance of the powers in the act of 1858) land was conveyed to the corporation of Bath "acting as the local board, and requiring the land thereby conveyed for a street improvement within their district," was exempt from stamp duty by virtue of the Public Health Act, 1848, s. 151, notwithstanding the express exception of that section from the Bath Local Act of 1851. *Bath Corporation* v. *Inland Revenue Commissioners*, 40 L. J., Ex. 181; 20 W. R. 80.

**Contract by Third Parties for Benefit of Parish.**]—A. agrees in writing with B. and C. to pave the streets in the parish of D.; B. and C., on behalf of themselves and the rest of the parish, agree to pay A. The agreement is lodged in the hands of B. A. shall have his remedy against B. and C., and they must resort to the rest of the parish. *Meriel* v. *Wymondsall*, Hard. 205.

2. LIABILITY OF OFFICERS FOR PENALTIES.

*See* 48 & 49 Vict. c. 53.

**"Interested in Bargain or Contract"—Demise to Board—"Allowance."**]—A demise of rooms is a "bargain or contract" within the meaning of

s. 193 of the Public Health Act, 1875, and if an officer, employed by a local board constituted under that statute, lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the transaction of its business, he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an "allowance" to the officer in addition to his salary within the meaning of ss. 189, 193, it being unconnected with the performance of any services in the course of his employment under the board. *Burgess* v. *Clark*, 14 Q. B. D. 735; 33 W. R. 269; 49 J. P. 388—C. A.

—— **Shareholder in Company — Contract between Company and Local Board.**]—An officer of a local board, who is a shareholder in a company, having a contract with the board, is, so long as the contract exists, "interested in a bargain or contract" with the board within the meaning of the Public Health Act, 1875, s. 193, and if the contract is capable of producing any profit to the shareholders of the company, he is liable to the penalty imposed by that enactment. *Todd* v. *Robinson*, 54 L. J., Q. B. 47; 14 Q. B. D. 739; 52 L. T. 120; 49 J. P. 278—C. A.

—— **Percentage payable by Contractor.**]—By the terms of contracts entered into with a local authority for the purpose of the Public Health Act, 1875, the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts he should certify to be due to such contractors respectively by the local authority:—Held, that in respect of each contract the surveyor was liable to a penalty as having been "concerned or interested" therein within the meaning of s. 193 of the Public Health Act, 1875. *Whiteley* v. *Barley*, 57 L. J., Q. B. 643; 21 Q. B. D. 154; 60 L. T. 86; 36 W. R. 823; 52 J. P. 595—C. A.

—— **Allowance in Addition to Salary.**]—A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—Held, that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875. *Ib.* See *Burgess* v. *Clark*, supra.

Semble, that the word "allowances" in s. 193 of the Public Health Act, 1875, includes extra payments for extra work, and is not limited to allowances in respect of lodgings, coals, gas, and other like matters. *Edwards* v. *Salmon*, 58 L. J., Q. B. 571; 23 Q. B. D. 531; 38 W. R. 166; 54 J. P. 180—C. A.

Semble, the word "allowance" in s. 189 of the Public Health Act, 1875, does not include an allowance of money. *Reg.* v. *Ramsgate Corporation*, infra.

**Acceptance of Fee under Colour of Office.**]—The council of a borough, being also the local sanitary authority under the Public Health Act, 1875, appointed the defendant, a solicitor and the town clerk of the borough, to be clerk to the sanitary authority; and by a resolution of the council the defendant's salary was fixed at a certain sum "to include all legal charges except for contentious business matters, travelling expenses and payments out of pocket. Subsequently the council, as local sanitary authority, promoted a sewage scheme, which had not been contemplated when the defendant's salary was fixed, and in connection with this scheme the defendant did work, partly in respect of contentious and partly in respect of non-contentious matters. On the completion of the sewage works the council passed a resolution that the defendant be paid a sum of money for his services in connection with the scheme; and the money was duly paid to and received by him:—Held, that the facts did not show an acceptance by the defendant under colour of his office or employment of a fee or reward other than his proper salary, wages, and allowances within the meaning of s. 193 of the Public Health Act, 1875, and that he was not liable to the penalty imposed by the section. *Edwards* v. *Salmon*, 58 L. J., Q. B. 571; 23 Q. B. D. 531; 38 W. R. 166; 54 J. P. 180.

**Resolution for Payment of Commission — Disallowance of—Certiorari.**]—A local authority employed one of their officers, apart from his ordinary duties, to superintend the execution of certain works on their behalf, upon the terms that he should be paid for his services by a commission upon the contract price of such works, whereby he became "interested" in the contract for the works contrary to the provisions of s. 193 of the Public Health Act, 1875. The officer duly superintended the execution of the works, and the local authority passed resolutions for the payment of, and paid him, the amount of the stipulated commission. On application for a certiorari to bring up such resolutions for the purpose of quashing them, it was admitted by the defendants that the payment was invalid, but it was contended that a fixed sum equal to the amount of the commission might have been lawfully paid to the officer as an "allowance" under s. 189 of the Public Health Act, 1875:—Held, that the payment being illegal, the application must be granted. *Reg.* v. *Ramsgate Corporation*, 58 L. J., Q. B. 352; 23 Q. B. D. 66; 61 L. T. 333; 37 W. R. 781; 53 J. P. 740.

### 3. Liability of Contractor for Negligence.

A contractor employed by a local board to execute a work on a highway is not relieved by s. 140 of the Public Health Act, 1848, from liability for negligence in the execution of the work whereby a third party suffers damage. *Arthy* v. *Coleman*, 6 W. R. 34.

## III. JURISDICTION.

### 1. Streets and Roads.

#### a. What are.

**Street.**]—The word "street" in the Towns Police Clauses Act, 1847, and the Public Health Act, 1848, means a place to which the public have a right of access, and does not include a spot from which the public may be shut out by the owner of the soil. *Curtis* v. *Embrey*, 42 L. J., M. C. 39; L. R. 7 Ex. 369; 21 W. R. 143.

A piece of ground dedicated by user to the public as a road is not a "street, not being a highway" within the Public Health Act, 1848,

s. 69. *Healey* v. *Batley Corporation*, 44 L. J., Ch. 642 ; L. R. 19 Eq. 375.

Sect. 150 of the Public Health Act, 1875, applies only to streets which are, in the ordinary and proper sense of the word, "streets" ; and the word "street" in that section does not necessarily include every meaning given to it by s. 4 of the act. *Reg.* v. *Burnup*, 50 J. P. 598.

The meaning of "street" in s. 150 of the Public Health Act, 1875, includes such of the terms set out in the interpretation clause (s. 4) as are not inconsistent with the context or subject-matter of that section ; and such extended meaning, if so applicable, must be read into the word "street" throughout the section without regard to the particular work to be done under it. *Jowett* v. *Idle Local Board*, 36 W. R. 530—C. A. Affirming, 57 L. T. 928.

—— **Private Road.**]—A private road is a "street" within the meaning of ss. 16 and 54 of the Public Health Act, 1875. *Hill* v. *Wallasey Local Board*, 63 L. J., Ch. 1 ; 7 R. 51 ; 42 W. R. 81—C. A.

A private road may be a street within the meaning of s. 150 of the Public Health Act, 1875. *Midland Ry.* v. *Watton*, 55 L. J., M. C. 99 ; 17 Q. B. D. 30 ; 54 L. T. 482 ; 34 W. R. 524 ; 50 J. P. 405—C. A.

—— **Line of Buildings.**]—Under the Towns Improvement Clauses Act, 1847, s. 66, the commissioners may allow, upon such terms as they think fit, any building within the limits of the special act to be set forward, for improving the line of the street in which such building or any building adjacent thereto is situated. "Street" is here used in its proper acceptation of a line of buildings, and does not include a highway generally. The commissioners have no power under this section to divert a highway by widening it, and closing a longitudinal part of the old highway ; to do this they must apply to the magistrates under the Highway Acts. *Reg.* v. *Platts*, 49 L. J., Q. B. 848 ; 43 L. T. 159 ; 28 W. R. 915 ; 44 J. P. 765.

—— **Finding of Fact by Justices.**]—By s. 4 of the Public Health Act, 1875, "in this act, if not inconsistent with the context, the following words and expressions have the meaning hereinafter respectively assigned to them," and (amongst other definitions) "street includes any road," &c. By s. 150, "where any street within any urban district (not being a highway repairable by the inhabitants at large)" is not sewered, paved, and channelled to the satisfaction of the urban authority they may give notice to the owners of the adjoining premises to sewer, &c., the street, and on failure to comply with the notice the urban authority may execute the works themselves, and recover the expense of so doing from the adjoining owners in a summary manner. Summary proceedings having been taken by an urban authority to recover under s. 153, the expense of sewering, &c., a road within the district which was not a highway repairable by the inhabitants at large :—Held, that it was a question of fact for the justices to determine whether or not the road was a street within s. 150, and that they were not bound to find as matter of law that it was a street by the terms of the definition in s. 4. *Maude* v. *Baildon Local Board*, 10 Q. B. D. 394 ; 48 L. T. 874 ; 47 J. P. 644.

In summary proceedings to recover expenses under s. 150, it is for the justices, having regard to the surrounding circumstances, and to whether there is any intention of building along a road so as to convert it into a street, to find as a fact whether the road in question is a street in the ordinary and popular sense of the word ; and it makes no difference that the section has been applied or may apply to a portion of the road other than that in question. Where the justices find a road or a portion of a road is not a street in the ordinary and popular sense, they will be right in holding that the section is not applicable to the road or portion of a road. *Reg.* v. *Burnup*, 50 J. P. 598.

—— **Question of Law—Direction to Jury.**]—The question whether the place in dispute comes within the interpretation clause is one of law for the judge at the trial, and the question which may properly be left to the jury is whether the said place is "a street in the popular acceptation of the term." *Jowett* v. *Idle Local Board*, 36 W. R. 530—C. A. Affirming, 57 L. T. 928.

—— **Includes Houses.**]—The word "streets" in the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 32, means, not only the roadway, but the houses and the ground on which they are built, on each side of the roadway. *Baker* v. *Portsmouth Corporation*, 3 Ex. D. 4 ; 37 L. T. 381 ; 25 W. R. 677. Affirmed, 47 L. J., Ex. 223 ; 3 Ex. D. 157 ; 37 L. T. 822 ; 26 W. R. 303—C. A.

Street may include as well the houses abutting upon or fronting a public thoroughfare, as the actual roadway or footways. Yet the strict and primâ facie meaning of the word is confined to the roadway and footways. *L. C. & D. Ry.* v. *London Corporation*, 19 L. T. 250.

—— **Strip of Land added to Highway repairable by Inhabitants at large.**]—Owners of land adjoining a highway repairable by the inhabitants at large, erected houses on their land, and threw open to the highway a strip of land in front of them :—Held, that the houses with the strip of land in front, together formed a "street" within the meaning of s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which the urban sanitary authority within whose district it was situate could compel the frontagers to pave, channel, and kerb under the provisions of that section. *Richards* v. *Kessick*, 57 L. J., M. C. 48 ; 59 L. T. 318 ; 52 J. P. 756.

—— **Estate laid out for Building—Roads.**]—By a local act commissioners were created having duties with regard to streets and buildings within a certain area. In 1878 it was proposed to lay out an estate within such area for building, and plans were submitted to and approved by the commissioners. By an agreement between them and the defendant, the defendant was, on completion of the roads in question, to throw eighteen feet of his land into the said roads (which was done), but not to make the roads. In 1887 the powers of the commissioners passed to the council on incorporation. In 1892 the council by an order required the defendant to sewer, drain, level, flag, and metal the said roads so far as his premises fronted, adjoined, or abutted thereon. The order not having been complied with, the council did the work them-

selves, and on making request for payment the defendant's agent disputed that the property was liable. On a summons taken out by the council to have the sums expended declared a charge on the property:—Held, first, that the said roads were streets as to which the council had power to make the said order; secondly, that they were public streets as well as streets within the ordinary meaning of the term; thirdly, that entry upon lands in obedience to the said order could not constitute a trespass; fourthly, following *Folkestone Corporation* v. *Brooks* (62 L. J., Ch. 863; [1893] 3 Ch. 22), that the dispute not being as to the amount of apportionment, but whether the defendant was liable at all, the plaintiffs were not compelled to go to arbitration, and therefore were not disentitled to sue; fifthly, that the said agreement did not constitute a defence to the action; and, sixthly, that accordingly the plaintiffs must succeed, but, following *Walthamstow Local Board* v. *Staines* (60 L. J., Ch. 738; [1891] 2 Ch. 606), decided on s. 278 of the Public Health Act, 1875, which was substantially in the same words, that having regard to s. 349 of the local act it appeared to be a case where a memorial to the secretary of state for relief would lie. *West Hartlepool Corporation* v. *Robinson*, 75 L. T. 677; 45 W. R. 312; 61 J. P. 200. Affirmed, 77 L. T. 387—C. A.

—— **Highway repairable by Inhabitants at large.**]—To an action by commissioners acting under a local improvement act against the owners, &c., of buildings to recover the expenses incurred in paving, flagging, soughing, cleansing, and completing a certain street, the defendant pleaded that the said street was a public street and common highway repairable and repaired by the inhabitants at large as a common highway:—Held, on demurrer (with reference to several local acts), a bad plea. *Stockport Corporation* v. *Cheetham*, 1 L. T. 541.

The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road":—Held, that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under s. 150 of the Public Health Act, 1875. *Austerberry* v. *Oldham Corporation*, 55 L. J., Ch. 633; 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

—— **"Turnpike Road."**]—Semble, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; and the mere fact that a number of persons form themselves into a company for making and maintaining a road, and erect gates and bars and charge tolls, does not make the road a "turnpike road" in the sense of a turnpike road made such by act of parliament, and so dedicated to the public. *Ib.*

The owners of a road put up bars upon it and took tolls from the public for the passage of vehicles, horses, and cattle:—Held, that such road was not a turnpike road within the meaning of the exception contained in the definition of "street" given by s. 4 of the Public Health Act, 1875. *Midland Ry.* v. *Watton*, 55 L. J., M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405—C. A.

—— **Order investing Rural with powers of Urban Authority—Highway not repairable by Inhabitants at large.**]—The appellant owned premises fronting upon a road, 900 feet long, which had several houses in it on the south side but none on the north. By an order of the local government board, s. 150 of the Public Health Act, 1875, was declared to be in force in the district in which the road was situated, and the road was declared to be a "street." The road was a public highway, but there was no evidence of its formal dedication. There was some evidence of its use prior to 1835, but none inconsistent with its having been a mere occupation road or a footpath. The appellant was summoned for nonpayment of expenses incurred by the rural authority in sewering, levelling, and paving the road. The justices decided that the order of the local government board was conclusive, although in their opinion the road was not a street according to the common use and simple ordinary meaning of the word; they also decided that it was a street by virtue of the definition in s. 4 of the act of 1875, and, subject to a case stated, held the appellant liable to pay the amounts claimed:—Held, that the order of the local government board was not conclusive with reference to the application of s. 150 to the road in question, but that the road was within the definition "street" in s. 4, and was, therefore, a street within the meaning of s. 150. *Fenwick* v. *Croydon Sanitary Authority*, 60 L. J., M. C. 161; [1891] 2 Q. B. 216; 65 L. T. 645; 40 W. R. 124; 55 J. P. 470.

—— **Soil below Surface—Urinals.**]—In 1739, by an agreement, which was ratified by a special act of parliament, between the plaintiff's predecessors in title, being lords of a manor, and their freehold tenants, certain walks which formed part of the waste of the manor were dedicated "to remain always open and free for the public use and benefit of the persons frequenting Tunbridge Wells in the manner the same then were or lately had been used." In 1876, 1887 and 1888 the town authorities of Tunbridge Wells, with the consent of the lord, made certain alterations and improvements in the walks. From the earliest time to the present the public had always passed and repassed on foot over the walks. In 1890 the Tunbridge Wells Improvement Act authorised the defendant corporation to "erect and maintain in any street or public place" conveniences for the use of the public, the word "street" to have the same meaning as in the Public Health Act, 1875. The defendants having constructed underground conveniences beneath the walks:—Held, that the soil in which the conveniences were constructed below the surface was not part of "a street" within the meaning of the Public Health Act, 1875, repairable by the inhabitants at large and so vested in the defendants, nor was it part of a "street or public place" within the meaning of the Tunbridge Wells Improvement Act of 1890; and that the plaintiffs were entitled to a declaration that the defendants were not entitled to, or to the use of, the conveniences without the plaintiff's consent. *Baird* v. *Tunbridge Wells Corporation*, 64 L. J., Q. B. 145; [1894] 2 Q. B. 867; 9 R. 479; 71 L. T. 211; 59 J. P. 36—C. A. See *S. C.* in H. L. infra, col. 382.

**New Streets.**]—The 11 & 12 Vict. c. 63, s. 69, does not empower a local board to make new streets, and rate the owners of the adjoining land for paving them; but the enactment only applies to existing streets not repairable by the parish. *Kingston-upon-Hull Local Board* v. *Jones*, 1 H. & N. 489; 26 L. J., Ex. 33; 2 Jur. (N.S.) 1193; 5 W. R. 161.

—— **Old Country Road.**]—The term "new street" in the Public Health Act, 1875, s. 157, applies to an old country road near a town which, by the building of houses along it, has become a street in the common sense of the word, notwithstanding that before the building of such houses it was a street within the meaning of s. 4 of the act. *Robinson* v. *Barton Local Board*, 53 L. J., Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276—H. L. (E.)

—— **Passages at Back of House—Jurisdiction of Local Board.**]—Passages at the back of houses intended to afford access to the ashpits and privies of such houses come within the definition of "street" as defined by s. 4 of the Public Health Act, 1875, and are therefore subject to the by-laws made by a local board in pursuance of the powers contained in s. 157, sub-s. 1, of the same act. *Reg.* v. *Goole Local Board*, 60 L. J., Q. B. 617; [1891] 2 Q. B. 212; 64 L. T. 595; 39 W. R. 608; 55 J. P. 535.

—— **Conversion.**]—The appellant built six cottages upon a piece of garden ground in a lane 6 feet wide and 250 feet long, which was admitted to be a street within the meaning of the definition of that word in the Public Health Acts:—Held, that the justices were not justified in coming to the conclusion that the land had been converted into a "new street," and therefore they were wrong in convicting the appellant for having violated certain by-laws made by the urban sanitary authority pursuant to the powers contained in the Public Health Act, 1848, and the Local Government Act, 1858, one of which provided that every new street not being a carriage road should be laid out and formed at least 18 feet wide. *Williams* v. *Powning*, 48 L. T. 672; 47 J. P. 486.

—— **By-laws—"Person who lays out."**]—An urban sanitary authority made by-laws under s. 157 of the Public Health Act, 1875. By the first by-law it was provided that "every person who lays out a new street shall, as regards the minimum width of such street, comply with such of the requirements hereinafter specified as shall be applicable to the case":—Held, that a person who in accordance with his contract with a building owner simply builds along the line of street already laid out by such owner is not a "person who lays out a new street" within the meaning of the by-law. *Sunderland Corporation* v. *Brown*, 43 L. T. 478; 44 J. P. 831.

### b. Property in.

**Street "vesting" in Urban Authority.**]—Plaintiff was lessee, under a local board, the urban authority, of the right of pasturage over the herbage at the side of a public road, which was a "street" within the meaning of the Public Health Act, 1875, and which, therefore, by s. 149 "vested in and was under the control of" the local board. He was also lessee to the same extent of the herbage at the side of the private road, within the district of the board, and he turned out his cattle to graze on both roads. Defendant turned out his cattle on the same roads without any right to do so:—Held, that plaintiff could maintain an action against defendant for depasturing the public road, inasmuch as that road "vested" in the local board, which thereby acquired such a property in the soil of the road as was necessary for the purpose of exercising the powers over the road given by the statute, and which therefore could give plaintiff a title to the pasturage; but that he could not do so with respect to the private road, for the local board could not give him any title to the pasturage, and he had no such possession as enabled him to maintain an action against defendant for interfering with his enjoyment of the pasturage on that road. *Coverdale* v. *Charlton*, 48 L. J., Q. B. 128; 4 Q. B. D. 104; 40 L. T. 88; 27 W. R. 257—C. A.

**Highway "vesting" in Local Board.**]—The commissioners appointed in pursuance of the South Wales Turnpike Act, 1844 (by which act, also, the roads of the county of Glamorganshire were vested in the defendant board), directed that a certain road, situated within the borough of S., should be continued as a turnpike road, and in 1845 a toll-gate was erected on it, at which tolls have been collected up to the present time. In the year 1850 a provisional order was made, by which the Public Health Act, 1848, was applied to the borough of S., and a local board of health for the borough was appointed. By the 68th section of that act it is provided that all present and future streets, being highways without any district, shall vest in and be under the management of the local board of health, and that board is directed to repair these roads. By 15 & 16 Vict. c. 42, s. 13, it is declared that the word "highway" in the above section shall mean "any highway repairable by the inhabitants at large":—Held, that, though the road in question was in fact a street, it was not a "highway repairable by the inhabitants at large," and therefore had not become vested in the local board of health, but had remained vested in and subject to the powers of the defendant board. *Nutter* v. *Accrington Local Board* (4 Q. B. D. 375), distinguished. The commissioners having done certain acts more than thirty years ago which had ever since been acted on, the court refused to review their decision, though it appeared wrong. *Swansea Improvement Co.* v. *County Roads Board, Glamorganshire*, 41 L. T. 583.

**Vesting of Subsoil — Underground Conveniences.**]—The declaration in a private act of parliament that a place of usual resort is a "public place" does not imply a dedication to the public of anything except the surface, and a corporation is not entitled to erect public conveniences under the surface of such public place. Even if such "public place" be a street within the meaning of the Public Health Act, 1875, the property in the soil does not vest in the local authority, but remains in the original owners. *Tunbridge Wells Corporation* v. *Baird*, 65 L. J., Q. B. 451; [1896] A. C. 434; 74 L. T. 385; 60 J. P. 788—H. L. (E.)

The appellants, purporting to act under the authority of a local act of parliament which

empowered them to erect in any street or public place, or on any land belonging to them or under their control, conveniences for the use of the public, constructed a convenience under a public promenade within the borough. The soil under the promenade belonged to the respondents, although the promenade itself had been dedicated to the public:—Held, that, even if the promenade was a street, the soil thereunder did not vest in the appellants, who therefore had no right to construct the conveniences in question. Dicta in *Coverdale* v. *Charlton* (48 L. J., Q. B. 128; 4 Q. B. D. 104), as to vesting in an urban authority of soil below a street, disapproved by Lord Herschell. *Ib.*

**Authorising the laying of Trade Pipes under Street—Ultra vires.**]—The laying of pipes to be used for trade purposes under a street cannot be authorised by an urban authority under s. 149 of the Public Health Act, 1875. *Salt Union* v. *Harvey*, 61 J. P. 375.

**Power to Dedicate Road to Public.**]—See *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board*, 60 L. T. 172.

**Right of Gas Company to Break up.**]—A corporation, being the local board of health for a particular town, and being also the paving commissioners for the same town, permitted pipes to be laid down in certain streets for the purpose of supplying the town with gas. The gas company, being about to lay down new pipes, and for that purpose being about to break up the pavements, were interfered with by the corporation:—Held, that the gas company has a right to break up the pavements, and the corporation was restrained from interfering with the gas company. *Dover Gaslight Co.* v. *Dover Corporation*, 1 Jur. (N.S.) 812—L.JJ.

### c. Formation and Alteration.

**Uniform Level—Adjacent Streets.**]—Under 11 & 12 Vict. c. 63, s. 69, a local board of health has power only to require a street to be levelled with reference to any want of inequality or want of uniformity in the street itself. The local board has no power to require the level of a street to be raised or lowered so as to bring it into uniformity with the adjacent streets. *Caley* v. *Kingston-upon-Hull Local Board*, 5 B. & S. 815; 34 L. J., M. C. 7; 11 Jur. (N.S.) 171; 11 L. T. 339; 13 W. R. 143.

**Paving—Trustees for—Who are.**]—The 20 & 21 Vict. c. 50, s. 2, applies only to bodies charged with the duty of executing local and personal acts of the kind mentioned in the enactment, and a local board of health constituted under 11 & 12 Vict. c. 63, are not trustees acting under an act for paving, &c., within the meaning of that enactment. *Swinford* v. *Keble*, 7 B. & S. 573; 35 L. J., Q. B. 185; L. R. 1 Q. B. 54; 12 Jur. (N.S.) 783; 14 L. T. 770; 14 W. R. 858.

—— **Notice to "Owner"—Validity.**]—The term "owner" as defined in s. 4 of the Public Health Act, 1875, does not include a receiver of rents and profits appointed by the court, and service on him of a notice under s. 150 of the act is invalid. *Bacup Corporation* v. *Smith*, 59 L. J., Ch. 518; 44 Ch. D. 395; 63 L. T. 195; 38 W. R. 697.

In Jan., 1883, a local board passed a resolution for the paving and sewering of a certain street, and on the 11th May, 1883, notice was served on P. & Co. requiring them to pave and sewer the street. P. & Co. had been the owners of the land abutting on the street, but by a conveyance of the 27th April, 1883, had conveyed their estate to the respondent; the local board, however, had no notice of this conveyance. In an action by the local board to recover the paving expenses from the respondent:—Held, that P. & Co. were not at the time of the service of the notice either "owners or occupiers" of the premises, and that as the proper steps prescribed by the Public Health Act, 1875, s. 150, had not been taken, the respondent was not liable. *Wallsend Local Board* v. *Murphy*, 61 L. T. 777.

—— **Service of Notice.**]—A new street being about to be paved by the urban authority, they addressed a notice to pave to the owner of a vacant field, whose name was doubtful, thus: "To B., or other the owner, or other the occupier," &c. The notice was affixed to a conspicuous part of the premises. No notice ever reached B.:—Held, that the service of notice was sufficient under the Public Health Act, 1875, s. 267. *Butler* v. *Gravesend Urban Authority*, 58 J. P. 446.

**Alteration of Turnpike Road—Liability for Damage.**]—By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, streets being highways within the district of a local board shall vest in and be under the management of the board, and the board shall cause all such streets to be levelled, paved, flagged, channelled, altered, and repaired as occasion may require. By the interpretation clause (s. 2): "The word 'street' shall apply to and include any highway (not being a turnpike road)." By s. 144 compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the act; and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the act.—The footpath of a street which was a highway and also a turnpike road within the district of a local board, was altered by them under an agreement with the turnpike trustees, so as to raise the level of the footpath in front of the house of the plaintiff and cause him damage:—Held, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from the board in the manner prescribed by s. 144. *Nutter* v. *Accrington Local Board*, 48 L. J., Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802—C. A. Affirmed, 43 L. T. 710—H. L. (E.)

—— **Access to House Impeded.**]—A local board of health gave notice, under 11 & 12 Vict. c. 63, s. 69, to the owner of a house abutting on a street to level and pave it, and in default of the owner, they did the work themselves. By the alteration so caused in the level of the street, the access to the house was rendered difficult and dangerous:—Held, that the owner was entitled to compensation under s. 144. *Reg.* v. *Wallasey*

*Local Board*, 10 B. & S. 428; 38 L. J., Q. B. 217; L. R. 4 Q. B. 351; 21 L. T. 90; 17 W. R. 766.

**Breaking up Private Road.**]—A corporation, affecting to act under the provisions of their local act, commenced to break up and excavate a private road belonging to the plaintiff, and situate within the borough, for the purpose of laying down a sewer:—Held, that on the construction of the local act, taken with the provisions contained in the Public Health Act, 1848, the Sewage Utilisation Act, 1865 (28 & 29 Vict. c. 75), and the Public Health Act, 1875, the road was a street within those acts, and that the corporation had power to lay down the sewer thereunder, and for that purpose to break up the soil thereof. *Taylor* v. *Oldham Corporation*, 46 L. J., Ch. 105; 4 Ch. D. 395; 35 L. T. 696; 25 W. R. 178—C. A.

**Injunction restraining unnecessary Damage.**]—A local board of health in repairing and improving a road under the powers of the Public Health Act, 1848 (11 & 12 Vict. c. 63), raised a footpath by the side of the road a few inches, the effect of which was to prevent water, which fell upon the space between a warehouse of the plaintiff in which needles were stored and the road, from draining into the road. On a bill filed by him against the local board for an injunction:—Held, that they had no right to make improvements in a way calculated to cause unnecessary injury to the plaintiff; that the evil complained of was one of easy remedy, and that the case was not one for pecuniary compensation; and a mandatory injunction was granted to prevent the local board from allowing such water to remain dammed up to the injury of the plaintiff. *Milward* v. *Redditch Local Board*, 21 W. R. 429.

**Power of Local Authority to change Name.**]—By s. 6 (1) of the Towns Improvement Clauses Act, 1847, the Commissioners might, from time to time, cause the houses and buildings in all or any of the streets to be marked with numbers, as they might think fit, and should cause to be put up or painted on a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street, the name by which such street was to be known. The corporation of Dublin adopted a resolution that the name of Sackville Street be changed to O'Connell Street, for the purpose of commemorating by this and other intended alterations in street nomenclature the past historical events of the country and the names of illustrious men. The householders of Sackville Street, with very few exceptions, objected to the proposed change in its name on the ground of inconvenience and of detriment to their trades and businesses:—Held, in an action by some of the objecting householders, that the corporation had no power, either by statute or at common law, to make the change, and that even if they possessed such power, the court had jurisdiction to restrain them from doing so, if satisfied that the proposed change would be injurious to the owners or occupiers of houses in the street. *Anderson* v. *Dublin Corporation*, 15 L. R., Ir. 410.

**Repair — Liability — Ancient Highway, altered, and added to.**]—An ancient footpath or highway, the original track of which has been partially altered, widened and added to, and abutting upon which houses have been built, is a new street within the meaning of the Public Health Act, 1875, and repairable by the owning frontages and not by the inhabitants at large. The last clause of the 150th section of the act is conclusive upon the point. *Evans* v. *Newport Sanitary Authority*, 59 L. J., M. C. 8; 24 Q. B. D. 264; 61 L. T. 684; 38 W. R. 400; 54 J. P. 374.

—— **Precautions during Repairs.**]—Sect. 79 of the Towns Improvement Clauses Act, 1847, prescribes certain precautions to be taken during the construction and repair of sewers, streets, and houses. The section does not mean that the traffic in the street is to be entirely stopped during the execution of the works, but merely that protection should be afforded to prevent vehicles and persons from passing over the place where the works are being executed. *Woodall* v. *Nuttall*, 56 J. P. 150—C. A.

**New Street—Width—By-laws.**]—A by-law of an urban authority provided that every person who constructed a new street which was 100 feet long should make it 30 feet wide. The other streets in the town were generally of less width. The appellant bought some land on one side of a road and proceeded to erect thereon a wall 170 feet long, thereby reducing the width of the roadway to seven feet:—Held, that an offence against the by-law had been committed, and that the by-law was not unreasonable. *Roberts* v. *Richards*, 54 J. P. 693.

By the Public Health Act, 1875, s. 157, every urban sanitary authority may make by-laws with respect to the width and construction of new streets. The respondents, an urban sanitary authority, made by-laws providing that every person who should lay out a new street exceeding 100 feet in length should lay out such street as a carriage road, with footways, and of a width of not less than thirty-six feet. The appellant was lessee of a piece of ground, together with a right of way over the adjoining road, which was fifteen feet wide, for a distance of more than 100 feet. The appellant commenced to build two houses on the ground of which he was lessee, but did not widen the road over which he had a right of way to thirty-six feet. He was summoned by the respondents for laying out a new street of a width of less than thirty-six feet, contrary to the by-laws:—Held, that what the appellant had done, in commencing to erect the houses on the piece of ground adjoining the road, did not amount to laying out the road as a new street, and therefore he was not liable to be convicted. *Gozzett* v. *Maldon Urban Sanitary Authority*, [1894] 1 Q. B. 327; 70 L. T. 414; 58 J. P. 229.

A builder purchased a plot of land fronting upon a main thoroughfare, and on one side abutting for a distance of 176 feet upon a narrow lane which ran at right angles to the thoroughfare. He built three houses fronting the thoroughfare; the wall of the corner house extended up the lane for forty feet, and a high wall, bounding the back-yard of the house, extended for another forty feet, but there was no window or means of access on that side:—Held, that these facts alone were not sufficient to show that he was beginning to build a new street so as to subject himself to by-laws as to width made under the provisions of s. 157 of the

Public Health Act, 1875. *St. George's Local Board* v. *Ballard*, 64 L. J., Q. B. 547; [1895] 1 Q. B. 702; 14 R. 293; 72 L. T. 345; 43 W. R. 409; 59 J. P. 182—C. A.

—— **Width of Entrance—By-laws.**]—The by-laws of a local board provided: (4) "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be forty feet at the least." (6) "Every person who shall construct a new street shall provide at one end, at least, of such street, an entrance of a width equal to the width of such street, and open from the ground upwards":—Held, that the 6th by-law was intra vires and reasonable, and that it prevented a landowner from "constructing" a new street upon his land until he had provided an "entrance" to the new street of the specified width, even though that entrance could only be made upon the land of another person over whom he had no control:—Held, also, that the "construction" of a new street included the building of the houses abutting on it, and, consequently, that the landowner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street. *Hendon Local Board* v. *Pounce*, 42 Ch. D. 602; 61 L. T. 465; 38 W. R. 377.

The by-laws of a sanitary authority, which had been duly confirmed by the local government board, provided that: "4. Every person who shall lay out a new street, which shall be intended for use as a carriage road, shall so lay out such street that the width thereof shall be forty feet at the least. 8. Every person who shall construct a new street shall provide at one end, at least, of such street, an entrance of a width equal to the width of such street, and open from the ground upwards." Upon motion on behalf of the sanitary authority for an injunction to restrain a landowner from constructing or commencing a new street until an entrance should have been provided according to by-law 8:—Held, that, under the by-laws, a person proposing to construct a new street must provide a mode of access thereto of a width equal to the width of the new street; that it made no difference that the mode of access to the new street was by means of a public street, if such street was of less than the required width; and, therefore, that an injunction must be granted. *Bromley Local Board* v. *Lloyd*, 66 L. T. 462; 56 J. P. 278.

Where the by-laws of a local authority require that the entrance to any new street shall be thirty-six feet wide at the least, the local authority is justified in refusing to pass the plans for the construction of a new street, the entrance to which is by an existing street outside the district of the local authority, which is not of the width required by the by-laws. *Barton Regis Rural Council* v. *Stevens*, 61 J. P. 598.

—— **Notice of Intention to Lay Out—Abandonment.**]—S. had an old house with a shop front abutting on a lane, and also other property near; he gave notice to the urban authority of his intention to lay out a new street, and submitted a plan that was approved, shewing the alterations and proposed width of the new street, which involved setting back the shop and garden. He did nothing to carry out the plan, but two months later put in a new shop front and rebuilt the garden wall on the old site:—Held, that as he had abandoned his intention of laying out a new street, he had committed no offence against a by-law regulating the width of new streets. *Sunderland Corporation* v. *Skinner*, 53 J. P. 660.

—— **Approval of Plans by Local Board—Encroachment.**]—An alleged encroachment upon a street as marked in a plan approved by a local board was made by a building which was itself built according to a plan approved by the local board:—Held, that the owner of a house in the same street opposite the alleged encroachment had no cause of action, either in the name of the attorney-general against the local board for not preventing the encroachment, or against the alleged trespasser. *Att.-Gen.* v. *Pudsey Local Board*, 59 J. P. 329.

—— **Approval of Local Authority—Erection of Buildings before whole Street constructed.**]—The Sunderland Local Improvement Act, 1885, by s. 37, enacts that it shall not be lawful for any person, except with the consent of the corporation, to erect or build, or begin to erect or build, any new buildings abutting upon any new street or part of a new street, unless the corporation shall have previously approved of the level and available width of such new street or part of a new street, nor until the carriage way and footway of such new street, or part of a new street, shall have been formed to such a level and of such a width, and constructed and sewered to the satisfaction of the corporation, in accordance with s. 150 of the Public Health Act, 1875. The appellants, who were builders, gave notice to the Sunderland local authority, the respondents, of their intention to lay out a new street, the plans for which were approved by the respondents. They subsequently gave notice that they intended to erect four new houses in that street, the plans of which were submitted to and approved by the respondents. The appellants began to erect these houses abutting upon or fronting that part of the new street which had been sewered, levelled, paved, metalled, flagged and channelled to the satisfaction of the respondents; but the whole of the new street had not been constructed and made good to the satisfaction of the respondents within s. 37 of the Sunderland Local Improvement Act, 1885. The appellants were summoned in respect of the infringement of that section and fined:—Held, on appeal, that the conviction was right, and that, as the appellants had given notice to lay out the whole of a new street, the urban authority, under their local act, were entitled to withhold their consent to the erection of any house or building abutting on the new street, unless the whole of the new street were constructed and sewered to their satisfaction. *Woodhill* v. *Sunderland Corporation*, 57 L. T. 303; 52 J. P. 5.

**Road—Width—Plan referred to in Act—Time of Indictment.**]—A local act, after reciting that certain roads were "intended to be made in the courses and directions as shewn" on a certain plan, enacted that the said roads should be made "as shewn or laid down on the said plan." The width of the roads was delineated on the plan, but in the act nothing was said regarding it:—Held, that the roads must be of the width shewn on the plan; and also that an indictment would lie in respect of their being made of a less width when such width was tendered as sufficient, although the time for completion of the roads,

under the act, had not expired. *Reg.* v. *Liverpool Corporation*, 5 W. R. 503.

**Liability to Fence Lands abutting on Highway.**]—By s. 81 of the Rotherham Borough Extension and Sewerage Act, 1879, "If the corporation are of opinion that danger to the public is likely to ensue by reason of lands abutting on streets not being fenced, the owner of such land shall, when required by the corporation, and to their satisfaction, sufficiently fence off the land from the street, and shall afterwards keep such fence in good repair, to the satisfaction of the corporation, and if he fails so to fence or repair as aforesaid, within fourteen days after notice for that purpose given to him by the corporation, the corporation may fence or repair and recover the expenses for so doing from him under the Public Health Act, 1875":—Held, that this act did not apply to fences by the side of a road which had been a turnpike highway, but applies only to new streets where there are no fences, and which, in the opinion of the corporation, are dangerous to the public. *Rotherham Corporation* v. *Fullerton*, 50 L. T. 364.

### d. Obstructions in.

**Enclosure—Removal of.**]—The owner in fee of a house abutting on the highway in 1858, wrongfully enclosed a portion of the highway as a garden. In 1873, the local board of health served a notice on the occupier to remove the obstruction, and stating that in default it would be removed at his expense. On a bill filed by the occupier and owner to restrain the local board:—Held (assuming the enclosure to be wrongful), the board had power, under 10 & 11 Vict. c. 34 (The Towns Improvement Clauses Act, 1847), ss. 69 & 70, to remove the garden, as an obstruction to the safe and convenient passage along the highway. *Bagshaw* v. *Buxton Local Board*, 45 L. J., Ch. 260; 1 Ch. D. 220; 34 L. T. 112; 24 W. R. 231.

**Collecting Crowd — Auction Caravan.**] — A person had an auction caravan, standing in the market-place of a town, for which he paid a rent or toll to the improvement commissioners, appointed by a local act, the lords of the manor. The caravan was only three feet from a public street of the town, and many persons obstructed the thoroughfare by stopping to listen to his sales. The justices convicted him under 10 & 11 Vict. c. 89 (The Town Police Clauses Act, 1847), s. 28, of causing an obstruction in a thoroughfare:—Held, that what he did was not an offence within that act. *Ball* v. *Ward*, 33 L. T. 170.

**Blocking and Walking Abreast on Footpath—Conviction.**]—Three defendants were convicted under s. 28 of the Towns Clauses Act, 1847, for obstructing passengers in the public streets, and unlawfully preventing persons passing there. It appeared by the evidence of a police constable that the three defendants were standing, with three or four other persons, on the pavement, blocking up the same. They then walked up the street, all three abreast, causing passengers who met them to leave the footpath and go into the road. Sect. 28 of the act provides that "every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath, or other public thoroughfare," shall be guilty of an offence under the act, and liable to a penalty:—Held, that the conviction was wrong, and could not be sustained. *Reg.* v. *Long*, 59 L. T. 33; 52 J. P. 630; 16 Cox, C. C. 442.

Four men walked abreast on the pavement, causing passengers to go into the carriage way in order to pass them:—Held, that they could not be convicted summarily under s. 28 of the Towns Police Clauses Act, 1847, for obstructing the highway. *Reg.* v. *Williams*, 55 J. P. 406.

**Exposing Goods for Sale outside Shop.**]—*See* post, col. 434.

**Erecting Posts—Action to Restrain Removal—Striking out Pleadings on the Ground of Irrelevance.**]—Where the owners of land adjoining a public footpath brought an action against the local board to restrain the removal of posts erected by the plaintiffs to prevent vehicular traffic over the footpath, the court struck out as irrelevant allegations in the statement of claim that one of the members of the board, who was also an adjoining landowner, had taken an active part in the plaintiffs' negotiations with the board for the protection of the footpath, and had acted therein with a view to his own private interest, and that consequently the plaintiffs had not succeeded in inducing the board to take any steps for the protection of the footpath. *Murray* v. *Epsom Local Board*, 66 L. J., Ch. 107; [1897] 1 Ch. 35; 75 L. T. 579; 45 W. R. 185; 61 J. P. 71.

### e. Other Offences in.

**Street Cries to Annoyance of Inhabitants—Evidence.**]—In a prosecution under a by-law of a town providing that any person making a violent noise in the streets to the annoyance of the inhabitants shall be guilty of an offence, it is sufficient to prove that one inhabitant has been annoyed. *Innes* v. *Newman*, 63 L. J., M. C. 198; [1894] 2 Q. B. 292; 10 R. 348; 70 L. T. 689; 42 W. R. 573; 58 J. P. 543.

**Indecent or Profane Language.**] — *See* post, col. 479.

**Display of Advertisements on "Vehicle"—Bicycle.**]—A bicycle is a vehicle within s. 12 of the Liverpool Corporation Act, 1889, which provides that it shall not be lawful in any street in the city to use any vehicle exclusively or principally for the purpose of displaying advertisements, without the consent of the corporation. *Ellis* v. *Nott-Bower*, 60 J. P. 760.

## 2. Buildings.

### a. Definition.

**"Building" — Jurisdiction of Justices — Buildings in Streets Act, 1888.**]—Whether a structure is a "building" within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888, is a question of fact to be determined by the justices, provided the thing erected is of such a nature that it is capable of being a building. A wooden structure, used for advertising purposes, that was nine feet six inches long, three feet wide, and seven feet high, was roofed over, and had a glass front and a door by which to enter, and was fastened into the ground by four posts, let into the ground to the depth of nine to twelve inches, is of such a nature that it is capable of being a "building" within the above

section. *Leicester Corporation* v. *Brown*, 62 L. J., M. C. 22; 5 R. 35; 67 L. T. 686; 41 W. R. 78; 57 J. P. 70.

**"New Building"—Jurisdiction of Justices.**]—A local board, having power to make by-laws under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34, made and published a by-law enjoining, under penalty, that a notice should be given to its surveyor of any new building erected, or intended to be erected, within its district. D., having in his back-yard a stable, pulled the same down, and with a small part of the materials and a quantity of new materials, built a stable partly on the former site, but chiefly on a new site, in another part of the yard. The justices, having dismissed a summons against D. for an infringement of the by-law in not giving notice of the erection of this structure to the surveyor, on the ground that they did not consider the erection a new building within the meaning of the statute and by-law:—Held, that this was a "new building." Held, also, that the question of new building or not was not one within the justices' province on evidence and inspection absolutely and conclusively to determine, but was a question of legal definition, and that the justices' decision was based upon a construction which might be reviewed by the court. *Hobbs* v. *Dance*, 43 L. J., M. C. 21; L. R. 9 C. P. 30; 29 L. T. 687; 22 W. R. 90.

—— **Question of fact—By-laws—Penalty.**]—By-laws were made for the borough of S., under the powers given by s. 34 of the Local Government Act 1858. This act was repealed by the Public Health Act, 1875, but by s. 326 of the latter act all by-laws duly made under any of the sanitary acts by this act repealed, and not inconsistent with any of the provisions of this act, shall be deemed to be by-laws under that act. The 27th by-law provided that every person who intended to erect any new building should give one month's notice of such intention, and send in a plan of the works to the surveyor for the urban sanitary authority. The 31st by-law provided that if the owner or person intending to construct any new building fail to give the required notices, or construct or cause to be constructed, any buildings contrary to the provisions of any of the said by-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*; and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said provision. The appellant contended that he was not bound to give notice or send a plan of alterations he proposed to make in his house, as the alterations merely consisted in raising the old walls a storey higher, but he sent a plan, as he said, as a matter of courtesy. This plan was disapproved of, and notice of such disapproval was sent to the appellant, but he went on with the buildings. He was then summoned by the respondent, who was the surveyor for the urban sanitary authority, for neglecting to give notice and send plans as required by the by-laws. The magistrate found that the structure was in fact a comfortable, good-looking dwelling-house, which previously it was not. He also found, as a fact, that the old building was partly pulled down to the ground floor, and that the buildings erected on the site thereof formed a new building intended for occupation, and that they were not adapted for personal occupation previously, and that they were "a new building" within s. 159 of the Public Health Act, 1875. The appellant was convicted and fined 40*s.* and costs, and a further sum of 20*s.* for each day the work should continue or remain contrary to the provisions of the said by-laws:—Held, that the question whether the alterations constituted a "new building" was a question of fact for the magistrate to decide, and that he had decided as a fact that they did constitute a "new building," and that the penalty of 5*l.* was payable in addition to the penalty of 40*s.* a day, though the information laid against the appellant was only for not having given the notices and plans under the 27th by-law. *James* v. *Wyrill*, 51 L. T. 237; 48 J. P. 725. See also *Reay* v. *Gateshead Corporation*, infra, col. 409.

—— **Construction of By-law.**]—A local board made by-laws with a general heading, following the language of 21 & 22 Vict. c. 98, s. 34. The first by-law was also headed, "width and level of new streets." It provided for the width of new streets, dividing them into front streets, cross streets, and back streets; and went on, in a subsequent paragraph, to provide "that no dwelling-house shall be built immediately adjoining any back street without the special permission of the local board":—Held, that this provision applied only to new back streets, and not to a new building in an old back street. *Shiel* v. *Sunderland Corporation*, 6 H. & N. 796; 30 L. J., M. C. 215.

—— **Wooden Building on Wheels.**]—R. was charged under the W. Improvement Act with unlawfully erecting a new building without notice to the local board. The building was made of wood, thirty feet long and thirteen feet wide, and was brought along the street on wheels, and put at the corner of a new street. It had spouts and a down corner, had a supply of gas, and was used as a butcher's shop:—Held, that the justices were right in treating this as a new building, and subject to the ordinary requirements as to new buildings. *Richardson* v. *Brown*, 49 J. P. 661.

—— **Ground enclosed by Hoardings for Advertisements.**]—An advertising company surrounded a piece of ground, within a borough, with boarded walls or hoardings raised to a height of from thirteen to nineteen feet on three of its sides. These hoardings were stayed, fastened, and tied together, and strengthened on the inner side. The space inside was used for the preparation of wood for other hoardings:—Held, that this structure was not a new building within a by-law in force within the borough, made in pursuance of s. 157 of the Public Health Act, 1875. *Slaughter* v. *Sunderland Corporation*, 60 L. J., M. C. 91; 65 L. T. 250; 55 J. P. 519.

——**New Boiler—No Roof.**]—The substitution of a new boiler for an old one, which is sunk in the ground and has a casing of brickwork without any covering, is not a new building within s. 157 of the Public Health Act, 1875, or by-laws relating to new buildings. *Gery* v. *Black Lion Brewery Co.*, 55 J. P. 711.

—— **Addition to an existing Building.**]—A local act, and by-laws passed therewith, provided that before "any addition to an existing building by raising any part thereof" was made,

certain notices, &c., should be given to the surveyor of the urban sanitary authority. The respondent was summoned before justices for making an addition, contrary to the above act and by-laws, without giving the proper notices, he having pulled down a conservatory and erected in its stead a bedroom, at the same time raising one of the external walls to the height at which the top of the conservatory was previously situate. The justices dismissed the summons on the ground that, as the bedroom, when erected, did not occupy any greater space than was previously to its erection occupied by the conservatory, the respondent had not made an addition to an existing building:—Held, that the ground of the decision by the justices was erroneous in point of law, and that the case should accordingly be remitted to them to consider whether, under all the circumstances, there had been an addition to an existing building. *Meadows* v. *Taylor*, 59 L. J., M. C. 99; 24 Q. B. D. 717; 62 L. T. 658; 54 J. P. 757.

**Buildings in "New Street."**]—A country road, which had long been a public highway, and was therefore a "street" within the Public Health Act, 1875, s. 4, though there had been very few houses along its sides, was in course of becoming a street in the ordinary acceptation of the term, by the erection of houses on both sides, but those houses were scattered singly and in small groups at irregular distances, and did not form continuous lines. The urban authority made by-laws to regulate "new streets," and acting, as they considered, under those by-laws, disapproved the building plans of a lessee of a plot of ground on one side of the above road, on the ground that the proposed houses would contravene their building line, and be built within the line of the existing buildings on that side of the street. The buildings were nevertheless commenced in accordance with the disapproved plan, and the urban authority, relying upon their by-laws, called upon the lessee to shew cause why his buildings should not be removed:—Held, that the road was a "new street" within s. 157 of the act, and that the urban authority was not entitled under a by-law for regulating the width of the street to disapprove of and pull down houses in the course of erection in a "new street," on the ground that the building line was too near the roadway. *Robinson* v. *Barton Local Board*, 53 L. J., Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276—H. L. (E.)

### b. General Regulations.

**Regular Line of Street.**]—Sect. 162 of the General Police and Improvement (Scotland) Act, 1862, provides that, "when any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backward to or toward the line of the street or the line of the adjoining houses or buildings in such manner as the commissioners may direct for the improvement of such street":—Held, that the words "regular line of the street" refer to a street that is built upon to the line of the buildings, and not to a line which has been drawn along the pavement to indicate that a part of the street has been dedicated to the public as a highway. Sect. 40 of the Galashiels Municipal Extension Police and Water Act, 1876, incorporates s. 91 of the General Turnpike (Scotland) Act, 1831, and therefore no building exceeding seven feet in height can be erected within twenty-five feet of the centre of any street within the borough without the consent of the corporation. *Schulze* v. *Galashiels Corporation*, [1895] A. C. 666; 11 R. 219; 60 J. P. 277—H. L. (Sc.)

**Prescribed Line — Projection — Continuing Offence.**]—By s. 156 of the Public Health Act, 1875, it is an offence to bring forward or build any addition to a house in a street beyond the front of the house or building on either side without the consent of the urban authority; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority":—Held, that an offence to which the penalty was applicable continued so long as the addition to the house was maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given. *Marshall* v. *Smith* (L. R. 8 C. P. 416) distinguished. *Rumball* v. *Schmidt*, 8 Q. B. D. 603; 46 L. T. 661; 30 W. R. 949; 46 J. P. 567.

—— **"Bringing forward" House—Buildings on Land never before built upon.**]—In the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 156—which enacts that it shall not be lawful in any urban district without the written consent of the urban authority to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof—the expression "house or building" does not include new buildings in course of erection upon land never before built upon. *Williams* v. *Wallasey Local Board*, 55 L. J., M. C. 133; 16 Q. B. D. 718; 55 L. T. 27; 34 W. R. 517; 50 J. P. 582.

—— **Rebuilding—Board misleading Owners.**]—The defendants being about to pull down a school and erect a new one, submitted plans to the local board. The board objected to the plans, as violating a by-law, which obliged a person laying out a new street to leave it of a certain width. This by-law was not applicable, as South Lane, on which the school fronted, was not a new street. The defendants disregarded the objection, commenced their works on the 5th of January, 1885, laid the foundations of the main wall towards South Lane on the 12th, and proceeded rapidly with the erection of it. On the 22nd of January, the board prescribed a building line which would prevent the erection of certain annexes between South Lane and the main wall, which annexes were shewn on the plans. The defendants had ground enough to allow of the annexes being erected elsewhere. The defendants proceeded with the annexes, and the board brought their action to restrain them from building beyond the line, and to compel them to pull down what they had built beyond it:—Held, that under s. 155, the commencement of the main building did not preclude the board from laying down a line which would prevent the erection of the annexes which had not then been commenced. Held, also, that as the notice given by the board, though ineffectual for the purpose of empowering them to pull down the

erection under s. 158, gave the defendants to understand that the board objected on the ground that buildings according to the plan would make the street too narrow, the board had not done anything to induce the defendants to believe that they would not prescribe a building line, and that there was no equity to prevent the board from exercising their powers under s. 155, on the ground that they had misled the defendants. *Newhaven Local Board* v. *Newhaven School Board*, 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172—C. A.

—— **"Taking down House to be Rebuilt or Altered"—Laches.**]—In order that the power given by s. 155 of the Public Health Act, 1875, to an urban authority to prescribe the line of frontage where any house or building in the district "or the front thereof has been taken down in order to be rebuilt or altered" may arise, there must be a substantial taking down of the house or building or the front thereof. Where, therefore, the defendant, with the view of converting two low-pitched floors into one lofty room, removed the front wall of the ground and first floors, leaving the basement untouched and supporting the top (second) floor in the state in which it was (and which it was intended to leave as it was) by means of supports placed beneath: —Held, that the power to prescribe the line of frontage had not arisen. *Att.-Gen.* v. *Hatch*, 62 L. J., Ch. 857; [1893] 3 Ch. 36; 2 R. 533; 69 L. T. 469; 57 J. P. 825—C. A.

Where the building-line is prescribed after the building has been partially erected on the old site, it is too late for the urban authority to interfere. *Ib.*

—— **"Front Main Wall of House"—House "on either side."**]—By s. 3 of the Public Health (Buildings in Streets) Act, 1888, it is enacted that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street." The respondent, on the 30th April, 1889, began to erect, at the distance of six feet from the edge of B. Street, a building, the plans for which had not been approved by the local board. Before that date plans had been approved by the board for the erection of a house by B. on a site at the distance of 300 yards from the respondent's site on the same side, but at the distance of twelve feet from the edge, of B. Street. On the 30th April, 1889, the front main wall of B.'s building was four inches above the ground, but below the level of the street, and foundations for other walls had also been laid: —Held, that the respondents had not committed an offence against the above section. *Ravensthorpe Local Board* v. *Hinchcliffe*, 59 L. J., M. C. 19; 24 Q. B. D. 168; 61 L. T. 780; 54 J. P. 421.

In considering which is the "front main wall" of a house or building for the purposes of s. 3 of the Public Health (Buildings in Streets) Act, 1888, and whether such house or building is "on either side of" or "in the same street" as a house or building in course of erection, for the purposes of the same section, all the circumstances of the case must be taken into consideration. The building must be looked at as a whole; its character, its position, its distance from the house or building which is being erected or brought forward in alleged contravention of s. 3, must be considered; a particular wing or other projection must not be selected, the front of which is to be treated as the "front main wall" that is to give the governing line, nor are two buildings necessarily "in the same street" for the purposes of the section because one faces on the same road or street, or a continuation of the same road or street, as the other. *Att.-Gen.* v. *Edwards*, [1891] 1 Ch. 194; 63 L. T. 639.

In November, 1893, T. built a house near to, but not abutting, on the west side of Westbourne Grove (part of Ormesby Road), 240 yards north of a house on the west side erected in 1886. The house fronted towards the south. In February, 1894, T. bought some land, seventy feet deep, along the west side of Ormesby Road, to the north of his house, with the object of erecting cottages upon it. On the east side of Ormesby Road a number of houses had been built close up to the road. The building plans shewed that the cottages would be somewhat nearer Ormesby Road than T.'s house was. The urban authority decided that the cottages must be in line with T.'s house under s. 3 of the Public Health (Buildings in Streets) Act, 1888. There was no continuous line of buildings where it was proposed to build the cottages:—Held, that the cottages need not be in a line with T.'s house, as, in the above circumstances, there will be no erection of a "house or building beyond the front main wall of the house or building on either side thereof in the same street." *Reg.* v. *Ormesby Local Board*, 43 W. R. 96.

—— **Building "on either side" in the same Street.**]—In 1887, R., the owner of a plot of ground on an estate laid out for building purposes, abutting on a new street, built two semi-detached villas on his property, leaving a space of sixty-two feet between their front wall and the road. In 1889, R. acquired the adjoining plot on the east side, and built other two villas at the same distance back from the road as the first. In 1894, L., who had in 1887 acquired the plot adjoining R.'s plot on the west side, proposed to erect a house on his property with a clear space of only twenty-one feet between the house and the road. The local authority considered that the proposed new house was a building in a street "beyond the front main wall of the house or building on either side thereof in the same street," within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888, and in the exercise of the discretion conferred upon them by that section refused to admit the plans. Upon a rule nisi for a mandamus to compel the local authority to admit the plans:—Held, that R.'s villas, although they were buildings "on either side" of the proposed new building, were not buildings "in the same street," within the meaning of s. 3. *Reg.* v. *Fulwood Local Board*, 72 L. T. 592; 59 J. P. 311.

—— **House on either side—Question of Fact.**]—At the junction of O. and C. Roads a house was erected abutting on the footpath of C. Road. The main entrance of the house was in O. Road. At a distance of sixty-four feet from the back wall of the premises attached to the house in C. Road was situate a row of eleven small cottages, set back eight feet from C. Road. The justices, on an information against the appellant, the owner of the house, under the Public Health (Buildings in Streets) Act, 1888, s. 3, held that

the house in question was both in O. and C. Roads, that the cottages were buildings on one side of the house within the meaning of the section, and convicted the appellant:—Held, that it was a question of fact for the justices whether the house in question was or was not both in O. and C. Roads, and also whether the cottages were sufficiently near to the house to be on one side thereof within the meaning of the section, and that the conviction must be affirmed. *Warren* v. *Mustard*, 61 L. J., M. C. 18; 66 L. T. 26; 56 J. P. 502.

—— **Meaning of either Side.**]—Where s. 3 of the Public Health (Buildings in Streets) Act, 1888, prohibits a house being brought forward beyond the front main wall of the house or building on either side thereof, this includes the case of buildings being only on one side thereof. *Leyton Local Board* v. *Causton*, 57 J. P. 135.

—— **When Building not Restrainable.**]—A corporation had by a private act, with which the Towns Improvement Clauses Act, 1847, was mainly incorporated, power in cases where the width of a street was less than forty feet to prescribe the line within which any house to be built or rebuilt should be erected, on compensating the owner if his house was set back. Land having been conveyed to a vicar for building a church, he first erected a temporary wooden structure. After some years he pulled it down and began to build a permanent church, still on the land conveyed. The church so to be erected would abut upon a street averaging thirty-two feet in width. The corporation prescribed a line within which the vicar should build, but the formal prescription was not made until some weeks after the foundations were laid. The proposed church would at one corner abut six feet beyond the prescribed line. There was no evidence to shew that land could not be taken from the other side of the street, if necessary, to widen it:—Held, that a church was a house within the meaning of the acts, and that the vicar was the owner to whom compensation would be paid, but that as the corporation had in the opinion of the court unreasonably exercised their strict power, and had prescribed the boundary line after the building was begun, the court would not restrain the vicar from continuing his building. *Folkestone Corporation* v. *Woodward*, 42 L. J., Ch. 782; L. R. 15 Eq. 159; 27 L. T. 574; 21 W. R. 97.

—— **House forming Part of a Street.**]—Whether a house or building forms part of a street within the meaning of the 24 & 25 Vict. c. 61, s. 28, which enacts that it shall not be lawful to bring forward any house or building forming part of any street beyond the front wall of the house or building on either side thereof without the consent of the local board, is a question of fact. *Reg.* v. *Fullford*, L. & C. 403; 33 L. J., M. C. 122; 10 Jur. (N.S.) 522; 10 L. T. 346; 12 W. R. 715; 9 Cox, C. C. 453.

Houses form part of a street within the meaning of the act when they are so contiguous as substantially to form a continuous row. *Ib.*

—— **Projection—Where no Obstruction to Traffic.**]—A local act for the promotion of health and the regulation of buildings in a borough, enacted after making various provisions for the prevention of nuisances upon the pavements of streets, that no projection should be made in front of any building over or upon the pavement:—Held, that this enactment did not apply to projections from the front of a building which were too high up to interfere with free passage along the footpath. *Goldstraw* v. *Duckworth*, 49 L. J., M. C. 73; 5 Q. B. D. 275; 42 L. T. 440; 28 W. R. 504; 44 J. P. 410.

—— **Power to order Removal.**]—By a local act owners of buildings within the district were required, within fourteen days after receiving notice in writing from the local authority, to remove all signs or other projections affixed to their buildings which, in the judgment of the local authority, should be considered annoying or dangerous to the public passage along the streets:—Held, that the local authority were not obliged to act as a court, and give the owner of a building an opportunity of being heard before they passed a resolution to send him notice to remove a sign affixed to his building; his proper course, if he objected to their order, was to apply to them to allow him to be heard and lay his objections before them. *Att.-Gen.* v. *Hooper*, 63 L. J., Ch. 18; [1893] 3 Ch. 483; 8 R. 535; 69 L. T. 340; 57 J. P. 564.

**Open Space—Addition to old Dwelling-house.**]—The proprietor of a house erected before the constitution of the district, and used for an hotel, having a yard with coach-house and stables in the rear, for the purpose of making an addition to the hotel, pulled down the coach-house and stables below the ground floor, and erected upon the site a building three storeys high; the only means of access to the upper chambers being up the staircase of the old house, and through a passage into the new building. On an information against the proprietor for an offence against the by-law of the local board, made under 21 & 22 Vict. c. 98, s. 34, in not leaving an open space equal to one-third of the area of the ground on which the dwelling-house stood, the justices found that the building erected in the yard being a new building built up to, and adjoining the old building, must either be considered with the old building as one house, or that the old house and new building must be considered as two erections, and that both old and new buildings must be considered in reckoning the ground upon which the building stood, and convicted him of a breach of the by-law:—Held, that the conviction could not be sustained, because the new erection was not a new dwelling-house, but merely an addition to an old dwelling-house, or because the justices had not found that it was a new dwelling-house, which was essential to the validity of the conviction. *Shiel* v. *Sunderland Corporation*, 6 H. & N. 796; 30 L. J., M. C. 215.

**Thickness of Walls.**]—A local board of health made a by-law under 11 & 12 Vict. c. 63, s. 115, and 21 & 22 Vict. c. 98, s. 34, as to the structure of new buildings, requiring the party-wall of a house of more than one storey to be built of the thickness of nine inches, subject to a penalty, and by another by-law a penalty was imposed of forty shillings, de die in diem, in case of a continuing offence under other by-laws after written notice by the board to the offender. A person built a house of more than one storey with a party-wall of a thickness of four and a half inches, and sold and disposed of the house and did nothing more to it. Five months after-

wards he was fined under the former by-law. Subsequently, notice having been given to him to make the walls of the requisite thickness, he was fined again under the latter by-law in a continuing penalty for seven days of five shillings a day:—Held, that the latter by-law did not apply to an offence of this description, which was complete before the first conviction, and that the latter conviction was therefore bad. *Marshall* v. *Smith*, 42 L. J., M. C. 108; L. R. 8 C. P. 416; 28 L. T. 538.

By 3 & 4 Vict. c. 85, s. 6, "all partitions between any chimney or flue . . . shall be of brick or stone, and at least equal to half a brick in thickness. A subsequent local statute enacted that "the chimneys and flues of every new building shall be constructed in such mode and of such materials and dimensions as shall from time to time be determined or approved by the corporation," and then, if no direction should be given by the corporation, prescribed certain directions different from those contained in 3 & 4 Vict. c. 85, s. 6. A master builder built a chimney not in accordance with the provisions of 3 & 4 Vict. c. 85, s. 6, and he was convicted before justices of an offence against that act:—Held, that the local statute had not repealed 3 & 4 Vict. c. 85, s. 6, and that the conviction was right. *Hill* v. *Hall*, 45 L. J., M. C. 153; 1 Ex. D. 411; 35 L. T. 860.

—— **Party Liable.**]—B. contracted with W., the owner of land, to erect seventy-six houses thereon for a certain price and on certain terms, and lodged plans with the urban sanitary authority. After erecting fifty-nine houses B. agreed on 1st September with C., that C. should erect the rest of the houses at a certain price, and C., in erecting the houses, made the walls insufficient, and not in compliance with the by-law of the urban sanitary authority, but C.'s violation of the by-law was after 1st September, when B. had ceased to have anything to do with the buildings:—Held, that B. was not "the person erecting the buildings" which C. was building, and, therefore, not liable under the by-law, which imposed a penalty for violation of rules as to thickness of walls. *Brown* v. *Edmonton Local Board*, 45 J. P. 553.

**Walls of "Hard and Incombustible Material"—Galvanised Iron Building—Wooden Framework—By-laws.**]—Where a by-law of a local sanitary authority provides that the walls of new buildings shall be composed only of "hard and incombustible material," such by-law applies to walls composed of wooden posts attached to a wooden frame, covered on the outside by a skin of galvanised iron. *Badley* v. *Cuckfield District Council*, 64 L. J., Q. B. 571; 15 R. 461; 72 L. T. 775; 43 W. R. 663; 59 J. P. 582.

**Height of Floor—By-law—Deviation from Plan.**]—A by-law of a sanitary authority, made under s. 157 of the Public Health Act, 1875, required that a plan shewing the dimensions of the several parts of any proposed building should be sent to, and approved by, the sanitary authority before the work of building was commenced. The respondent sent in plans of a proposed building, which were approved by the sanitary authority. In the course of building he deviated from the plans sent in by altering the height of the floors of the building:—Held, that the respondent had committed a breach of the by-law. *James* v. *Master*, [1893] 1 Q. B. 355; 5 R. 112; 67 L. T. 855; 41 W. R. 174; 57 J. P. 167.

**Open Spaces—Old Buildings.**]—A local board of health made a by-law, that wherever any open space had been left belonging to any building, such space should never afterwards be built upon without the consent of, &c., and without leaving an open space belonging to such building of a specified size and dimensions:—Held, that if the by-law applied to open spaces belonging to old buildings it was bad, as exceeding the powers conferred by 21 & 22 Vict. c. 98, s. 34. *Tucker* v. *Rees*, 7 Jur. (N.S.) 629.

—— **Between opposite Properties—How Calculated.**]—By a by-law made by commissioners, under 21 & 22 Vict. c. 98, it was provided that every building to be erected and used as a dwelling-house shall, during such use, have in the rear or at the side thereof an open space exclusively belonging thereto, to the extent of at least 150 square feet, free from any erection thereon above the level of the ground, other than a privy; but where there is a water-closet and no other privy, an open space of not less than 100 feet may be allowed, and the distance across such open space between every such building and the opposite property at the rear or side, exclusive of any common passage, shall be ten feet at least; if such building be two storeys in height above the level of such open space, the distance across shall be fifteen feet; if such building be three storeys, it shall be twenty feet; if more than three storeys, twenty-five feet:—Held, that the space required to be left between the building to be erected and the opposite property must be co-extensive with the line of demarcation between such building and such opposite property, and that at no point should a less distance than that prescribed by the by-law intervene between them, exclusive of any common passage. *Anderton* v. *Rigby*, 13 C. B. (N.S.) 603; 32 L. J., M. C. 137; 9 Jur. (N.S.) 1058.

—— **Buildings not in a Street.**]—By a local improvement act, "it shall not be lawful to build within the borough any houses with their fronts facing each other, which shall be separated from each other by a space of less than twenty-four feet wide":—Held, that this did not apply to the erection of buildings not in a street, but that the prohibition affected only the building in a street of two or more houses at the same time, with their fronts facing each other, within the prescribed distance. *Reg.* v. *Sidebotham*, Bell, C. C. 171; 28 L. J., M. C. 189; 5 Jur. (N.S.) 1083; 7 W. R. 450; 8 Cox, C. C. 206.

—— **Distance across to opposite Property.**]—The L. improvement commissioners made a by-law that every person erecting a new building for a dwelling-house should provide in the rear an open space exclusively belonging thereto, to the extent of at least 150 square feet, and should cause the distance across such open space between every such building and the opposite property at the rear to be at least twenty feet. P. erected a new building to be used as a dwelling-house; in the rear there was a space exclusively belonging thereto of 700 square feet; the distance

across such open space to the opposite houses was fifty-two feet; but as P.'s land was bounded by a public street, the distance from the houses of P. to the edge of the street was only eight feet:—Held, that on the true construction of the by-law the public street was the opposite property, and that P. had committed a breach of the by-law. *Jones* v. *Parry*, 57 L. T. 492; 52 J. P. 69.

**Suitableness of Building to locality—Power to disapprove.**]—Plans of an intended new dwelling-house were submitted to the respondents under s. 68 of the Newcastle-upon-Tyne Improvement Act, 1870. The plans did not disclose the breach of any of the statutory provisions or by-laws of the respondents. The respondents, however, disapproved of the intended building on the ground that a house of the nature and character intended to be erected would be unsuitable to the locality, and would tend to depreciate the character of the neighbouring property:—Held, that s. 69 did not give the respondents an absolute discretionary power of approval or disapproval, and that under the circumstances they were bound to approve of the intended new building. *Reg.* v. *Newcastle-on-Tyne Corporation*, 60 L. T. 963; 53 J. P. 788.

**Wooden Fence with Covering—Liability of Owner.**]—B., being owner of waste ground in an urban district, put up a wooden fence along the boundary without floor or roof, and let the place to R., but forbade R. to affix anything to the structure. R., without B.'s knowledge, stretched canvas across the top of the fence, and left the premises. B. was then charged with erecting a wooden building contrary to the by-laws:—Held, that the justices were wrong in convicting B., the mere fact of being owner shewing no offence. *Bennett* v. *Skegness Local Board*, 54 J. P. 469.

**Back Yard—Contravention of Plan.**]—Sect. 99 of the Kingston-upon-Hull Improvement Act of 1854, enacts that every house to be thereafter constructed on vacant ground (except corner houses, &c.), shall have a back yard, or other vacant ground and area, of not less than eight feet, extending from the main building for the whole length of such building; and by s. 101, a plan shall be furnished to the local board of health by persons intending to build, shewing the particulars required by that act; and the building shall not be commenced until the local board approve the plan. A builder submitted to the local board of health of the borough of Kingston-upon-Hull a plan of four new houses (not corner houses), having vacant ground at the side, but not at the back. The local board disapproved the plan, as not complying with s. 99, but the party commenced to build notwithstanding:—Held, that whether s. 99 required the vacant space to be at the back or not, the party was rightly convicted of an offence against s. 101. *Pearson* v. *Kingston-upon-Hull Local Board*, 3 H. & C. 921; 35 L. J., M. C. 36; 13 L. T. 180.

**Building without Consent of Board.**]—Sect. 97 enacts, that any building, after the commencement of the act, built, shall not, without the previous consent of the local board, be used as a dwelling-house, except only during such time as there is adjoining or belonging thereto, or occupied therewith, either a street or a clear open space in and to the full extent of the front thereof, and of not less than twenty feet in width:—Held, that a party had committed an offence under this section in building, and causing to be used without the consent of the local board, a dwelling-house with an open space in front less than twenty feet in width. *Ib.*

Sect. 103 enacts, that if any sewer, drain, privy, cesspool, ashpit, building, or other work be made or suffered to continue contrary to any of the provisions of this act . . . every person so offending shall for every such offence forfeit a sum not exceeding 5*l.*, and for every day after the first during which the offence continues, a sum not exceeding 10*s.*:—Held (by reference to the sections preceding), that the word "building" is not restricted to a building of similar description with the class of buildings previously enumerated in the section, but includes a dwelling-house; and that the commencing a building within s. 101 is the making a building within s. 103. *Ib.*

Held, also, that the user of a dwelling-house, contrary to s. 97, is not the making or suffering it to continue contrary to the act, within s. 103. *Ib.*

The owners of a house and area situate in and fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage, but not beyond the limits of the area. After the completion of the alterations, the local authority threatened them with summary proceedings before the justices for the recovery of penalties under the Public Health Act, 1875, on the ground that they had set forward their building without the written consent of the local authority under s. 156. The owners then moved ex parte for an injunction to restrain the local authority from taking these proceedings, alleging that as the alterations had been made over their own property, the local authority, in threatening proceedings, were acting ultra vires; that they having had notice of the intention of the owners to make the alterations, were bound by acquiescence; and that the justices had no jurisdiction, as the local authority had not made their complaint within six months after the alleged offence, as required by s. 252; the injunction was refused. *Kerr* v. *Preston Corporation*, 46 L. J., Ch. 409; 6 Ch. D. 463; 25 W. R. 264.

—— **Consent, how given.**]—A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. *Ib.*

**Building Plans—Approval of—Mandamus.**]—A rural district council invested with the powers of an urban sanitary authority to make by-laws respecting the sewerage of new streets, the drainage of new buildings and the depositing of plans for the same under s. 157 of the Public Health Act, 1875, are not entitled to reject the plans of an owner of a proposed building estate, properly deposited with them, and not contravening any of their by-laws, solely on the ground that the plans do not disclose a complete system of sewerage, including outfall, for the building estate; and a mandamus will issue to the council to enforce the passing of the plans if their approval is withheld on that ground. *Reg.* v. *Tynemouth District Council*, 65 L. J., Q. B. 545; [1896]

2 Q. B. 451; 75 L. T. 86; 60 J. P. 804—C. A. Affirming 44 W. R. 646.

No action will lie against a local authority for a mandamus compelling them to approve building plans submitted to them in pursuance of the by-laws in force in their district, which plans the authority in the bonâ fide exercise of their powers have already disapproved of, on the ground that they are not in conformity with the by-laws. *Smith* v. *Chorley District Council*, 66 L. J., Q. B. 427; [1897] 1 Q. B. 678; 76 L. T. 637; 45 W. R. 417; 61 J. P. 340—C. A.

### c. Right to Pull Down.

**Power of Local Board—Notice to Building Owner.**]—The provisions of s. 158 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and of the by-laws of a local board giving them power to pull down or remove any work executed without the approval or after the disapproval of the local board, and which is in any respect not in conformity with any by-law of the local board, do not authorise them to pull down a building without giving notice of their intention so to do to the owner, in order that he may have an opportunity of shewing cause why the building should not be pulled down. *Cooper* v. *Wandsworth Board of Works* (14 C. B. (N.S.) 180), and *Masters* v. *Pontypool Local Board* (9 Ch. D. 677), approved. *Hopkins* v. *Smethwick Local Board*, 59 L. J., Q. B. 250; 24 Q. B. D. 712; 62 L. T. 783; 38 W. R. 499; 54 J. P. 693—C. A.

**For Infringement of By-laws.**]—On the infringement of by-laws made by an urban sanitary authority, whether as to structural requirements or the depositing of plans, respecting the building of houses in a new street, they are empowered under s. 34 of the Local Government Act of 1858, to pull down the houses. *Baker* v. *Portsmouth Corporation*, 47 L. J., Ex. 223; 3 Ex. D. 157; 37 L. T. 822; 26 W. R. 303—C. A.

A local board of health made by-laws, under the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 34, as follows: "6th. Every person intending to erect any new building shall give fourteen days' notice, to be delivered to the board's surveyor, or left at his house, with detail plans and sections, and any person who shall erect any new building without delivering such notice, and plans and sections, or without having the plans, &c., approved by the board, shall be liable to a penalty of 40*s*." By by-law 36, the board might cause to be altered or pulled down any work begun or done in contravention of the by-laws:—Held, that the 6th by-law was within the powers conferred by s. 34, and was reasonable and therefore valid. *Hall* v. *Nixon*, 44 L. J., M. C. 51; L. R. 10 Q. B. 152; 32 L. T. 87; 23 W. R. 612.

"Width" in s. 157 of Public Health Act, 1875, and the by-laws under it, means width of roadway and not width between houses on each side of the street, so that an urban authority is not entitled under the above section and by-laws to disapprove of and pull down houses in the course of erection in a new street on the ground that the building was too near the pathway. *Robinson* v. *Barton Local Board*, 53 L. J., Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276—H. L. (E.)

—— **Part of Building.**]—A by-law of the defendants provided that fifteen square feet of air space should be left open in the rear of any new building. The plaintiff built in contravention of this by-law:—Held, that the defendants might pull down that part of the building that infringed the by-law in any way they pleased consistently with safety, but not in a dangerous way; that where there had been excess in pulling down the building the defendants were not liable unless the damage caused thereby was appreciable. *Jagger* v. *Doncaster Sanitary Authority*, 54 J. P. 438.

**For not giving Notice or depositing Plans.**]—By the Local Government Act, 1858 (21 & 22 Vict. c. 28), s. 34, local boards have power to make by-laws with respect to—first, the level, width and construction of new streets; second, the structure of the walls of new buildings; third, the sufficiency of space about buildings; fourth, the drainage, &c., of buildings. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter or pull down buildings:—Held, that the power to pull down buildings for which the local boards might make provision was not confined to cases of contravention of by-laws relating to structure, but might be extended to cases of contravention of by-laws relating to the giving of notices, the deposit of plans, &c. *Baker* v. *Portsmouth Corporation*, 47 L. J., Ex. 223; 3 Ex. D. 157; 37 L. T. 822; 26 W. R. 303—C. A.

**Notice and Deposit of Plans.**]—If a person gives a notice of his intention to build, and leaves with the local board plans and sections, he may at once commence the building, subject to the right of its being altered or pulled down, if not in conformity with the by-laws of the board. *Hattersley* v. *Barr*, 4 H. & C. 523; 12 Jur. (N.S.) 894; 14 L. T. 565; 14 W. R. 864.

—— **Approval of Plan.**]—The owner of a house after having, in accordance with a by-law of the local government board, left, on the 16th of October, a plan of an intended new building, the local board passed a resolution that the plan was approved of, and that he should be offered 40*l*. for certain land of his thrown into the street. He refused to accept the 40*l*., but proceeded with his works, and by the 26th of October had pulled down the front wall of his house. On the 27th of October the board passed a resolution abandoning the terms before offered, and requiring him to set his frontage further back. This notice was given under s. 155 of the Public Health Act, 1875, as on the front of a house having been pulled down. On the 27th of November the owner of the house proceeded with his building, and on the 21st of December he was served with notice to pull down his new building:—Held, that the local board having approved of a plan, and having allowed a house-owner to proceed and pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down. *Masters* v. *Ponty-*

*pool Local Board*, 47 L. J., Ch. 797; 9 Ch. D. 677.

—— **Time for Disapproval.**]—Held, that where a local board has not, during the month prescribed by the Public Health Act, s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan. *Ib.*

—— **Consent to Plans—Objection afterwards to Width of Street.**]—T., having land within the area of a local board upon which he proposed to build six houses, sent a notice and plan shewing what he intended to do, and where the new street of ten yards wide was to be. The board sanctioned the houses, and they were built. Some years afterwards T. was summoned for disobeying the by-law in not leaving a space of thirty feet wide for the street. The fact was, that his land extended only nine feet in front of the houses, but this was not known to the board till afterwards. T. was convicted:—Held, that the conviction was wrong, and that the local board ought to have satisfied themselves before sanctioning the plans that T. had land of sufficient width to make the proposed new street when the houses were completed. *Thompson* v. *Failsworth Local Board*, 46 J. P. 21.

—— **Injunction to Prevent Interference.**]—An owner of a factory being desirous of rebuilding his premises, submitted the plans to a committee, to whom the town council, also the local board of health, delegated their powers, and the plans having been approved, pulled down the factory, and proceeded to rebuild it according to such plans. The town council, under the 21 & 22 Vict. c. 98, s. 35, relating to buildings to be erected, having required him to set back his premises, the court restrained them by injunction from interfering with the erection of the factory according to the approved plans. *Slee* v. *Bradford Corporation*, 4 Giff. 262; 1 N. R. 386; 9 Jur. (N.S.) 815; 8 L. T. 491.

—— **New or Old Buildings.**]—The 21 & 22 Vict. c. 98, s. 34, empowers a town council, being a local board, to make a by-law requiring to be given to them a notice, plan, &c., of a new building; and s. 25 applies only to buildings that have been taken down "without any previous approval of a plan, &c., for their re-erection." *Ib.*

The 21 & 22 Vict. c. 98, s. 34, does not authorise the local board to make a by-law so as to affect premises erected prior to 1853, when the district was formed. *Burgess* v. *Peacock*, 16 C. B. (N.S.) 624; 10 Jur. (N.S.) 803; 10 L. T. 617.

—— **Temporary Erections.**]—Under a local act incorporating the provisions of the Public Health Acts, 1848 and 1858, by-laws were made, by which it was provided that "every person who shall intend to erect any new building shall give a week's notice to the town-surveyor of such intention, by writing delivered to the surveyor or left at his office, and shall at the same time leave at the office detail plans and sections of every floor of such intended new building"; and a penalty not exceeding 5*l.* is imposed for non-compliance with this requirement. F. without giving such notice or delivering any plans, erected structures which from their description could not be intended for residential purposes, and which were found by the justices to have been erected for a temporary purpose only, and to have been intended to be pulled down by F. when that purpose was answered:—Held, that a conviction under the by-laws could not be sustained, inasmuch as such by-laws, if intended to apply to such structures, were unreasonable and bad. *Fielding* v. *Rhyl Improvement Commissioners*, 3 C. P. D. 272; 38 L. T. 223; 26 W. R. 881.

**Right of Owner to shew Cause.**]—A local board cannot, under s. 158 of the Public Health Act, 1875, pull down a building without giving the owner an opportunity of shewing cause why it should not be pulled down. *Masters* v. *Pontypool Local Board*, 47 L. J., Ch. 797; 9 Ch. D. 677.

**Dangerous Buildings—Effect of Surveyor's Certificate.**]—A local act enacted that "if the surveyor of the city, or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation" of the city "shall and may, without any presentment, notice or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite." It also enacted that if any summons, demand or notice or other such document under the act, "require authentication by the corporation, the signature of the town-clerk thereto shall be a sufficient authentication":—Held, that the certificate of the surveyor was conclusive as to whether danger was imminent, and that the corporation was bound to act upon it; secondly, that by force of the statutory provisions, the directions by the town-clerk to the surveyor must be deemed the act of the corporation, which had ratified his proceedings; and that the certificate of the surveyor sufficiently described two houses having internal communication as "a building, No. 95, Market Street." *Cheetham* v. *Manchester Corporation*, 44 L. J., C. P. 139; L. R. 10 C. P. 249; 32 L. T. 28.

Held, also, that the acts of the surveyor, authenticated by the town-clerk, were the acts of the corporation; or that, at all events, they were ratified and adopted by them so as to justify what was done under the certificate. *Ib.*

The certificate and notice referred generally to the "building," No. 95, Market Street; the premises dealt with consisted, besides No. 95, Market Street, of other premises adjoining thereto, being No. 2, Palace Street, for which the plaintiff was separately rated, but connected therewith by internal communications, and occupied therewith by him as one set of business premises:—Held, that the description in the certificate and notice was sufficient to cover both sets of premises. *Ib.*

**Demolition when Insanitary — Service of Notice on Owner.**]—The "owner" of an insanitary dwelling to be served with notice under s. 32 of the Housing of the Working Classes Act, 1890, is the person defined by s. 29 of the same act. *Osborne* v. *Skinners' Co.*, 60 L. J., M. C. 156; 39 W. R. 715.

Where the person receiving the rents and profits is a leaseholder with less than twenty-one years of his lease to run, he is not the person to be served, notwithstanding that s. 32 and

schedules 3 and 4 of the same act refer to the Public Health Act, 1875, and the Nuisances Removal Act, 1854, for purposes of procedure, and those acts regard the receiver of the rents and profits as owner. *Ib.*

—— **Compensation—Basis of Arbitration.**]—By a presentment of the grand jury, at the Liverpool city sessions, under the provisions of the Liverpool Sanitary Amendment Act, 1864, certain houses were condemned as unfit for human habitation. In the proceedings which followed, to determine the amount of compensation to be paid to the owner, the arbitrator made his award on the basis of the value of the site and materials of the houses only:—Held, that the houses ought to have been valued as they stood before demolition, and without reference to the fact of their approaching demolition, as premises which might have been let; and that their value was unaffected by the presentment of the grand jury. *Gough* v. *Liverpool Corporation*, 64 L. T. 596; 55 J. P. 648. Varied, 65 L. T. 512; 55 J. P. 789—C. A.

—— **Award.**]—If an arbitrator appointed under the Liverpool Sanitary Amendment Acts, 1864 and 1869, assesses on correct principles, the amount of compensation should be left to his discretion. *Gough* v. *Liverpool Corporation*, 56 J. P. 357—C. A.

—— **Several Houses—One Report and one Order.**]—A medical officer of health reported, under the Artizans' and Labourers' Dwellings Act, 1868 (31 & 32 Vict. c. 130), ss. 5 and 6, that the premises in Marsh's Court, in the parish of St. George the Martyr, Nos. 1 to 12 and 13, were in a condition or state injurious to health, so as to be unfit for human habitation; and upon this report the surveyor reported that he had surveyed the premises, and was of opinion that the causes of the evil were structural defects in the premises, and that such defects could not be remedied by structural alterations or improvements, or otherwise, but such premises ought to be demolished. The whole of the premises belonged to one party. The vestry subsequently made an order that the premises should be totally demolished:—Held, first, that it was not necessary that there should be a report and an order in respect to each house, but that one report and one order were, under the circumstances, sufficient. *Flight* v. *St. George the Martyr*, 24 L. T. 24.

—— **Report of Surveyor.**]—Held, secondly, that as the report of the surveyor stated that the structural defects could not be remedied, but that the premises ought to be demolished, it was unnecessary to specify in detail in what the structural defects consisted. *Ib.*

### d. By-Laws ultra vires.

A by-law made by a local board of health, that no dwelling-house should be erected without having at the rear, or side, a sufficient roadway for the purpose of affording efficient means of access to the privy or ashpit belonging to the house, is bad, as beyond the jurisdiction conferred by the act. *Waite* v. *Garston Local Board*, 37 L. J., M. C. 19; L. R. 3 Q. B. 5; 17 L. T. 201; 16 W. R. 78.

Lessees had for ninety-nine years a piece of land within the jurisdiction of a local board. The land leased was higher than the street, and was bounded from the street by a wall. They erected a chapel on the land, and in order to approach the chapel steps were placed on their land. The chapel was erected before the local board was in existence, but the steps and boundary wall were completed afterwards. After a resolution of the board and a notice to the lessees, the local board removed the steps and boundary wall and refused compensation:—Held, that the local board was not justified, under 21 & 22 Vict. c. 98, and if any by-law authorised the act such by-law would be unreasonable. *Brown* v. *Holyhead Local Board*, 1 H. & C. 601; 32 L. J., Ex. 25; 7 L. T. 332; 11 W. R. 71.

A by-law by a local board of health, imposing continuing penalties on any person who shall construct any works, or do, or omit to do, any act, or to comply with any requirements of the board, or shall make any alteration or deviation in any plan approved by the board, whether in new or existing buildings contrary to the provisions therein contained, or shall do any act, matter, or thing contrary to the by-laws made under the authority of 21 & 22 Vict. c. 98, s. 34, or shall omit, neglect, or fail to perform any of the works, matters, or things required by such by-laws, and empowering the board to remove, alter, pull down, or otherwise deal with such work as the case may require, is invalid, as exceeding the authority given by the 21 & 22 Vict. c. 98. *Young* v. *Edwards*, 33 L. J., M. C. 227; 11 L. T. 424.

**Requiring a Month's Notice.**]—A by-law under 21 & 22 Vict. c. 98, requiring a month's notice before proceeding to build, is bad. *Hattersley* v. *Barr*, 4 H. & C. 523; 12 Jur. (N.S.) 894; 14 L. T. 565; 14 W. R. 864.

**Erection before Kerb put in.**]—By s. 157 of the Public Health Act, 1875, every urban authority is empowered to make by-laws "with respect to the level, width and construction of new streets":—Held, that the section did not empower the making of a by-law that "no person shall commence the erection of a building in a new street unless and until the kerb of each footpath therein shall have been put in at such level as may be fixed or approved by the urban sanitary authority." *Rudland* v. *Sunderland Corporation*, 52 L. T. 617; 33 W. R. 164; 49 J. P. 359.

**Plans—Power to Retain.**]—It is reasonable for an urban sanitary authority to make a by-law and regulations enabling it to retain the plans of intended buildings deposited under the Public Health Act, 1875, although such plans be disapproved of and rejected. *Gooding* v. *Ealing Local Board*, 1 Cab. & E. 359.

—— **Power to approve or disapprove.**]—A by-law giving power to a corporation to approve or disapprove of plans of proposed new buildings is not unreasonable where by the special legislation under which it is made power to appeal to quarter sessions from the decision of the corporation is given to the building owner. *Cook* v. *Hainsworth*, 65 L. J., M. C. 190; [1896] 2 Q. B. 85; 75 L. T. 51; 44 W. R. 541; 60 J. P. 439.

—— **No Approval of—Continuing Penalty—Limitation of Time for Proceedings.**]—On the

11th December, 1885, an information was preferred against the appellant for that he, between the 6th March, 1885, and October, 1885, had commenced the execution of works, the plans of which were not in conformity with the by-laws, and had erected such works notwithstanding the disapproval of the urban sanitary authority, and permitted the same to continue, notwithstanding written notice of such contravention of the by-laws. By by-law 5, s. 9, "If the person intending to construct new houses shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirements of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions." The justices convicted the appellant of the offence, and ordered him to pay the penalty of 5*l.* and costs, and also to pay a further sum of 5*s.* per day from the 12th of October, 1885, being the day on which the respondent first served a notice of objection, to the 11th December, 1885, being the day on which the said information was laid:—Held, that the conviction could not be sustained, and that the 9th paragraph of the 5th by-law was bad, because there was no authority to inflict, by a by-law, a continuing penalty for merely not pulling down a building actually erected and completed. Held, also, that the said by-law was ultra vires, because, under s. 115 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), a continuing penalty is to run only for each day after written notice of the offence has been given by the local board. The section does not authorise the infliction of a continuing penalty "for each day during which the works shall continue contrary to the provisions of the by-laws." Held, also, that the respondents had not taken proceedings in time, and were barred by s. 11 of Jervis' Act (11 & 12 Vict. c. 43), because the original offence of commencing the work was not shewn to have been committed within six months of the date of the information. The period of limitation mentioned in s. 158 of the Public Health Act, 1875, applies only to the case of a continued offence. *Reay* v. *Gateshead Corporation*. 55 L. T. 92; 34 W. R. 682; 50 J. P. 805. See also *James* v. *Wycill*, supra, col. 392.

**Sufficiency of Space about Building.**]—A local improvement act authorised by-laws to be made for sufficiency of space about buildings. A by-law provided that every new building should have in the rear or side an open space of at least 150 square feet, and wherever any open space had been left, when the building was approved, such space should not afterwards be built upon without approval:—Held, that the by-law was bad so far as prohibiting future buildings on the spaces left open. *Quinby* v. *Liverpool Corporation*, 53 J. P. 213.

**Prohibition of use unless fit for Human Habitation.**]—An urban sanitary authority made the following by-law under the Local Government Act, 1858 (all by-laws made under which are deemed to be by-laws under the Public Health Act, 1875, if not inconsistent with any of the provisions of that act): "No new house shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board, or their officer authorised to give such certificate, after examination, to be in every respect fit for human habitation in their or his opinion":—Held, that the by-law was reasonable and not inconsistent with any of the provisions of the Public Health Act, 1875, and therefore valid. *Horsell* v. *Swindon Local Board*, 58 L. T. 732; 52 J. P. 597.

**Dwellings for Servants of Railway Company—Not "Buildings used for purposes of such Railway."**]—The appellants erected dwelling-houses for their servants whose duties required them to live upon the spot, on vacant land, acquired and held by them under certain acts of parliament, near to but not forming part of one of their stations, nor used for the purposes of their railway. The appellants were convicted and fined at petty sessions for not having given the respondents, who were the rural sanitary authority, notice in writing of their intention to erect the buildings as required by one of the by-laws, then in force, made by the respondents for the regulation of new streets and buildings under ss. 157 and 276 of the Public Health Act, 1875, and allowed by the Local Government Board. Sect. 157 contains a proviso that the section is not to apply to "buildings belonging to any railway company, and used for the purposes of such railway under any act of parliament":—Held, that the by-law was valid, and that the buildings in question were not within the proviso. *Manchester, Sheffield and Lincolnshire Ry.* v. *Barnsley Union*, 67 L. T. 119; 56 J. P. 679.

**Power of Local Authority to set aside By-laws.**]—Even though the plans of new buildings have been passed by the local authority, the building owner will not be entitled to erect buildings in contravention of any of their by-laws. Semble, that a local authority empowered to make by-laws has no power to sanction plans in contravention of by-laws properly made. *McIntosh and Pontypridd Improvements Co., In re*, 61 L. J., Q. B. 164.

**Power to order Removal.**]—A local board made by-laws with respect to new streets, by one of which their approval was required for the erection of buildings; and it was provided that if any works were constructed "contrary to the provisions herein contained," the board might have such works removed, altered, or pulled down:—Held, that the by-law did not give the board a general power of veto on the construction of buildings, but only of disapproving and ordering the removal of buildings which contravened specific regulations contained in the by-laws. *Robinson* v. *Barton Local Board*, 53 L. J., Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276—H. L. (E.)

### e. Used as Watch-Houses.

The provisions of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 84, with regard to buildings used as watch-houses, apply to such buildings in those places only that were under the control of various local authorities before the passing of the act. *Baldwin* v. *White*, L. R. 10 Q. B. 279; 32 L. T. 365; 23 W. R. 826.

3. Recreation Grounds and Parks.

**Power to Regulate.**]—26 & 27 Vict. c. 13, only applies to cases where land, by act of parliament or otherwise, has been vested in trustees, or irrevocably set apart for the use and enjoyment of the inhabitants of a square or a street, and it gives no power to deprive the owner of his beneficial interest in property where he has not given it up. *Tulk* v. *Metropolitan Board of Works*, 37 L. J., Q. B. 272; L. R. 3 Q. B. 682; 19 L. T. 18; 16 W. R. 985—Ex. Ch.

**Origin of Right.**]—The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. *Dyce* v. *Hay*, 1 Macq. H. L. 305.

**What Buildings may be Erected on.**]—When premises have been provided for the purpose of being used as public walks or pleasure grounds, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 74, it is allowable to erect thereon such buildings as may be conducive to the purpose for which the premises have been acquired. Of such a nature are a conservatory, a museum, and a public library, but not a town hall or a school of art. *Att.-Gen.* v. *Sunderland Corporation*, 45 L. J., Ch. 839; 2 Ch. D. 634; 34 L. T. 921; 24 W. R. 991—C. A.

**Holding of Fairs.**]—Where, by an act of parliament, a corporation was directed to cause a piece of land to be drained and levelled, and kept in a proper condition for the purpose of public recreation, the court restrained the corporation by injunction from permitting a cattle fair to be held on such piece of land. *Att.-Gen.* v. *Southampton Corporation*, 2 Giff. 363; 29 L. J., Ch. 282; 6 Jur. (N.S.) 36; 1 L. T. 155.

**Straying of Fowls—By-law.**]—A local board made by-laws for the regulation of a pleasure ground within their jurisdiction, and one was, "A person shall not suffer any fowl, &c. belonging to him to enter or remain in the pleasure ground." And the fine for offending was 5*l.* B.'s six fowls strayed inside, there being no fence between sufficient to prevent them; and the justices declined to convict, holding the by-law to be repugnant to the law of England and not warranted by s. 164 of the Public Health Act. *Torquay Local Board* v. *Bridle*, 47 J. P. 183.

**Royal Parks — Rules — Conviction for Infringing.**]—By the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 9, any rule made in pursuance of the first schedule to this act shall be forthwith laid before both houses of parliament, if parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of parliament; and if any such rules shall be disapproved of by either house of parliament within one month after the same shall have been so laid before parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced:—Held, that rules made during the recess came into operation and remained in force until disapproved of by parliament; and a conviction for infringing such rules was valid. *Bailey* v. *Williamson*, 42 L. J., M. C. 49; L. R. 8 Q. B. 118; 28 L. T. 28; 21 W. R. 404.

Held, also, that there was no right in the public to hold meetings in the royal parks, and therefore there was no right interfered with within s. 11; and that the conviction was therefore right. *Ib.*

4. Sewers.

a. What are.

**Private Drain for more than one House.**]—The word "sewer" in the Public Health Act, 1875, should receive the largest possible interpretation, and a drain is a "sewer" within the meaning of s. 13 when more than one house has been connected with it. *Acton Local Board* v. *Batten*, 54 L. J., Ch. 251; 28 Ch. D. 283; 52 L. T. 17; 49 J. P. 357.

A drain passing through private ground, but receiving the drainage of more than one building, is a "sewer" within the meaning of the Public Health Act, 1875. *Travis* v. *Uttley*, 63 L. J., M. C. 48; [1894] 1 Q. B. 233; 70 L. T. 242; 42 W. R. 461; 58 J. P. 85.

A single private drain conveying the drainage of two or more houses belonging to different owners into a public sewer is a sewer within the meaning of the Public Health Acts, 1875 and 1890, and as such vests in and is repairable by the local authority. *Hill* v. *Hair*, 64 L. J., M. C. 164; [1895] 1 Q. B. 906; 15 R. 424; 72 L. T. 629; 43 W. R. 651; 59 J. P. 374.

Where part III. of the Public Health Act, 1890, has been adopted by a sanitary authority, a drain passing through private ground, but receiving the drainage of more than one house, is a drain within the meaning of s. 19 of this act, and is not a sewer within the meaning of the Public Health Act, 1875. *Travis* v. *Uttley* ([1894] 1 Q. B. 233) considered and distinguished. *Self* v. *Hove Commissioners*, 64 L. J., Q. B. 217; [1895] 1 Q. B. 685; 15 R. 283; 72 L. T. 234; 43 W. R. 300; 59 J. P. 103.

A local sanitary authority who have adopted part III. of the Public Health Acts Amendment Act, 1890, may upon the true construction of s. 19, treat a drain which connects two or more houses, the property of different owners, with a public sewer, as a single private drain, and repairable by such owners individually. *Self* v. *Hove Commissioners* (64 L. J., Q. B. 217; [1895] 1 Q. B. 685) approved and followed. *Hill* v. *Hair* (64 L. J., M. C. 164; [1895] 1 Q. B. 906) disapproved. Dictum of Wills, J., in *Travis* v. *Uttley* (63 L. J., M. C. 48; [1894] 1 Q. B. 233) commented on. *Eastbourne Corporation* v. *Bradford*, 65 L. J., Q. B. 571; [1896] 2 Q. B. 205; 74 L. T. 762; 45 W. R. 31; 60 J. P. 501.

Sect. 15 of the Public Health Act, 1875, which imposes upon every local authority the duty of keeping in repair all sewers belonging to them, has not been altered by s. 19 of the Public Health Acts Amendment Act, 1890, or by a section in a local act which confers on the local authority all the powers given by s. 41 of the Public Health Act, 1875. Therefore drains draining two or more houses not within the same curtilage are still "sewers" for the purposes of the general obligation of s. 15 of the act of 1875. Where it is sought to compel a local authority to perform its duty in this respect the proper procedure is by complaint to the Local Government Board under s. 299 of the Public Health Act, 1875, and not, as a general rule, by prerogative writ of

mandamus. *Reg.* v. *Hastings Corporation*, 66 L. J., Q. B. 80; [1897] 1 Q. B. 46; 75 L. T. 377; 45 W. R. 109; 60 J. P. 759.

A drain constructed upon private ground to which the public have not access is a private drain within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890. *Hill* v. *Hair* (64 L. J., M. C. 164; [1895] 1 Q. B. 906) discussed and doubted. *Seal* v. *Merthyr Tydfil Urban Council*, 67 L. J., Q. B. 37; [1897] 2 Q. B. 543; 77 L. T. 303; 61 J. P. 551.

—— **After Point of Junction.**]—A drain used for the drainage of more buildings than one becomes a "sewer" within the meaning of s. 4 of the Public Health Act, 1875, from and after the point where it receives the drainage of more than one of such buildings. Such a drain is not a "sewer" from end to end. Dicta of Wills, J., in *Travis* v. *Uttley* (63 L. J., M. C. 48; [1894] 1 Q. B. 233) explained. *Beckenham Urban District Council* v. *Wood*, 60 J. P. 490.

**Water-course.**]—The sewage of certain houses drained into a sewer, and, after passing through the sewer, was for a period of some years allowed to fall into an open water-course, which, in its turn, flowed into a brook:—Held, that, under the circumstances of the case, the open water-course was a sewer within the meaning of s. 4 of the Public Health Act, 1875. *Wheatcroft* v. *Matlock Local Board*, 52 L. T. 356.

**Cesspit.**]—A cesspit into which ten houses are drained by their owner is not a sewer or a work belonging thereto, so as to vest in the local board under s. 13 of the Public Health Act, 1875. *Meader* v. *West Clowes Local Board*, 61 L. J., Ch. 561; [1892] 3 Ch. 18; 67 L. T. 454; 40 W. R. 676.—C. A.

**Reservoir or Cesspool.**]—The word "drain" in the above act means a passage for sewage from a single house; the word "sewer" extends to any system of drainage; but neither word includes reservoirs or cesspools. *Sutton* v. *Norwich Corporation*, 6 W. R. 432.

**Sewer "to Satisfaction of Urban Authority."**]—In 1885 plans relating to the proposed erection of seven houses along part of a private street were submitted to a local board and approved of by them. Upon one of the plans certain surface and slop-water drains were marked, leading into a nine-inch stoneware pipe. The houses were built, and the drains made, the nine-inch pipe being connected with a sewer in an adjoining street. There was no express approval or disapproval of the drain by the local board, and it became vested in them on completion. Other houses were subsequently built along the private street, and in 1890 the local board required the frontagers to sewer the street pursuant to s. 150 of the Public Health Act, 1875. On their default, the local board executed the works, and claimed a proportionate part of the expenses from the defendants, who had become the owners of the houses in question. In an action by the local board to enforce payment:—Held, that the sanction given to the plans by the local board did not amount to an approval of the drain in question as a sewer for part of the street to their satisfaction within the meaning of s. 150 of the Public Health Act; and that the defendants were liable for the payment demanded. *Handsworth Local Board* v. *Taylor*, 69 L. T. 798.

The existence of sewers under a street for the independent drainage of particular houses, and the fact that the street has become vested in the urban authority, are not sufficient to shew that the street has been sewered as a whole. Still less can the legal assumption be made that such a street has been sewered "to the satisfaction of the urban authority" within s. 150 of the Public Health Act, 1875, when notices to sewer have been given by them, and proceedings taken under that section. *Handsworth Urban Council* v. *Derrington*, 66 L. J., Ch. 691; [1897] 2 Ch. 438; 77 L. T. 73; 61 J. P. 518.

**"New Sewer"—Enlarging old Sewer.**]—The commissioners, under an improvement act, were empowered to make new sewers, but prohibited from making any new sewer to drain into a public river above a certain point:—Held, that they ought to be restrained, at the suit of the private owners of a weir in and part of the soil of the river below that point, from enlarging and deepening an old sewer running into the river above that point, so as to make it virtually a new sewer. *Holt* v. *Rochdale Corporation*, 39 L. J., Ch. 761; L. R. 10 Eq. 354; 23 L. T. 43; 18 W. R. 885.

Held, also, that the plaintiff's suit, being based upon their statutory rights, was maintainable without making the attorney-general a party thereto, or proving special injury. *Ib.*

**"Works for Sewage purposes."**]—The cleaning, levelling and cementing the bottom of a pool, into which the effluent from sewage works flows, is a work for sewage purposes within the meaning of s. 32 of the Public Health Act, 1875. *Wimbledon Local Board* v. *Croydon Sanitary Authority*, 56 L. J., Ch. 159; 32 Ch. D. 421; 55 L. T. 106—C. A.

### b. Duty of Board.

**To Repair.**]—By 18 & 19 Vict. c. 121, s. 22, the local authority of a district is required to lay down a sewer in such district when necessary, and keep the same in good and serviceable repair:—Held, that the expression repair does not mean the reconstruction of a sewer which has been originally defectively made; but the keeping the original sewer in proper repair. *Reg.* v. *Epsom Union*, 8 L. T. 383; 11 W. R. 593.

By s. 148 of the Hastings Improvement Act, 1885, "in cases where two or more houses are connected with a single private drain which conveys their drainage into a public sewer, the corporation shall have all the powers conferred by s. 41 of the Public Health Act, 1875." The owner of a number of houses, which were drained into a drain running into a common sewer, called upon the local authority to execute certain necessary repairs to the drain:—Held, that the general obligation to repair imposed upon the local authority by s. 15 of the Public Health Act, 1875, was not taken away by s. 148 of the Hastings Improvement Act, 1885, and that the local authority, and not the owner, were liable to repair the drain. *Reg.* v. *Hastings Corporation*, 66 L. J., Q. B. 80; [1897] 1 Q. B. 46; 75 L. T. 377; 45 W. R. 109; 60 J. P. 759.

**To Cleanse—Agreement with Sewage Company.**]—A sewage company was under covenant with a local board to keep their own works in

order, so as to admit the free flow of sewage from sewers of the board. A demurrer to a bill seeking to restrain the company from causing or permitting sewage to remain in the sewers of the board was overruled. *Nuneaton Local Board* v. *General Sewage Co.*, 44 L. J., Ch. 561; L. R. 20 Eq. 127.

**Omitting to Provide.**]—An order under the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 49, reciting that a sewer authority "had made default in providing a proper system of main drainage," and ordering the authority to "do its duty, and begin to set about the works for the purpose, within one month from the date of the order, and proceed therewith until completion," is good, and a second order made after default in complying with the first, appointing a person to "perform the duty of the sewer authority in respect to sewerage, as he should be directed by the secretary of state," is also good. *Reg.* v. *Cocherell*, 40 L. J., M. C. 153; L. R. 6 Q. B. 252; 19 W. R. 1133.

**New Sewer — Old Water-course.**]—A local authority, under 18 & 19 Vict. c. 121, s. 22, in laying down a new sewer is not bound to follow the course of an old water-course, but may carry the new sewer across inclosed land adjoining the old water-course. *Derby (Earl)* v. *Bury Improvement Commissioners*, 38 L. J., Ex. 100; L. R. 4 Ex. 222; 20 L. T. 927; 17 W. R. 772—Ex. Ch.

**Right of Householder to Drain into Sewer.**]—The owner and occupier of a house within a sanitary district was summoned at petty sessions by the sanitary authority for causing the water-closet attached to the house to discharge night-soil into the water-channel under the main street of N., a town within the district, causing a dangerous nuisance. It was proved that the channel or drain in question was, from its size and form, having a gravel bottom, unsuited to receive and carry off fæcal matter, and was only intended to carry off surface water. There was no other sewer in N. into which the sewage from the houses could be discharged, but the sanitary authority had made arrangements for the carting away of sewage weekly. There was no evidence of any nuisance on the defendant's premises; but it appeared that the drain or channel was in a most offensive state, and the justices being satisfied that a nuisance existed, ordered the defendant to disconnect the soil-pipe of the water-closet with the drain in the main street, so as to prevent any deposit or accumulation from the water-closet being discharged into the drain. On a case stated:—Held, that the justices' order was wrong, and should be quashed. *Molloy* v. *Gray*, 24 L. R., Ir. 258.

—— **Drainage flowing through Sewer into Stream—Conjoint Default of Owner and Local Authority—Discretion.**]—Sect. 17 of the Public Health Act, 1875, does not affect the right conferred by s. 21 upon the owner or occupier of premises within the district of a local board, to drain into the existing sewers of the board, and it is for the board to see that their sewers are so arranged that they do not contravene s. 17. *Kirkheaton Local Board* v. *Ainley*, 60 L. J., Ch. 734; 55 J. P. 230.

The plaintiffs, who were owners of premises within the district of the defendant local board, had, eight years before action, connected a drain with the defendants' sewer, which was formerly an open watercourse, and still emptied into a natural stream. Proceedings having been taken against the board to restrain the fouling of the stream, the board gave notice to the plaintiffs under s. 21 of the Public Health Act, 1875, of their intention to cut off their drain:—Held, that the plaintiffs' right to drain into the sewer was absolute, that the board was bound to see that sewage was not conveyed into the stream without first being freed from noxious matter, and that the board must be restrained by injunction from cutting off the plaintiffs' drain. *Ib.*

The defendants erected water-closets on their premises, the drains from which they connected with two small natural water-courses, which had become sewers and were, therefore, vested in the plaintiffs, a local board. Through these sewers the sewage from the water-closets flowed by natural gravitation into a larger stream. The defendants were entitled as against the plaintiffs to connect the drains from their water-closets with these sewers under s. 21 of the Public Health Act, 1875; but the plaintiffs had not sanctioned their so doing. The plaintiffs, under s. 10 of the Rivers Pollution Prevention Act, 1876, applied to a county court for and obtained an order to restrain the defendants from causing the sewage to flow into the stream. On appeal against this order, it appeared to the court that, upon the facts of the case, the plaintiffs were themselves in default in not having made any provision for dealing with the sewage in these sewers, as required by the Public Health Act, 1875:—Held, that the making of the order was discretionary, and although the defendants had offended against the Rivers Pollution Prevention Act, 1876, as a matter of discretion, under the circumstances of the case, an order ought not to be made against them at the instance of the plaintiffs, who were themselves offenders against that act, and were seeking to avoid performance of their duty under the Public Health Act, 1875. *S. C.*, 61 L. J., Q. B. 812; [1892] 2 Q. B. 274; 67 L. T. 209; 41 W. R. 99; 57 J. P. 36—C. A.

—— **County Court Appeal—Mode of Bringing.**]—An appeal on the above-mentioned ground is correctly brought by way of motion. An appeal from a county court on the merits under s. 11 of the Rivers Pollution Prevention Act, is by s. 124 of the County Courts Act, 1888, brought within the operation of s. 120 of the latter act. *Ib.*

**Duty to Prevent Nuisance.**]—It is no answer to an information at the relation of a local board of health to abate a nuisance arising from sewage, that the board has power itself to remedy the evil by making sewers, because it is the duty of the board to prevent a nuisance arising in its district, instead of putting the ratepayers to the expense of additional works. *Att.-Gen.* v. *Colney Hatch Lunatic Asylum*, 38 L. J., Ch. 265; L. R. 4 Ch. 146.

### c. Power to Create a Nuisance.

**General Rule.**]—The Public Health Act, 1875, does not authorise a sewer which would cause a nuisance, and an injunction was granted accord-

ingly when a jury found that a nuisance would be created. *Lamacraft* v. *St. Thomas Sanitary Authority*, 42 L. T. 365; 44 J. P. 441.

**Discharge of Sewage—Into a River.**]—The Local Government Act, 1858, and Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 4, enable local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse":—Held, that a local board is not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge. *Att.-Gen.* v. *Cockermouth Local Board*, 44 L. J., Ch. 118; L. R. 18 Eq. 172; 30 L. T. 590; 22 W. R. 619.

A local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at a town situated eight miles farther down, and supplied with water for domestic purposes from the river. Upon an information and bill filed by the local board (in whom the waterworks were vested), as relators and plaintiffs, seeking to restrain the local board from so discharging the sewage, on the ground that their acts were, first, an infringement of the above-mentioned provisions of the Local Government Act, 1861, and, secondly, a nuisance to the inhabitants:—Held, that upon the information an injunction to restrain the local board from infringing the act of parliament must be granted with costs; but that the bill which sought to make out a case of nuisance must be dismissed with costs. *Ib.*

—— **Into the Sea.**]—The right of drainage into the sea and public rivers conferred by s. 24, is subject to the condition that no nuisance is created. *Att.-Gen.* v. *Kingston-on-Thames*, 34 L. J., Ch. 481; 11 Jur. (N.S.) 596; 12 L. T. 665; 13 W. R. 888.

—— **Into Watercourses.**]—The fact that a watercourse is a natural drain of a district, and is polluted to some extent, but not so as to be a nuisance or to prevent a qualified enjoyment of it, by the sewage of some of the houses on its banks flowing or draining into it, does not entitle a local board of health to treat it as a common sewer, and to connect other sewers with it so that it becomes a public nuisance. *Att.-Gen.* v. *Hackney Local Board*, 44 L. J., Ch. 545; L. R. 20 Eq. 626; 33 L. T. 244.

—— **Restraining Board from Interference.**]—When a local board of health is interfering with a watercourse in a manner not authorised by the Local Government Act (21 & 22 Vict. c. 98), s. 68, art. 3, it will be restrained from so doing, and the person injured will not be left to his remedy under the compensation clause of the 11 & 12 Vict. c. 63, s. 144. *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483; 24 L. T. 402; 19 W. R. 569.

Where a man has the right to the use of an ancient stream of water flowing through his land and sewage matter is precipitated into it so as to pollute it and prevent his using it, he may obtain an injunction to prevent its becoming an undoubted nuisance; and it is not competent to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, 35 L. J., Ch. 88; L. R. 1 Eq. 161; 13 L. T. 332; 14 W. R. 92. Affirmed, 35 L. J., Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 308; 14 L. T. 154; 14 W. R. 562.

—— **Into an Open Gutter.**]—A local board of health is not justified in polluting the surface water, which flows by an open gutter into a canal, by diverting it into a sewer and passing the sewage into it. *Manchester, Sheffield and Lincolnshire Ry.* v. *Worksop Local Board*, 23 Beav. 198; 26 L. J., Ch. 345; 3 Jur. (N.S.) 304; 5 W. R. 279.

—— **Surface Water.**]—Where a canal company had a statutory power to supply the canal with water out of such "brooks, streams, and watercourses as should be found within a certain distance":—Held, that it would be difficult to hold that the mere surface water of a road, not arising from any spring or natural certain supply, could fall within the act, so far and to such an extent as to exclude a local board of health from making a system of drainage essential to the district which, offending against the rights of no one in any other particular, merely allowed to flow through gratings into the sewer the water collected on a public road from rain and from the overflowing of the surplus of the neighbouring houses, which water had theretofore flowed down an open gutter into a canal. *Ib.*

A local authority, when draining their district under the powers of the Public Health Act, 1875, and the Private Street Works Act, 1892, have, under ss. 15, 16, and 17 of the act of 1875, a right to discharge surface water into a natural stream or watercourse or canal on land belonging to another person within their district, so long as such surface water is, as required by s. 17, free from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse. *Durrant* v. *Branksome Urban Council*, 66 L. J., Ch. 653; [1897] 2 Ch. 291; 76 L. T. 739; 46 W. R. 134—C. A. Affirming 61 J. P. 472.

**Deleterious Matter.**]—Sand and silt are not "deleterious matter" within the meaning of s. 17 if the stream is already naturally charged therewith. *Ib.*

**Damage—Compensation.**]—Any damage caused by the proper exercise by the local authority of the right in question is a matter for compensation under s. 308 of the act of 1875, and forms no ground for an injunction against the local authority or for an action for damages by the owner of the land on which is the bed of the stream. *Ib.*

**Injuries—Private Streams.**]—By direction of a local board of health the sewage of a town had been by means of drainage conveyed to a river, which sewage, not having been completely deodorised before coming in contact with the river,

had so polluted the stream passing B.'s property as to kill the fish therein, and otherwise cause a nuisance:—Held, that B. was entitled to an injunction to restrain the further pollution of the water passing by his property. *Bidder* v. *Croydon Local Board*, 6 L. T. 778.

The council of a borough was bound by a local act incorporating the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town:—Held, that they were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town, and where it belonged to the plaintiff. *Att.-Gen.* v. *Birmingham Borough Council*, 4 Kay & J. 528; 6 W. R. 811.

Held, also, that, assuming the inhabitants of the borough to have had before their act a right to drain their houses into a river, that circumstance would not authorise the council discharging the sewage in such manner as to subject the plaintiff to the inconvenience of which he now complained. *Ib.*

—— **Prescriptive Rights of a few Inhabitants.**]—A local board carried the whole drainage of the town into an adjacent river, a small stream which, immediately below the town, flowed for three miles through the plaintiff's lands on both sides. The plaintiff was also seised of a mill upon the stream. The quantity of sewage matter thrown into the stream was greatly increased, the population of the town having increased nearly one-half, and the extent of sewers from 250 yards in 1848, to 10,500 yards in 1855; and besides other evidence of that, it appeared that sheep could no longer be washed there, that the fish were all dead, and that the exhalations were noisome:—Held, first, that the practice, long previously and up to 1848, of a few houses in the town to drain into the river, afforded no ground for the local board setting up a prescriptive right, and that the local board, as a modern corporation, could claim no prescriptive rights. *Att.-Gen.* v. *Luton Local Board*, 2 Jur. (N.S.) 180.

—— **Consent of Owner.**]—Held, secondly, that the stream was a private stream, the property of the plaintiff, and, therefore, that the board had no rights, except with his consent. *Ib.*

—— **Watering-places in a River.**]—Under 11 & 12 Vict. c. 53, ss. 45, 46 and 145, providing that the local boards may make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the act should authorise the boards to use, injure, or interfere with any watercourse, stream, river, &c., in which the owner of any lands may be interested, without the consent of such owner:—Held, first, that persons having a right to watering-places in a river adjoining lands, for the use of their cattle, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference. *Oldaker* v. *Hunt*, 6 De G. M. & G. 376; 3 Eq. R. 671; 19 Beav. 485; 1 Jur. (N.S.) 785; 3 W. R. 297.

Held, secondly, that works of a local board of health, producing an outfall of the sewage of a town above such a watering-place, was such an interference as to cause injury to the landowners; but that whether this was established or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers. *Ib.*

—— **Right of Fishing.**]—A right of fishing is within the term "land," according to the interpretation clause of the 11 & 12 Vict. c. 63, s. 2. *Ib.*

—— **Mill Stream.**]—A local board of health made sewers in execution of the powers of 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, and in doing so injuriously affected a stream, without having obtained the consent of the occupier of a mill on the stream and entitled to the flow of the stream to his mill. He obtained a mandamus to the local board for compensation, and made a claim, first, for damage sustained in consequence of the board opening the main sewer so as to allow the water of the stream to flow through it for forty-six hours; and secondly, for a drain or a trap door being made out of the stream, and water allowed to flow out of the stream into the trap door:—Held, first, that 21 & 22 Vict. c. 98, s. 73, was not confined to cases in which a court of equity would grant an injunction against the local board, and that the occupier of a mill was in the position of a person who would, if the act had not passed, have been entitled by law to prevent the injuriously affecting the stream. *Reg.* v. *Darlington Local Board*, 6 B. & S. 562; 35 L. J., Q. B. 45; 13 W. R. 789—Ex. Ch.

Held, secondly, that the works of the local board were not authorised by s. 73, and therefore the claim of the occupier was not the subject of compensation, but a ground of action. *Ib.*

**New Board — Existing Nuisance.**] — An annual highway board, constitued under 5 & 6 Will. 4, c. 50, acting as a local authority, under the Nuisance Removal Act, 18 & 19 Vict. c. 121, constructed in 1859 a system of sewers, which conveyed the sewage of their district into a stream, and thus occasioned a nuisance in the adjoining district:—Held, that the highway board of 1865 could not be compelled to take any steps to remedy the existing nuisance, but that they could be restrained from exercising their statutory powers so as to increase the nuisance. *Att.-Gen.* v. *Richmond*, 35 L. J., Ch. 597; L. R. 2 Eq. 306; 12 Jur. (N.S.) 554; 14 L. T. 398; 14 W. R. 686.

**Power to Carry Above Ground.**]—By the Public Health Act, 1875, s. 16, a local authority is empowered to carry any sewer, "into, through or under" any lands within its district, and the act provides for compensation to all persons sustaining damage by reason of the exercise of the powers of the act in relation to any matters as to which they are not themselves in default. A local board under this act proceeded to carry a sewer across private pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, and a permanent embankment about six feet high would be made:—Held, that the local board was authorised so to do, for that the act did not confine them to carrying a sewer underground. *Roderick* v. *Aston Local Board*, 46 L. J., Ch. 802; 5 Ch. D. 328; 36 L. T. 328; 25 W. R. 403—C. A.

**Tenant Obstructing.**]—A landlord made a sewer under land occupied by A. as his tenant

without A.'s consent. A. afterwards stopped up the sewer and caused a nuisance, but not on the land occupied by him :—Held, that A. was liable to conviction under the Public Health Act, as a person by whose act a nuisance arose or continued. *Riddell* v. *Spear*, 40 L. T. 130.

**Nuisance from Sewage Works — Order of Justices.**]—The provisions of 38 & 39 Vict. c. 55 (the Public Health Act, 1875), ss. 91 to 96, for the abatement of certain nuisances do not apply to a nuisance arising from sewage tanks and works constructed under s. 27 by a local board of health, and a court of summary jurisdiction has, therefore, no power, on proof of a nuisance so caused, to make an order for the abatement of such nuisance under s. 96. *Reg.* v. *Parlby*, 58 L. J., M. C. 49 ; 22 Q. B. D. 250 ; 60 L. T. 422 ; 37 W. R. 335 ; 53 J. P. 327.

### d. Compulsory Entry on Lands.

**For making Reservoirs.**]—A local board of health has no power under s. 46 of 11 & 12 Vict. c. 63, to enter upon land without the consent of the owner for the purpose of making reservoirs and deposit beds for retaining the sewage. *Sutton* v. *Norwich Corporation*, 27 L. J., Ch. 739 ; 6 W. R. 432.

**Out of Particular District.**]—The 11 & 12 Vict. c. 63, and the 21 & 22 Vict. c. 98, do not give to a local board of health power to go out of its district to make sewers. *Haywood* v. *Lowndes*, 4 Drew. 454 ; 28 L. J., Ch. 400 ; 5 Jur. (N.S.) 185 ; 7 W. R. 279.

**For the Purposes of Outfall.**]—The 21 & 22 Vict. c. 98, extends the exercise of those powers beyond the district only where it may be necessary for the purpose of outfall or distribution of sewage, and not for the purpose of making new sewers. *Ib.*

**To Repair — Compensation.**]—The B. improvement commissioners in 1843 constructed a sewer through certain lands belonging to a railway company, and through other lands, not the property of the commissioners, which the company subsequently acquired for the purposes of their railway. Nothing was ever done by the commissioners or their successors to acquire any rights with regard to the sewer beyond its construction. Within twenty years from the construction of the sewer the company made an embankment for their railway upon the lands and over the sewer. In 1879 it became necessary for the plaintiffs, the successors of the commissioners, to make an open cutting through the embankment in order to do repairs to the sewers, which could not be effected from the inside. In an action upon an inquisition under the Lands Clauses Consolidation Act, 1845, to assess compensation claimed by the plaintiffs from the defendants, in respect of the injuriously affecting of the sewer by the embankment :—Held, that the plaintiffs had no title or interest at law in the sewer, or in the lands in which it was situate, sufficient to support the claim :—Held, on appeal, that as a right of access to the sewer had not been expressly given to the improvement commissioners, but had to be implied, the right of access which ought to be implied was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendant's embankment, but only rendered less easy and convenient, the plaintiffs had no right to compensation. *Birkenhead Corporation* v. *L. & N. W. Ry.*, 55 L. J., Q. B. 48 ; 15 Q. B. D. 572 ; 50 J. P. 84—C. A.

**Order of Justices.**]—L., the owner of a meadow, received notice from the rural sanitary authority that they intended to enter and make a sewer under the meadow, and this being objected to, they entered forcibly. An action of trespass and injunction being brought by L., on the ground that the sewer would create a nuisance :—Held, that the order of justices mentioned in s. 305 of Public Health Act does not apply when proceedings are taken under s. 16. *Lamacraft* v. *St. Thomas Sanitary Authority*, 42 L. T. 365 ; 44 J. P. 441.

—— **To Execute Works on Land of Stranger.**]—An order was made by justices, under the 112th section of the Public Health (Ireland) Act, 1878, that M., on whose premises a nuisance existed, should abate the same by continuing a sewer, which already ran through his own land to the boundary between his land and that of C., across C.'s lands to a public road. C. refused to allow M. to enter on his lands for the purpose of executing this work, which, therefore, was not done ; whereupon the complainants, as the urban sanitary authority, obtained an order from justices, authorising their officer to enter on C.'s lands to do the work, and C. having refused to allow him to enter, C. was convicted and fined, under s. 119 :—Held, that the original order, directing the work by M. on premises in the occupation of C., was ultra vires and illegal, and that the conviction for refusal to allow the complainant's officer to enter on C.'s premises, based on it, was illegal. *Scarborough* v. *Scarborough Sanitary Authority* (1 Ex. D. 344), followed. *Letterkenny Commissioners* v. *Collins*, 28 L. R., Ir. 235.

**Notice of Entry.**]—A notice is reasonable, within the meaning of 11 & 12 Vict. c. 63, s. 45, when it specifies the object of an entry on private premises to be the construction of a sewer of certain dimensions, and shews that the entry will be made at a particular point, and that the sewer will go from that point in an oblique direction. It is not necessary that this notice should be accompanied by a map. *Cleckheaton Industrial Self-help Society* v. *Jackson*, 14 W. R. 950.

**Breaking up Private Roads.**]—A corporation, affecting to act under the provisions of their local act, commenced to break up and excavate a private road belonging to the plaintiff, and situate within the borough, for the purpose of laying down a sewer :—Held, that on the construction of the local act, taken with the provisions contained in the Public Health Act, 1848, the Sewage Utilisation Act, 1865 (28 & 29 Vict. c. 75), and the Public Health Act, 1875, the road was a street within those acts, and that the corporation had power to lay down the sewer thereunder, and for that purpose to break up the soil thereof. *Taylor* v. *Oldham Corporation*, 46 L. J., Ch. 105 ; 4 Ch. D. 395 ; 35 L. T. 696 ; 25 W. R. 178.

—— **For making a Man-hole.**]—The defendants, a local board of health, prior to 1875, constructed a sewer under a public footpath, the

soil of which belonged to the plaintiff, and they made a shaft thirty feet deep into the sewer, with an entrance or man-hole upon the footpath, at a point where there was a junction of two sewers. The defendants also gave the plaintiff notice after 1875 of their intention to make similar man-holes into their sewers upon other parts of the plaintiff's property :—Held, that they were parts of the sewer within the meaning of 11 & 12 Vict. c. 63, s. 45, and could be made without purchasing land for the purpose; and that the plaintiff was only entitled to compensation for the damage arising from making them. *Swanston* v. *Twickenham Local Board*, 48 L. J., Ch. 623; 11 Ch. D. 838; 40 L. T. 734; 27 W. R. 924—C. A.

**Application of Lands Clauses Act, 1845.**]—A provisional order of a secretary of state empowering a local board of health to put in force the powers of the Lands Clauses Act of 1845, with respect to the purchase of lands otherwise than by agreement, is nothing more than a substitution for proceedings before a standing orders committee, and has no force or validity until confirmed by act of parliament; and cannot be brought up by certiorari for the purpose of being quashed. *Frewen* v. *Hastings Local Board*, 6 B. & S. 401; 34 L. J., Q. B. 159; 11 Jur. (N.S.) 670; 12 L. T. 346; 13 W. R. 678.

**Taking more Lands than required.**]—A corporation being, as the sanitary authority for a city, duly empowered to take lands specified in the schedule to its provisional order for the purpose of public improvements, served notice to treat upon the trustees of a charity, who were the owners of the lands. The lands comprised in the notice were more than were actually required for the purpose of the works :—Held, that the cases deciding that a railway company cannot take compulsorily more land than is actually required for its works did not apply to a corporation taking lands for public improvements, and that the corporation was entitled to take compulsorily the whole of the lands comprised in the notice. *Quinton* v. *Bristol Corporation*, 43 L. J., Ch. 783; L. R. 17 Eq. 523; 30 L. T. 112; 22 W. R. 434.

*See also* LANDS CLAUSES ACT.

**Jurisdiction of Justices.**]—The power of justices to grant or refuse an order enabling a local authority to enter lands under s. 305 of the Public Health Act of 1875 is wholly discretionary, their decision being, therefore, final. *Diss Urban Sanitary Authority* v. *Aldrich*, 46 L. J., M. C. 183; 2 Q. B. D. 179; 36 L. T. 663.

—— **Power to State a Case.**]—A. applied to the justices under s. 305 of the Public Health Act, 1875, for an order authorising them, as the local authority, to enter upon certain lands of the defendant for the purposes of the act. The application was dismissed, but the justices stated a case under 20 & 21 Vict. c. 43, s. 2, for the opinion of the court :—Held, that the justices had no power to state a case, as this was not the determination of a complaint within 20 & 21 Vict. c. 43, s. 2. *Ib.*

### e. Property in Sewers.

**Natural Stream—Exception in s. 43 of the Public Health Act, 1875.**]—A natural stream, flowing through and draining agricultural land, was widened, deepened, and otherwise improved, by inclosure commissioners under a private act, at the expense of the landowners. In its course it passed through a town, receiving the drainage of two or three houses :—Held, that it was not thereby converted into a sewer, within 11 & 12 Vict. c. 63; but even if so, it came within the second exception in s. 43, and therefore did not vest in the local board so as to cast upon the board the duty of cleansing and repairing it. *Reg.* v. *Godmanchester Local Board*, 5 B. & S. 886; 34 L. J., Q. B. 13; 11 Jur. (N.S.) 63; 13 W. R. 155. Affirmed, 5 B. & S. 936; 35 L. J., Q. B. 125; L. R. 1 Q. B. 328; 14 L. T. 104; 14 W. R. 375—Ex. Ch.

**Sewer made by Owner—Made "for his own Profit."**]—A sewer made by the owner of some only of the houses in a street not yet a highway, though made for the purpose of draining his own amongst other houses, is not a sewer made by a person "for his own profit" within the meaning of the exception in s. 13 of the Public Health Act, 1875. *Acton Local Board* v. *Batten*, 54 L. J., Ch. 251; 28 Ch. D. 283; 52 L. T. 17; 49 J. P. 357.

A street having been laid out by the owners of a building estate, a sewer was made by them for the drainage of the houses in the street. Subsequently, in the year 1868, a local board was formed whose district included such street. The sewer, which discharged into the Thames, was sufficient for the purpose of the drainage of the street, assuming that drainage into the Thames could be continued. In 1884 the local board, having received notice from the Thames conservators to discontinue the discharge of sewage into the Thames, gave notice under s. 150 of the Public Health Act, 1875, to the frontagers in the street to make a new sewer, and on their default themselves constructed such sewer and sought to charge the expenses upon the frontagers :—Held, that the original sewer was not a sewer made by the owners for their own profit, and therefore had vested in the board under the Public Health Act, 1875; that the board not having taken any steps to compel the frontagers to sewer the street within a reasonable time after the sewer became vested in them, must be taken to have been satisfied with the sewer, and could not afterwards proceed against the frontagers under s. 150, but were bound themselves to keep the sewer in repair under s. 15 of the Public Health Act, 1875, and, if it became necessary, to enlarge or alter it under s. 18; and that consequently the expenses of constructing the new sewer were chargeable not on the frontagers but on the general district rate. *Bonella* v. *Twickenham Local Board*, 57 L. J., M. C. 1; 20 Q. B. D. 63; 58 L. T. 299; 36 W. R. 50; 52 J. P. 356—C. A.

A sewer that is made by a company solely for the purpose of draining the cottages upon their estate is not a sewer "made by any company for the profit of the shareholders," within the exception contained in s. 13 of the Public Health Act, 1875. Such a sewer, therefore, vests in and is under the control of the local authority. Assuming that the value of the premises was enhanced to the owners by the construction by them of the sewer, that was not the kind of "profit" contemplated by the exception in s. 13. *Ferrand* v. *Hallas Land and Building Co.*, 62 L. J., Q. B. 479; [1893] 2 Q. B. 135; 4 R. 430; 69 L. T. 8; 41 W. R. 580; 57 J. P. 692—C. A.

A landowner who has constructed a sewage system on his own property, intending to receive a sewer-rate from those using his sewers, and

who has received such a rate, is a person making sewers "for his own profit" within the exception in s. 13, sub-s. 1 of the Public Health Act, 1875. *Acton Local Board* v. *Batten* (28 Ch. D. 283), *Bonella* v. *Twickenham Local Board* (18 Q. B. D. 577), and *Ferrand* v. *Hallas Land and Building Co.* (4 R. 430) distinguished. *Minehead Local Board* v. *Luttrell*, 63 L. J., Ch. 497; [1894] 2 Ch. 178; 8 R. 379; 70 L. T. 446; 42 W. R. 667.

A landowner, who has constructed a sewer on his own property for the improvement of his estate, but which was not intended for the use of owners of property and houses not on the estate, and who has made purchasers of plots of his land pay him a specific sum for the use of the sewer on making a connection with it, is not a person making a sewer "for his own profit" within the exception in s. 13, sub-s. 1 of the Public Health Act, 1875. *Minehead Local Board* v. *Luttrell* ([1894] 2 Ch. 178) distinguished; *Ferrand* v. *Hallas Land and Building Co.* ([1893] 2 Q. B. 135) applied. *Vowles* v. *Colmer*, 64 L. J., Ch. 414; 13 R. 583; 72 L. T. 389.

**Sewage "caused" or "suffered" to flow into River—Notice to discontinue—Change of Parties.**]—Two local sanitary authorities appointed a joint drainage committee consisting of members from each board, and gave to such joint committee the exclusive control and management of the sewage and sewage works, and henceforward the disposal and treatment of the sewage of both districts were carried out under the control of the said committee. The sewerage works continued to remain the property of the local board to which the said works belonged prior to the appointment of the said joint committee. Sewage or other offensive or injurious matter was allowed to flow from the said sewerage works into an adjoining river, thereby polluting it. The conservancy board thereupon served a notice in writing upon the local board to which the sewerage works belonged to discontinue the flow of sewage into the river. The local board, having failed to comply with the terms of the notice, were summoned before the magistrates to compel them to discontinue the nuisance, or to render them liable to the penalty for not doing so:—Held, that the local board were not liable, as they had ceased to have the control over the sewers, and so could not have "caused" or "suffered" the outflow into the river. *Lea Conservancy Board* v. *Tottenham Local Board*, 64 L. T. 198; 55 J. P. 343.

**Railway Accommodation Works—Pipes laid for Draining Land.**]—Drains and pipes laid by a railway company, in whose special act is an express incorporation of the Railways Clauses Consolidation Act, 1845, for the purpose of conveying away the water from the lands lying near to or affected by the railway as clearly as before the making of the railway, as required by s. 68 of that act, and so used—if, being also used de facto for carrying away the sewage of more than one building, they constitute a "sewer" within the meaning of s. 4 of the Public Health Act, 1875, as to which quære—are within the exception in sub-s. 2 of s. 13 of the act of 1875, of "sewers made and used for the purpose of draining, preserving, or improving land under any private or local act of parliament," and accordingly do not vest in the local authority under the act. *L. & N. W. Ry.* v. *Runcorn Rural Council*, 67 L. J., Ch. 23; [1898] 1 Ch. 34; 77 L. T. 485; 46 W. R. 121; 62 J. P. 9. Affirmed, 67 L. J., Ch. 324.

**Pollution of Stream—Prescriptive Right to use Sewers—Neglect of Duty—"Cause or Suffer."**]—A local board under the Public Health Act, 1875, have only a qualified property in the sewers within their district, and cannot prevent persons who have acquired a prescriptive right to use them from so doing unless they provide other sewers equally effectual. Where a local board have not themselves constructed sewers which are a nuisance, but only permitted them to be used by inhabitants who have acquired a prescriptive right to use them, the local board do not "cause or suffer" sewage to flow into the Thames within the meaning of s. 64 of the Thames Navigation Act, 1866, and cannot be convicted of a misdemeanour under that act. *Reg.* v. *Staines Local Board*, 60 L. T. 261; 53 J. P. 358.

### f. Obligations of Landowners.

**Subjacent Support.**]—The Public Health Act, 1875, imposes on landowners, through whose land a sewer is run under that act, an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines. *Dudley Corporation, In re*, 51 L. J., Q. B. 121; 8 Q. B. D. 86; 45 L. T. 733; 46 J. P. 340—C. A.

### 5. Drains.

**When a Sewer.**]—*See next case and* ante, 4, *a* (cols. 412—414).

**Liability to Repair.**]—A drain constructed upon private ground to which the public have not access is a private drain within the meaning of s. 19 of the Public Health Acts Amendment Act, 1890. Therefore, if such drain becomes a nuisance, a local authority who have adopted the act of 1890, may take proceedings under s. 41 of the Public Health Act, 1875, against any owner of premises connected with the drain by a branch drain. *Hill* v. *Hair* (64 L. J., M. C. 164; [1895] 1 Q. B. 906) discussed and doubted. *Seal* v. *Merthyr Tydfil Urban Council*, 67 L. J., Q. B. 37; [1897] 2 Q. B. 543; 77 L. T. 303; 61 J. P. 551.

**Cleansing of.**]—A mandamus to a local board of health alleged that a drain or a watercourse was in such a state as to be a nuisance injurious to health, and commanded the board to cleanse it. On a return and plea, the stream was found to be in the state alleged:—Held, that the prosecution was not entitled to judgment, for that the duty of the local board under 11 & 12 Vict. c. 63, s. 58, to cleanse ditches, &c. is only conditional on the neglect of the owner or occupier of the land on which the nuisance exists to remove it after notice, and no such notice or neglect was alleged in the mandamus. *Reg.* v. *Godmanchester Local Board*, 5 B. & S. 936; 35 L. J., Q. B. 125; L. R. 1 Q. B. 328; 14 L. T. 104; 14 W. R. 375—Ex. Ch.

**Nuisance—Abatement—Default of Sanitary Authority.**]—A sanitary authority which has not complied with the requirements of s. 15 of the Public Health Act, 1875, in providing

sewers for effectually draining their district cannot obtain an order to compel a person discharging sewage matter into a sewer which has no proper outlet to discontinue such discharge on the ground that it contributes to a nuisance. *Wycombe Rural Sanitary Authority* v. *Parsons*, 64 L. J., M. C. 22; [1894] 2 Q. B. 780; 10 R. 426; 71 L. T. 428; 58 J. P. 765.

6. Ditches, Cesspools and Deposits.

**Right to Fill up.**]—By a section of a local act, a local board when they think fit may cause the ditches at the sides of, or across public roads and public footpaths to be filled up, and may substitute pipe or other drains alongside or across such roads. A. was possessed of a freehold close adjoining a public highway. By the side of the highway was a low fence about two feet high, then a strip of greensward averaging ten feet in width, with a broad ditch running parallel to the highway. The close was separated from the strip of greensward by a paling eight feet high. The local board, under the authority of the act of parliament, filled up the ditch and substituted drain pipes:—Held, that the ditch being fenced from the highway, the presumption was that it belonged to A., and also, that, as the section referred only to ditches by the side of the highway, the act was not applicable. *Tutil* v. *West Ham Local Board*, L. R. 8 C. P. 477; 28 L. T. 597.

**Fencing of.**]—An ancient open watercourse alongside a public footpath which has been from time immemorial unfenced is not a "hole or other place near a street" within s. 83 of the Towns Improvement Clauses Act, 1847, so as to impose on the local board of health for the district the duty of protecting or inclosing the same. *Wilson* v. *Halifax Corporation*, 37 L. J., Ex. 44; 3 L. R., Ex. 114; 17 L. T. 666; 16 W. R. 707.

**Abatement of Nuisance from.**]—By an order of justices under the Public Health Act, 1875, ss. 94, 96, it was found that on land, the property of a certain person named, a nuisance existed, viz. a foul ditch, caused by refuse water and offensive liquid from an adjoining brewery, and that this nuisance was caused by the act or default of the defendant as owner and occupier of the brewery, and it was ordered that the defendant, within three months, should abate the nuisance, and for that purpose should execute such works and do all such things as might be necessary so that the same should no longer be a nuisance or injurious to health. Upon a rule for certiorari, on the ground that the defendant was not the occupier of the premises on which the nuisance was proved to exist, and that he had no power or authority from the owner to enter on the premises for any purpose whatever:—Held, that the order must be quashed. *Reg.* v. *Trimble*, 36 L. T. 508.

—— **On Boundary of two Districts.**]—A ditch ran along a highway which divided two rural sanitary districts. The ditch was situated in N., but a nuisance was caused in greater part by sewage from premises in W. The W. sanitary authority applied to justices for an order on the N. authority to cleanse the ditch as being in their area:—Held, that the justices were right in ordering W. to cleanse the ditch. *Woburn Union* v. *Newport Pagnell Union*, 51 J. P. 694.

—— **Action for Injunction by Local Authority—Sanction of Attorney-General.**]—The Public Health Act, 1875, enacts in s. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under the act:—Held, that such proceedings must be ordinary proceedings known to the law, and that in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the attorney-general by action in the nature of an information. *Wallasey Local Board* v. *Gracey*, 56 L. J., Ch. 739; 36 Ch. D. 593; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740.

A local authority is not empowered by s. 107 of the Public Health Act, 1875, to bring an action in their own name for an injunction to restrain a public nuisance by which they have not suffered any special damage. *Wallasey Local Board* v. *Gracey* (56 L. J., Ch. 739; 36 Ch. D. 593) approved. *Tottenham Urban District Council* v. *Williamson*, 65 L. J., Q. B. 591; [1896] 2 Q. B. 353; 75 L. T. 238; 44 W. R. 676; 60 J. P. 725—C. A.

Semble, if the sanction of the attorney-general be obtained, such an action may be brought in the name of the attorney-general at the instance of the local authority as relators. *Ib.*

**Filling up—Injury to Public.**]—The local board of S. filed a bill for an injunction against the defendant as Secretary for War to restrain him from stopping up a ditch in S., the War Office having nearly filled the ditch with soil, and made only a small grip or cutting in the place of the old passage. The plaintiffs alleged injury to certain sanitary measures of their own, as representing the S. public, who are entitled to the free use of the ditch. No one appearing for the defendant:—Held, that as the real objects of all parties must in this case be in common, and no danger was threatened to the people of S., the injunction must be refused. *Felkin* v. *Herbert* (*Lord*), 4 L. T. 433; 9 W. R. 496.

—— **Remedy of Board.**]—A local board of health instituted a suit against an owner of a ditch for filling it up, thereby obstructing an ancient easement which the plaintiffs possessed in a flow of water through the ditch, and interfering with their right to its free use for sanitary purposes. The plaintiffs claimed the easement with regard to the drainage of the whole district, whereas it appeared that, from the nature of the locality, the ditch could carry off only the surface water, which collected on an undulating space of ground 114 yards in length. The suit was dismissed with costs, principally on the ground that the proper remedy for a board of health to resort to in such a case was under the 11 & 12 Vict. c. 63. *S. C.*, 11 L. T. 173.

**Cesspool—Rural District Council—Powers of Urban Sanitary Authority—By-laws.**]—A by-law, issued by a rural district council having the powers of an urban sanitary authority duly extended to them by an order of the local government board and approved by the local government board, requiring "every person constructing a cesspool in connection with a building to construct the same at a distance of fifty

feet at least from a dwelling house," is properly applicable to cesspools in connection with old as well as with new buildings, and is not unreasonable merely from the fact that it may be impossible in a particular instance to construct a cesspool at that distance. *Simmons* v. *Malling Rural Council*, 66 L. J., Q. B. 585; [1897] 2 Q. B. 433; 77 L. T. 341; 45 W. R. 603; 61 J. P. 502.

**Accumulation or Deposit—Nuisance or Injurious to Health.**]—In s. 107, sub-s. 4, of the Public Health (Ireland) Act, 1878, corresponding to s. 91, sub-s. 4, of the Public Health Act, 1875, which provides that "any accumulation or deposit which is a nuisance or injurious to health" shall be deemed to be a nuisance within the act, the word "accumulation" implies some gradual accretion, a heaping up of matter from day to day; and "deposit" means something put down in some place and left there. Both words involve the idea of a certain degree of permanency, and do not extend to the case of loading and unloading manure in the ordinary course from a railway company's waggons for the purpose of delivery to customers. *G. N. Ry.* v. *Lurgan Commissioners*, [1897] 2 Ir. R. 340.

—— **Absence of Injury to Health.**]—By s. 91 of the Public Health Act, 1875, "any accumulation or deposit which is a nuisance or injurious to health" shall be deemed to be a nuisance liable to be dealt with summarily under the act:—Held, that an offence within the section was committed where the accumulation emitted offensive smells which interfered with the personal comfort of persons living in the neighbourhood, but did not cause injury to health. *G. W. Ry.* v. *Bishop* (L. R. 7 Q. B. 550) distinguished. *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.*, 52 L. J., M. C. 38; 10 Q. B. D. 138; 48 L. T. 223; 31 W. R. 288; 47 J. P. 389.

*See also* NUISANCE.

7. WATER-CLOSETS, ASH-PITS, &c.

**Orders for necessary Work.**]—By 11 & 12 Vict. c. 63, s. 54, the surveyor of the local board of health may examine any drain, water-closet, privy, cesspool, or ash-pit; and if it is in bad order and condition, the board shall cause notice in writing to be given to the owner or occupier of the premises, requiring him to do the necessary works; and if such notice be not complied with, the party shall be liable to a penalty for every day during which he makes default:—Held, that the discretion to determine what works are necessary to be done is vested in the board, and that, on a proceeding before justices to recover the penalty under s. 129, they have no jurisdiction to review its determination. *Hargreaves* v. *Taylor*, 3 B. & S. 613; 32 L. J., M. C. 111; 9 Jur. (N.S.) 1053; 8 L. T. 149; 11 W. R. 562.

**General Order to Construct particular Kind of Water-closet—Consideration of Requirements of each particular House.**]—Under s. 36 of the Public Health Act, 1875, a local authority have no power to pass a general resolution that a particular kind of water-closet shall be furnished to all houses within the district. The requirements of each particular house must be considered, and the only power the local authority have is to require a sufficient water-closet to be provided. *Tinkler* v. *Wandsworth Board of Works* (2 De G. & J. 261; 27 L. J., Ch. 342) followed. *Wood* v. *Widnes Corporation*, 66 L. J., Q. B. 797; [1897] 2 Q. B. 357; 77 L. T. 306; 46 W. R. 30; 61 J. P. 646.

**One Privy for Two Cottages.**]—The respondent built two cottages with one privy sufficient for the use of the occupiers of both cottages:—Held, that he had complied with the requirements of the 35th section of the Public Health Act, 1875, on the ground that the section does not require a separate water-closet, earth-closet, or privy for every house built or rebuilt. *Clutton Union* v. *Pointing*, 48 L. J., M. C. 135; 4 Q. B. D. 340; 40 L. T. 844; 27 W. R. 658.

**By-law requiring Plans — Deviation from Plans—Position of Privies.**]—B. was charged with erecting new buildings not in accordance with the plans, in so far as the tub closets were not in the positions shewn on the plans. The closets had been erected from 15 to 27 feet distant from main buildings instead of 2½ feet as shewn on the plans:—Held, that the justices were right in holding that tub-closets came within the meaning of "privies" in 21 & 22 Vict. c. 98, s. 34, and that it was an offence against by-laws to deviate from the plans. *Burton* v. *Acton*, 51 J. P. 566.

**Abatement of Nuisance—Who Liable.**]—A nuisance arose from a privy in the upper part of a house, of which, with the shop belonging thereto, H. was the lessee, at a rack rent, for twenty-one years. H. occupied the shop only, and sub-let the other part, where the nuisance arose, to K., a weekly tenant, and to this part of the premises H. had no access. C., as agent for H.'s lessor, collected the rent. The parish authorities, for the purpose of abating the nuisance, under the powers given them by 29 & 30 Vict. c. 90, s. 21, and 18 & 19 Vict. c. 121, s. 12, summoned C., as the owner of the premises within the interpretation clause (s. 2) of the latter statute, before the justices, who made an order upon him to abate the nuisance:—Held, that C. was not the owner within the true construction of s. 2, as K., the weekly tenant, was the occupier of the premises where the nuisance arose, and that therefore H. was not the occupier, but the person receiving rent from the occupier of the property within the meaning of the statutes. *Reg.* v. *Bath JJ.*, or *Cook* v. *Montague*, 41 L. J., M. C. 149; L. R. 7 Q. B. 418; 26 L. T. 471; 20 W. R. 624.

—— **Premises Leased for Years.**]—A local authority served the owner of premises with a notice, under s. 94 of the Public Health Act, 1875, requiring him within seven days to abate a nuisance arising from the defective construction of a structural convenience, and for that purpose to execute certain specified works. Having failed to comply with the notice, the owner was summoned under s. 95 before a court of summary jurisdiction, and on the hearing it was proved that the premises in question were occupied by a tenant to the owner under a lease for twenty-one years containing the usual covenants:—Held, that the owner, even although he could not enter upon the premises and execute the works without the tenant's permission, had "made default" in complying with the requisitions of the notice within the meaning of s. 95, and therefore that the justices had jurisdiction to make an order under s. 96, requiring him to abate the nuisance. *Parker* v. *Inge*, 55 L. J., M. C. 149; 17 Q. B. D. 584; 55 L. T. 300; 51 J. P. 20.

—— **"Forthwith."**]—N. was duly served with a notice under s. 94 of the Public Health Act, 1875, requiring him to abate forthwith a nuisance arising from filth:—Held, that the word "forthwith" meant within a reasonable time, and sufficiently defined the time for doing the work. *Thomas* v. *Nokes*, 58 J. P. 672.

—— **Jurisdiction of Justices.**]—Under 18 & 19 Vict. c. 121, s. 12, the power of a local authority to prefer, and the jurisdiction of justices to determine, a complaint in respect of a nuisance existing within the area of that local authority, arises only where the cause of such nuisance is also within that area. *Reg.* v. *Cotton*, 1 El. & El. 203; 28 L. J., M. C. 22; 5 Jur. (N.S.) 311; 7 W. R. 62.

—— **Power of Justices to order Specific Works.**] — A water-closet in the centre of a house being a nuisance, the sanitary authority gave notice to the owner of the house under the 94th section of the Public Health Act, 1875, to abate the nuisance, and for that purpose to remove the said closet from the centre of the house and place the same near an outer wall where there might be efficient ventilation, and to fix the soil-pipe outside the walls. The owner making default in so doing, justices thereupon, under s. 96, ordered him to do the things above specified:—Held, that they had jurisdiction under the 96th section to make the order. *Whitchurch, Ex parte* (6 Q. B. D. 545), distinguished. *Saunders, Ex parte*, 52 L. J., M. C. 89; 11 Q. B. D. 191; 31 W. R. 918; 47 J. P. 584.

A nuisance existed consisting of a privy and ash-pit in such a state as to be a nuisance, and the local sanitary authority gave notice to the owner under the Public Health Act, 1875, s. 94, to abate the same, and for that purpose to fill up the ashpit, abandon the privy, and build a pail closet. The owner failed to do so, and justices thereupon, under s. 96, ordered the owner to fill up the ashpit, to abandon the privy, and to construct a proper and sufficient pail closet in lieu thereof. On a rule for a certiorari to quash the order of justices:—Held, that the order was bad, as the justices had no power under s. 96 to order the erection of the pail closet. *Whitchurch, Ex parte*, 50 L. J., M. C. 41; 6 Q. B. D. 545; 29 W. R. 507; 45 J. P. 392.

The respondents, an urban sanitary authority, served, under the provisions of s. 94 of the Public Health Act, 1875, upon the appellant, who was the owner of certain houses within the borough to which respectively were attached privies and ashpits which were a nuisance, a notice requiring him to abate the nuisance, "and for that purpose, to deodorise and fill in the privies, privy vaults, and ashpits, convert the same to proper pan water-closets, and connect them with the main sewer." The notice was not complied with. An order was thereupon made by two justices under the provisions of s. 96 of the act, in the terms of the notice:—Held, upon a case stated, that the order was a good order, for that by s. 96 it was left absolutely to the justices to order any works or structural alterations which they in their discretion might think necessary for the abatement of the nuisance. *Whitaker* v. *Derby Urban Sanitary Authority*, 55 L. J., M. C. 8; 50 J. P. 357.

A privy openly discharged night-soil and offensive matter on the bank of a river; the sanitary authority served the owner of the premises with a notice to abate the nuisance, and for that purpose to "remove the present pipes and pan, level the floor under the seat of the privy, and provide a galvanised double-handled pail under the seat, the cover of which said seat to be movable, so that the premises should no longer be a nuisance or injurious to health"; and the justices at sessions made an order in the terms of the notice:—Held, that they had jurisdiction to make the order. *Saunders, Ex parte* (11 Q. B. D. 191), followed, and *Whitchurch, Ex parte* (6 Q. B. D. 545), distinguished or dissented from. *Reg.* v. *Llewellyn*, 55 L. J., M. C. 9, n.; 13 Q. B. D. 681; 33 W. R. 150; 49 J. P. 101.

A sanitary authority had served a notice under s. 94 of the Public Health Act, 1875, on the owner of premises to abate a nuisance, and had ordered the owner "to lay down a six-inch glazed stoneware drain-pipe, and to connect it with the main sewer in front of his house":—Held, that the justices had jurisdiction under s. 96 to make the order in that form. *Reg.* v. *Kent Inhabitants*, 55 L. J., M. C. 9, n.

—— **Order should specify Work required to be done.**]—An order of justices made under s. 96 of the Public Health Act, 1875, upon the complaint of a local authority, required the owner of premises to abate within a specified time a nuisance arising from untrapped drains, "and to execute such works and do such things as may be necessary for that purpose, so that the same shall no longer be a nuisance or injurious to health":—Held, that this order was bad, because it did not specify what works and things the owner should execute and do for the purpose of abating the nuisance. *Reg.* v. *Wheatley*, 55 L. J., M. C. 11; 16 Q. B. D. 34; 54 L. T. 680; 34 W. R. 257; 50 J. P. 424.

*See also* NUISANCE.

### 8. URINALS.

**Proper and Convenient Situation—Discretion of Urban Authority.**]—Where an urban authority, acting under s. 39 of the Public Health Act, 1875, selects a site as a proper and convenient situation for a urinal, then, in the absence of malâ fides, and assuming that no case of nuisance is made out, the onus lies on persons objecting to that particular site to shew that it is not a proper and convenient situation, and for this purpose evidence that there are other situations more proper and more convenient is irrelevant. *Pethick* v. *Plymouth Corporation*, 8 R. 107; 70 L. T. 304; 42 W. R. 246; 58 J. P. 476.

**Liability of Person Erecting.**]—An owner of a public-house erected a urinal in a private passage leading out of the street, and enclosed it between doors which he kept locked every night. There was a space between the line of area railings in the street and the urinal door nearest to the street, which space he shut off from the street with an iron gate placed flush with the line of railings. This gate was never locked. It being proved that persons habitually used the space between the door and the gate in such a manner as to cause to the neighbours a nuisance, which he took no steps to prevent:—Held, that he was responsible for such user, it being a probable consequence of the manner in which he had arranged the premises. *Chibnall* v. *Paul*, 29 W. R. 536.

### 9. Lodging Houses.

**What are.**]—A local board made by-laws requiring registration, &c., from the landlord of a lodging-house, and defined "lodging-house" to mean "a house or part of a house which is let in lodgings or occupied by members of more than one family." B. let four unfurnished rooms of her house to M. and his family:—Held, that the justices were wrong in holding that B. did not come within the meaning of the definition as landlord of a lodging-house. *Roots* v. *Beaumont*, 51 J. P. 197.

A lodging-house maintained as a charitable institution for the reception of poor persons at a small payment, and not for purposes of gain, held not to be a common lodging-house within the Common Lodging Houses Act, 1853, s. 3. *Booth* v. *Ferrett*, 59 L. J., M. C. 136; 25 Q. B. D. 87; 63 L. T. 346; 38 W. R. 718; 55 J. P. 7.

**Resolution to Register—Registration.**]—The respondent, having fulfilled the necessary preliminaries under s. 78 of the Public Health Act, 1875, applied to be registered as the keeper of a common lodging-house under s. 76, and the local authority passed a resolution that his house should be registered. The clerk did not carry out this resolution, and no formal registration of the respondent or his house was made, and eight months afterwards the local authority resolved that the respondent should not be registered, and two months later prosecuted him for keeping a common lodging-house without being registered. The justices refused to convict:—Held, upon a case stated, that, for the purpose of the act, the resolution of the local authority constituted registration, and that the justices were right in refusing to convict the respondent. *Coles* v. *Fibbens*, 52 L. T. 358; 49 J. P. 308.

**Cancelling Registration—Keeping without Licence.**]—K. was duly entered in the register of the B. urban authority as keeper of a common lodging-house. Two months later the inspector reported that it was kept as a house of bad repute, and the health committee by resolution withdrew the licence and ordered K. to clear out his lodgers in a week, and on his refusal he was charged with keeping the house without being registered:—Held, that the justices were right in dismissing the information, as there was no power to cancel the licence except for the reasons set forth in the statute. *Blake* v. *Kelly*, 52 J. P. 263.

*See further*, as to lodging-houses, *cases* ante, sub-tit. Landlord and Tenant, vol. VIII., cols. 1286 et seq.

### 10. Markets and Shops.

#### a. Locality.

**Setting up Market in a New Place.**]—A corporation, being lords of a market and owners of the soil, is entitled at common law to remove the market; but where the corporation, acting as a local board, takes steps under the Local Government Act, 1858, to set up a market in a new place it can only act under the powers and subject to the provisoes of the statute, and is not entitled to fall back on its common law right. *Ellis* v. *Bridgenorth Corporation*, 2 Johns. & H. 67; 4 L. T. 112; 9 W. R. 331.

Quære, whether the immemorial privilege of householders, of erecting and hiring out stalls in front of houses in a market place, is a right protected by the proviso in s. 50. *Ib.*

Semble, that the setting up of a new market under that statute, at a short distance from and in lieu of an ancient market, is an establishment of a market within s. 50, and not a mere removal. *Ib.*

—— **Ancient Market.**]—A local improvement act imposed a penalty for exposing for sale in any of the streets of the town any meat so as to project over or upon any foot or carriage-way. The act provided that no person should be subject to any penalty for placing any stall or exposing provisions for sale, so as such stalls be placed in such part of the street as should be appointed by the commissioners, and that no person should be subject to any penalty for placing any stall or exposing provisions for sale in such parts of the streets as should have been theretofore used for that purpose at the times of the usual fairs and markets within the town. In 1853 a local board of health was constituted in the township, under 16 & 17 Vict. c. 24, who, by by-laws duly allowed and published, appointed certain places for markets for certain descriptions of goods on market days, and imposed penalties for the breach thereof:—Held, that the provisions of the local act did not exempt from such penalties one who violated these by-laws by exposing for sale meat at a place other than that so appointed by the local board of health, notwithstanding the spot where such meat was so exposed for sale was a place where such articles had for a long series of years been sold by him and others. *Savage* v. *Brook*, 15 C. B. (N.S.) 264; 33 L. J., M. C. 42; 10 Jur. (N.S.) 587; 9 L. T. 334; 12 W. R. 81.

*See also* Markets and Fairs.

**Obstruction of Footway—Exposing for Sale outside Shop.**]—W.'s shop, on being rebuilt, was set back four-and-a-half feet to suit the line of building. The space thus added to the pavement had been open to the street for two years, and W. put goods for sale on this space. He was charged, under a local act, for exposing goods in the street outside his shop:—Held, that the justices were right in holding that the intervening space so used was not part of the street, and that W. had a right to use it as he did. *Hitchman* v. *Watt*, 58 J. P. 720.

The defendant exposed goods for sale outside his shop in a street in the city of Dublin, but the place where they were so exposed was part of the premises of the defendant over which the public had no right to pass:—Held, that he was guilty of an offence within the meaning of 5 & 6 Vict. c. 24, s. 17, sub-s. 7. *Dowling* v. *Byrne*, Ir. R. 10 C. L. 135. *Dolan* v. *Kavanagh*, ib. 166.

A shopkeeper exposed goods for sale outside his shop in a street, on a space in front of it which was gained by covering over the area. This space lay between the shop and the public flagway, and at one end of it a railing projected from the house to the public flagway:—Held, that to expose things for sale on such a space was not an offence within 5 & 6 Vict. c. 24, s. 17, sub-s. 7. The concluding words of the sub-section, "so as to cause any annoyance or obstruction in any thoroughfare," govern only the immediately preceding portion of the section. *Byrne* v. *Ring*, Ir. R. 10 C. L. 192.

—— **User for Thirty Years.**]—W. was a draper, who had a shop with a grid in front and a cellar-flap on which he exposed goods about a

foot or more from his outer wall. He and his predecessor had done the same for thirty years. Being summoned for exposing goods which projected over the footway, he set up a claim of right as the owner of the street or soil, and also on the ground of the original owner having always done the same:—Held, that there being no proof of the dedication by the original owner subject to such right, and no proof of ownership of the soil, the justices rightly convicted W. *Whittaker* v. *Rhodes*, 46 J. P. 182.

By a local act of 1872 (35 & 36 Vict. c. 78), s. 95, if any person places, hangs up, or otherwise exposes any furniture, goods, produce, wares, merchandise, matter, or thing, so that the same projects or project into or over any footway, or beyond the line of any house, shop, or building, at which the same is or are exposed, he shall be liable to a penalty. Justices refused to convict a person who was charged under this section; but they stated, in the case reserved at the complainant's request, that the defendant exposed greengrocery, in which he dealt, on a cooler or a tray of wood, projecting two feet nine inches beyond the line of the brickwork of his building. This tray fell forward from the shop window, and when used was supported by iron stanchions and hinges. The steps of the adjoining house projected three inches further than this tray during the day. At night, and on Sundays, the tray was not beyond the line of the defendant's and the adjoining house; the street was exceptionally wide at this particular part. The premises had been erected between thirty and forty years, and during that period the tenants had always used the same cooler or tray, or something of the same description:—Held, that the act must be taken to refer to the line of shop existing at the time of its passing, which in this case was the line of the tray; and that the justices were right. *Wilson* v. *Cunliffe*, 29 L. T. 913.

**Sale on Land Leased by Corporation—Right of Corporation to establish Market—"Prescribed Limits."**]—The appellant, a cattle salesman, occupied premises which he used for the sale of cattle under leases granted by the corporation of a borough, containing covenants for quiet enjoyment. Afterwards the corporation, as the urban authority, established a cattle market in the borough and published a list of tolls. The appellant was convicted for selling cattle for which no toll had been paid in his sale-yard, within the borough, but not within the limits of the markets. On a case stated:—Held, that the corporation had not derogated from their grant by establishing a market, that the appellant had not by virtue of the leases acquired any right to sell cattle within the meaning of s. 166 of the Public Health Act, 1875, which the urban authority could not interfere with by establishing a market, and was therefore liable to a penalty under s. 13 of the Markets and Fairs Clauses Act, 1847; that, by the use of the words "within their district" in s. 166 of the Public Health Act, 1875, the district of the urban authority was constituted "the prescribed limits" within the meaning of s. 13 of the Markets and Fairs Clauses Act, 1847. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157; 17 Cox, C. C. 372; 56 J. P. 132.

**Sale on Foreshore — By-law.**]—A sanitary authority was empowered by a local act to make by-laws and regulations with reference to the seabeach and foreshore in the district which were vested in them for the purpose of public walks and pleasure-grounds. Subsequently to the passing of the local act a part of the foreshore was converted into an esplanade. The sanitary authority made a by-law prohibiting the sale of any goods on any part of the seabeach, foreshore, or esplanade, except by the direction of the local authority:—Held, that the by-law was not unreasonable or ultra vires. *Gray* v. *Sylvester*, 46 W. R. 63; 61 J. P. 807.

### b. Regulation of Sales.

**Of Coals.**]—By 26 & 27 Vict. c. 32, the owner of any coals brought within the district of the local board of health for Hull is bound, "before such coal, or any part thereof, is sold or delivered or dealt with in the district," to deliver to the inspector appointed for the purpose the original pit note denoting the quantity and quality thereof. A shipowner brought coals in a lighter into the district of the board of health for Hull, where they were transferred into a steamer, also belonging to the shipowner:—Held, that this was dealing with the coals within the meaning of the statute, and that the shipowner was bound to deliver the pit note to the inspector. *Wilson* v. *Kingston-upon-Hull Local Board*, 12 Jur. (N.S.) 706; 14 W. R. 638.

*And see* COALS.

**Of Bread.**]—By 6 & 7 Will. 4. c. 37, s. 4, all bread sold beyond the city of London shall be sold by weight: provided that nothing in the act shall extend to prevent bakers "from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same":—Held, that the proviso does not apply to bread which, having at the time of the passing of the act been usually sold under the denomination of fancy bread, had at the time of the sale ceased to be sold under that denomination. *Reg.* v. *Wood*, 10 B. & S. 534; 38 L. J., M. C. 144; L. R. 4 Q. B. 559; 20 L. T. 654; 17 W. R. 850.

The 6 & 7 Will. 4, c. 37, s. 4, provides, under a penalty, that all bread shall be sold by weight, but nothing in the act contained is to prevent any baker or seller of bread from selling "bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same." The exemption from the necessity of selling by weight applies only to that which was known as French or fancy bread at the time of the passing of the act (1836) and to bread of a like kind with it. *Aërated Bread Co.* v. *Gregg* or *Grigg*, 42 L. J., M. C. 117; L. R. 8 Q. B. 355; 28 L. T. 816.

Bread made in separate loaves, and so baked as to be crusty all over, and known in the trade as French or fancy bread, but differing from ordinary bread only in the manner of baking, is not French or fancy bread within the meaning of the exemption. *Ib.*

Where a customer applying to purchase bread asks for bread by weight, the baker is bound to sell by weight, whether he delivers to him ordinary bread or fancy bread, but, semble, he is not bound to weigh the loaf in the presence of the customer when he is not requested to do so. *Reg.* v. *Kennett*, 10 B. & S. 534; L. R. 4 Q. B. 565; 20 L. T. 656.

The practice of a baker was to sell loaves of bread at 6*d.*, varying the weight of the loaf with

the price of corn. When he purposed to sell a 3½-lb. loaf for 6*d.*, the custom in his bakery was to put into the oven 4 lbs. of dough, but the loaf was not weighed after baking. He sold at 6*d.* each six loaves, which varied in weight, but all but one weighed over 3¼ lbs. :—Held, that he was rightly convicted of selling bread otherwise than by weight, under 6 & 7 Will. 4, c. 37, s. 4. *Hill* v. *Browning*, L. R. 5 Q. B. 453 ; 22 L. T. 584 ; 19 W. R. 21.

—— **Obligation to Carry Weights and Scales.**]—By 6 & 7 Will. 4, c. 37, s. 7, every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights . . . and in case any such baker or seller of bread . . . shall, at any time, carry out or deliver any bread without being provided with such beam and scales with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay a sum of money not exceeding 5*l.* A baker delivered bread from a cart at a customer's shop pursuant to a general order given some time previously ; he was then unprovided with scales and weights :—Held, that he had committed an offence against the foregoing enactment. *Robinson* v. *Cliff*, 45 L. J., M. C. 109 ; 1 Ex. D. 294 ; 34 L. T. 689.

*And see* BAKER.

### 11. OFFENSIVE TRADES.

#### a. Slaughter-houses.

**What are.**]—"Slaughter-house," as used in the Towns Improvement Clauses Act, 1847, and the Local Government Act, 1858, includes not merely the premises where the actual slaughtering of cattle takes place, but also the premises used for processes connected with or incident to the slaughtering ; and premises in use for these processes, even though no actual slaughtering of cattle takes place within them, are used as slaughter-houses within s. 126 of the Towns Improvement Clauses Act, 1847. *Hides* v. *Littlejohn*, 74 L. T. 24 ; 18 Cox, C. C. 219 ; 60 J. P. 101.

**Consent to Erection—Licence.**]—A corporation was also the local board of health under 11 & 12 Vict. c. 63. By the Local Government Act, 1858, which is to be read with that act, the clauses of 10 & 11 Vict. c. 34 (Towns Improvement Act), with respect to slaughter-houses, is incorporated. The effect of the clauses as incorporated is to provide that no slaughter-house shall be erected or used without the licence of the board of health. By a market act, passed subsequently to the local government act, for the better management of the property of the corporation, a company was incorporated, in which certain property of the corporation was vested, and the act provided that the company, with the consent of the corporation in writing under the hand of the town clerk, might erect and maintain slaughter-houses in the borough. The company erected a slaughter-house, having previously obtained the consent of the corporation in a memorandum of a resolution under the hand of the clerk ; but the corporation, acting as a local board, afterwards refused to license the slaughter-house. A., to whom the company had agreed to demise the tolls receivable under the act for slaughtering cattle in the slaughter-house, brought an action against the company for not making a good title to the tolls :—Held, that the consent given under the market act included the licence of the local board required by the 10 & 11 Vict. c. 34, s. 126. *Anthony* v. *Brecon Markets Co.*, 41 L. J., Ex. 201 ; L. R. 7 Ex. 399 ; 26 L. T. 979 ; 21 W. R. 27—Ex. Ch.

By a local act of 1862, a company was empowered to erect a cattle market at Brecon, and by s. 65 the company from time to time, if and when they should think fit, and with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town clerk, might provide and maintain slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they should think expedient. In 1863 the corporation consented to the provision and maintenance by the company of slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, in pursuance of, and in accordance with, the above-mentioned s. 65 ; the company built slaughter-houses accordingly, but absolutely abandoned the use of them in 1864. The company subsequently built other slaughter-houses a quarter of a mile off ; but the corporation had always refused to give any further consent. Justices refused to convict under s. 19 of the Markets and Fairs Clauses Act, 1847, for slaughtering cattle on premises in the borough other than those leased by the appellant :—Held, that the slaughter-houses occupied by the appellant had not received the consent of the corporation under s. 65 of the local act of 1862, and that the justices were right. *Hughes* v. *Trew*, 36 L. T. 585.

—— **By Resolution and Notice.**]—A police act empowered a town council of a borough to grant licences for the erection of slaughter-houses. A. applied for a licence. The market committee inspected the site, and recommended the grant. The committee passed a resolution to grant the licence, and communicated the same to A., and the resolution was confirmed by the town council :—Held, that though it was usual afterwards to grant a formal licence in a printed form, still the grant was complete on the confirmation of the resolution and communication thereof to A., and operated as a licence. *Howarth* v. *Manchester Corporation*, 6 L. T. 683.

**Penalty for Erecting—Liability.**]—By 11 & 12 Vict. c. 63, s. 64, the business of a slaughterer of cattle, or other noxious or offensive business, shall not be newly established in any building or place in any district, after the act has been applied to it, without the consent of the local board of health ; and whosoever offends against this enactment shall be liable, for each offence, to a penalty of 50*l.* A cattle-market company, cattle having never been slaughtered in the market before, after the act had been applied to the district, erected a building in which they allowed persons to slaughter cattle on the payment of 2*s.* a head, the company finding the tackle attached to the building, but the persons slaughtering bringing their own implements :—Held, that the company was liable to the penalty. *Liverpool New Cattle Market Co.* v. *Hodson*, 36 L. J., M. C. 30 ; L. R. 2 Q. B. 131 ; 15 L. T. 534 ; 15 W. R. 563.

**Premises Covered by Licence.**]—Prior to the coming into operation in a town of the 31 & 32 Vict. c. 98, S. occupied premises in a street there for the purpose of slaughtering pigs. These premises consisted of a yard with an entrance by closed doors or gates from the street, and in the yard, pig-pens, a cart-shed, a shed used for slaughtering pigs, and a stable for horses, the external vaults of which constituted the walls of the building. Whilst the premises were so used S., upon the coming into operation of the act, obtained a licence, which licence stated that the animals to be slaughtered were pigs. No animals before them were ever slaughtered in the stable. Since obtaining such licence S. had converted the stable into another slaughtering shed, and used the same for slaughtering bullocks and sheep therein. Upon an information for using this stable as a slaughter-house without having obtained a licence for that purpose, the justices held that upon a proper application of the law to the facts, S. was entitled to use the stable as he did, for that the stable, as forming an original portion of the premises licenced as a slaughter-house, was covered by such licence: —Held, that the justices were right. *Brighton Local Board* v. *Stenning*, 15 L. T. 567.

**Private Premises.**]—By a clause in a local act, which closely followed the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14), s. 19, it was enacted, that "no person shall slaughter any cattle, or dress any carcase for sale as human food, or food of man, in any place within the limits other than a slaughter-house": —Held, that to slaughter cattle on the private premises of an inhabitant of the town, unless for sale as human food, was no offence within this clause. *Elias* v. *Nightingale*, 8 El. & Bl. 698; 27 L. J., M. C. 151; 4 Jur. (N.S.) 166; 6 W. R. 91.

**Using Horses Delivered to be Slaughtered.**]—The huntsman of a pack of hounds had the care and management of the kennels, and of a place which was used solely as a slaughter-house for the purpose of slaughtering horses and other cattle sent there as food for the hounds. B. sent a horse to this place, and delivered it to the huntsman for the purpose of the horse being slaughtered as food for the hounds, telling him of the purpose. Instead of slaughtering the horse, he lent him to a person for the purpose of being worked, and he was worked by that person: —Held, that the 12 & 13 Vict. c. 92, s. 9 (which imposes a penalty for using horses delivered to be slaughtered at a place used for slaughtering), applied to the huntsman, and was not confined to persons having or managing licensed slaughter-houses under 26 Geo. 3, c. 71. *Colam* v. *Hall*, 40 L. J., M. C. 100; L. R. 6 Q. B. 206; 23 L. T. 802; 19 W. R. 563.

### b. Other Trades.

**Brick-making.**]—Brick-making is not necessarily a noxious or offensive business, trade, or manufacture, within s. 64 of the Public Health Act, 1848. *Wanstead Local Board* v. *Hill*, 13 C. B. (N.S.) 479; 32 L. J., M. C. 135; 9 Jur. (N.S.) 972; 7 L. T. 744; 11 W. R. 368.

**Keeping Swine.**]—It is an offence under the Public Health Act, 1875, s. 47, to keep swine so as to be a "nuisance" in the common-law meaning of the term. It is not necessary to such offence that there should be any injury to health. *Banbury Urban Sanitary Authority* v. *Page*, 51 L. J., M. C. 21; 8 Q. B. D. 97; 45 L. T. 759; 30 W. R. 415; 46 J. P. 184.

Keeping of swine and a pig-sty in such a manner as to be a nuisance is an offence within 11 & 12 Vict. c. 63, s. 59. *Digby* v. *West Ham Local Board*, 6 W. R. 468.

—— **Near Dwelling Houses—By-law.**] — A rural sanitary authority, purporting to act under the powers of ss. 44 and 276 of the Public Health Act, 1875, made a by-law prohibiting the keeping of swine within the distance of fifty feet from any dwelling house within their district:—Held, that the by-law was unreasonable, and therefore bad. *Heap* v. *Burnley Union*, 53 L. J., M. C. 76; 12 Q. B. D. 617; 32 W. R. 660; 48 J. P. 359.

An urban sanitary authority, under the powers conferred by the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), made certain by-laws, one of which was as follows:—No swine shall be kept in any yard within a distance of twenty-one feet from a dwelling-house or public building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business, except with the special permission of the sanitary authority:—Held, that the by-law was valid. *Lutton* v. *Doherty*, 16 L. R., Ir. 493.

—— **For some Hours only.**]—A by-law made by an urban authority imposed a penalty for keeping swine within fifty yards of a dwelling-house. M., in course of business, used to buy swine elsewhere in the morning, and bring them within fifty yards, &c., and keep them till the evening, when they were sent off by the railway The justices held that, because the pigs were not fed and kept all night, this could not be a keeping within the by-law:—Held, the justices were wrong, and that keeping them all night was not necessary to the offence. *Steers* v. *Manton*, 57 J. P. 584.

**Manure Making — Effluvia Injurious to Health.**]—The respondents were manufacturers of artificial manures, and in the course of manufacture offensive effluvia were given off which were blown over the appellant's district, and occasionally interfered materially with the comfort of the inhabitants. The appellants made a complaint to the justices under s. 114 of the Public Health Act, 1875. The justices dismissed the complaint, but stated a special case:—Held, that inasmuch as the effluvia, though not injurious to persons in sound health, were calculated to cause sick persons to suffer, it was a nuisance and injurious to health within the 114th section. *Malton Local Board* v. *Malton Farmers' Manure Co.*, 49 L. J., M. C. 90; 4 Ex. D. 302; 44 J. P. 155.

**Injury to Health.**]—It is not necessary, in order to bring a nuisance within the section, to prove that such nuisance is injurious to health. *Ib.* See *Banbury Urban Sanitary Authority* v. *Page*, supra.

**Bone-boiling—Closed Cylinders.**]—The appellants, without the leave of the sanitary authority, carried on a business of steaming bones by placing them in metal cylinders hermetically sealed, and introducing dry steam, which stripped the bones and caused no offensive smell, no water being used in the process:—Held, that the appel-

lants could not be convicted under s. 112 of the Public Health Act, 1875, for establishing the offensive trade of bone-boiling. *Cardiff Manure Co.* v. *Cardiff Union*, 54 J. P. 661.

**Smelting Works—Exemption—Public Nuisance.**]—The provision in s. 334 of the Public Health Act, 1875, that nothing in that act shall extend to certain businesses therein specified, exempts their proprietors only from the liabilities created and penalties imposed by that act, and does not relieve them from liability for a public nuisance in a suit brought by the attorney-general for its abatement, nor from their ordinary common-law liability to an owner whose property is injuriously affected by it. *Att.-Gen.* v. *Logan*, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615.

**Right of Local Board to sue as Owners and to act as Relators.**]—A local authority may act as relators in an action brought by the attorney-general for the purpose of abating a public nuisance, and may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners. *Ib.*

**Fish-Frying.**]—By the 112th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is provided that any person who, after the passing of this act, establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, the trade of blood-boiler, or bone-boiler, or fell-monger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty, &c. A fish-frying business, which is as a fact an offensive business by reason of effluvia arising therefrom and extending to a distance of two or three hundred yards, is not a noxious or offensive business within the meaning of the section, which only applies where a business is necessarily noxious or offensive. *Braintree Local Board* v. *Boyton*, 52 L. T. 99; 48 J. P. 582.

**Smallpox Hospital — Adjoining District — Consent.**]—A hospital is not a noxious business within s. 112 of the Public Health Act, 1875. The powers conferred by s. 131, exercisable by a local authority, are not limited for their exercise to the district of the particular local authority which exercises them. Sect. 285 does not apply to the powers conferred by s. 131 so as to require for their exercise in an adjoining district the consent of the local authority of such adjoining district. *Withington Local Board* v. *Manchester Corporation*, 62 L. J., Ch. 393; [1893] 2 Ch. 19; 2 R. 367; 68 L. T. 330; 41 W. R. 306; 57 J. P. 340—C. A.

12. Cleansing Pavements and Premises.

**Removal of Snow — 11 & 12 Vict. c. 63—Power to make By-laws.**]—Under 11 & 12 Vict. c. 63, local boards of health have no general power to make by-laws for carrying out the purposes of the act, but only such by-laws as are authorised by s. 55. *Reg.* v. *Wood*, 5 El. & Bl. 49; 3 C. L. R. 1134. *S. C.*, nom. *Reg.* v. *Rose*, 24 L. J., M. C. 130; 1 Jur. (N.S.) 802; 3 W. R. 419.

A by-law, "that all occupiers of any premises within the district shall properly clean and remove all snow, or other obstructions, from the footpath and channel opposite their respective premises before nine of the clock in the forenoon of each day," is bad. *Ib.*

An information having been laid against an occupier under this by-law, and it being proved that the occupier had neglected to remove snow, it was objected that the by-law was bad; but the justice held that, inasmuch as it had been allowed by the secretary of state, he could not entertain the objection; and he convicted the occupier. The court quashed the conviction on certiorari, though s. 137 enacts that no proceeding touching the conviction of any offender against the act shall be removable by certiorari, holding that the justice acted without jurisdiction. *Ib.*

**Dust and Ashes.**]—The 10 & 11 Vict. c. 34, s. 82, which requires the commissioners under the special act to cause "all the dust, ashes and rubbish to be carried away from the houses and tenements of the inhabitants of the town or district within the limits of the special act," does not extend to the dust and ashes the exclusive produce of manufactories. *Lyndon* v. *Standbridge*, 2 H. & N. 45; 26 L. J., Ex. 386; 5 W. R. 590.

**"House Refuse"—Clinkers from Furnaces in Steam Laundry.**]—Clinkers produced in the furnaces of boilers belonging to a steam laundry, used to generate steam for the purpose principally of heating the water used in the business, but also for the purpose of warming the laundry, are not "house refuse" within the meaning of s. 42 of the Public Health Act, 1875, and therefore a local authority which has undertaken the removal of house refuse within its district is not bound to remove them. *London and Provincial Laundry* v. *Willesden Local Board*, [1892] 2 Q. B. 271; 67 L. T. 499; 40 W. R. 557; 56 J. P. 696.

**—— Removal of, from "House"—What is.**]—The definition of "house" in s. 4 of the Public Health Act, 1875, is not to be read into s. 42 of that act, and therefore a steam laundry, although containing a dwelling-house for the manageress and for the clerk in charge, is not a "house" for the purpose of the removal of "house refuse" under s. 42 of the same act. *Ib.*

**Power to Enter Private Premises—Well on Private Property.**]—The Public Health (Scotland) Act, 1867, s. 89, sub-s. 4, provides that "the local authority may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts and works used for the gratuitous supply of water to the inhabitants to be continued, maintained and plentifully supplied with water." A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of this section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before. And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water. *Smith* v. *Archibald*,

5 App. Cas. 489. And see *Dungarvan Union* v. *Mansfield*, and *Holmfirth Local Board* v. *Shore*, post, col. 478.

13. Food and Drink.

a. Sale of Unsound Meat.

**Persons Liable for.**]—Victuallers, brewers and other common dealers in victuals, who in the course of their trade sell provisions unfit for the food of man, are criminally responsible under 51 Hen. 3, "Pillor' et Tumbrel' &c." and of Edw. 1, "De Pistoribus et Hasiatoribus et aliis Vitellariis," if they do so knowingly, and probably if they even do not, and are liable civilly to the vendee without any fraud on their part or warranty of the soundness of the thing sold: but a private person, not following any of these trades, who sells an unwholesome article for food, is not liable under such circumstances. *Burnby* v. *Rollitt*, 16 M. & W. 644; 17 L. J., Ex. 190; 11 Jur. 827.

A meat salesman can be indicted at common law for knowingly sending or exposing meat for sale in a public market as fit for human food, which, in fact, was not so. *Reg.* v. *Stevenson*, 3 F. & F. 106.

So a carrier, for knowingly bringing to market meat unfit for human food. *Reg.* v. *Jarvis*, 3 F. & F. 108.

But a person is not indictable for sending to a meat-salesman meat he knows to be unfit for human food, if he does not know and intend that it is to be sold as human food. *Reg.* v. *Crawley*, 3 F. & F. 109.

**Person "to Whom the Same belongs"—Under-bailiff.**]—The appellant was an under-bailiff on the estate of N., a large landowner, and it was his duty to receive instructions from, and obey the orders of, the head bailiff. Two cows belonging to N. were slaughtered, as they were affected by disease; the appellant was not present when the cows were slaughtered, but on the same day he was told by the head bailiff to send the meat to Portsmouth, and to go there himself to meet it. The appellant went to Portsmouth on the following day and saw a butcher named B., and on the next day, the head bailiff, having been told that the meat had not been sent off, directed the appellant to take the meat to P. railway station and consign it to the butcher. The transit of the meat to the P. station was superintended by the appellant, who took charge of it. It was then sent by train in the appellant's own name to the butcher at Portsmouth, the appellant sending a telegram to the butcher, "Two carcases of meat addressed to you; make best of it." The butcher replied that the meat, which was then lying at Portsmouth railway station, was of no use to him. The appellant then sent a telegram to the station-master: "Ask consignee to do the best he can. If he can't dispose of it, ask him to bury it, and charge sender expenses." The meat was seized while lying at the station, and condemned as unsound. Upon these facts the appellant was convicted, under s. 117 of the Public Health Act, 1875, of exposing unsound meat for sale, as being the person "to whom the same belonged": —Held, quashing the conviction, that there was no evidence whatever upon the facts, to shew that the appellant was the person "to whom the meat belonged" within the meaning of s. 117 of the act. *Newton* v. *Monkcom*, 58 L. T. 231; 16 Cox, C. C. 382; 51 J. P. 692.

**Exposure for Sale.**]—Diseased meat placed on a cart, when passing along the streets of the city of Dublin from a slaughter-house to a place for the manufacture of preserved meats, in the city, was seized by the inspector of nuisances:—Held, that the meat was, when placed upon the cart, exposed for sale and intended for the food of man, within the meaning of the 26 & 27 Vict. c. 117, s. 2. *Daly* v. *Webb*, Ir. R. 4 C. L. 309; 18 W. R. 631.

The appellant, a farmer, sent to a salesman on the London Central Meat Market meat for the purpose of being sold for human food, such meat being unwholesome and unfit for the food of man. The salesman did not expose the meat for sale, but placed it on one side, and gave notice to an inspector of nuisances, who caused the meat to be removed and condemned by a justice. The appellant was thereupon summoned before a justice upon an information laid under s. 2 of the Nuisances Removal Act (Amendment Act), 1863, charging him with being the owner of meat "unlawfully deposited in the London Central Meat Market for the purpose of sale and intended for the food of man, the same being diseased, unsound, unwholesome and unfit for the food of man," and was convicted:—Held, that there having been no sale or exposure for sale of the meat, the appellant was wrongly convicted. *Barlow* v. *Terrett*, 60 L. J., M. C. 104; [1891] 2 Q. B. 107; 65 L. T. 148; 39 W. R. 640; 55 J. P. 632.

**Intent to Sell.**]—A person who has unsound meat in his possession with the intention of selling the same for the food of man is guilty of an offence under s. 117 of the Public Health Act, 1875, although he may not have actually exposed the meat for sale. *Vinter* v. *Hind* (10 Q. B. D. 63) distinguished. *Mallinson* v. *Carr*, 60 L. J., M. C. 34; [1891] 1 Q. B. 48; 63 L. T. 459; 39 W. R. 270; 17 Cox, C. C. 220; 55 J. P. 102.

The council of a borough under the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 99, empowering them to make by-laws for the suppression of all such nuisances as are not already punishable in a summary manner, made a by-law imposing a penalty on any butcher or other person who should have in his possession, with intent to sell or expose for sale, any unsound, putrid or unwholesome meat or other victuals or provisions unfit for the food of man, or which would be deleterious to the health of persons who might feed thereon. S. was charged under this by-law with having in his possession, with intent to sell, some cheese unfit for the food of man:—Held, that the by-law was properly made, and was still in force, and that the having in possession with intent to sell, or exposing for sale, cheese which was in fact unfit for human food, was a nuisance at common law, and so within the scope of the Municipal Corporations Act, s. 90, and that S. was within the by-law. *Shillito* v. *Thompson*, 45 L. J., M. C. 18; 1 Q. B. D. 12; 33 L. T. 506; 24 W. R. 57.

**Scienter.**]—It is not necessary to support a conviction under s. 117 of the Public Health Act, 1875, against the owner of unsound meat for exposing it for sale, that proof should be given of actual personal knowledge on the part of the

owner of the condition of the meat. *Blaker* v. *Tillstone*, 63 L. J., M. C. 72; [1894] 1 Q. B. 345; 10 R. 94; 70 L. T. 31; 42 W. R. 253; 58 J. P. 184.

**Obstructing Inspection—On a Sunday.**]—A butcher at his residence half a mile from his shop, on a Sunday afternoon was requested to go himself or send someone with the key to admit the inspector of nuisances to his shop, in order that some meat there might be examined. He refused, and was convicted under 26 & 27 Vict. c. 117, s. 3, of preventing, obstructing, or impeding the inspector when duly engaged in carrying the provisions of that act into execution:—Held, that although Sunday afternoon might, under some circumstances, be a reasonable time for the examination of meat under s. 2, the butcher had committed no offence under s. 3. *Small* v. *Bickley*, 32 L. T. 726.

**Seizure.**]—The respondent, a butcher, exposed for sale part of a cow which had died of disease, and sold the meat to a customer, who took it home for food, and some days afterwards at the request of the appellant, an inspector of nuisances, handed it over to him, and it was condemned by a justice as unfit for the food of man:—Held, that the meat was not "so seized" and condemned as is prescribed by ss. 116, 117, of the Public Health Act, 1875, and therefore the respondent was not liable as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under s. 117. *Vinter* v. *Hind*, 52 L. J., M. C. 93; 10 Q. B. D. 63; 48 L. T. 359; 31 W. R. 198; 47 J. P. 373.

Some diseased meat was taken into a yard belonging to a butcher's shop and then seized by the police. Within this yard there was a slaughter-house:—Held, that the yard was a place within 26 & 27 Vict. c. 117, s. 2. *Young* v. *Gattridge*, 38 L. J., M. C. 67; L. R. 4 Q. B. 166.

**Condemnation Day after Seizure — Whether Delay reasonable.**]—Where unsound meat was seized by the inspector of nuisances at half-past nine in the evening, and he then went in search of a justice, but did not find one till next morning at a quarter-past ten, when an order to condemn the meat was made:—Held, that there had been no unreasonable delay, and that the justices were wrong in dismissing on that ground an information for having unsound meat for sale within the meaning of ss. 116 and 117 of the Public Health Act, 1875. *Burton* v. *Bradley*, 51 J. P. 118.

**Evidence that Meat was wrongly Condemned —Admissibility.**]—Meat exposed by a butcher for sale was seized and condemned under the Public Health Act, 1875, ss. 116 and 117, as unfit for the food of man. Upon a charge against the butcher under s. 117 (which enacts that the person to whom the meat seized and condemned belonged shall be liable to a penalty), the justices admitted evidence that the meat was sound and fit for the food of man, and, being satisfied that it was so, dismissed the charge:—Held, that the justices decided correctly. *Waye* v. *Thompson*, 54 L. J., M. C. 140; 15 Q. B. D. 342; 53 L. T. 358; 33 W. R. 733; 15 Cox, C. C. 485; 49 J. P. 693.

**Refusal of Magistrate to Condemn — Compensation — Costs of Attendance.**] — When a justice refuses to condemn as unwholesome meat that has been seized by the officer of a local authority under s. 116 of the Public Health Act, 1875, the owner is entitled to include in the amount of "full compensation" recoverable by him from the local authority under s. 308, the costs incurred through the attendance of himself and his witnesses before the magistrate. *Bater and Birkenhead Corporation, In re*, 62 L. J., M. C. 107; [1893] 2 Q. B. 77; 4 R. 438; 69 L. T. 220; 41 W. R. 513; 58 J. P. 7—C. A.

The Queen's Bench Division also held that where a justice refuses to condemn the meat, the owner cannot decline to take it back if tendered to him; and, therefore, the compensation he is in such case entitled to under s. 308 is the difference between the value of the meat when seized and when tendered. *S. C.*, 62 L. J., M. C. 107; [1893] 1 Q. B. 679; 4 R. 438; 68 L. T. 680; 41 W. R. 513; 57 J. P. 487.

**Destruction of Meat—Notice.**]—The 116th and 117th sections of the Public Health Act, 1875, give power to a medical officer of health or inspector of nuisances to seize meat, &c. exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, which may appear to him to be diseased or unsound, and carry it before a justice, who, if it appears to him to be diseased or unsound, is to condemn the same and order it to be destroyed. The person to whom such meat, &c. belongs is also rendered by s. 117, liable to a penalty:—Held, that meat might be taken before a justice under the above sections and condemned without any summons or notice to the person to whom it belonged, and that such person having been subsequently to the destruction of the meat summoned and convicted of an offence under the above sections, such conviction was good. *Reg.* v. *White*, or *White* v. *Redfern*, 49 L. J., M. C. 19; 5 Q. B. D. 15; 41 L. T. 524; 28 W. R. 168; 44 J. P. 87.

### b. Adulteration of Food.

#### i. *Offences generally.*

**"Food"—Baking Powder.**]—Baking powder composed of ingredients some of which are injurious to health is not an article of "food" within the Sale of Food and Drugs Act, 1875, and a person selling the same cannot be convicted under s. 3. "Food" comprises articles intended to form substantial components of articles of food or to be eaten as adjuncts thereto. *James* v. *Jones*, 63 L. J., M. C. 41; [1894] 1 Q. B. 304; 10 R. 410; 70 L. T. 351; 42 W. R. 400; 17 Cox, C. C. 726; 58 J. P. 230.

**"Drug"—Beeswax.**]—In a prosecution, under s. 6 of the Sale of Food and Drugs Act, 1875, of a grocer for selling beeswax adulterated by being mixed with paraffin:—Held, that beeswax, so sold, was not a drug. *Fowle* v. *Fowle*, 75 L. T. 514; 18 Cox, C. C. 462; 60 J. P. 758.

**Bread.**]—Mixing alum with bread in such manner as that crude lumps were found in the bread is indictable. *Rex* v. *Dixon*, 3 M. & S. 11; 4 Camp. 12; 15 R. R. 381.

Indictment against a defendant who was employed to make bread for the Military Asylum,

which charged that he delivered to J. H. divers, to wit, 297 loaves, as and for good household bread, for the use and supply of the asylum and the children belonging thereto, whereas the loaves were not good household bread, but contained divers noxious and unwholesome materials not fit for the food of man, is sufficiently certain, without shewing what the noxious materials were, or that the defendant intended to injure the children's health. *Ib.*

An indictment does not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oatmeal and barleymeal differing from the produce of the barley and which is musty and unwholesome. *Rex* v. *Haynes*, 4 M. & S. 214.

Indictment against a miller, charging in the same count that he received two separate parcels of barley, each of four bushels, to be ground at his mill, and that he delivered three bushels forty-six lbs. of oatmeal and barleymeal mixed, other and different than the produce of the four bushels, is ill, for the uncertainty to which of the four bushels it relates. *Ib.*

**Gin.**]—A publican sold as a bottle of gin liquid composed of 26 per cent. alcohol, 70 per cent. water, and 4 per cent. sugar. Evidence was adduced that gin was sold by retailers at varying strength from proof to 20 per cent. under proof. This liquid was 44 per cent. under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." Justices convicted the publican under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6:—Held, the facts justified the finding that this liquid was not of the quality of gin, but that the excess of water was a fraudulent increase of the measure of the article within the enacting part of the section. *Pashler* v. *Stevenitt*, 35 L. T. 862.

A publican was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance, and quality of the article demanded by such purchaser. A person asked for a pint of gin at the publican's premises. He said that he had gin at 2*s.* and 1*s.* 4*d.* per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43·15 per cent. of water, that is, it was 43·15 below proof, but the mixture was not injurious to health. The magistrate found that there was no recognised standard of alcoholic strength for gin, but that it varied from proof to 20 under proof:—Held, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction. *Webb* v. *Knight*, 46 L. J., M. C. 264; 2 Q. B. D. 530; 36 L. T. 791; 26 W. R. 14—C. A.

And see *Gage* v. *Elsey*, post, col. 453.

**Tea.**]—A tea dealer was convicted under the Adulteration of Food Act, 1870 (35 & 36 Vict. c. 74), s. 2 (repealed), for selling geeen tea as unadulterated which was adulterated. A person asked for two ounces of green tea at the shop, for which he paid 5½*d.*, the shopman stating that he was authorised by his employer to guarantee all their green teas of the value of 3*s.* per pound and upwards as genuine green teas. On analysis, the tea was proved to be painted or faced with gypsum and prussian blue for the purpose of colouring it. The tea was sold in the same state in which it comes from abroad. The tea, which is imported from China as green tea, and generally known as such in the tea trade, is painted and faced in this manner; but this practice is not known to the public. Pure green tea, though not known generally in the trade as green tea, is imported from Japan:—Held, by Cockburn, C.J., Blackburn and Archibald, JJ., Quain, J., dissentiente, that the conviction was right. *Roberts* v. *Egerton*, 43 L. J., M. C. 135; L. R. 9 Q. B. 494; 30 L. T. 633; 22 W. R. 797.

**Coffee — Fraudulent Intention to Increase Bulk.**]—The defendant was a shopkeeper, and on being asked for a pound of coffee served the purchaser out of a canister of Symington's coffee, for which 1*s.* 4*d.* was paid, and affixed a label stating that it was sold as a mixture of chicory and coffee. It contained 85 per cent. of chicory. The magistrate dismissed the information for selling to the prejudice of the purchaser, but did not find whether the mixture was made with a fraudulent intent to increase the bulk:—Held, that he was bound to find that fact, and if affirmatively, that he ought to convict, though the defendant might have sold the article as he purchased it. *Horder* v. *Meddings*, 44 J. P. 234.

The respondent went into the appellant's shop and asked for half a pound of coffee, for which he was charged 9*d.*, the price of pure coffee; when the coffee was put up in a parcel and lying on the counter after payment, the respondent said he had bought it for analysis. The appellant then pointed out a label outside the parcel with the words, "This is a mixture of coffee and chicory." On analysis the coffee was only 60 per cent.; and the justices found that the chicory was used fraudulently to increase the bulk, and convicted L.:—Held, that the justices, on finding that there was fraud, were right. *Liddiard* v. *Reece*, 44 J. P. 233.

O. sold French coffee, the label stating that it was mixed with chicory, and the purchaser was also told the same. The analysis shewed that there was 60 per cent. chicory, and 40 per cent. coffee. The justices convicted O., holding that, as the proportion of chicory was not stated, it must have been added fraudulently to increase the bulk:—Held, the justices were wrong, and that there was no evidence to support a conviction. *Otter* v. *Edgley*, 57 J. P. 457.

—— **Article asked for.**]—A. went into H.'s shop and asked for half a pound of coffee. H. said she did not keep it, whereon A. pointed to certain tins labelled "coffee and chicory." H. said she sold that as a mixture, and A. asked for half a pound of it, which H. sold. The mixture contained about 30 per cent. of coffee. H. was charged with selling coffee not of the nature, &c., of coffee:—Held, that the justices were wrong in convicting H. of selling coffee, for that she sold only a mixture as she was entitled to do, and in doing which, she committed no offence within s. 6 of 38 & 39 Vict. c. 63. *Higgins* v. *Hall*, 51 J. P. 293.

**Milk—Skimmed Milk.**]—It was proved on an information under s. 6 of the Sale of Food and Drugs Act, 1875, that the appellant, who was an

inspector under the act, on asking the respondent, a milk seller, for "milk," was supplied by the respondent with milk which had been skimmed, and which was, in consequence, as compared with normal milk as it comes from the cow, deficient in butter fat to an extent of 60 per cent. :—Held, that on these facts it was not proved that any offence had been committed by the respondent against the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. *Lane* v. *Collins*, 54 L. J., M. C. 76 ; 14 Q. B. D. 193 ; 52 L. T. 257 ; 33 W. R. 365 ; 49 J. P. 89.

—— **In course of Delivery — Payment of Carriage by Purchaser—"Place of Delivery."**]—By the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, certain officers therein named "may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk"; and power is given to submit such sample for analysis, and take proceedings as provided by s. 13 of the Sale of Food and Drugs Act, 1875. The appellant, who lived at C., contracted with a dairy company for the sale to them of the milk from his dairy, to be delivered at London, or at such other station as the purchasers should from time to time appoint ; the carriage of the milk from C. to be paid by the purchasers. The purchasers appointed H. as a station for the delivery of milk under the contract. The appellant consigned milk from C. to the purchasers at H. ; immediately on its arrival at the latter station, and before possession was taken of it by the purchasers, a sample was taken by the respondent, which, upon analysis, was found to be adulterated by the addition of water :—Held, that, notwithstanding the provision for payment of the carriage by the purchasers, H. was the place of delivery of the milk to the purchasers within the meaning of the section ; and the appellant was, therefore, rightly convicted of an offence under the acts. *Filshie* v. *Evington*, [1892] 2 Q. B. 200 ; 66 L. T. 199 ; 40 W. R. 380 ; 17 Cox, C. C. 481 ; 56 J. P. 312.

**Mustard—Declaration of Impurity.**]—The 35 & 36 Vict. c. 74, s. 3 (repealed), enacts, that "any person who shall sell any article of food . . . knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same and no other, shall be deemed to have sold an adulterated article of food . . . under this act" :—Held, that a person who had sold mustard admixed with flour and turmeric, substances not injurious to health, declaring at the time of such sale that he did not sell the article as pure mustard, had been guilty of no offence under the statute, and that it was not necessary, in order to comply with s. 3, that he should declare the nature and proportion of the substances admixed. *Pope* v. *Tearle*, 43 L. J., M. C. 129 ; L. R. 9 C. P. 499 ; 30 L. T. 789 ; 22 W. R. 950.

**Hops.**]—It is an offence within 7 Geo. 2, c. 19, to mix the vapour of sulphur and brimstone with hops. *Rex* v. *Pack*, 6 Term Rep. 374.

**Seeds—Dyeing.**]—Under 32 & 33 Vict. c. 112 (The Adulteration of Seeds Act, 1869), which by s. 2 defines the term "to dye seeds" as giving to seeds by any process of colouring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind, and by s. 3 imposes a penalty upon any person, who with intent to defraud, "dyes any seeds, or sells any dyed seed," no offence is committed by subjecting seeds to a process by sulphur smoking, so as to improve them in appearance, and to make old and inferior seed appear to be new seed, so long as such seed is not made to appear of a different species or description from that to which it actually belongs. *Francis* v. *Maas*, 47 L. J., M. C. 83 ; 3 Q. B. D. 341 ; 38 L. T. 100 ; 26 W. R. 422.

**Saffron — Article sold, wholly different from that demanded.**]—The Sale of Food and Drugs Act ,1875, after reciting that it is desirable to amend the law regarding the sale of foods and drugs in a pure and genuine condition, provides by s. 6 that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty :—Held, that s. 6 was not limited in its application to sales of adulterated articles, but that it applied also to cases in which the article sold was unadulterated but wholly different from that demanded by the purchaser. *Knight* v. *Bowers*, 54 L. J., M. C. 108 ; 14 Q. B. D. 845 ; 53 L. T. 234 ; 33 W. R. 613 ; 15 Cox, C. C. 728 ; 49 J. P. 614.

**Tincture of Opium — British Pharmacopœia Standard of Quality.**]—Upon a complaint under s. 6 of the Food and Drugs Act, 1875, for selling tincture of opium which was not "of the nature, substance, or quality," of the article demanded by the purchaser, it appeared that the drug which was sold as "tincture of opium" by the defendant was deficient in opium to the extent of one third, and in alcohol to the extent of nearly one half as compared with the standard prescribed by the British Pharmacopœia :—Held, that the defendant was liable to be convicted, although the purchaser had not specifically asked for tincture of opium "prepared according to the recipe in the British Pharmacopœia." *White* v. *Bywater*, 19 Q. B. D. 582 ; 36 W. R. 280 ; 51 J. P. 821.

**Representation at Time of Sale.**] — To constitute an offence under s. 6 of the Food and Drugs Act, 1875, the representation of the "nature, substance, and quality" of the article must be made at the time of the sale. A prior false representation in this respect is no offence within the act, provided a true one is made at the time the sale actually takes place. *Kirk* v. *Coates*, 55 L. J., M. C. 182 ; 16 Q. B. D. 49 ; 54 L. T. 178 ; 34 W. R. 295 ; 50 J. P. 148.

By 35 & 36 Vict. c. 74, s. 2 (repealed), every person who shall sell as unadulterated any article of food or drink which is adulterated . . . shall forfeit a penalty not exceeding 20*l*. By s. 3, any person who shall sell any article of food or drink, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser before delivering the same, shall be deemed to have sold an adulterated article of food or drink under the act. An information was laid against a provision and butter dealer for that he sold as unadulterated an article of food,

to wit, butter which was adulterated. It was proved that an inspector of nuisances went to his shop and asked for a pound of butter at 7*d.*, and the shopman handed him a pound, his master being present; on being analysed, it was proved to have been largely adulterated with lard, tallow, or material of that nature. The magistrate was of opinion that it was necessary to prove that the butter when sold was represented as unadulterated, and that it was also necessary to prove that the dealer knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk, and he therefore dismissed the information:—Held, first, that it was not necessary that any express representation that the article sold was unadulterated should be made at the time of sale of a simple article like butter; butter was asked for, and something handed over as butter, and that was selling as unadulterated. *Fitzpatrick* v. *Kelly*, 42 L. J., M. C. 132; L. R. 8 Q. B. 337; 28 L. T. 558; 21 W. R. 681.

**Scienter.**]—Held, secondly, that s. 3 (repealed), whatever might be its effect, was not intended to cut down s. 2; it was merely adding an additional offence, and that, therefore, it was not necessary to prove that the butterman knew the butter had been mixed with some substance, with intent fraudulently to increase its bulk. *Ib.*

By s. 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*":—Held, that, an offence within that section was committed, although the seller did not know that the article sold was not of the nature, substance, and quality demanded. *Betts* v. *Armstead*, 57 L. J., M. C. 100; 20 Q. B. D. 771; 58 L. T. 811; 36 W. R. 720; 16 Cox, C. C. 418; 52 J. P. 471.

In a prosecution under s. 9 of the Sale of Food and Drugs Act, 1875, for the "abstraction of any part of an article of food before sale, and selling without making disclosure," it is unnecessary to prove guilty knowledge on the part of the seller. *Pain* v. *Boughtwood*, 59 L. J., M. C. 45; 24 Q. B. D. 353; 62 L. T. 284; 38 W. R. 428; 16 Cox, C. C. 747; 54 J. P. 469.

A person cannot be convicted under 6 & 7 Will. 4, c. 37, s. 8, for using prohibited mixtures or ingredients in the making of bread for sale, unless there is knowledge, either in himself or in the person employed by him, of the presence of the mixture or ingredient. *Core* v. *James*, 41 L. J., M. C. 19; L. R. 7 Q. B. 135; 25 L. T. 593; 20 W. R. 201.

**Intent to sell in an altered State without Notice.**]—In a prosecution under s. 9 of the Sale of Food and Drugs Act, 1875, it is sufficient to prove that an article of food has been altered by the abstraction of some part of it, and sold in its altered state without notice, and it is not necessary to prove that it was so altered by the seller with intent to sell it in its altered state without notice. *Dyke* v. *Gower*, 61 L. J., M. C. 70; [1892] 1 Q. B. 220; 65 L. T. 760; 17 Cox, C. C. 421; 56 J. P. 168.

**False Warranty in Writing—Mens Rea.**]—Under clause 3 of s. 27 of the Sale of Food and Drugs Act, 1875, in order to constitute the offence of giving a false warranty in writing to a purchaser in respect of an article of food or drug, a mens rea on the part of the seller at the time when the warranty was given must be proved. *Derbyshire* v. *Houliston*, 66 L. J., Q. B. 569; [1897] 1 Q. B. 772; 76 L. T. 624; 45 W. R. 527; 61 J. P. 374.

ii. *Prejudice of Purchaser.*

**Purchaser.**]—Where an article of food, which was not of the nature, substance, and quality of the article demanded, was sold to an inspector of nuisances, who purchased for the purpose of analysis under s. 13 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), with money belonging to the authority by whom he was employed:—Held, that such sale was "to the prejudice of the purchaser" within the meaning of the Sale of Food and Drugs Act, 1875, s. 6. *Hoyle* v. *Hitchman*, 48 L. J., M. C. 97; 4 Q. B. D. 233; 40 L. T. 252; 27 W. R. 487.

—— **Purchase of Adulterated Article by Deputy Inspector.**]—The respondent was summoned upon an information laid by the appellant, the inspector appointed under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), for having sold to the prejudice of one Toy, certain coffee which was not of the nature and quality of the article demanded by such purchaser, contrary to the provisions of s. 6. It appeared that Toy went as the appellant's assistant, and asked for some best coffee, for which he paid. On being analysed, the coffee purchased was found to contain a large proportion of chicory. The justices dismissed the information on the ground, amongst others, that the proceeding having been instituted by the appellant in his official capacity, he and not Toy should have personally purchased the article, and dealt with the same:—Held, upon the above facts, that Toy might be treated as an ordinary purchaser, and that the justices had acted wrongly in entertaining the objection. *Horder* v. *Scott*, 49 L. J., M. C. 78; 5 Q. B. D. 552; 42 L. T. 660; 28 W. R. 918; 44 J. P. 520. S. P., *Smith* v. *Stace*, 44 J. P. 796.

An inspector gave his servant some money and sent him to a public-house to purchase a bottle of spirits; after the servant had been in the house a minute, and had paid for the bottle, the inspector entered:—Held, that the inspector was the purchaser and was himself prejudiced. *Garforth* v. *Esam*, 56 J. P. 521.

**Notice to Purchaser.**]—When the seller of an article brings to the purchaser's knowledge the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not "to the prejudice of the purchaser" within s. 6 of 38 & 39 Vict. c. 63, and consequently no offence is committed within that section. *Sandys* v. *Small*, 47 L. J., M. C. 115; 3 Q. B. D. 449; 39 L. T. 118; 26 W. R. 814.

Sect. 8 points out a mode of giving notice to the purchaser that is made by the statute sufficient, but it is not intended by that section that, whenever the mode therein specified is not adopted, there shall necessarily be an offence against s. 6. *Ib.*

By s. 6 of 42 & 43 Vict. c. 30, it is provided

that "in determining whether an offence has been committed under 38 & 39 Vict. c. 63, s. 6, by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . 35 degrees under proof for gin." The appellant sold to the respondent gin more than 35 degrees under proof, but, at the time of sale, brought to his knowledge a printed notice hanging up in the room to the effect that all spirits were sold "as diluted spirits, no alcoholic strength guaranteed":—Held, that, although the appellant had not a good defence under 42 & 43 Vict. c. 30, s. 6, he was not by that section deprived of any defence which he would have had under 38 & 39 Vict. c. 63, and that the sale not having been to the prejudice of the purchaser, no offence had been committed under 38 & 39 Vict. c. 63, s. 6. *Gage* v. *Elsey*, 52 L. J., M. C. 44; 10 Q. B. D. 518; 48 L. T. 226; 31 W. R. 500; 47 J. P. 391.

An agent of, and acting at the instance of, an inspector under the Sale of Food and Drugs Act, 1875, entered the shop of a provision dealer and, pointing to an article labelled "Valleyfield Finest Oleine Cheese," demanded two pounds of cheese. The words "Finest Oleine" were in smaller type than the other words. He did not notice the word "oleine" and did not know its meaning. He received the article and paid for it. The inspector then entered the shop and notified that he intended to have the substance analysed. The purchaser did not receive any label notifying that the article was a mixture. The analysis shewed the article to contain seventy per cent. of fat other than milk fat. The magistrate held that there was no sufficient indication of the admixture of the foreign ingredient, and that the purchaser was supplied to his prejudice with an article not of the nature and substance demanded:—Held, that the vendor was rightly convicted of selling the article to the prejudice of the purchaser. *Collett* v. *Walker*, 64 L. J., M. C. 267; 59 J. P. 600.

### iii. *Analysis.*

**Notice of — When Necessary.**]—It is a condition precedent to a summary conviction under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, that the purchaser of the article shall notify to the seller his intention to have it analysed by the public analyst. It is not enough for him to say that he had purchased the article for the purpose of the analysis. *Barnes* v. *Chipp*, 47 L. J., M. C. 85; 3 Ex. D. 176; 38 L. T. 570; 26 W. R. 635.

The provisions of s. 14 of the Sale of Food and Drugs Act, 1875, apply to the purchase of an article by a private person as well as by one of the public officers named in the act; so that it is a condition precedent to the right of a private purchaser to take proceedings for a penalty under the act that he should have given to the seller the notification required by that section. *Parsons* v. *Birmingham Dairy Co.*, 51 L. J., M. C. 111; 9 Q. B. D. 172; 30 W. R. 748; 46 J. P. 727.

—— **When Unnecessary.**]—It is not necessary, where a sample of milk in course of delivery is procured for analysis under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, for the officer procuring such sample to notify to the seller or his agent his intention of having the sample analysed, or to deliver to the seller or his agent a portion of the sample in accordance with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875. *Rouch* v. *Hall*, 50 L. J., M. C. 6; 6 Q. B. D. 17; 44 L. T. 183; 29 W. R. 304; 45 J. P. 220.

The provisions of s. 14 of the Sale of Food and Drugs Act, 1875, do not apply to the purchase of an article unless for analysis, and therefore it is not a condition precedent to the right of a purchaser for consumption to take proceedings for a penalty under the act that he should have given to the seller the notification required by that section. *Parsons* v. *Birmingham Dairy Co.* (9 Q. B. D. 172) dissented from. *Enniskillen Union* v. *Hilliard*, 14 L. R., Ir. 214.

A sample of milk in course of delivery by the defendant's servant under a contract for the delivery thereof to a workhouse, was procured for analysis by the master of the workhouse, and divided by him into three portions, one of which he retained, another he gave to the defendant's servant, and the third he enclosed in a bottle labelled "milk," and having on it the name of the contractor, and sent it by rail to the public analyst, who analysed it, and gave his certificate as provided by the statute. The defendant having been fined for the act of adulteration:—Held, that a purchase was shewn under the Sale of Food and Drugs Act, 1875, there being a buyer on one side and seller on the other; that the provisions of s. 14 of that statute did not apply, and no notification was necessary as a condition precedent to the bringing of the prosecution; that there was sufficient evidence that the milk taken was the milk submitted to analysis; and that a corporation such as the board of guardians was within the statute. *Ib.*

—— **Sufficiency.**]—W., the seller of spirits, was informed after the purchase that the article was to be examined by the "county analyst," and W. knew that the county analyst was the public analyst of the place:—Held, that this notice to W. was sufficient, though the words "public analyst" were not expressly used by the purchaser. *Wheeker* v. *Webb*, 51 J. P. 661.

S., the sanitary inspector, went with D. to a shop where butter was sold, and sent into the shop D., who bought a pound for a shilling. D. came out and gave it to S., who, within two minutes, went inside and gave notice to the shopkeeper that he had bought it for analysis, and he then and there divided it into parts, and S. laid the information for selling butter not of the nature, &c., of butter:—Held, the purchaser of the article was S. and not D., and that S. properly gave the notice and laid the information. *Stace* v. *Smith*, 45 J. P. 141.

—— **Notification "forthwith."**]—A constable acting on the instructions of an inspector went into an inn to buy some spirits, and upon bringing back what he had bought he and the inspector went into the inn two minutes after the sale and informed the innkeeper that the spirits were bought for analysis, and divided the sample:—Held, that the object of the purchase was notified forthwith within the meaning of s. 14 of the Food and Drugs Act, 1875, and that the justices should have convicted. *Somerset* v. *Miller*, 54 J. P. 614.

**Sample—Authority of Inspector to demand.**]—An inspector of nuisances cannot procure a sample in a district for which he is not appointed. *Reg.* v. *Smith*, 65 L. J., M. C. 104; [1896] 1 Q. B. 596; 74 L. T. 348; 44 W. R. 492; 18 Cox, C. C. 307; 60 J. P. 372. *And see next case.*

—— **Demand of, from a particular Vessel.**]—P., a publican, on request, supplied H. with rum out of a bottle on a shelf in the bar. After tasting it, H. requested to have half a pint of rum. P. was about to supply H. from another vessel, but H. demanded the supply from the same bottle, saying he was an inspector and that it was for analysis. H. refused, and was summoned for such refusal under the Food and Drugs Act, 1875, s. 17, and was convicted:—Held, (1) that as P. had not demanded to see H.'s authority, H. was not bound to produce it; and (2) that P. was bound to supply the sample from the same bottle as that from which he first supplied H. *Payne* v. *Hack*, 58 J. P. 165.

—— **From Bulk for Sale by Wholesale.**]—Sect. 17 of the Foods and Drugs Act, 1875, applies to articles of food, &c., exposed for sale by wholesale as well as by retail. *M'Hugh* v. *M'Grath*, [1894] 2 Ir. R. 78.

—— **Offer to divide with Seller.**]—E. purchased a pint of milk from C., and after the purchase told C. that he intended to have the milk analysed, and then offered to divide it with the seller, who refused to accept it. The milk was found to be adulterated to the extent of nine and a half degrees of added water:—Held, that it was not necessary for E. before the purchase to offer to divide the milk into three parts in so many words, and that this offer was a substantial compliance with the statute. *Chapell* v. *Emson*, 48 J. P. 200.

—— **One Portion only forwarded to Analyst.**]—It is unnecessary, where a sample of milk in the course of delivery is procured for analysis under s. 3 of the Sale of Food and Drugs Act (Amendment Act), 1879, for the officer procuring such sample to deliver the whole to the public analyst. It is none the less a sample because he divides it into two parts and delivers one part only. *Rolfe* v. *Thompson*, 61 L. J., M. C. 184; [1892] 2 Q. B. 196; 67 L. T. 295; 17 Cox, C. C. 551; 56 J. P. 425.

**Certificate of Analyst—Form.**]—To convict a person, under the Food and Drugs Acts, 1875 and 1879, of adulterating spirits, the certificate of analysis given in evidence against him must shew the quantities of each element in the compound substance. *Newby* v. *Sims*, 63 L. J., M. C. 228; [1894] 1 Q. B. 478; 10 R. 596; 70 L. T. 105; 58 J. P. 263.

A public analyst gave a certificate that a sample of milk contained "5 per cent. of added water":—Held, that this certificate was insufficient. The quantities and distinction of the constituent parts and the percentages, shewing the surplusage of water, should have been set out in detail. *Fortune* v. *Hanson*, 65 L. J., M. C. 71; [1896] 1 Q. B. 202; 74 L. T. 145; 44 W. R. 431; 18 Cox, C. C. 258; 60 J. P. 88.

The certificate of a public analyst in regard to a sample of "milk" to the effect that he was of opinion that the sample contained "milk 94 per cent., added water 6 per cent.," followed by the statement that "this opinion is based on the fact that the sample contained 7·97 per cent. solids, not fat, whereas genuine milk contains not less than 8·5 per cent. solids, not fat," is sufficient in form to comply with the requirements of the Sale of Food and Drugs Act, 1875, and is admissible as evidence under s. 21 of the act. *Fortune* v. *Hanson* (supra) distinguished. *Bridge* v. *Howard*, 65 L. J., M. C. 229; [1897] 1 Q. B. 80; 75 L. T. 300; 45 W. R. 78; 18 Cox, C. C. 421; 60 J. P. 790.

The duty of a public analyst under the Sale of Food and Drugs Act, 1875, is merely to analyse any sample of food or drugs submitted to him and to report the result of such analysis; and if he reports extraneous facts unconnected with the analysis, his certificate is inadmissible as evidence of such facts. *Fortune* v. *Hanson* (supra) explained. *Reg.* v. *Smith*, 65 L. J., M. C. 104; [1896] 1 Q. B. 596; 74 L. T. 348; 44 W. R. 492; 18 Cox, C. C. 307; 60 J. P. 372.

—— **Where Adulteration charged.**]—Where adulteration is not charged, a certificate of analysis under the Sale of Food and Drugs Act, 1875, should "specify the result" only of the analysis, the words in the form of certificate found in the schedule to the act, "I am of opinion that the said sample contained the parts as under" relating to cases of adulteration only. The heading "Observations," in the next paragraph of the schedule, also relates to cases of adulteration only; but the addition in other cases of "Observations," which ought not to be there, does not necessarily invalidate a certificate of analysis. *Bakewell* v. *Davis*, 63 L. J., M. C. 93; [1894] 1 Q. B. 296; 10 R. 617; 69 L. T. 832; 58 J. P. 228.

—— **Validity—Analyst of District.**]—An analyst cannot give a valid certificate in a district for which he is not appointed. *Reg.* v. *Smith*, supra.

—— **Weight of, in Evidence.**]—R. sold milk to H., which was stated to be purchased for analysis, and the milk was duly divided into parts, as required by the statute; and on analysis the certificate of the analyst, after stating the constituents, said the milk was adulterated with 20 per cent. of water. R. being charged with selling adulterated milk, the analyst's certificate was given in evidence, and R. gave no evidence to contradict it, but the magistrate, thinking that the state of the milk might be explained by it standing several hours in a large can, and the best milk at the top ladled out before the purchase, dismissed the summons:—Held, the magistrate was wrong, and as there was no evidence to contradict the certificate of the analyst, he ought to have acted on it, and convicted R. *Harrison* v. *Richards*, 45 J. P. 552.

Upon the true construction of s. 21 of the Sale of Food and Drugs Acts, 1875, the certificate of the analyst is, at the hearing of a proceeding under the act, sufficient, but not conclusive, evidence of the facts stated therein, and it is the duty of the justices to accept it as evidence and weigh it together with the other evidence for the prosecution upon the one side and any evidence given on behalf of the defendant upon the other side, and to come to a conclusion upon the fact of the adulteration of the food or drug upon a consideration of the whole of the evidence before them. *Hewitt* v. *Taylor*, 65 L. J., M. C. 68; [1896] 1 Q. B. 287;

74 L. T. 51; 44 W. R. 431; 18 Cox, C. C. 226; 60 J. P. 311.

Upon the hearing of a complaint under s. 6 of the Food and Drugs Act, 1875, justices, applying their own special knowledge of the article alleged to be adulterated, and without hearing evidence in contradiction of the public analyst's certificate, considered that the case came within the proviso to the section. Being doubtful, however, as to whether a technical offence had not been committed, but considering that, if it had, it was in the absence of fraud, of too trifling a nature to merit a penalty, they discharged the accused under s. 16 of the Summary Jurisdiction Act, 1879:—Held, that the justices need state no case, for though technically wrong in not hearing evidence in contradiction of the analyst's certificate, yet they were not bound to discard their own particular knowledge of and acquaintance with the subject-matter of the complaint, founded on practical experience:—Held, further, that fraud was no element of an offence under s. 6 of the Food and Drugs Act, 1875, and had the justices entertained the question of fraud they would have been wrong; but that, in determining whether they should act under s. 16 of the Summary Jurisdiction Act, 1879, they could take the fact of absence of fraud into their consideration. *Reg.* v. *Field, White, Ex parte*, 64 L. J., M. C. 158.

iv. *Persons Liable.*

**Master — Unauthorised Act of Servant.**]—A servant of the appellants sold lard adulterated with foreign matter without a proper label indicating its character. On the hearing of a summons against the appellants under s. 6 of the Sale of Food and Drugs Act, 1875, it was proposed on behalf of the appellants, to call evidence to shew that the action of the servant was contrary to their express instructions. The justices refused to admit the evidence:—Held, that the statute does not make a master responsible for the unauthorised acts of his servant, and that the evidence should have been admitted. *Kearley* v. *Tonge*, 60 L. J., M. C. 159; 65 L. T. 261; 56 J. P. 72; 17 Cox, C. C. 328.

—— **Sale by Servant—No Evidence of Master's Knowledge or Connivance.**]—P., a servant of the appellant, was employed to sell milk out of cans by retail. The cans were received by the appellant, the master, on arrival from the country, and a sample taken from each can before it was sent out for sale. The appellant had published a warning to his servants that any servant whose can of milk did not correspond with the sample taken from it would be liable to instant dismissal. P.'s can was duly sampled, and the sample proved to be unadulterated. Subsequently to his taking out the can for the sale of milk, P. admitted watering the milk, some of which milk he sold to an inspector, who thereupon summoned the appellant, the master, as "a person selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality of the article demanded," under the terms of s. 6 of the Sale of Food and Drugs Act, 1875. The appellant was convicted by a magistrate and fined the full penalty:—Held, that the appellant was rightly convicted, on the ground that he was the seller within the meaning of the act, and was liable for his servant's action in selling adulterated milk:—Held, further, that the fact of the sale of adulterated milk was sufficient proof of the offence without evidence of any connivance by the appellant, though evidence rebutting connivance might properly be admitted by the magistrate with a view to mitigate any penalty he might otherwise have thought fit to impose. *Brown* v. *Foot*, 61 L. J., M. C. 110; 66 L. T. 649; 17 Cox, C. C. 509; 56 J. P. 581.

The servant of C., a dairyman, being short of milk, bought two gallons from another dairyman, and, having mixed it with his own, sold the same to customers:—Held, that the fact that neither C. nor his servant knew or had reason to suspect the milk was adulterated was no defence to a summons under s. 9 of the Sale of Food and Drugs Act, 1875. *Morris* v. *Corbett*, 56 J. P. 649.

**Servant.**]—A local foreman in the service of a company may be convicted of adulterating milk under s. 6 of the Sale of Food and Drugs Act, 1875. *Hotchin* v. *Hindmarsh*, 60 L. J., M. C. 146; [1891] 2 Q. B. 181; 65 L. T. 149; 39 W. R. 607; 55 J. P. 775.

v. *Prosecution.*

**Jurisdiction of Justices.**]—The prosecution of offenders under s. 20 of the Sale of Food and Drugs Act, 1875, must take place before justices of the peace having jurisdiction within the district where the offence was actually committed. An inspector of nuisances can neither procure a sample in a district for which he is not appointed, nor can an analyst not appointed to act for such district give a valid certificate. *Reg.* v. *Smith*, 65 L. J., M. C. 104; [1896] 1 Q. B. 596; 74 L. T. 348; 44 W. R. 492; 18 Cox, C. C. 307; 60 J. P. 372.

**By Constable—Proof of Authority.**]—Where a police constable prosecutes for adulteration of food it is not necessary for him to prove, as a condition precedent, that he was directed to prosecute by the local authority appointing him such constable. *Hale* v. *Cole*, 55 J. P. 376.

**Several Informations in respect of One Delivery.**] — The appellant contracted with guardians to supply milk daily throughout the year. The contract provided that the milk should be new milk, free from adulteration, yielding seven degrees of cream, the milk to be tested on each delivery, and a deduction made of 1*d.* per gallon for each degree of cream short under six degrees. As the appellant's servant was in the act of delivering a day's supply—seventy gallons in five separate cans—the inspector of weights and measures procured one sample from each can under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. Upon analysis of the samples it was found that in two cases one half of the cream had been abstracted. Upon these facts two informations were laid against the appellant for offences under s. 9 of the Sale of Food and Drugs Act, 1875, and the justices convicted the appellant upon each:—Held, that, although there was but one sale in each day as between the appellant and the guardians, each sale of a sample to the police officer was a separate sale, and an information could be laid in respect of each, and that these sales were unaffected by the terms of the contract

abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case," &c. The respondent sold to the appellant a tin of skimmed milk, which purported to be, and was sold as marked upon a label upon the tin, "Condensed Milk." On another part of the label, in smaller print, it stated that "this tin contains skimmed milk." As to whether there had been a sufficient disclosure within the meaning of s. 9 of the Food and Drugs Act:—Held, that the label on the tin was a disclosure of the contents of the tin, and the appeal was dismissed. *Jones* v. *Davies*, 69 L. T. 497; 17 Cox, C. C. 694; 57 J. P. 808.

P. was charged under the Food and Drugs Act, 1875, ss. 8 and 9, with selling condensed milk, from which 80 per cent. of fat had been abstracted without making disclosure of the alteration. The purchaser was told it was skimmed milk, and was shewn a label on the tin, which, in smaller type, stated the milk to be skimmed. The justices convicted P., holding the disclosure insufficient:—Held, the justices were wrong, and that the disclosure was sufficient. *Platt* v. *Tyler*, 58 J. P. 71.

A person was charged with selling adulterated cocoa. The article was contained in a packet, on which was a label in small print, which stated that the cocoa was mixed. The packet was delivered, wrapped in opaque paper, to the purchaser. The article had been so sold, mixed, for thirty years. When analysed there was found to be 30 per cent. cocoa, and 70 per cent. starch:—Held, that the quarter sessions were wrong in holding that the label did not comply with s. 8 of the Food and Drugs Act, 1875, and in holding that the mixture was made for fraudulent purposes. *Jones* v. *Jones*, 58 J. P. 653.

—— **Otherwise than by Label.**]—In proceedings under the Sale of Food and Drugs Act, 1875, against the seller of diluted spirits, the defendant may prove that the sale was not to the prejudice of the purchaser, inasmuch as the purchaser had notice of the dilution. Such notice may be given otherwise than by a label. *Palmer* v. *Tyler*, 61 J. P. 389.

—— **Implied Notice—Less than usual Price Charged.**]—W. was charged before justices with selling for new milk an article not of the nature, substance, and quality demanded, contrary to s. 6 of the Food and Drugs Act, 1875. A sergeant of police, acting under H.'s orders, who was an inspector under the act, purchased the milk from W., who, when he was asked for new milk, sold skimmed, and charged a penny a pint, the usual price for skimmed. The justices differed—one being of the opinion that only a penny a pint being asked the purchaser must have been aware it was skimmed milk he was buying:—Held, that the knowledge of the purchaser was immaterial, and case remitted to the bench to convict. *Heywood* v. *Whitehead*, 76 L. T. 781.

vii. *Effect on Action when both Parties in Default.*

**Costs.**]—A bill was filed in equity by the manufacturers of a substance used instead of hops for brewing beer to restrain a company from making and selling a substance intended for the same purpose. As to some of the grounds for relief the plaintiffs had failed, and as to others they were held to be too late in their applications, and the bill was therefore dismissed:—Held, that as the substances made both by the plaintiffs and the company were intended to be used to deceive the public, no costs would be given to the company. *Estcourt* v. *Estcourt Hop Essence Co.*, 44 L. J., Ch. 223; L. R. 10 Ch. 276; 32 L. T. 80; 23 W. R. 313.

c. Margarine.

"**Exposed for Sale.**"]—The respondent was summoned, under 50 & 51 Vict. c. 29, for having unlawfully "exposed for sale by retail" a parcel of margarine without having attached to such parcel a label marked "margarine." The evidence shewed that the margarine in question had been placed behind a screen in the respondent's shop in the ordinary course of business, and where it could not be seen by a purchaser. A metropolitan police magistrate dismissed the summons on the ground that the margarine was not exposed for sale:—Held, that the magistrate was right, inasmuch as the words "exposed for sale" meant exposed to the view of the purchaser. *Crane* v. *Lawrence*, 59 L. J., M. C. 110; 25 Q. B. D. 152; 63 L. T. 197; 38 W. R. 620; 17 Cox, C. C. 135; 54 J. P. 471.

By the 6th section of the Margarine Act, 1887, "if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a-half-inches square 'Margarine.'" A dealer in margarine placed a number of parcels of margarine upon the counter of his shop. The parcels were in view of purchasers, but were wrapped in paper, so that they could not see the contents. The paper wrappers had the word "margarine" printed on them in letters a quarter of an inch square, but no label marked "margarine," in letters one inch and a-half square, was attached to any of the parcels in such manner as to be visible to purchasers. An information having been laid against the dealer for exposing a parcel of margarine for sale contrary to the section, the justices dismissed it on the ground that in order to constitute an offence under the section, the margarine itself must be exposed to the view of the purchaser:—Held, that it was not necessary in order to constitute an offence under the section, that the margarine itself should be exposed to the view of the purchaser. *Wheat* v. *Brown*, 61 L. J., M. C. 94; [1892] 1 Q. B. 418; 66 L. T. 464; 40 W. R. 462; 56 J. P. 153.

"**Exposed for Sale by Retail**"—**Refreshment House.**]—The sale of margarine in a refreshment house in conjunction with other articles of food is not a sale of margarine by retail within the meaning of s. 6 of the Margarine Act, 1887, nor is the separate exposure of the margarine which is being so used for sale with other food an exposure of such margarine for sale by retail within the meaning of the section. *Moore* v. *Pearce's Dining and Refreshment Rooms*, 65 L. J., M. C. 7; [1895] 2 Q. B. 657; 15 R. 611; 73 L. T. 400; 44 W. R. 94; 18 Cox, C. C. 196; 59 J. P. 805.

**Offer to Sell.**]—An offer to sell margarine under any other name is not an offence against the Margarine Act, 1887. An offering for sale contrary to the act is not proved by proof of an offer to sell. *World's Tea Co.* v. *Gardner*, 59 J. P. 358.

**Mens rea.**]—The Margarine Act, 1887, s. 7, does not make the sale of margarine as butter penal, irrespective of the defendant's state of mind, but throws on the defendant the burden of disproving intent and knowledge. *Fitzgerald* v. *Leonard*, 32 L. R., Ir. 675.

**Package — Paper Wrapper — Cardboard Box fastened by Paper Band.**]—A person sold margarine by retail in a cardboard box, the lid of which was fastened on by an adhesive paper band, to which was attached a folded paper containing an advertisement of margarine. The word "margarine" was stamped in letters a quarter of an inch square, partly on the box and partly on the paper band. The box was delivered to the purchaser wrapped in brown paper, which was not marked with the word "margarine," but it did not appear whether the covering of brown paper was added at the request of the purchaser or not:—Held, that the cardboard box, paper band, and advertisement together formed a paper wrapper within the meaning of the 3rd clause of s. 6 of the Margarine Act, 1887, and did not form a package within the meaning of the 1st clause of the section; and that if the outer covering of brown paper was added at the request of the purchaser the delivery of the box so covered did not constitute an offence against the section. *Toler* v. *Bischop*, 65 L. J., M. C. 4; 73 L. T. 403; 18 Cox, C. C. 202; 60 J. P. 9.

Quære, whether, if the outer covering had been added by the seller of his own accord or to conceal the mark of "margarine," the delivery of the box so covered would have constituted an offence against the act. *Ib.*

**Other Words besides "Margarine" on Wrapper.**]—It is not necessary that the word "margarine" should be the only word printed on the wrapper required by the act to be delivered to the purchaser on a sale of margarine by retail, so long as it is printed thereon in capital letters of the required size. *World's Tea Co.* v. *Gardner*, 59 J. P. 358.

**Notification—Purchase for Consumption.**]—It is not a condition precedent to the right of a purchaser for consumption to take proceedings for a penalty under s. 6 of the Margarine Act, 1887, that he should have given the seller the notification required by s. 14 of the Sale of Food and Drugs Act, 1875. *Buckler* v. *Wilson*, 65 L. J., M. C. 18; [1896] 1 Q. B. 83; 73 L. T. 580; 44 W. R. 220; 60 J. P. 118.

—— **Purchase for Analysis.**]—It is a condition precedent to a prosecution under s. 12 of the Margarine Act, 1887, that the officer authorised to take samples of margarine shall notify to the person dealing in it his intention of having it analysed. *Smart* v. *Watts*, 64 L. J., M. C. 89; [1895] 1 Q. B. 219; 15 R. 154; 71 L. T. 768; 43 W. R. 379; 18 Cox, C. C. 62; 59 J. P. 54.

**Jurisdiction of Justices—Limit of Time.**]—Where an offence under s. 6 of the Margarine Act, 1887, has been committed in a borough having no separate court of quarter sessions, the prosecution may be instituted before county justices, and is not by the operation of s. 20 of the Sale of Food and Drugs Act, 1875, solely within the jurisdiction of the borough justices, nor is the prosecution as regards time limited by s. 10 of the Sale of Food and Drugs (Amendment) Act, 1879. *Buckler* v. *Wilson*, supra.

**Penalties recovered, to whom payable.**]—Penalties recovered under the Margarine Act, 1887, are payable to the person who proceeds for the same where such person is an officer acting in execution of the Food and Drugs Act, 1875, and has been properly appointed under s. 26 of that act, and not to the receiver of police, under s. 47 of the Police Courts (Metropolis) Act, 1839. *Reg.* v. *Titterton, Quelch, Ex parte*, 64 L. J., M. C. 202; [1895] 2 Q. B. 61; 15 R. 418; 73 L. T. 345; 43 W. R. 603; 18 Cox, C. C. 181; 59 J. P. 327.

### d. Other Offences.

**Engrossing or Regrating.**]—The common-law offence of engrossing or regrating applied only with respect to the necessaries of life. *Pettumberdass* v. *Thackoorseydass*, 5 Moore, Ind. App. 109; 7 Moore, P. C. 239; 15 Jur. 257; and 7 & 8 Vict. c. 24, abolished the law of engrossing or regrating.

## 14. Contagious Diseases.

### a. Animals.

#### i. *Generally.*

**Possession of Diseased Animals.**]—By an order of the privy council, made in December, 1871, under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70, repealed), every person having in his possession an animal affected with a contagious or infectious disease, shall with all practicable speed give notice to a police constable. On an information against a party, alleging that he had five sheep affected with a contagious disease and did not give notice to a constable, it was proved that this person had five sheep so affected:—Held, that there was primâ facie evidence on which he might be convicted of the offence charged, and it lay on him to shew if he could that he had given notice to a police constable. *Huggins* v. *Ward*, L. R. 8 Q. B. 521; 29 L. T. 33; 21 W. R. 914.

Held, secondly, that whether publication of the order of the privy council was necessary to its validity or not, the production of a copy purporting to be printed by the government printers was primâ facie evidence of the order under the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2. *Ib.*

Held, thirdly, that no penalty being imposed by the order, and the offence being with respect to more than four animals, the justices had power, under s. 103, to inflict a penalty of 20*l.*, or 5*l.* for each animal. *Ib.*

**Possession of Cows without a Licence.**]—S. was convicted of carrying on the trade of a cowkeeper without a licence. He was a farmer, keeping cows to supply his family and for amusement, and for some years had allowed some of his neighbours to get a few pints of milk when they required it. The neighbours lived a mile

off. Twenty times in one period of six weeks a dairyman had got about six quarts at a time from S., but it being winter the dairyman was short of milk :—Held, that S. was in no sense a trader, and it was straining words to call him a cowkeeper because he occasionally supplied a neighbour in this way, and therefore the court quashed the conviction. *Southwell* v. *Lewis*, 44 J. P. 796.

**Exposing Diseased Animals.**]—To bring a horse infected with the glanders into a public place, to the danger of infecting the people, is a misdemeanour at common law. *Reg.* v. *Henson*, Dears, C. C. 24.

An indictment that the defendant knew that a mare which he brought into a fair was glandered : —Held, good, without an averment that he knew that the glanders was a disease communicable to mankind. *Ib.*

The mere fact of selling a glandered horse is not an illegal act, either at common law or under 16 & 17 Vict. c. 62. *Hill* v. *Balls*, 2 H. & N. 299 ; 27 L. J., Ex. 45 ; 3 Jur. (N.S.) 592 ; 5 W. R. 740.

The Contagious Diseases (Animals) Act, 1869, s. 57, does not render the sending of diseased animals to a public market an actionable wrong, in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation. *Ward* v. *Hobbs*, 48 L. J., C. P. 281 ; 4 App. Cas. 13 ; 40 L. T. 73 ; 27 W. R. 114—H. L. (E.)

**Scienter.**]—By the Animals Order, 1871, made by the privy council under the Contagious Diseases (Animals) Act, 1869, s. 75 (repealed), it is provided that every person having in his possession or under his charge an animal affected with a contagious or infectious disease shall, "with all practicable speed, give notice to a police constable of the fact of the animal being so affected" :—Held, that in order to convict the person in possession or charge of a diseased animal of an offence against the order, it must be proved that he was aware of the fact that the animal was diseased. *Nichols* or *Nicholls* v. *Hall*, 42 L. J., M. C. 105 ; L. R. 8 C. P. 322 ; 28 L. T. 473 ; 21 W. R. 579.

So on a prosecution under the Cattle Disease Acts, Ireland (29 & 30 Vict. c. 4 ; 33 & 34 Vict. c. 36), and the orders of the privy council, knowledge that the cattle are diseased is part of the offence, and must be proved by the prosecutor. *Carroll* v. *Ewers*, Ir. R. 7 C. L. 226.

—— **Evidence of.**]—When the owner of an animal takes it to a public market for sale, this furnishes evidence of a representation on his part that the animal is not, so far as he knows, suffering from any infectious disease. *Bodger* v. *Nicholls*, 28 L. T. 441.

—— **Certificate of Veterinary Inspector.**]—H. was summoned for exposing in a public market pigs suffering from typhoid fever. A certificate of the veterinary inspector was produced, that the pigs were so suffering. H. produced evidence to prove that he did not know and had no means of knowing of the disease. The justices refused to receive such rebutting evidence, and convicted H. :—Held, that the justices were wrong in rejecting the evidence, though they were to determine whether it amounted to any excuse. *Harris* v. *Smith*, 44 J. P. 361.

**Action for Neglect of Regulations.**]—A declaration alleged that the defendant contracted with the plaintiff to carry on board his vessel the plaintiff's sheep from Hamburg to Newcastle, and omitted to provide any pens, battens or footholds for the sheep on board the vessel, as required by an order of the privy council ; and that by reason of this omission the sheep were washed overboard by the sea and lost. The order was made under the powers conferred by the Contagious Diseases (Animals) Act, 1869, s. 75 (repealed), which imposes penalties for disobedience :—Held, that the declaration was bad, because the object of the act and of the order of the privy council was not to protect owners of animals from such injuries, but to prevent the introduction and spread of contagious diseases in Great Britain. *Gorris* v. *Scott*, 43 L. J., Ex. 92 ; L. R. 9 Ex. 125 ; 30 L. T. 431 ; 22 W. R. 575.

**Effect of Offence upon Contracts.**]—By a charterparty made in France between the master of a ship and the agent of the charterer, it was stipulated that the ship should proceed to Trouville, a port in France, there load a cargo of pressed hay, and proceed therewith direct to London, and that all cargo should be brought and taken from the ship alongside. At the time the charterparty was entered into there was in existence an order in council made under the authority of the Contagious Diseases (Animals) Act, s. 78, prohibiting the landing in any port or place in Great Britain of hay brought from France. Neither party, however, knew, at the time, of the existence of this order in council, but the master of the ship was told by the charterer's agent that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek. On arriving in the Thames, the master of the ship heard of the existence of the order in council, and could not therefore proceed to the wharf and deliver the cargo. After some delay the charterer received the hay from alongside the ship into another vessel, and exported it. The shipowner having brought an action against the charterer to recover damages in respect of the detention of the ship :—Held, that there was no such illegality in the voyage as entitled the charterer to resist the claim. *Waugh* v. *Morris*, 42 L. J., Q. B. 57 ; L. R. 8 Q. B. 202 ; 28 L. T. 265 ; 21 W. R. 438.

**Liability to make Compensation—Slaughtering diseased Animals.**]—By the 42nd section of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), it is provided that every local authority shall, from time to time, appoint so many inspectors and other officers as they think necessary for the execution and enforcement of this act, and shall assign to those inspectors and officers such duties and salaries or allowances, and may delegate to any of them such authorities and discretion as to the local authority may seem fit, and may at any time revoke any appointment so made. The local authority failed to appoint an inspector, and disease having broken out amongst the plaintiff's cattle, some of them died. The local authority did not slaughter any of the plaintiff's cattle, nor did they pay him any compensation :—Held, that the plaintiff could not maintain an action for damages nor for a peremptory mandamus. *Mulcahy* v. *Kilmacthomas Guardians*, 18 L. R., Ir. 200.

—— **Foreign Animals Slaughtered at Sea.**]—Under the Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70), no compensation is payable by local authorities in respect of foreign animals slaughtered after their arrival, but before being landed at a British port, for compensation is only payable where animals have been slaughtered in pursuance of the act, and the act does not authorise local authorities to order such animals to be slaughtered. *Nissler* v. *Hull Corporation*, 49 L. J., Q. B. 501; 5 Q. B. D. 325; 42 L. T. 894; 28 W. R. 700; 44 J. P. 664.

—— **Animals Injured by Disinfecting Process—Liability.**]—Where a plaintiff delivered certain pigs to a railway company for delivery to a third party, and the pigs were injured in the pens of the company; it was held that it was no defence for the railway company to say that the pigs had only been injured by them in carrying out the orders of the lord lieutenant in council under the Contagious Diseases (Animals) Act, 1878. *Shaw* v. *Great Southern and Western Ry.*, 8 L. R., Ir. 10—C. A.

ii. *Expenses of Enforcing Orders.*

**Recovery by Local Authority.**]—By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70, s. 57, repealed), the local authority constituted by that act may exercise compulsory powers with regard to horses and other animals, "and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal": —Held, that in proceedings in a county court to recover such expenses, where the person suing was described as "J. M., the inspector appointed by the local authority for the county of H. under the Contagious Diseases (Animals) Act, 1869," first, that the county court judge might, without the defendant's consent, amend the plaint by substituting the proper description of the person suing, and secondly that the plaint was rightly amended by describing the action as brought by "the local authority for the county of H.," as s. 57 enabled the local authority to sue for the expenses under that description, although not a corporation. *Mills* v. *Scott*, 42 L. J., Q. B., 234; L. R. 8 Q. B. 496; 29 L. T. 96; 21 W. R. 915.

iii. *Jurisdiction of Justices.*

**Summary Conviction.**]—By the Contagious Diseases (Animals) Act, 1870 (32 & 33 Vict. c. 70, s. 57, repealed), if any person exposes in a public place where animals are commonly exposed for sale, any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against the act, unless he shews, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected; and by s. 103, a penalty not exceeding 20*l.* is imposed on any person guilty of an offence against the act:—Held, that jurisdiction was implicitly given to justices to summarily convict in a penalty a person guilty of an offence under s. 57. *Cullen* v. *Trimble*, 41 L. J., M. C. 132; L. R. 7 Q. B. 416; 26 L. T. 691; 20 W. R. 691.

—— **Continuing Offence.**]—In a proceeding for a penalty under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70, repealed), before the justices for the county of Pembroke, against the master of a vessel for having carried sheep on board such vessel without having the places used for such sheep divided into pens, as required by the Animals Order of 1875, it was proved that the vessel brought the sheep from Ireland to New Milford, in Milford Haven, which is in the body of the county of Pembroke, and that the vessel arrived there without having the places on board for the sheep divided, as required by the said order. On these facts the justices determined that they had no jurisdiction to convict the master:—Held, that the justices had jurisdiction, as the offence continued, so as to be in Pembrokeshire within the jurisdiction of the justices, when the vessel arrived at New Milford with the sheep without pens, as required by the order. *Muir* v. *Hore*, 47 L. J., M. C. 17; 37 L. T. 315.

**Stating Case on Appeal.**]—Held, also, that though s. 108 of the 32 & 33 Vict. c. 70 (repealed), gives a power of appealing from the justices to the quarter sessions, it does not deprive a party of the right to have a case stated for the opinion of the superior court. *Ib.*

Held, also, that the justices having necessarily heard the case before they determined that they had no jurisdiction, the opinion of the court was properly applied for on a case under 20 & 21 Vict. c. 43, instead of on an application for a mandamus to the justices to hear. *Ib.*

*See also* ANIMALS.

**b. Persons.**

i. *Offences.*

**Exposing Infectious Persons in Public Place—Liability.**]—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 126, sub-s. 2, any person who, while suffering from an infectious disorder wilfully exposes himself, without proper precautions against spreading the disorder, in any street or public place, or who, being in charge of any person so suffering, so exposes such person, is subject to a penalty. A medical man in practice at Tunbridge Wells sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the road, and not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the chairman of the local board, from whom, after some delay, he obtained an order for the man's admission to the hospital. He then returned with the patient to the police-station to procure the ambulance to convey him thither. Upon an information against the medical man for an alleged infringement of the statute, the justices were of opinion that it was not proved before them that the medical man had charge of the patient, that he had not wilfully exposed the patient in any street or public place without proper precaution, and that he had made the best use of the means at his disposal to prevent the spread of the fever; and they refused to convict him:—Held, that their decision was right. *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187.

A person may be indicted for unlawfully and injuriously carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. *Rex* v. *Vantandillo*, 4 M. & S. 73; 16 R. R. 389.

It is an indictable offence in an apothecary unlawfully and injuriously to inoculate children with the small-pox, and, while they are sick of it, unlawfully and injuriously to cause them to be carried along a public street. *Rex* v. *Burnett*, 4 M. & S. 272 ; 16 R. R. 468.

**Neglect of Quarantine Laws.**]—Disobeying the orders of the privy council with respect to the performance of quarantine is an offence at common law. *Rex* v. *Harris*, 2 Leach, C. C. 549 ; 4 Term Rep. 202 ; 2 R. R. 358.

ii. *Actionable Nuisance.*

**Hospital established by Order of Local Government Board.**]—The defendants, under the powers given them by the Metropolitan Poor Act, 1867, built a hospital which they used for patients suffering from infectious diseases. In an action by adjacent landowners the jury found that the hospital was a nuisance to such landowners :—Held, first, that the act did not make the defendants mere irresponsible agents to carry out the orders of the local government board so as to exempt them from liability. Secondly, that they were not exempt on the ground that they acted bonâ fide in the discharge of a duty cast upon them by the act. *Metropolitan Asylum District Managers* v. *Hill*, 50 L. J., Q. B. 353 ; 6 App. Cas. 193 ; 44 L. T. 653 ; 29 W. R. 617 ; 45 J. P. 664—H. L. (E.)

*See* NUISANCE.

15. DANGEROUS DOGS.

**Orders to Destroy.**]—Under 34 & 35 Vict. c. 56, s. 2, a court of summary jurisdiction may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control. *Pickering* v. *Marsh*, 43 L. J., M. C. 143 ; 22 W. R. 798.

**Notice of Regulations.**]—In the absence of any special provision for the mode of publication of an order under the Dogs Act, 1871 (34 & 35 Vict. c. 56), it is enough to shew that it has been posted up in five or six places within the borough. *Reg.* v. *Huntingdon JJ.*, 4 Q. B. D. 522.

**Proof of Ownership — Whether Dog under Control.**]—An order was made in pursuance of 34 & 35 Vict. c. 56, s. 3, on owners to keep their dogs under the control of some person for a fixed period. A dog was seen in the road with W.'s governess and children, rushing backwards and forwards to them, sometimes being as much as twenty yards away. A constable swore the dog belonged to W., and that he had seen it in his yard within the previous fortnight. W., however, called evidence to contradict this. The justices convicted, but stated a case for the opinion of the court as to whether there was sufficient evidence of ownership, and whether the dog was under control :—Held, that there was reasonable evidence that the dog belonged to W., and was not under control, to support the conclusion arrived at by the justices. *Wren* v. *Pocock*, 34 L. T. 697.

The question whether or not a dog is under control within s. 3 is one of fact and not of law. *Ib.*

16. WATCHING AND LIGHTING UNDER 3 & 4 WILL. 4, C. 90.

**Nature of the Act.**]—The 3 & 4 Will. 4, c. 90, is a public act. *Pilkington* v. *Riley*, 6 D. & L. 628 ; 3 Ex. 739.

**Adoption of Act—Majority of Ratepayers.**]—A majority of two-thirds of the ratepayers of a parish is required only at the original meeting to be held for determining as to the adoption of the act, and as to the amount which the inspectors shall have power to call for in any year ; but where the parish has adopted the provisions of the act, a majority of two-thirds is not necessary, in order to determine the amount to be raised for the purpose of the act in a subsequent year ; but the resolution of a simple majority of the ratepayers voting at the meeting called for that purpose, or, in case of a poll being demanded, of the ratepayers voting upon it, is sufficient. *Beechey* v. *Quentery*, 10 M. & W. 65 ; 11 L. J., Ex. 420.

Where thirty-seven ratepayers attended a meeting, twenty voted for adopting the act and the remainder abstained from voting, and took no part in the proceedings, the provisions were not legally adopted, and the original objection was not answered by the inspectors having acted for a year under the provisions. *Eynsham, In re*, 12 Q. B. 398, n. ; 3 New Sess. Cas. 507 ; 18 L. J., Q. B. 210 ; 13 Jur. 345.

—— **Chairman not a Ratepayer.**]—A majority of the ratepayers of a parish, at a meeting held for that purpose, had resolved to adopt the act, and at a subsequent meeting a rate was made for the purposes of the act, both these meetings being presided over by a chairman who was not a ratepayer of the parish :—Held, that, although by ss. 5 and 6 only ratepayers had a right to be present at the meetings, and consequently that the chairman should, in strictness, have been a ratepayer ; yet that the resolutions of the requisite majority of the ratepayers were not rendered inoperative by reason of the chairman of the meeting not being a ratepayer. *Reg.* v. *Middlesex JJ.*, 1 B. C. C. 157 ; 22 L. J., M. C. 106 ; 17 Jur. 187.

—— **Who may Vote.**]—Held, also, that persons who had not paid the rate of the previous year were properly excluded from voting at the subsequent meeting. *Ib.*

—— **Publication of Notice.**]—A notice of adoption of the act for a district chapelry, held to be sufficiently published where it was affixed on the chapel of the district, but not on two dissenting and proprietary chapels within the district, nearly two months after the meeting at which it was adopted. *Reg.* v. *Deverell*, 3 El. & Bl. 372 ; 23 L. J., M. C. 121 ; 18 Jur. 494 ; 2 W. R. 231.

An ecclesiastical district was, by order in council, attached to the chapel of St. J., in a parish ; there were in the district also a proprietary chapel, called St. P., and two dissenting chapels ; in the other part of the parish there was only the parish church. The meeting for the adoption of the act in the district was held on the 18th of November, 1852. Notice of the adoption of the act was affixed to the outer doors of the parish church and the chapels of St. J. and St. P. on the 2nd of January, 1853. On

the 6th of July, 1853, the inspectors made an order, requiring the overseers to pay 150*l.* to the treasurer out of the amount raised during the year. Upon default a summons was taken out before justices, for a distress warrant to levy the amount by sale of the goods of the overseers. The justices refused to issue their warrant:—Held, first, that it was not necessary to affix the notice of the adoption of the act on the outer doors of the dissenting chapels.

Held, secondly, by Lord Campbell, C.J., that notice of the adoption of the act was given in sufficient time. *Ib.*

Held, thirdly, that the justices not having decided the case, the application was within 11 & 12 Vict. c. 44, s. 5, and that it was sufficient if the affidavits shewed that the order of the inspectors was valid. *Ib.*

**Proper Meeting of Churchwardens.**]—When a district within a parish had been assigned to a chapel for ecclesiastical purposes under 1 & 2 Will. 4, c. 38, and the 3 & 4 Will. 4, c. 90, had been adopted more than two years before the application at a meeting convened by the churchwardens of the district church; and these churchwardens were churchwardens for ecclesiastical purposes only, and never in the habit of calling meetings for secular purposes:—Held, that the meeting was improperly convened, the churchwardens of the district church not being such churchwardens as are contemplated by 3 & 4 Will. 4, c. 90, s. 5; that consequently the act had never duly been adopted in the district, and an order of the inspectors for the payment of money was void. *Reg.* v. *Kingswinford Overseers*, 3 El. & Bl. 689; 23 L. J., Q. B. 337. *S. C.*, nom. *Reg.* v. *Staffordshire JJ.*, 18 Jur. 1073; 2 W. R. 453.

**Rates.**]—*See* post, V. 3.

### 17. Fires.

**Expenses of Extinguishing.**]—By 10 & 11 Vict. c. 89 (The Towns Police Clauses Act, 1847), s. 33, the commissioners may send fire-engines for the purpose of extinguishing fires in the neighbourhood, and "the owner of the lands and building where such fire shall have happened shall, in such case, defray the actual expense." A. was the owner of a haystack which stood upon land in his occupation. Expenses were incurred in sending an engine and working the same in the endeavour to extinguish a fire in the haystack:—Held, that A. was the owner within s. 33, and was bound to defray the expenses. *Lewis* v. *Arnold*, 44 L. J., M. C. 68; L. R. 10 Q. B. 245; 32 L. T. 553; 23 W. R. 729.

—— **Charges for.**]—A local government board is not entitled, under 10 & 11 Vict. c. 89 (The Towns Police Clauses Act, 1847), s. 32, to charge for the use of apparatus employed and the value of water consumed on the occasion of a fire in premises situate within the district of such board. *Drightlington Local Board* v. *Bower*, 22 W. R. 165.

**Right to Control of Premises—Exclusion of Public.**]—Sect. 171 of the Public Health Act, 1875, incorporating s. 32 of the Towns Police Clauses Act, 1847, empowers a fire brigade established by an urban authority to exclude all persons whose presence would interfere with their operations from the premises on fire. *Carter* v. *Thomas*, 62 L. J., M. C. 104; [1893] 1 Q. B. 673; 5 R. 343; 69 L. T. 436; 41 W. R. 510; 57 J. P. 438.

### 18. Smoke.

**Black Smoke—Furnace constructed to consume Smoke.**]—By the 7th sub-s. of s. 91 of the Public Health Act, 1875, "Any fireplace or furnace which does not, so far as practicable, consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufacturing or trade process whatsoever; and any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by this act: provided that where a person is summoned before any court in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the court shall hold that no nuisance is created within the meaning of this act, and dismiss the complaint if it is satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable, having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof." An information was laid against the proprietor of a brewery, for that black smoke was from time to time sent forth from the chimney of his brewery in such quantities as to be a nuisance, and he was convicted and fined thereon:—Held, on case stated, that the proviso applied only to the first part of the sub-section, and not to the latter part, making it an offence to send forth black smoke in such a quantity as to be a nuisance, and that the defendant was not entitled to call evidence as to the construction of the furnace. *Weekes* v. *King*, 53 L. T. 51; 15 Cox, C. C. 723; 49 J. P. 709.

—— **Coal Mines.**]—Sect. 91 of the Public Health Act, 1875, applies to black smoke allowed to be sent forth out of chimneys of coal mines. *Patterson* v. *Chamber Colliery Co.*, 56 J. P. 200.

—— **Liability of Master.**]—The chimney of a mill sent forth black smoke. The furnace was properly constructed and efficient foremen superintended; the stoker's own negligence being the sole cause of the smoke:—Held, that the owner of the mill was liable under s. 96 of the Public Health Act, 1875. *Niven* v. *Greaves*, 54 J. P. 548.

### 19. Water Supply.

**Statute.**]—60 & 61 *Vict. c.* 44 *is the District Councils (Water Supply Facilities) Act*, 1897.

**"Water Company"—Own Profit.**]—The undertaking of a waterworks company was transferred by statute to a borough. The profits of the waterworks were under a subsequent statute to

be transferred to the borough improvement fund, or at the option of the corporation to be applied in reducing the price of water to consumers:—Held, that the corporation were supplying water for their own profit, and were a water company within the meaning of s. 52 of the Public Health Act, 1875. *Wolverhampton Corporation* v. *Bilston Commissioners*, [1891] 1 Ch. 315; 39 W. R. 394. See *S. C.* in C. A., W. N. (1891) 56.

**Company able and willing to Supply.**]—A waterworks company is not within the meaning of the Public Health Act, 1875, s. 52, "able and willing to supply water within the district of a local authority" unless it has both the necessary powers and the requisite supply of water. *Richmond Waterworks Co. and Vauxhall Waterworks Co.* v. *Richmond Vestry*, infra.

—— **Action to restrain Local Board from constructing works and from proceeding to Arbitration—Costs.**]—Under the plaintiff company's special act of 1891 (modifying s. 52 of the Public Health Act, 1875), it was, as the court construed the provision, unlawful for the defendant local board to construct waterworks within the plaintiffs' limits of supply during four years from the passing of the special act, so long as the plaintiffs were able and willing to supply water proper and sufficient. The plaintiffs made some unsuccessful attempts to find water, and before they succeeded in doing so the defendant board served them on the 20th May, 1893, with notice of the board's desire to supply water within their own district, and their intention of constructing waterworks under the provisions of the Public Health Act, 1875. The notice further stated that if not informed within a month of the plaintiffs' ability and willingness the board would construct works. The matter was referred to arbitration, but the company becoming aware that the board were still forwarding a scheme of water supply, moved in an action to restrain the board from commencing or threatening to construct works and from proceeding to arbitration. The motion stood over on terms to await the award. The arbitrators found that the company were "able and willing," and that the water was proper and sufficient:—Held, that the defendants must pay the costs of the action, setting off any costs incurred by the defendants by reason of the plaintiffs seeking an injunction to restrain the arbitration. *Bognor Water Co.* v. *Bognor Local Board*, 70 L. T. 402.

**"Waterworks"—What are.**]—Works erected and maintained by a local authority to provide the water necessary to carry out a scheme for the disposal of sewage of its district are not "waterworks" within the meaning of s. 52 as defined by s. 4 of the Public Health Act, 1875; nor can the local authority be said to be "supplying" water within the meaning of those sections. *West Surrey Water Co.* v. *Chertsey Union*, 63 L. J., Ch. 806; [1894] 3 Ch. 513; 8 R. 696; 71 L. T. 368; 43 W. R. 6; 59 J. P. 167.

There is no provision in the Waterworks Clauses Act, 1847, which compels a local authority to take water to "cleanse sewers" from a water company within whose limits of supply the sewers are situate. *Ib.*

**"Construction of Waterworks."**]—See *Cleveland Water Co.* v. *Redcar Local Board*, and *Huddersfield Corporation* v. *Ravensthorpe Urban Council*, infra.

**Construction of Waterworks by Local Authority—Giving Notices as to.**]—The Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 75, is not materially extended by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 52, and therefore a local authority, desiring to construct waterworks, and having, before the passing of the latter act, given the notices required by s. 75 of the former act, is not, in consequence of the passing of the latter act, required to give the notices under s. 52 of that act. *Richmond Waterworks Co. and Vauxhall Waterworks Co.* v. *Richmond Vestry*, 45 L. J., Ch. 441; 3 Ch. D. 82; 34 L. T. 480.

Where, prior to the incorporation of a local water company, the local authority had substantial waterworks in existence, additions to or alterations of such works can be made by the local authority without giving the water company notice under s. 52 of the Public Health Act, 1875. The words "before commencing to construct waterworks," in s. 52, mean new waterworks in a fair and reasonable sense of the term, and do not apply to improvements of or additions to existing waterworks. *Cleveland Water Co.* v. *Redcar Local Board*, 64 L. J., Ch. 64; [1895] 1 Ch. 168; 13 R. 18; 43 W. R. 90; 59 J. P. 7.

The extension by an urban district council of their existing waterworks into an area formerly part of an adjoining urban district, but added to their district by an order under s. 57 of the Local Government Act, 1888, amounts to a "construction of waterworks" within s. 52 of the Public Health Act, 1875, so as to make it necessary, before commencing to construct, to give notice to a water company whose limits of supply at the date of the order included the added area. *Cleveland Water Co.* v. *Redcar Local Board* (64 L. J., Ch. 64; [1895] 1 Ch. 168) distinguished. *Huddersfield Corporation* v. *Ravensthorpe Urban Council*, 66 L. J., Ch. 581; [1897] 2 Ch. 121; 76 L. T. 817; 45 W. R. 642; 61 J. P. 596—C. A.

**Power to Lay Down Water-mains—"Surveyor," Report of.**]—Sect. 54 of the Public Health Act, 1875, provides that where a local authority supply water they shall have the same powers for carrying water-mains as they have for carrying sewers. Sect. 16 provides that any local authority may carry any sewer, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands within their district:—Held, that "the surveyor" is the person duly appointed surveyor under s. 189, and no other, not even an engineer of the greatest experience whom the local authority may think fit to consult; that the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public"; that as the report on which the proceedings of the defendant were founded was not the report of "the surveyor" the plaintiff was entitled to an interlocutory injunction; and further, that "the surveyor" is the person to determine on the necessity, and therefore if he exercise a bonâ fide judgment in the matter, the court will not interfere. *Lewis* v. *Weston-super-Mare Local Board*, 58 L. J., Ch. 39; 40 Ch. D. 55; 59 L. T. 769; 37 W. R. 121.

—— **"Street"—Private Road—Local Authority having control of Streets generally.**]—A

private road is a "street" within the meanings of ss. 16 and 54 of the Public Health Act, 1875. The words "where the local authority have not the control of the streets," in s. 57 of the Public Health Act, 1875, are descriptive of and mean a local authority not having the control of the streets generally in its district, i.e. a local authority which is not the road authority. *Hill* v. *Wallasey Local Board*, 63 L. J., Ch. 1; [1894] 1 Ch. 133; 7 R. 51; 69 L. T. 641; 42 W. R. 81—C. A.

The defendants who had the powers of an urban sanitary authority with respect to the W. district, and the control of the streets generally in that district, and also the power of supplying the inhabitants with water, proceeded, without the plaintiff's consent, to break up a private road belonging to the plaintiff, which was situate within their district, for the purpose of laying down water-mains:—Held (A. L. Smith, L.J., dissenting), that s. 57 of the Public Health Act, 1875, incorporating s. 29 of the Waterworks Clauses Act, 1847, which forbids the laying down of any pipe in any private land without the consent of the owner, did not apply to the defendants, as they were a local authority having the control of the streets generally in their district; that, under ss. 16 and 54 of the Public Health Act, 1875, the defendants, as the local authority, had the power to carry the water-mains through the plaintiff's private road without his consent; and, consequently, that the plaintiff was not entitled to an injunction. *Ib.*

**Entry on Land without District.**]—A local authority that has obtained the consent of the local authority of an adjoining district to lay down water-mains in such adjoining district cannot enter upon the lands required unless the notices and advertisements mentioned in s. 32 of the Public Health Act, 1875, have been duly given. *Jones* v. *Conway and Colwyn Bay Water Board*, 62 L. J., Ch. 767; [1893] 2 Ch. 603; 2 R. 504; 69 L. T. 265; 41 W. R. 616; 57 J. P. 501—C. A.

—— **Authority about to supply Water.**]—Sect. 54 of the Public Health Act, 1875, applies not merely to an authority which is already a water supplying body, but also to one that has taken upon itself the burden of carrying out the sections of the act relating to water supply within their district. *Ib.*

**Liability—Contamination of Water—Leaden Pipes.**]—The defendants were empowered by a private act, which incorporated the Waterworks Clauses Acts, 1847 and 1863, to supply water for domestic purposes. The local act enabled the defendants to make by-laws, and provided that they should not be bound to lay down service-pipes, but might do so by agreement with and at the expense of the occupier of any house. The plaintiff was injured by using the water, which had become contaminated from passing through the leaden service-pipe laid down by the defendants at his request and expense:—Held, that the defendants were not liable. *Milnes* v. *Huddersfield Corporation*, 53 L. J., Q. B. 12; 12 Q. B. D. 443; 32 W. R. 265—C. A.

—— **Defective Fire Plug.**]—See *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J., Ex. 57 (post, col. 531).

**Public Well—Vesting in Local Authority.**]—A trough or cistern receiving the overflow from a spring at some distance had been used by the public gratuitously for watering cattle and for domestic purposes for a period of over fifty years. The defendant erected a gate to prevent the access of cattle to the trough, and let a pipe into the bottom of the trough leading into his own house, where it terminated in a stopcock, and by means of this pipe and stopcock he could draw off as much water as he pleased:—Held, that the trough or cistern was a public well or work used for the gratuitous supply of water to the inhabitants of the district of the local authority in which it was situate, and that it was vested in and was under the control of the local authority by force of s. 64 of the Public Health Act, 1875, and that the local authority might maintain an action in their own name in the county court against the defendant for damages for the interference caused by the insertion of the pipe in the bottom of the trough. *Holmfirth Local Board* v. *Shore*, 59 J. P. 344.

Where at the time of the passing of the Public Health (Ireland) Act, 1878 (the provisions of which as to public wells correspond to those in the Public Health Act, 1875), a well was an existing public well used for the gratuitous supply of water to the inhabitants of the district, it becomes, by s. 74 of the act (s. 64 of the English act), vested in the local authority. To shew that the well was then a public well it need not be proved that the soil and freehold of the well itself was public property, for if the public had a servitude attached to the soil and freehold, by virtue of which they enjoyed the right of free access to the well to obtain water, it would be a public well within the meaning of the act. *Smith* v. *Archibald* (5 App. Cas. 489; *see* ante, col. 442), applied. *Dungarvan Union* v. *Mansfield*, [1897] 1 Ir. R. 420.

### 20. Vehicles.

**Lights on—By-Law—Validity.**]—A county council made a by-law that "a person driving any vehicle shall from the end of the first hour after sunset to two o'clock a.m., except during such part of that period as shall be between the rising and setting of the moon, carry attached to such vehicle a lighted lamp placed so as to exhibit a light in the direction he is proceeding, in order to signal the approach or position of the vehicle, and in case of a vehicle carrying timber such person shall also carry, attached to the end thereof, a lighted lamp, so as to exhibit a light to persons overtaking the vehicle":—Held, that this by-law was not bad, either (i.) by reason of its throwing on an alleged offender the onus of proving that the alleged offence occurred at a period between the rising and setting of the moon, for that could be proved by means of an almanack; or (ii.) by reason of the omission in the by-law of the words "in any street or public place," for those words were to be implied; or (iii.) by reason of the words "attached at the end thereof" being capable of being construed as applicable either to the vehicle itself or to the timber carried thereon, for those words reasonably construed must be taken as applicable only to the vehicle itself. *Walker* v. *Stretton*, 44 W. R. 525; 60 J. P. 313.

**For Display of Advertisements—"Vehicle"—Bicycle.**]—A bicycle is a vehicle within the meaning of s. 12 of the Liverpool Corporation

Act, 1889, which provides that it shall not be lawful in any street in the city to use any vehicle exclusively or principally for the purpose of displaying advertisements without the consent of the corporation. *Ellis* v. *Nott-Bower*, 60 J. P. 760.

21. Indecent or Profane Language.

**By-Law—Public Place—Land adjacent.**]—For the good rule and government of a county, a county council made (inter alia) the following by-law, which had received the approval of a secretary of state: "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language":—Held, that the by-law was too wide, and could not be upheld. "On land adjacent thereto" imposed a prohibition beyond anything necessary for the better government of the county; and "sing or recite any profane or obscene song or ballad, or use any profane or obscene language," should have been guarded by the words "to the annoyance of the public":—Held, further, that by-laws relating to the better government of a county, and not to nuisance, do not require the confirmation of the local government board; the approval of a secretary of state is sufficient. *Strickland* v. *Hayes*, 65 L. J., M. C. 55; [1896] 1 Q. B. 290; 74 L. T. 137 44 W. R. 398; 18 Cox, C. C. 244; 60 J. P. 164.

—— **Room opening on Street.**]—A by-law made by a county council under s. 16 of the Local Government Act, 1888, that "no person shall in any house, building, garden, land, or other place abutting on or near to a street or public place, make use of any violent, abusive, profane, indecent, or obscene language, gesture, or conduct to the annoyance of any person, in such street or place," is neither repugnant nor ultra vires; and any one using such language in a room opening into a street with the door open is liable to be convicted of an offence against such by-law. *Mantle* v. *Jordan*, 66 L. J., Q. B. 224; [1897] 1 Q. B. 248; 75 L. T. 552; 61 J. P. 119; 18 Cox, C. C. 467.

22. By-Laws.

**Construction.**]—A by-law for the good rule and government of a locality, made by a local authority, ought to be construed so as to give reasonable effect to the object aimed at. *Walker* v. *Stretton*, 44 W. R. 525; 60 J. P. 313.

**Publication.**]—By a local act (passed in 1847) town improvement commissioners were empowered to make by-laws, which were to be published by being printed and a copy delivered to every person applying for the same, and by painting or placing on boards to be hung up on the front of the office of the commissioners, and also on some conspicuous part of the works or locality to which the same related. Under the Public Health Acts, 1848 and 1858, the prescribed mode of publication of by-laws is by "printing and hanging the same up in the office of the local board":—Held, that a publication in the manner prescribed by the last-mentioned acts was sufficient. *Fielding* v. *Rhyl Improvement Commissioners*, 3 C. P. D. 272; 38 L. T. 223; 26 W. R. 881.

**Confirmation.**]—By-laws relating to the better government of a county, and not to a nuisance, do not require the confirmation of the local government board; the approval of a secretary of state is sufficient. *Strickland* v. *Hayes*, 65 L. J., M. C. 55; [1896] 1 Q. B. 290; 74 L. T. 137; 44 W. R. 398; 18 Cox, C. C. 244; 60 J. P. 164.

*As to particular matters, see specific headings.*

IV. EXPENSES.

1. What Recoverable.

**Road "made good" and afterwards Paved—"Theretofore."**]—In 1857 a local act was passed which incorporated s. 53 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In 1874 the appellants, in their capacity as the corporation of P., bought some land of the respondents abutting upon a country high road within the district to which the local act applied, and in pursuance of an agreement then made with the respondents, at their own expense widened and improved the road and laid out a footpath along the side, and gravelled, channelled and kerbed the footpath. In 1879 the appellants, in their capacity as the urban authority, paved and flagged the footpath and sought to recover the expense of so doing from the respondents as adjoining owners under the powers of s. 53. The jury found that before the paving and flagging in 1879 the road was not a street in the popular sense of the term, and that the footpath had been "made good" within s. 53:—Held, that the respondents were not liable, upon the ground that the footpath had been "theretofore made good" within the meaning of s. 53, but without deciding whether the road was a "street" within the meaning of that section. The word "theretofore" in s. 53 refers to the period before the work is done by the commissioners, not to the period before the passing of the special act. *Portsmouth Corporation* v. *Smith*, 54 L. J., Q. B. 473; 10 App. Cas. 364; 53 L. T. 394; 49 J. P. 676—H. L. (E.)

**New Street—Approval and Acceptance of Ineffective Sewer—Subsequent Liability of Frontagers.**]—A local authority has power to approve and accept a sewer made in accordance with a scheme by a landowner in land laid out as a new street, though the sewer may not be an effective sewer until the whole scheme has been carried out. When the local authority has accepted the work it cannot afterwards require the frontagers to do it again under s. 150 of the Public Health Act, 1875. *Hornsey Local Board* v. *Davis*, 62 L. J., Q. B. 427; [1893] 1 Q. B. 756; 4 R. 322; 68 L. T. 503; 57 J. P. 612—C. A.

**Work done under Contract over £50 not under Seal.**]—In an action by a local authority to recover from the defendant his proportion of the cost of sewering, paving, &c., a street under the powers of the Public Health Act, 1875, s. 150, it appeared that part of the work, to an amount exceeding 50*l.*, had been done by contractors employed by the local authority, but that no written contract under the common seal of the authority had been made with them as provided by s. 174:—Held, that the defendant was nevertheless liable. By A. L. Smith, J., that the objection, if valid, would have been an objection to the apportionment, which could only be raised

in the time and manner provided by s. 257. *Bournemouth Commissioners* v. *Watts*, 54 L. J., Q. B. 93; 14 Q. B. D. 87; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102.

**Legal Expenses whether properly Included.**]—A local board brought an action against a frontager to enforce a charge under s. 257 of the Public Health Act, 1875, for sewering and paving expenses incurred under s. 150. The charge included items for legal expenses and expenses of collection:—Held, that such items were properly included. *Walthamstow Local Board* v. *Staines*, 60 L. J., Ch. 738; [1891] 2 Ch. 606; 65 L. T. 430. See *Jersey (Earl)* v. *Uxbridge Sanitary Authority*, post, col. 538.

**Defect in Exercise of Jurisdiction—Remedy.**]—Where a question arises as to whether certain items are properly included or not, inasmuch as the matter relates, not to the jurisdiction of the local board, but to a defect in the exercise of their jurisdiction, the frontager ought to appeal to the local government board under s. 268, the high court having no jurisdiction in the matter. *Ib.*

**Higher Rate of Interest than charged to Local Board.**]—The H. urban authority, after giving notice to N. to pave a new street adjoining N.'s premises, did the work and borrowed money at 4 per cent. to defray the cost. Part of this sum was apportioned on N., and the local board by a resolution duly resolved to make the sum payable by N. by instalments at 5 per cent. interest. N. refused to pay an instalment:—Held, that the justices were right in enforcing payment, and were not bound to allow the objection that the interest charged was higher than the local board themselves paid. *North British Railway* v. *Holme Cultram Local Board*, 54 J. P. 86.

**Interest on Debt.**]—Interest under 21 & 22 Vict. c. 98, s. 62, upon expenses incurred by a local board under 11 & 12 Vict. c. 63, s. 69, runs from the time that the amount due is ascertained. *Wallington* v. *Willes*, 16 C. B. (N.S.) 797; 33 L. J., M. C. 233; 10 Jur. (N.S.) 906; 10 L. T. 784; 12 W. R. 917.

**Re-paving and Re-channelling.**]—Upon the true construction of s. 150 of the Public Health Act, 1875, the paving and channelling of streets not repairable by the inhabitants at large are not matters done once and for all, and do not fall within the category of sewers. Frontagers may be called upon by the local authority to pay the apportioned expenses of re-paving and re-chanelling. *Barry and Cadoxton Local Board* v. *Parry*, 64 L. J., Q. B. 512; [1895] 2 Q. B. 110; 15 R. 430; 72 L. T. 692; 43 W. R. 504; 59 J. P. 421.

**Expenses of Making-up Street—Statute—Repeal—Right Acquired—Liability Incurred—Interpretation Act, 1889, s. 38.**]—Proceedings duly taken by an urban authority under s. 150 of the Public Health Act, 1875, with a view to making good a private street under the powers of that section, which proceedings, though merely preliminary to the commencement of the actual work, are in active progress at the time the Private Street Works Act, 1892, comes into operation by voluntary adoption in the district, may, notwithstanding the provisions of s. 25 of the act of 1892, be continued, and the actual work may be done, and the expenses recovered, under s. 150 of the act of 1875. *Heston and Isleworth Urban Council* v. *Grout*, 66 L. J., Ch. 647; [1897] 2 Ch. 306; 77 L. T. 118; 45 W. R. 697—C. A. Affirming, 61 J. P. 454.

If s. 25 of the act of 1892 amounts to a local repeal of s. 150 of the act of 1875, such active proceedings, though only preliminary, give rise to "a right, privilege, obligation, or liability acquired, accrued, or incurred" under such repealed section, within the meaning of and preserved by s. 38 of the Interpretation Act, 1889. *Ib.*

If s. 25 of the act of 1892 does not amount to such a repeal, s. 24, which provides that the powers of the act of 1892 shall be "deemed to be in addition to and not in derogation of any other powers," has the effect of preserving the powers of s. 153 of the act of 1875. *Ib.*

## 2. Parties Liable.

### a. Position of Premises.

**Premises fronting and abutting on Streets.**]—By the Public Health Act, 1848, s. 69, in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice. Premises were divided from D. Street by a small stream, but by two bridges over the stream the premises were connected with it; by means of gates they could effectually close all communication. One of the bridges had been moved and reinstated by the owners. The principal outlet from their premises led into W. Street:—Held, that the premises fronted and abutted upon D. Street within the meaning of the foregoing enactment. *Wakefield Local Board* v. *Lee*, 1 Ex. D. 336; 35 L. T. 481.

A. B. owned plots of land and cottages thereon, separated from a street by a wall five feet high, which belonged, with the land on which it stood, to another person. There was a public footway which went between the plots of land, and through an opening in the wall into the middle of the street. The backs only of the cottages fronted the street, and the only way for vehicles from the cottages to the street was by a small roadway, which, without touching that part of the street which had been paved, came into a highway which joined one end of such street. With the exception of the public footway this roadway was the only access from the cottages to the street:—Held, that A. B. was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewering and paving the street under that section. *Lightbound* v. *Higher Bebington Local Board*, 55 L. J., M. C. 94; 16 Q. B. D. 577; 53 L. T. 812; 34 W. R. 219; 50 J. P. 500—C. A.

—— **Under Special Acts.**]—By a Birkenhead local act of 1838, commissioners are required to cause all such parts of the streets, ways, or places within the township, not being public or

common highways, which are now in the estimation of the commissioners fully built upon, but not sufficiently paved or put in good condition, and all such streets, ways or places as are now making or may hereafter be made within the township, although not fully built upon, to be made, paved and cleansed, as to the commissioners shall seem necessary; the expenses to be paid by the frontagers. S. occupied a house in a street formed about seventeen years back, and ever since used by the public:—Held, that he was liable to contribute to the making and sewering of this street lately resolved upon by the commissioners. *Birkenhead Improvement Commissioners* v. *Sanson*, 34 L. T. 175.

Sect. 149 of the Public Health Act, 1875, which imposes upon urban authorities the duty of causing all streets repairable by the inhabitants at large to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require, has not the effect of repealing s. 20 of the Ashton-under-Lyne Improvement Act, 1849, which empowers the corporation to call upon the frontagers in any street which is not completed to their satisfaction, to complete it, and, in default of the frontagers doing the work, authorises the corporation to do the work and recover the expense from them. *Ashton-under-Lyne Corporation* v. *Pugh*, 67 L. J., Q. B. 32; [1898] 1 Q. B. 45; 46 W. R. 100; 61 J. P. 788—C. A.

—— **Effect of General on previous Special Act.**]—Sect. 340 of the Public Health Act, 1875, expressly reserves the powers given by local acts, and sub-s. 2 of that section, which provides that a local authority shall not be exempt from the performance of any duty under the act by reason of any local act, has not the effect of depriving the corporation of their right to call upon the frontagers to do the work under the local act. *Hornsey Urban Council* v. *Smith*, 66 L. J., Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581—C. A. Reversing 61 J. P. 311.

—— **Railway Company.**] — The expense of each owner should be apportioned according to the frontage of the premises, irrespective of the width of the street. *Reg.* v. *Newport Local Board*, 3 B. & S. 341; 32 L. J., M. C. 97; 9 Jur. (N.S.) 746; 11 W. R. 263.

A railway and canal company, whose premises abut on a street, but with a fence between them and the street, is liable to be charged. *Ib.*

—— **Without Access.**]—A. was the owner of three houses fronting a street called York Place, and adjoining or abutting at the rear upon a footpath at the end of a street called St. Julian Street, which formed a cul-de-sac. The ground at the back of these houses was five feet above the level of St. Julian Street, and the wall, which was the property of A., was about twelve feet high on the outside. There was no access from A.'s premises to St. Julian Street:—Held, that his premises "adjoined or abutted on" St. Julian Street within the act, and consequently that he was chargeable with his proportion of the expenses of paving, &c., that street under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150. *Newport Urban Sanitary Authority* v. *Graham*, 9 Q. B. D. 183; 47 L. T. 98; 31 W. R. 121; 47 J. P. 133.

The Manchester Improvement Act, 1851, enacts, in s. 17, that the expenses incurred by the town council in sewering and flagging a street shall be borne by the owners "according to the extent of their respective houses and grounds lying alongside or adjoining to the said street":—Held, that the owner of ground at the end of a street forming a cul-de-sac was liable under this section, although a wall divided his property entirely from the street. *Manchester Corporation* v. *Chapman*, 37 L. J., M. C. 173; 18 L. T. 640; 16 W. R. 974.

—— **New Street.**]—When a street has been paved, flagged, or made good before the passing of the 10 & 11 Vict. c. 34, the commissioners under that act have no power to assess the occupiers of the adjoining property to a special improvement rate, under s. 53, which gives that power "if any street, although a public highway at the passing of the special act, have not theretofore been well and sufficiently paved and flagged, or otherwise made good." *Reg.* v. *G. W. Ry.*, 1 El. & El. 806; 28 L. J., M. C. 246; 5 Jur. (N.S.) 1054; 7 W. R. 432.

—— **Work done on one Side only.**]—An urban authority, acting under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, repaired the footway on the south side of a street, and apportioned the whole cost among the owners and occupiers of premises on the south side only:—Held, that the apportionment was right. *Wakefield Sanitary Authority* v. *Mander*, 5 C. P. D. 248; 28 W. R. 922; 44 J. P. 522.

Where under the Private Street Works Act, 1892, an urban authority construct a new "street" with a footpath on one side of the road only, the expenses of making such footpath as well as the expenses of making the road must be apportioned among the owners of premises "fronting, adjoining or abutting" on both sides of the "street"; and the expenses of the footpath must not be apportioned only among those owners whose premises front, adjoin, or abut on such footpath. *Wakefield Sanitary Authority* v. *Mander* (5 C. P. D. 248) distinguished. *Clacton Local Board* v. *Young*, 64 L. J., M. C. 124; [1895] 1 Q. B. 395; 15 R. 92; 71 L. T. 877; 43 W. R. 219; 59 J. P. 581.

**Houses using a Sewer.**]—By 18 & 19 Vict. c. 121, s. 22, the local authority is empowered to lay down a sewer along any ditch or watercourse used for the conveyance of sewage from any house, and to keep the same in good repair, and "to assess every house, building, or premises then or any time thereafter using for the purposes aforesaid the said ditch, watercourse, or sewer, to such payment, either immediate or annual, or distributed over a term of years, as they shall think just and reasonable." Under this enactment a local authority assessed the houses then built and using a sewer in certain sums set opposite to their names in the assessment, and passed a resolution enabling the persons assessed to compound for the assessment:—Held, first, that the assessment was not bad, because it did not provide for houses which might thereafter be built and use the sewer. *Reg.* v. *Middlesex JJ.*, 2 Jur. (N.S.) 1045; 4 W. R. 562.

Held, secondly, that the resolution enabling the persons to compound was no part of the assessment. *Ib.*

—— **Amalgamation of Districts.**]—A parish, H., was divided into districts, for the purpose of

drainage works. In 1855 the local authority constructed a sewer at M. Street, and assessed the houses using that sewer, and B. was charged with an annual payment which was redeemed by him, in pursuance of a resolution of the local authority. In 1856 the local authority constructed another sewer at M. Hill. These sewers increased a nuisance which already existed in the village of H., which was a lower district. In 1859 the local authority laid down a sewer in the village, and it was resolved that the drainage of M. Street, M. Hill, and in the village should be considered as one system, and that the total cost of the works should be ascertained, and that all houses using the sewers so constructed should be assessed in such manner that each should pay an equal pound rate. The local authority assessed the houses in M. Street at a rate, making, with what was paid by that district for the work done in 1855, an amount equalling the amount to be paid by the houses in the village. Among others, B. was assessed:—Held, that the local authority had power to assess B., as his house used the sewer laid down in the village within the meaning of the 18 & 19 Vict. c. 121, s. 22. *Reg.* v. *Bodkin*, 3 El. & El. 271; 30 L. J., M. C. 38; 6 Jur. (N.S.) 1270.

**Houses in Higher District — Liability of Owners for Abatement of Nuisance in Lower District.**]—Under 18 & 19 Vict. c. 121, the local authority in a district, which has rendered innocuous a drain passing through its district, conveying away the filth of houses in a higher district has no power to assess the owners of those houses for payment of the expenses, though those houses use this drain. *Reg.* v. *Tatham*, 8 El. & Bl. 915. *S. C.*, nom. *Reg.* v. *Warner*, 27 L. J., M. C. 144; 4 Jur. (N.S.) 609; 6 W. R. 256.

The power of assessment of a local authority is confined to property within the district for which they act. *Ib.*

### b. Ownership of Premises.

**Receipt of Rent.**]—The definition of an owner of premises let at a rack-rent, in 11 & 12 Vict. c. 63, s. 2, is satisfied by a person who is de facto receiving the rack-rent. *Peek* v. *Waterloo and Seaforth Local Board*, 2 H. & C. 709; 33 L. J., M. C. 11; 9 Jur. (N.S.) 1343; 9 L. T. 338; 12 W. R. 252.

Therefore, where A., a person de facto receiving such a rent, was served by a local board of health with a notice to sewer under s. 69 (by which service is to be upon the owner or occupier), and on his failure to comply with the notice the local board executed the sewerage work and charged the expenses, under 21 & 22 Vict. c. 98, s. 62, to B., who was owner when the works were completed, B. (though his title to the premises had accrued prior to the service of the notice, and the notice had not been served on him, nor had he any knowledge of it till after the completion of the works) was liable for the expenses incurred. *Ib.*

—— **Under a Power of Attorney.**]—A person to whom an owner of premises resident abroad sent a power of attorney, authorising him to receive the rents, is not thereby constituted owner within 18 & 19 Vict. c. 121, s. 2, so as to render him personally liable for the costs and expenses of the abatement of a nuisance on the premises previously to the receipt of his authority. *Blything Union* v. *Warton*, 3 B. & S. 352; 32 L. J., M. C. 132; 9 Jur. (N.S.) 867; 7 L. T. 672; 11 W. R. 306.

—— **By Agent for Collection of Rents.**]—By ss. 98 & 99 of the St. Helens Improvement Act, 1869 (32 & 33 Vict. c. 120), the corporation of St. Helens are, upon failure of the owners of property fronting on a new street to drain, pave, &c., the roadway and paths pursuant to an order, empowered to do the work themselves, and to charge the expenses thereby incurred upon such owners in proportion to their respective frontages; and by the interpretation clause, s. 4, "owner" is declared to mean "the person for the time being receiving the rack-rent of the lands in connection with which the said word is used, whether on his own account or under or by virtue of any mortgage or charge, or as agent or trustee for any other person, . . . and shall include every successive owner from time to time of such land for any part of the time during which the enactment wherein that term is used operates in relation to such land":—Held, that an "agent" employed to collect the rents of the property charged by the apportionment is an "owner" within the act, and is liable to be called upon to pay, whether he has money of his principal in hand or not, at any time whilst the sum assessed upon the premises remains unpaid. *St. Helens Corporation* v. *Kirkham*, 16 Q. B. D. 403; 34 W. R. 440; 50 J. P. 647.

**Owner of Rack-rent.**]—J. held certain premises in the city of Dublin from B. as tenant from year to year, at the yearly rent of 65*l.* The premises were valued under the acts relating to the valuation of ratable property in Ireland at 72*l.* 10*s.* J. let the premises to weekly tenants at rents from which he had a profit out of the premises. The sanitary authority of the city of Dublin served on J. a notice under the Public Health Act (Ireland), 1878, addressed to the owner of the premises, or to J., requiring certain specific sanitary works to be done, and on the 3rd of September, 1879, the police magistrate made an order that the works should be done within seven days. J. alleged that B. was the owner under the Public Health Act (Ireland), 1878, on the ground that the rent payable by him, J., to B. was more than two-thirds of the valuation of the premises:—Held, that B. was not the owner of the premises within the meaning of the Public Health Act (Ireland), 1878. *Bowen* v. *James*, 10 L. R., Ir. 26.

The town council of the borough of St. Helens having under the St. Helens Improvement Act of 1869 incurred certain expenses in sewering, levelling, &c., a street, not being a highway repairable by the inhabitants at large, adjoining lands in the occupation of the defendant, brought the present action for their recovery. The local act contained provisions similar to those contained in s. 150 of the Public Health Act, 1875. The defendant was the lessee of the lands in question under a building lease for 999 years at a ground-rent of 26*l.*, and at the time the expenses were incurred there were no buildings erected upon the land. By the local act the expenses were to be charged upon the several owners of buildings or lands in the street in proportion to the extent of the frontage of their respective buildings and lands; the word "owner" being defined as meaning the person for the time being receiving the rack-rent of the land . . . or who

would so receive the same if such lands or premises were let at a rack-rent, and the definition of rack-rent being the same as that contained in the Public Health Act of 1875:—Held, that the defendant was the owner of the lands in question within the meaning of the definition in the local act. *St. Helens Corporation* v. *Riley*, 47 J. P. 471.

The local act enacted that the proportion in which such expenses were to be apportioned was to be ascertained and settled by the corporation:—Held, that the fact that the apportionment had been corrected by the surveyor of the corporation after it had been approved by the corporation did not invalidate it. *Ib.*

—— **Trustees of Settled Land.**]—Where by a will, which was made and took effect in 1846, certain real estate was devised unto and to the use of trustees, their heirs and assigns, upon trust to permit certain persons to occupy and enjoy the same, and receive and take the rents thereof in succession, and after their decease in trust for other persons in tail with divers remainders over, and between the years 1861 and 1869, during the life of one of the persons beneficially entitled to the rents, the trustees expended capital moneys on drainage under the Public Health Act, 1848, such expenditure was held to have been rightly made, inasmuch as the trustees, being the persons to receive the rack-rents of the estate and hand them over to the beneficiaries, were "owners" within the meaning of that act. *Barney, In re, Harrison* v. *Barney*, 63 L. J., Ch. 676; [1894] 3 Ch. 562; 8 R. 459; 71 L. T. 180; 43 W. R. 105.

**Trustees of Chapel—Building used partly as Chapel.**]—The defendants were the trustees of a chapel consisting of two floors. The upper floor was the chapel itself, and the lower contained a lecture hall and several smaller rooms. The premises as a whole were registered as a place of religious worship. The lecture-hall was used for the purposes of a Sunday school and of an institute, the members of the latter paying a subscription, and lectures and concerts were from time to time given in the hall in connection with the institute, for which tickets were sold to persons who were not members; but the money received did not cover the cost of the entertainments. A bazaar and a sale of work had also been held in the lecture-hall, when a charge was made for admission. The money realised from the bazaar was handed to the defendant, Brewis, and appropriated by him to the chapel building fund, and the proceeds of the sale of work were devoted to the purchase of a piano for the institute. The defendants, who had no beneficial interest in the chapel, having failed to comply with a notice under s. 150 of the Public Health Act, 1875, requiring them to pave, &c., the portion of the street upon which the chapel abutted, the complainants executed the work themselves, and obtained an order of justices for the repayment by the defendants of the expenses thus incurred:—Held, that the defendants were the "owners" of the premises when the works were completed within the meaning of s. 257 of the Public Health Act, 1875, and that they did not come within s. 151, which exempts from liability "the incumbent or minister of any church, chapel, or place appropriated to public religious worship," and that the order of the justices was, therefore, rightly made. *Hornsey Local Board* v. *Brewis*, 60 L. J., M. C. 48; 64 L. T. 288; 55 J. P. 389.

**Trustees of School.**]—Land had been conveyed to three trustees under 4 & 5 Vict. c. 38, s. 2, for the purposes of the act, and to permit the premises and all buildings erected thereon to be for ever used as a school for the education of poor children, and for the residence of the master and mistress, and for no other purpose whatsoever. The school was built and used according to the trust, no rent whatever being received by the trustees. The local board gave the proper notices for paving the street along which the school fronted, to one of the trustees and the owners of other premises fronting the street, under 11 & 12 Vict. c. 63, s. 69; and they charged the trustee, as owner of the school, the proportion according to the frontage of the school:—Held, that the trustee was owner within s. 2, which enacts that "owner" "shall mean the person for the time being receiving the rack-rent of the lands or premises, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent": and that he was therefore liable to pay the proportion of the expenses. *Bowditch* v. *Wakefield Local Board*, 40 L. J., M. C. 214; L. R. 6 Q. B. 567; 25 L. T. 88.

Trustees to whom land is conveyed in perpetuity under s. 6 of the School Sites Act, 1841, for the purposes of a school, and "for no other purpose whatever," are "owners" within the Public Health Act, 1875, s. 4, and a proportion of the expenses incurred by the urban authority in metalling a road abutting thereon will be declared to be a charge on the land and buildings under s. 257, notwithstanding that the charge cannot be enforced by a sale. *Bowditch* v. *Wakefield Local Board* (40 L. J., M. C. 214; L. R. 6 Q. B. 567) followed. *Hornsey Urban District Council* v. *Smith*, 66 L. J., Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581—C. A. Reversing 61 J. P. 311.

**Lord of Manor—Turf Common subject to Charitable Trust.**]—Where by an inclosure act and by an award of the inclosure commissioners made thereunder, the soil of a turf common forming part of the waste of a manor is beneficially vested in the lord of the manor, subject as regards the surface to certain charitable trusts created by the act, so that the common cannot be let at a rack-rent, the lord of the manor is "owner" of the common within the meaning of the Public Health Act, 1875, and is consequently liable to contribute to the expenses of paving roads adjoining the common. *Christchurch Inclosure Act, In re, Meyrick* v. *Att.-Gen.*, 63 L. J., Ch. 657; [1894] 3 Ch. 209; 8 R. 480; 71 L. T. 122; 42 W. R. 614; 58 J. P. 556.

**Tenements Occupied or Unoccupied.**]—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, the owner instead of the occupier may, at the option of the urban authority, be rated to general district rates, provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements, whether occupied or unoccupied, then such assessment may be made on one-half of the amount at which such tenements would be liable to be rated if the same were occupied, and the rate were levied on the occupiers:—Held, that

a discretionary power is given to the urban authority by that enactment to rate the owner in respect of premises whether occupied or unoccupied, but where the owner is so rated the assessment must only be upon one-half of the ratable value. *Reg.* v. *Barclay*, 51 L. J., M. C. 47; 8 Q. B. D. 486; 46 L. T. 335; 30 W. R. 672; 46 J. P. 693—C. A.

**Change of Ownership before Completion of Works.**]—Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, which enables the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level, and pave it, and upon default to execute the works and recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from anyone who, though the owner of premises when notice was given by the urban authority, has ceased to be owner before the completion of the works. *Reg.* v. *Swindon Local Board*, 48 L. J., M. C. 119; 4 Q. B. D. 305; 40 L. T. 424; 27 W. R. 732.

**Vendor or Purchaser.**]—Leasehold houses in an urban district, abutting partly on a private road, were sold on an open contract; at the date of the sale works had been done by the local board of the district on the road under s. 150 of the Public Health Act, 1875; the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed:—Held, that the apportioned expenses became a charge on the premises at the date of completion, and as between the vendor and purchaser were payable by the vendor. *Bettesworth and Richer, In re*, 57 L. J., Ch. 749; 37 Ch. D. 535; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740.

**Subsequent Owners.**]—The charge created by s. 257 of the Public Health Act, 1875, for expenses incurred by a local authority for paving, &c., for the payment whereof the owner of the premises at the time the works are completed is liable and against whom the local authority have, under s. 150, a summary remedy, is a charge on the premises in the hands of a subsequent owner, although the local authority have by negligence lost their summary remedy against the previous owner. *Sunderland Corporation* v. *Alcock*, 51 L. J., Ch. 546; 46 L. T. 377; 30 W. R. 655.

—— **Mortgagee in Possession—"Successive Owners"—Concurrent Remedies.**]—In 1879 the owner of premises abutting on H. Street and E. Street, Blackburn, mortgaged them to the defendant. In 1880 the plaintiffs, the Corporation of Blackburn, paved H. Street. In 1881 the mortgagor, in accordance with the provisions of the Blackburn Improvement Act, 1870, executed a charge on the premises in favour of the corporation, for the payment by instalments of his apportionment of the expenses thereof. In 1882, and prior to the commencement of the operation of the Blackburn Improvement Act, 1882, the corporation paved E. Street, and in 1883 the mortgagor further charged the premises, in accordance with the provisions of the Blackburn Improvement Act, 1882, with the payment by instalments of the expenses thereof. The mortgagor made default in payment of the instalments. On the death of the mortgagor in 1883 the defendant took possession of the premises under his mortgage. In an action by the corporation against the mortgagee to recover the unpaid instalments under s. 247 of the Blackburn Improvement Act, 1882, which entitles the corporation to institute an action at law against "successive owners" of premises, for the recovery of the expenses of paving streets abutting thereon:—Held, that the defendant being mortgagee in possession, was a "successive owner" within the meaning of s. 247; and that the execution of a charge in favour of the corporation did not preclude them from the remedy of action at law to recover the expenses; and that the act of 1882 was applicable to the recovery of expenses incurred prior to the commencement of the operation of that act. *Blackburn Corporation* v. *Micklethwait*, 54 L. T. 539; 50 J. P. 550.

—— **Notice to "Owner."**]—By their private act a local board were empowered to execute works of sewering and paving in streets, and to apportion among and demand from the owners of adjoining premises the estimated expenses. The defendant was a second mortgagee of houses abutting on a street, and from April, 1891, to June, 1892, was in possession, and collected the rents, which he applied in keeping down outgoings and the interest on the first mortgage. These payments being made, no surplus remained. In June, 1891, the local board apportioned sums in respect of estimated expenses of sewering and paving the street, and demanded 113*l.* from the defendant as his share. The first mortgagee entered into possession in June, 1892. The works were not completed till July or August following:—Held, that the defendant was "owner" of the houses, within the interpretation of s. 4 of the Public Health Act, 1875 (embodied in the private act), and liable for the estimated expenses apportioned in respect of them. *Tottenham Local Board* v. *Williamson*, 62 L. J., Q. B. 322; 69 L. T. 51; 57 J. P. 614.

### c. Landlord or Tenant.

A lessee covenanted to pay the tithe or rent-charges in lieu of tithes and tax (if any), sewers' rates, main drainage rates, and all other taxes, rates and assessments, and impositions and outgoings whatsoever then or thereafter to be charged or imposed on or in respect of the said premises or any part thereof:—Held, that the lessee was not liable to pay the amount charged by the urban authority for sewering, levelling, and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875. *Hill* v. *Edward*, 1 Cab. & E. 481.

*See further* LANDLORD AND TENANT.

### 3. Notice to do Works.

**Sufficiency of.**]—A notice to pave, given under 11 & 12 Vict. c. 63, s. 69, did not specify the breadth to be paved, or any of the particulars necessary to enable the party to do the work required, but contained a statement at the foot of it, that particulars of the necessary works might be obtained from the borough surveyor's office, and it appeared that plans and specifications were lodged at that office, and were seen there by the party on whom the notice had been served:—Held, that in the absence of evidence that such plans and specifications did not give ample information of the work to be done, the notice was sufficient. *Bayley* v. *Wilkinson*, 16

C. B. (N.S.) 161; 33 L. J., M. C. 161; 10 Jur. (N.S.) 726; 10 L. T. 543; 12 W. R. 797.

—— **If not objected to.**]—An owner on whom notice to level, &c., under the 11 & 12 Vict. c. 63, s. 69, and 26 & 27 Vict. c. 70, s. 3, has been served, and who has not given notice of objection, is estopped from shewing that the street in question is a highway repairable by the inhabitants at large. *Reg.* v. *Livesey*, 22 L. T. 470.

—— **Waiver of Proof.**]—An owner of premises abutting on a street having received from the urban authority notice under s. 150 of the Public Health Act, 1875, to pave, &c., such street, endorsed on the notice an authority to the urban sanitary authority to execute the works, and an undertaking to repay the costs on completion. On default of payment after demand made, the urban sanitary authority proceeded to recover the expenses in a summary manner before justices:—Held, that the owner having by the submission indorsed on the notice admitted the right of the sanitary authority to issue the notice, could not require proof to be given before the justices of the fulfilment of the conditions precedent to the existence of such right. The owner could not by such submission give jurisdiction to the sanitary authority, if in fact they had none, but he did thereby waive the proof by them of the preliminaries to the notice and make it incumbent on himself to disprove their original authority, if he wished to dispute it. *Lewis* v. *Cardiff Urban Sanitary Authority*, 47 L. J., M. C. 101.

—— **Absence of Estimate and Report.**]—A local board of health required the owners of property adjoining a street, not being a highway, to level it; and they, having made default, the local board caused the work to be done by contract. Before making the contract, no estimate was made of the annual expense of repairing the work when done, nor was any report obtained as to whether it would be more advantageous to contract only for the execution of the work, or for the execution and maintenance thereof. In other respects, the directions of 11 & 12 Vict. c. 63, s. 85, were followed:—Held, that, as the work when complete would not be repaired and maintained under the act or out of the rates, no such estimate or report was required; and that the local board might enforce payment of the expenses from the owners, notwithstanding the absence of the estimate and report. *Cunningham* v. *Wolverhampton Local Board*, 7 El. & Bl. 187; 26 L. J., M. C. 33; 3 Jur. (N.S.) 385; 5 W. R. 310.

—— **Contents of Plans and Sections.**]—A notice by a local board of health to the owner of houses abutting upon a street not being a highway, to sewer, level, pave, flag and channel the same, in pursuance of 11 & 12 Vict. c. 63, s. 69, is not invalid by reason of the plans and sections of the required works deposited under 24 & 25 Vict. c. 61, s. 16, including narrow strips of land in front of the houses, not open to or used by the public. *Hall* v. *Potter*, 39 L. J., M. C. 1; 21 L. T. 454.

—— **Notice to Pave—Alteration in Work done.**]—Under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), an urban sanitary authority gave notice to the owner of premises to pave part of a street upon which his premises abutted, specifying the materials and mode and (inter alia) requiring him to lay down concrete. The owner having failed to comply, the sanitary authority did the work themselves, but finding that the concrete would be an unnecessary expense, omitted it:—Held, that the omission to follow strictly the terms of their own notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses incurred. *Acton Local Board* v. *Lewsey*, 55 L. J., Q. B. 404; 11 App. Cas. 93; 54 L. T. 657; 34 W. R. 745; 50 J. P. 708—H. L. (E.)

The S. urban sanitary authority gave notice to K., an owner of land adjoining a new street, to sewer the road and lay an 18-inch pipe. K. having neglected to do so, the authority in course of carrying out the work, found a 12-inch pipe sufficient, and used it, and it saved expense to K. on the apportionment:—Held, that the magistrate was right in holding that the apportioned expenses of the altered work were recoverable under s. 150 of the Public Health Act, 1875, the alteration being not a material matter nor invalidating the notice. *Kershaw* v. *Sheffield Corporation*, 51 J. P. 759.

—— **Waiver of — Charge on Lands.**]—The plaintiffs incurred expenses in paving a street without having served on the defendants, who were frontagers, a notice under s. 69 of the Public Health Act, 1848 (to which s. 150 of the Public Health Act, 1875, now corresponds), requiring them to do the work themselves. The plaintiffs claimed in an action a declaration that the expenses were a charge on the defendant's property, under s. 62 of the Local Government Act, 1858 (to which s. 257 of the Public Health Act, 1875, corresponds). It was proved that B., a predecessor in title of the defendants, had taken from the plaintiffs a receipt for a payment in respect of the same expenses:—Held, that the plaintiffs were not entitled to a declaration, inasmuch as the service of the notice under s. 69 was a condition precedent to liability on the part of the defendants in respect of the expenses, and that the payment by B. could not operate as a waiver of the omission to give the notice. *Farnworth Local Board* v. *Compton*, 34 W. R. 334—C. A.

**Service of.**]—Service of a notice by delivering it to the clerk of an owner at his place of business is a sufficient notice to satisfy the requirements of 11 & 12 Vict. c. 63, s. 69, the 150th section being merely in aid of the service of notices. *Mason* v. *Bibby*, 2 H. & C. 881; 33 L. J., M. C. 105; 10 Jur. (N.S.) 519; 9 L. T. 692; 12 W. R. 382.

A place of business is a place of abode, and a clerk an inmate, within the meaning of the 150th section. *Ib.*

The service of a notice, under 11 & 12 Vict. c. 63, s. 69, on a person de facto receiving the rent, is a service on the owner, within the 2nd section. *Peek* v. *Waterloo and Seaforth Local Board*, 2 H. & C. 700; 33 L. J., M. C. 11; 9 Jur. (N.S.) 1344; 9 L. T. 338; 12 W. R. 252.

—— **Proof of.**]—On an information against a person for not paying the expenses apportioned upon him as owner of premises in a street upon which work had been done by a local board of health, it was proved that the work had been done, and an apportionment of the expenses made, and notice of it served upon him; he had

not given notice within three months that he disputed it, under 21 & 22 Vict. c. 98, s. 63; but no evidence was given of any notice having been served under 11 & 12 Vict. c. 63, s. 69, previously to the board doing the work:—Held, that the justices could not make an order unless the preliminary notice was proved to have been given. *Jarrow Local Board* v. *Kennedy*, L. R. 6 Q. B. 128; 19 W. R. 275.

—— **Evidence against subsequent Occupier.**]—Notice to remove a nuisance, left at the premises, is evidence against a subsequent occupier. *Johnson* v. *Bensley*, R. & M. 189.

—— **To Owner—What is.**]—Notice to one who receives the rent of land de facto, without right thereto, satisfies the provision requiring notice to the owner, contained in 21 & 22 Vict. c. 98, s. 62. *Peek* v. *Waterloo and Seaforth Local Board*, 2 H. & C. 700; 33 L. J., M. C. 11; 9 Jur. (N.S.) 1344; 9 L. T. 338; 12 W. R. 252.

**Notice to several Owners—Default by One.**]—The appellant and five others were the owners of premises within the district of the respondents, an urban authority under the Public Health Act, 1875. These premises abutted upon a street (not being a highway), which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents. The respondents gave a separate notice to each of such owners requiring them to sewer, level, pave, flag, and channel the parts of the street in front of their premises, within a specified time. Five of the owners executed the works in front of their premises, but the appellant made default. The respondents thereupon executed the works required to be done in front of her premises, and their surveyor having made his apportionment, gave her a notice stating that the expenses had been apportioned by their surveyor, who had settled that 213*l.* 13*s.* 6*d.* was payable by her according to the frontage of her premises, and that they required payment of that sum:—Held, that the respondents were not bound before executing such works to give the appellant a fresh notice specifying the particular works which remained to be done by her. *Simcox* v. *Handsworth Local Board*, 51 L. J., Q. B. 168; 8 Q. B. D. 39; 30 W. R. 273; 46 J. P. 260.

—— **Omission to serve One—Objection to Proceedings.**]—The service of a notice to sewer upon all the frontagers of a street being a condition precedent under s. 150, the omission to serve one of the frontagers is a valid objection to the subsequent proceedings. But where the question of the apportioned expenses of sewering has been referred to arbitration under the act, such objection must be taken before the arbitrators, and it is too late to take it in an action to enforce payment of the amount found due by the award. *Handsworth Urban Council* v. *Derrington*, 66 L. J., Ch. 691; [1897] 2 Ch. 438; 77 L. T. 73; 61 J. P. 518.

4. CONCLUSIVENESS OF APPORTIONMENT.

Where the apportionment of street improvement expenses by the surveyor under s. 150 of the Public Health Act, 1875, has not been disputed by a frontager in the manner pointed out by s. 257 of the act, such apportionment is conclusive, and the frontager cannot set up, as a defence to proceedings for the recovery of the sum apportioned, that he has been charged in respect of a greater extent of frontage than he possesses. *Midland Ry.* v. *Watton*, 55 L. J., M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405—C. A.

**Cross Notice to Dispute—Time for.**]—Where an owner of premises has not given notice to dispute the apportionment, it becomes binding on her within the three months limited by s. 257, and summary proceedings may be taken under that section for the recovery of the amount due from her. *Simcox* v. *Handsworth Local Board*, 51 L. J., Q. B. 168; 8 Q. B. D. 39; 30 W. R. 273; 46 J. P. 260.

By 11 & 12 Vict. c. 63, s. 69, and 15 & 16 Vict. c. 42, s. 13, a local board may require the owners of the houses in a street, not being a highway repairable by the inhabitants at large, to sewer, level, and pave it, and in default of the owners the board may do the work, and the expenses are to be paid by the owners in proportion to their frontage, the proportion to be settled by the surveyor, and in case of dispute by arbitration; and by 21 & 22 Vict. c. 98, s. 63, the apportionment of the surveyor shall be binding and conclusive upon every owner, unless, within three months from the notice of the amount of the proportion, he shall by written notice dispute the same. A local board having duly proceeded under the act, and sewered, levelled, and paved a street, and no notice having been given by an owner that he disputed the apportionment, the board sought to enforce before justices the payment of the proportion charged:—Held, that it was still open to the owner to dispute his liability, and to shew that the street was a highway repairable by the inhabitants at large. *Hesketh* v. *Atherton Local Board*, 43 L. J., M. C. 37; L. R. 9 Q. B. 4; 29 L. T. 530; 22 W. R. 58.

—— **Effect of.**]—The 21 & 22 Vict. c. 98, s. 63, makes the apportionment after three months binding and conclusive only as to the various amounts settled by it, but not on the question of highway or no highway. *Ib.*

—— **Deposit of Plans.**]—An apportionment of street expenses, made under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, and not disputed within three months from notice of it to the owner of the premises in respect of which the expenses were incurred, is binding and conclusive upon him by s. 257, and, therefore, in an action against him for the amount apportioned, the apportionment cannot be treated as a nullity merely because it mixed up the expenses of more than one street, and, in the opinion of the judge, reasonable opportunities were not afforded of inspecting the plans and estimate deposited according to s. 150, before the expenses were incurred. The deposit of plans and an estimate is not a condition precedent to the recovery of such expenses. *Shanklin Local Board* v. *Millar*, 49 L. J., C. P. 512; 5 C. P. D. 272; 42 L. T. 788; 29 W. R. 63; 44 J. P. 635.

**Dispute as to—Arbitration.**]—*See* infra, 5.

**Surveyor's Certificate.**]—Under the Public Health Act, 1848, and the Local Government Act, 1858, the surveyor's certificate of apportionment on the owners of premises abutting on a street of the cost of paving, &c., such street, is

conclusive only as to such apportionment, and not as to the original liability of the persons charged. *Hesketh* v. *Atherton Local Board*, 43 L. J., M. C. 37; L. R. 9 Q. B. 4; 29 L. T. 530.

Neither the arbitrators nor the justices in settling such proportions are entitled to inquire whether the amount alleged to have been expended by the surveyor has been actually so expended. *Ib.*

**Erroneous Notice—Fresh Apportionment—Charge on Premises.**]—An urban sanitary authority, acting under s. 150 of the Public Health Act, 1875, served the defendant and other frontagers of a new street with notices requiring them to execute certain works, including a particular work which could not legally be included in such notices. The notices not being complied with, the urban authority did the works and apportioned the expenses incurred by them in so doing on the frontagers. A summons to recover from the defendant the sum of 650*l.*, the amount charged to him under the apportionment, having been dismissed by the magistrates, the urban authority made a second apportionment, deducting the expense of the work which had been wrongly included, the amount charged to the defendant therein being 579*l.* They then brought an action under s. 257 of the Public Health Act to establish a charge on the defendant's premises for 579*l.*, or in the alternative, for 650*l.*:—Held, that the urban authority had power to make a second apportionment; and that, notwithstanding the dismissal of the summons, they were entitled to a charge on the premises for 579*l.* *Manchester Corporation* v. *Hampson*, 35 W. R. 334. See *S. C.* in C. A., 35 W. R. 591.

The surveyor of a local board, having made one apportionment upon a wrong principle, has a right to make a fresh apportionment under 21 & 22 Vict. c. 98, s. 64. *Cook* v. *Ipswich Local Board*, 40 L. J., M. C. 169; L. R. 6 Q. B. 451; 24 L. T. 579; 19 W. R. 1079.

—— **Jurisdiction of Justices.**] — Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district, acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewering, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work, shewed that part of the work in respect of which, upon his failure to comply with the notice, the expenses were incurred, was executed upon land belonging to private owners:—Held, that as part of the work was executed on a street, the urban authority had power to fix the sum to be apportioned, and the magistrate had jurisdiction to entertain the complaint, and could only make an order for payment of the apportioned sum, and if the frontager was aggrieved by what the urban authority had done, his only remedy was to appeal to the Local Government Board under s. 268 of the Public Health Act, 1875. *Wake* v. *Sheffield Corporation*, or *Reg.* v. *Sheffield Recorder*, 53 L. J., M. C. 1; 12 Q. B. D. 142; 50 L. T. 76; 32 W. R. 82; 48 J. P. 197—C. A.

A local authority, acting under s. 150 of the Public Health Act, 1875, served a frontager with a notice to execute works of sewering, paving, &c., a part only of the works specified being rightly included in the notice; the frontager not having complied with such notice, the work was done by the local authority:—Held, that unless the frontager disputes the apportionment upon him of the expenses incurred by the local authority in executing the works within the time limited by s. 257, he cannot do so by way of defence to proceedings to recover the amount in a court of summary jurisdiction, as such defence does not relate to the whole of his legal liability; and the justices have jurisdiction to make, and must make, an order upon him for payment of the whole amount. *Wake* v. *Sheffield Corporation* (12 Q. B. D. 142) followed; *Cook* v. *Ipswich Local Board* (L. R. 6 Q. B. 451) explained and distinguished. *Derby Corporation* v. *Grudgings*, 63 L. J., M. C. 170; [1894] 2 Q. B. 496; 10 R. 565; 72 L. T. 594; 43 W. R. 74.

### 5. Arbitration.

**When Allowed.**]—The 11 & 12 Vict. c. 63, s. 69, only authorises an arbitration in respect of the proportion to be borne by a defaulting owner, and not in respect of any question as to the expenses being reasonable or properly incurred by the board. *Bayley* v. *Wilkinson*, 16 C. B. (N.S.) 161; 33 L. J., M. C. 161; 10 Jur. (N.S.) 726; 10 L. T. 543; 12 W. R. 797.

Where a notice, served by a board of health upon an owner, calling upon him to pay an apportionment of expenses incurred in the sewering and paving of roads, is met by a counter-notice disputing the amount alone, such demand may be the subject of arbitration; but where the counter-notice disputes the liability to pay, such a demand must be tried by justices, who, if the counter-notice also disputes the amount, may exercise their jurisdiction as to the amount also. *West* v. *Downman*, 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6—C. A.

Where an urban authority gives notice to the owners and occupiers of premises fronting, adjoining, or abutting on a street, that requires to be sewered or otherwise dealt with under s. 150 of the Public Health Act, 1875, and in default executes the work, and the expense is apportioned by the surveyor, any dispute arising on the apportionment, whether as to amount or otherwise, must be dealt with by arbitration in the manner provided by the act, and the urban authority cannot proceed to recover the amount apportioned from any owner who has given notice that he disputes the apportionment. *West* v. *Downman* (14 Ch. D. 111) disapproved. *Sandgate Local Board* v. *Keene*, 61 L. J., Q. B. 775; [1892] 1 Q. B. 831; 66 L. T. 741; 56 J. P. 484—C. A.

An urban authority executed certain works under s. 150 of the Public Health Act, 1875, which empowers them to recover the expenses from the owners in default "according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the urban authority, and in case of dispute by arbitration." The surveyor apportioned the expenses and sent notices of apportionment to the several owners in default, one of whom wrote in reply, objecting to the account rendered and complaining that the cost per foot was too high. The urban authority treated this as a notice disputing the apportionment, and passed a resolution to appoint an arbitrator, but the appointment was never carried into effect. They then sued the owner for the apportioned amount:—Held, by Wright, J., that the owner's letter was

an objection to the prime cost of the work and not to the mode of apportioning the cost, and that the urban authority were not bound to proceed to arbitration before commencing their action. *Sandgate Local Board* v. *Keene* ([1892] 1 Q. B. 831), distinguished:—Held, by the court of appeal, that the urban authority had by their conduct precluded themselves from denying that there was a dispute as to the apportionment, and that they were bound to proceed to arbitration. *Folkestone Corporation* v. *Brooks*, 62 L. J., Ch. 863; [1893] 3 Ch. 22; 69 L. T. 403; 58 J. P. 53—C. A.

Another owner disputed the claim of the urban authority in general terms:—Held, by Wright, J., that this was a dispute as to the apportionment. *Ib.*

See also *West Hartlepool Corporation* v. *Robinson*, 75 L. T. 677; 45 W. R. 312; 61 J. P. 200. Affirmed, 77 L. T. 387 (ante, col. 379).

**Enforcing Award—Summary Proceedings.**]—Notices to sewer and pave roads having been, in 1872, served by a board of health on an owner, he took no notice during his lifetime, and the works having been executed by the board, notices to pay apportionments were on the 30th of July, 1875, served on the tenant for life under the will of the owner, and on the executors, who within the statutory three months served counter-notices on the board, disputing the amount of the apportionments, and alleging that the roads were public roads. The board then commenced proceedings by arbitration, which the owners refused to attend, and in their absence an award was made in favour of the board on the 9th of August, 1877. On the 19th of January, 1878, the award was made a rule of the Queen's Bench Division. On the 12th of February notices of demand were served by the board on the owners, and on the 9th of July, 1878, proceedings in the Queen's Bench Division to enforce the award were commenced and subsequently abandoned. On the 1st of August, 1878, proceedings were taken in the Queen's Bench with reference to the costs of the award, and these, on the 23rd of January, 1879, were transferred to the Chancery Division, in which an administration action was pending:—Held, by the vice-chancellor, and by the court of appeal, that a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices, and had become barred by the operation of Jervis's Act (11 & 12 Vict. c. 43), s. 11. *West* v. *Downman*, 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6—C. A.

Where a local authority gives notice under s. 150 of the Public Health Act, 1875, to the owners and occupiers of premises adjoining a street to level and pave the same, and in default executes the work, and, a dispute arising, the amount of the expenses apportionable to the premises of one of the persons served with notice is settled by arbitration under the act, the award made in the arbitration cannot be enforced under s. 12 of the Arbitration Act, 1889, the only remedy of the local authority against the person served being by summary proceedings before justices pursuant to s. 150 of the act of 1875, except where the amount is below 50*l.*, when, by s. 261, proceedings for its recovery may at the option of the local authority be taken in the county court. *Willesden Local Board and Wright, In re*, 65 L. J., Q. B. 567; [1896] 2 Q. B. 412; 75 L. T. 13; 44 W. R. 676; 60 J. P. 708—C. A.

**Award—On whom Binding.**]—By the Public Health Act, 1875, s. 150, an urban authority are empowered under certain circumstances to pave and repair highways, and to apportion through their surveyor, or in case of dispute by arbitration, the amounts so expended to be paid by the owners of premises abutting on such highway in proportion to their respective frontages. By s. 257 such apportionment is binding and conclusive on such owner unless he shall dispute the same within three months. By s. 180, sub-s. 15, the award of the arbitrator shall be binding and final on all parties to the reference. The plaintiffs, a local authority, required the defendant and other owners of land adjoining a road within the above section to pave that road, and on their failing to do so executed the work themselves, and had the amount apportioned; and claimed and received from the defendant, who did not dispute the apportionment, his share of the expenses so incurred. Certain of the other owners disputed the apportionment, and an arbitration was held, of which the defendant had no notice, and to which he was not a party. The arbitrator reapportioned the whole sum expended amongst the owners, including the defendant, and fixed the amount to be paid by the defendant at a higher sum than had been fixed by the surveyor. In an action to recover the additional amount so charged to the defendant:—Held, that the plaintiffs could not recover the sum claimed on the footing of the assessment made by the arbitrator, and that the award was not binding on the defendant. *Tunbridge Wells Local Board* v. *Akroyd*, 49 L. J., Ex. 403; 5 Ex. D. 199; 42 L. T. 640; 28 W. R. 450; 44 J. P. 504—C. A.

### 6. Proceedings for Recovery.

#### a. Summary before Justices.

**Nature of Jurisdiction.**]—Under 11 & 12 Vict. c. 63, s. 54, a discretion is vested in a local board of health to determine what works are necessary to be done, and justices at petty sessions, on a proceeding before them for a penalty under s. 129, have no jurisdiction to review the determination of the local board upon such a subject. *Hargreaves* v. *Taylor*, 3 B. & S. 613; 32 L. J., M. C. 111; 9 Jur. (N.S.) 1053; 8 L. T. 149; 11 W. R. 562.

Where under the provisions of ss. 52, 53 and 54 of the Sheffield Corporation Act, 1890 (or under ss. 6, 7 and 8 of the Private Street Works Act, 1892, which are to the same effect), the corporation has resolved to make a sewer in a street within their jurisdiction, and has approved the specifications, plans, &c., prepared by their surveyor, the court of summary jurisdiction, on objection made by a frontager, is entitled to say that it is unreasonable to make the proposed sewer at the expense of the frontagers, and in arriving at that conclusion, is entitled to take into consideration the existing state of the drainage of the street in question. *Sheffield Corporation* v. *Alexander*, 64 L. J., M. C. 44; 14 R. 275; 72 L. T. 242—C. A.

**At what Sessions.**]—The 11 & 12 Vict. c. 63, s. 2, defines a justice to be "a justice acting for

the place in which the matter requiring the cognisance of the justice arises" :—Held, that this, in a county, meant a justice acting within the petty sessional division in which the matter arose ; and, therefore, that justices of the county, not acting within the petty sessional division of it in which the offence under s. 148 had been committed, had no jurisdiction to convict under s. 129. *Reg.* v. *Brodhurst*, 32 L. J., M. C. 168 ; 11 W. R. 425.

**Notice to Treat as Private Improvement Expenses.**]—By s. 213, et seq., of the Public Health Act, 1875, a private improvement rate may be levied for expenses declared to be private improvement expenses, and certain advantages are given to owners. A notice under s. 150 given to the appellants, who were owners of premises fronting a street within the meaning of the latter section, requiring them to do certain sewering works within a prescribed period, and stating that if such works were not executed the urban authority would execute the same themselves at the appellant's expense, thus concluded : "And the said urban authority will thereupon also proceed to declare all costs, charges, and expenses paid, expended, or incurred by them in consequence of such neglect or default, to be private improvement expenses, and to enforce payment according to law" :—Held, that even assuming the notice to have been good, the concluding portion could not be treated as surplusage, and that it was not, therefore, competent for the urban authority, after their declared intention to treat the expenses incurred as private improvement expenses, to proceed against the appellants summarily for the recovery of such expenses. *Gould* v. *Bacup Local Board*, 50 L. J., M. C. 44 ; 44 L. T. 103 ; 29 W. R. 471 ; 45 J. P. 325.

**Election to Treat as Private Improvement Expenses.**]—The election of a board to declare expenses to be private improvement expenses did not prevent them from enforcing a charge on the land, but they could only enforce it in respect of the instalments that were for the time being in arrear. *Tottenham Local Board* v. *Rowell*, 50 L. J., Ch. 99 ; 15 Ch. D. 378 ; 43 L. T. 616 ; 29 W. R. 36—C. A.

In 1858, a local board of health served upon W., an owner of premises within the meaning of 11 & 12 Vict. c. 63, s. 69, a notice to execute certain specified works in paving, &c. The works not having been executed by him, the local board completed them on the 30th of November, 1860, and on the 21st of January, 1861, apportioned the expense among W. and the other owners, giving notice on the same day to him that "unless the amount of this account is paid within fourteen days after delivery, interest at the rate of 5*l.* per cent. per annum will be charged thereon until fully liquidated. To proportion of sewering, levelling, paving, flagging, channelling, &c., namely, fifty feet frontage, at 5*s.* 4*d.*, 13*l.* 6*s.* 8*d.*" The amount was not paid, and the local board, on the 25th of August, 1870, resolved and declared that the amount should be "private improvement expenses," and subsequently that the amount should be paid by two instalments. W. refused to pay, and an information was laid against him :—Held, that the local board having elected in 1861 to treat the amount as a debt, due from W., could not treat it as a private improvement expense. *Wilson* v. *Bolton Corporation*, 41 L. J., M. C. 4 ; L. R. 7 Q. B. 105 ; 25 L. T. 597 ; 20 W. R. 246.

**Disqualification of Justice.**]—By a local act for the improvement of a borough, the corporation was made the authority for the execution of the act, with power to direct prosecutions for this purpose. An information for an offence under the act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice, who was also an alderman and member of the corporation, but came on for hearing before justices, none of whom were connected with the corporation :—Held, notwithstanding, that such justices could not proceed with the hearing of the summons, for it had been issued by one who was virtually prosecutor. *Reg.* v. *Gibbon*, 6 Q. B. D. 168 ; 29 W. R. 442.

**Adjudication that Street is a Highway—Res Judicata.**]—An application to justices by a local board under the Public Health Act, 1875, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices, on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such expenses :—Held, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment. *Reg.* v. *Hutchins*, 50 L. J., M. C. 35 ; 6 Q. B. D. 300 ; 44 L. T. 364 ; 29 W. R. 724 ; 45 J. P. 504—C. A.

**Right to dispute Liability before Justices.**]—In proceedings before justices under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, to recover from an owner of premises fronting a road his proportion of expenses incurred by the local authority in sewering, levelling, and paving it, the owner may dispute his liability by shewing that the road is not a "street," or that it is a "highway repairable by the inhabitants at large." *Eccles* v. *Wirral Union*, 55 L. J., M. C. 106 ; 17 Q. B. D. 107 ; 34 W. R. 412 ; 50 J. P. 596.

### b. In other Courts.

**Jurisdiction of County Court.**]—The county court, or two justices, have exclusive jurisdiction to try an action for the recovery of money paid by parish authorities for the abatement of a nuisance, and the costs thereof, under 11 & 12 Vict. c. 123, s. 3, although the title to land may be in question. *Hertford Union* v. *Kimpton*, 11 Ex. 225 ; 25 L. J., M. C. 41. And see *Willesden Local Board and Wright, In re*, supra, cols. 497, 498.

**Right of Action when no Special Remedy provided.**]—The urban sanitary authority of the borough of Portsmouth (who represented the commissioners mentioned in ss. 53, 149, and 156

of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34)), having incurred certain expenses within s. 53 of the Towns Improvement Clauses Act, 1847, sought to recover the same by action from the owners of the abutting lands. The defendant alleged that the expenses in question could not be recovered directly by action, but that a rate must be made in respect of them, as in the case of private improvement expenses:—Held, on demurrer to the defence, that, by the repeal of s. 156 and the succeeding sections relating to private improvement expenses by a local act for the borough passed in 1857, the last words of s. 53 were in effect repealed; and, consequently, no special remedy being provided for the recovery of expenses under s. 53, an action would lie to recover them, independently of s. 149. *Portsmouth Corporation* v. *Smith*, 46 L. T. 552—C. A. Affirming 46 J. P. 23.

**Action of Debt, whether available — Construction of Acts.**]—A local board may recover from occupiers in streets, being highways not repairable by the public at large, their share of the expenses incurred by the board in repairing such streets under 11 & 12 Vict. c. 63, ss. 68 and 69, and may recover such money paid by action of debt under a local act incorporating the above act. The word "highway" in these sections means a highway not repairable by the public at large since the 15 & 16 Vict. c. 42, s. 13. *Sunderland Corporation* v. *Herring*, 2 W. R. 42.

By s. 34 of a local improvement act, a corporation might require owners of premises fronting a street to pave the same, and in default the corporation might execute the works, and recover the expenses as damages. The 10 & 11 Vict. c. 34 was incorporated; and by s. 149 of the latter act the expenses incurred in default of payment by the owner may be recovered "in the same manner as damages, or in an action of debt." Sect. 210 of the latter act incorporates the clauses of the Railways Clauses Act, 8 & 9 Vict. c. 20, which relate to the recovery of damages, and by s. 140, "in all cases where any damages, costs or expenses are by this act or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount, or enforcing payment thereof, is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices:"—Held, that the mode of recovering expenses incurred in works executed by the corporation upon the default of the owner, under s. 34 of the local act, was by proceeding before justices, and not by action. *Blackburn Corporation* v. *Parkinson*, 1 El. & El. 71; 28 L. J., M. C. 7; 5 Jur. (N.S.) 572; 7 W. R. 11.

### c. Time for.

**Under 21 & 22 Vict. c. 98.**]—The provision in the 21 & 22 Vict. c. 98, s. 62, as to the time for taking proceedings by a local board for the recovery of expenses incurred under 11 & 12 Vict. c. 63, is prospective only. *Eddleston* v. *Francis*, 7 C. B. (N.S.) 568; 3 L. T. 270.

**When not specially Limited.**]—By 11 & 12 Vict. c. 63, s. 51, the local board is empowered, on the owner's default, after notice, to provide certain necessary house accommodations, the expense of which is to be recoverable in a summary manner from the owner, the amount to be ascertained by and recovered before two justices. And by 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making or laying the complaint or information, it must be done within six calendar months from the time when the matter of complaint or information arose:—Held, that a complaint under 11 & 12 Vict. c. 63, must be made within six calendar months of the work being done, and notice of the amount due being given to the party, and not within six months of the demand of payment. *Ib.* See also *West* v. *Downman*, supra, col. 497.

**How Calculated.**]—A street being out of repair, a local board of health gave notice to the owners of the adjoining houses to repair it; and, on this not being complied with, executed the works, and gave notice of the expenses and apportionment to each of the owners. The owners gave no notice of disputing the apportionment, and, at the end of the three months limited by 21 & 22 Vict. c. 98, s. 63, the board made a demand of the amount. The owners having refused to pay, and the expenses not having been declared to be private improvement expenses:—Held, that the board had, under 11 & 12 Vict. c. 43, s. 11, six months from the expiration of the three months during which the apportionment might have been disputed, to take proceedings before justices of the peace for the recovery of the amount. *Jacomb* v. *Dodgson*, 3 B. & S. 461; 32 L. J., M. C. 113; 9 Jur. (N.S.) 848; 7 L. T. 764; 11 W. R. 308.

When works are executed by a local authority for the improvement of a street under 11 & 12 Vict. c. 63, s. 69, and 21 & 22 Vict. c. 98, s. 63, and the expenses charged upon the owners of the premises fronting the street, it is necessary, before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner that a demand of payment of the sum so apportioned should be served upon him, and the six months within which the summary proceedings must be taken, under 11 & 12 Vict. c. 43, s. 11, are to be reckoned from such notice of demand, and not from the notice of apportionment, which is not a sufficient demand. *Greee* v. *Hunt*, 46 L. J., M. C. 202; 2 Q. B. D. 389; 36 L. T. 404; 26 W. R. 543.

—— **Commencement of Proceedings.**]—Held, also, that in order to recover the amount from W., proceedings must have been taken within nine months from the service of the notice of the 21st of January, 1861, which must be considered as a demand. *Ib.*

In summary proceedings it is no objection to the validity of a summons that it was issued more than a year after the complaint upon which it was founded. *Simcox* v. *Handsworth Local Board*, 51 L. J., Q. B. 168; 8 Q. B. D. 39; 30 W. R. 273; 46 J. P. 260.

Held, also, that the notice of apportionment, which concluded with a demand of payment of the amount apportioned, was not a "notice of demand," within s. 257, and that the six months within which, under s. 252, summary proceedings must be taken, were not to be reckoned from it, but from a subsequent notice of demand. *Ib.*

**Limitation—When Applicable.**]—A local board, in the year 1864, determined to do certain works in a street adjoining the defendant's house, for the expenses of which the defendant, among others, was made liable under s. 69 of the Public Health Act, 1848, and for which, consequently,

there was a charge on the property under the 62nd section of the Local Government Act, 1858. Before the works were done they resolved that the expenses were private improvement expenses under the 90th section of the Public Health Act, 1848, and should be recovered from the owners and occupiers by annual instalments. In 1872 they revoked the resolution, and made a fresh rate for the whole amount then remaining unpaid, to be paid by the owners and occupiers. This rate being unpaid in 1875, they brought an action against the defendant to enforce the charge on his land under the 62nd section of the act of 1858 :—Held, that the limitation of six months, within which summary proceedings must be taken under the Local Government Act, 1861, does not apply to the enforcing of the charge created by the 62nd section of the Local Government Act, 1858. *Tottenham Local Board* v. *Rowell*, 50 L. J., Ch. 99 ; 15 Ch. D. 378 ; 43 L. T. 616 ; 29 W. R. 36—C. A. Cp. *West* v. *Downman*, supra, col. 497.

—— **Proceedings in County Courts.**]—By the Public Health Act, 1848, s. 69, the local board might require the owners of premises fronting or abutting upon any street to sewer and pave the same, and upon default might themselves execute the work ; and the expenses incurred by them were to be paid by the owners in default, and might be recovered in a summary manner. By s. 129, summary proceedings were to be taken before two justices. By the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 24, proceedings for the recovery of demands below 20*l.*, which local boards were empowered to recover in a summary manner, might at the option of the local board be taken in the county court. By 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making a complaint before justices, it must be made within six months from the time when the matter thereof arose. A local board under the Public Health Act, 1848, s. 69, incurred expenses in sewering and paving a street, upon which premises belonging to R. abutted ; his proportion of the expenses amounted to 13*l.* 5*s.* 5*d.* On the 18th of February, 1873, notice was served by the board on him that the foregoing amount was apportioned upon him, and that the same would become payable by him, unless within three months he disputed it. R. did not dispute the apportionment. The money not having been paid, on the 8th of June, 1875, a plaint was issued by the local board in a county court to recover it from R.'s executor :—Held, that the limitation of time mentioned in 11 & 12 Vict. c. 43, s. 11, applied as well to proceedings in county courts as to proceedings before justices, and that the action could not be sustained, it having been brought more than six months after the expiration of the three months allowed for disputing the amount apportioned upon R. *Tottenham Local Board* v. *Rowell*, 46 L. J., Q. B. 432 ; 1 Ex. D. 514 ; 35 L. T. 887 ; 25 W. R. 135—C. A. S. P., *West Ham Local Board* v. *Maddams*, 1 Ex. D. 516, n.; 33 L. T. 809 ; *Wilson* v. *Bolton Corporation*, ante, cols. 499, 500.

—— **Alternative Remedy in County Court.**]—The Leeds Improvement Act, 1877, s. 96, provided that summary proceedings before justices for the recovery of expenses must be brought within one year. Sect. 109 provided that when any person neglected to pay any sum due to the corporation, such sum might be recovered in any court of competent jurisdiction for the recovery of debts of the like amount. Other remedies were given for the recovery of these sums, one by an act of 1842, by way of distress, in which there was no limit of time, and another by an act of 1866, by way of action at law :—Held, that the limitation of one year did not apply to proceedings by way of action of debt in the county court. *Tottenham Local Board* v. *Rowell* (1 Ex. D. 514), distinguished. *Leeds Corporation* v. *Robshaw*, 51 J. P. 441.

—— **Real Property Limitation Act, 1874—When Time begins to Run.**]—The expenses incurred by a local board under the Public Health Act, 1848, s. 69, charged on the premises in respect of which they are incurred by the Local Government Act, 1858, s. 62, now repealed, but corresponding to s. 257 of the Public Health Act, 1875, are a sum of money charged upon land within the meaning of s. 8 of the Real Property Act, 1874 ; and the present right to receive it, accruing to a person capable of giving a discharge, twelve years next after which no proceeding can be brought for its recovery, dates from the completion of the work, and not from the service of the demand for payment under the Local Government Act. *Hornsey Local Board* v. *Monarch Investment Building Society*, 59 L. J., Q. B. 105 ; 24 Q. B. D. 1 ; 61 L. T. 867 ; 38 W. R. 85 ; 54 J. P. 391—C. A.

### d. Appeals.

**To Quarter Sessions—Notice of.**]—The Public Health Act, 1875 (38 & 39 Vict. c. 55), gives an appeal to quarter sessions in respect of any order, conviction, judgment, or determination of any court of summary jurisdiction, subject to the condition that the appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party of his intention to appeal. An order was made upon the appellants under s. 48, which order was eighteen days afterwards served upon them ; and they within eight days from the receipt of the service, gave notice of appeal :—Held, that the notice of appeal was too late. The words, "cause of appeal," in s. 269, sub-s. 2, have the same meaning as "decision of the court" in s. 269, sub-s. 1 ; and a notice of an appeal against an order made under s. 48 must be given within fourteen days from the time when the court pronounces its decision. *Reg.* v. *Barnet Rural Sanitary Authority*, 45 L. J., M. C. 105 ; 1 Q. B. D. 558 ; 35 L. T. 362.

By 18 & 19 Vict. c. 121, s. 22, the local authority is in certain cases required to make a sewer, and is empowered to assess every house using it, and after fourteen days' notice left on the premises assessed to levy the sum assessed in the same manner as highway rates are leviable, with the same right of appeal against the assessment as shall be given by the law for the time being relating to highways. By the Highway Act (5 & 6 Will. 4, c. 50), s. 105, notice of appeal is to be given within fourteen days after the rate has been made :—Held, that the fourteen days for appealing were to be reckoned from the notice of the assessment being left on the premises. *Reg.* v. *Middleton Nuisances Removal Committee*, 1 El. & El. 98 ; 28 L. J., M. C. 41 ; 5 Jur (N.S.) 622 ; 7 W. R. 37.

—— **Neglect of—Costs.**]—Where an appeal against an order for payment of money is duly entered at the sessions, and afterwards dismissed, after hearing counsel, on the ground that notice of the appeal has not been given to the magistrates making the order, though it has been given to the inspectors, the sessions cannot award costs to the respondent, the matter of the appeal not having been heard and determined. *Reg.* v. *Wilkinson*, 2 M. & Rob. 461.

**Certiorari—Criminal Matter.**]—An order was made by justices directing the defendant to fill up an ash-pit, so as to be no longer a nuisance. The Q. B. D. made absolute an order for a certiorari to quash this order as not warranted by the Public Health Act, 1875, ss. 94, 96:—Held, that the order was "a criminal cause or matter," and that an appeal from the Q. B. D. could not be entertained by the court of appeal. *Reg.* v. *Whitchurch* or *Whitchurch, Ex parte*, 50 L. J., M. C. 99; 7 Q. B. D. 534; 45 L. T. 379; 29 W. R. 922; 45 J. P. 617—C. A.

—— **Costs.**]—A rule for a certiorari to bring up and quash an order of justices made under s. 158 of the Public Health Act, 1875, is a civil proceeding on the crown side of the Queen's Bench Division within Ord. LXII. r. 2; and the costs are in the discretion of the court under Ord. LV. *Reg.* v. *Morris*, 31 W. R. 609.

**Power to State a Case—Reference to Local Government Board under Local Act.**]—The West Kent Sewerage Board is incorporated by a local act of 38 & 39 Vict. c. 163, and by s. 93 it is enacted that, if any difference arises between the board on the one hand and any constituted authority or person on the other hand, or between any two or more constituted authorities, or between any constituted authority and any parish or person, respecting any assessment of a main sewer rate, or any determination of the board, or any controversy or other matter under the act, the same shall by virtue of the act stand referred for decision to the local government board, whose decision thereon and respecting the costs of the reference shall be final and binding. A dispute having arisen between the West Kent Sewerage Board and the Bexley Local Board representing a claim made by the local board against the sewerage board for compensation for damage done to the highways, &c., of the district, the disputants, with the consent of the local government board, stated a case for the opinion of the court:—Held, that it was not competent to them to do so, the local government board being by s. 93 constituted the tribunal whose decision on the matter was to be final and binding, and this not being a submission to arbitration within s. 5 of the Common Law Procedure Act, 1854. *Bexley Local Board* v. *West Kent Main Sewerage Board*, 51 L. J., Q. B. 456; 9 Q. B. D. 518; 47 L. T. 192; 31 W. R. 119; 46 J. P. 519.

**Case Reserved by Quarter Sessions—Leave to Appeal.**]—The Public Health Act provides in certain cases for an appeal from petty sessions to quarter sessions, and provides that the quarter sessions may state the facts specially for the determination of a superior court. On a case under this act an appeal was brought to quarter sessions, which quashed the order appealed from, subject to a case reserved. A certiorari issued, and a rule calling on the prosecutor to shew cause was granted, and was argued in and discharged by the Queen's Bench Division. Leave to appeal was not given:—Held, that the case so reserved fell within the provisions of s. 45 of the Judicature Act, 1873, and that no appeal could be brought from the decision of the divisional court upon it unless special leave to appeal were granted. *Reg.* v. *Swindon New Town Local Board*, 49 L. J., Q. B. 522; 42 L. T. 614; 28 W. R. 80; 44 J. P. 505—C. A.

**To Local Government Board—Prohibition.**]—Under 38 & 39 Vict. c. 55, s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, and on his default, the authority executed the work, and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made on him for the amount. Under s. 268 he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the local government board stating the grounds of his complaint. On a rule for a prohibition to the local government board:—Held, that the notice to pave and the notice of apportionment were not, but the demand of payment was, within the terms of s. 268, a "decision" from which an appeal lay by memorial to the local government board, and the owner having some right of appeal, although the memorial did not accurately state the ground of complaint, the court would not, even if it could, prohibit the local government board from entertaining the appeal. *Reg.* v. *Local Government Board*, 51 L. J., M. C. 121; 9 Q. B. D. 600; 46 J. P. 820. Affirmed, 52 L. J., M. C. 4; 10 Q. B. D. 309; 48 L. T. 173; 31 W. R. 72; 47 J. P. 228—C. A.

**To Secretary of State.**]—The decision of a secretary of state upon an appeal to him under 21 & 22 Vict. c. 98, s. 65, is final as to the amount due for expenses and interest thereon. *Wallington* v. *Willes*, 16 C. B. (N.S.) 797; 33 L. J., M. C. 233; 10 Jur. (N.S.) 906; 10 L. T. 784; 12 W. R. 917.

**Stay of Execution.**]—In July, 1877, justices of the peace made orders against the plaintiff and others, one of whom was L., for payment to the local board of the expense of repairing a street. It was agreed that the order should not be enforced for three months, in order to abide the decision on a case to be presented by L. to the queen's bench upon a point of law. L. appealed to the quarter sessions, and, the order against him having been quashed on the ground of a technical error, he did not take a case to the queen's bench. The plaintiff was not told of what had taken place, and in November, her time for appealing having gone by, an order to levy the amount against her was obtained from the justices. On motion by the plaintiff, and on her undertaking to assent to the statement of a case to the queen's bench on the point of law, and on her bringing the amount claimed into the court, the court considering the plaintiff had been misled by the board, restrained them from levying, unless or until she should have an opportunity of stating a case to the queen's bench. *Ashworth* v. *Hebden Bridge Local Board*, 47 L. J., Ch. 195; 37 L. T. 496.

**Stay of Criminal Proceedings.**]—A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an act of parliament for a breach of

its enactments. *Kerr* v. *Preston Corporation*, 46 L. J., Ch. 409; 6 Ch. D. 463; 25 W. R. 265.

### e. Charge on Premises.

**Time for Enforcing.**]—A local board, in the year 1864, determined to do certain works in a street adjoining the defendant's house, for the expenses of which the defendant, among others, was made liable under s. 69 of the Public Health Act, 1848, and for which, consequently, there was a charge on the property under the 62nd section of the Local Government Act, 1858. Before the works were done they resolved that the expenses were private improvement expenses under the 90th section of the Public Health Act, 1848, and should be recovered from the owners and occupiers by annual instalments. In 1872 they revoked the resolution, and made a fresh rate for the whole amount then remaining unpaid, to be paid by the owners and occupiers. This rate being unpaid in 1875, they brought an action against the defendant to enforce the charge on his land under the 62nd section of the act of 1858:—Held, that the limitation of six months, within which summary proceedings must be taken before the justices or in the county court under the Local Government Act, 1861, does not apply to the enforcing of the charge created by the 62nd section of the Local Government Act, 1858. *Tottenham Local Board* v. *Rowell*, 50 L. J., Ch. 99; 15 Ch. D. 378; 43 L. T. 616; 29 W. R. 36—C. A.

**On Total Ownership.**]—The charge created by s. 257 of the Public Health Act, 1875, for expenses incurred by a local authority for sewering and other works, and for the payment whereof the owner of the premises in respect of which the same are incurred is liable under that act, is a charge upon the "premises" as defined by s. 4: accordingly, it is a charge, not on the interest of any particular owner of the premises, but on the total ownership, that is to say, on the respective interest of every owner for the time being in proportion to the value of his interest. *Birmingham Corporation* v. *Baker*, 17 Ch. D. 782; 46 J. P. 52.

**Expenses of Paving.**]—Trustees to whom land is conveyed in perpetuity under s. 6 of the School Sites Act, 1841, for the purposes of a school, and for "no other purpose whatever," are "owners" of the land within s. 4 of the Public Health Act, 1875; and a proportion of the expenses incurred by the urban authority in metalling a road abutting thereon will be a charge on the land and the buildings on it under s. 257 of the act. *Bowditch* v. *Wakefield Local Board* (40 L. J., M. C. 214; L. R. 6 Q. B. 257) approved. *Hornsey Urban Council* v. *Smith*, 66 L. J., Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581—C. A. Reversing 61 J. P. 311.

—— **Enforcing by Sale.**]—The charge so arising cannot be enforced by a sale of such land and buildings so long as they are used for the purpose of a school under the act of 1841; but the urban authority may recover the amounts they claim from the trustees personally. *Ib.*

—— **Estimated Expenses.**]—By a special act which was to be read together with the Public Health Act, 1875, as one act, a local authority were empowered to apportion the "estimated expenses" of sewering, paving and other works in a street among frontagers, and recover the expenses so apportioned either before the work was commenced, during its progress, or after its completion, by action at law or summary proceedings, and if the actual expenses were less than the estimated sum the difference was to be paid to the frontagers who had paid such sum or whose property might have been "charged therewith":—Held, that the right conferred by s. 257 of the Public Health Act, 1875, to charge the property of frontagers with expenses incurred was not, by virtue of the above provisions of the special act, extended to estimated expenses. *West Ham Corporation* v. *Grant*, 58 L. J., Ch. 121; 40 Ch. D. 331; 60 L. T. 17.

—— **Land subject to Restrictive Covenant.**]—The charge created by s. 257 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for expenses incurred by a local authority in paving and metalling a road, does not override restrictive covenants affecting the land charged; and a sale to satisfy the charge can only be made subject to any such covenants. *Tendring Union* v. *Dowton*, 61 L. J., Ch. 82; [1891] 3 Ch. 265; 65 L. T. 434; 40 W. R. 145—C. A.

—— **Land laid out for Building—Agreement by Adjoining Owner to throw Land into Roads—Liability.**]—By a local act commissioners were created having duties with regard to streets and buildings within a certain area. In 1878 it was proposed to lay out an estate within such area for building, and plans were submitted to and approved by the commissioners. By an agreement between them and the defendant, the defendant was, on completion of the roads in question, to throw eighteen feet of his land into the said roads (which was done), but not to make the roads. In 1887 the powers of the commissioners passed to the council on incorporation. In 1892 the council by an order required the defendant to sewer, drain, level, flag, and metal the said roads so far as his premises fronted, adjoined, or abutted thereon. The order not having been complied with, the council did the work themselves, and on making request for payment the defendant's agent disputed that the property was liable. On a summons taken out by the council to have the sums expended declared a charge on the property:—Held, that the plaintiffs must succeed, but, following *Walthamstow Local Board* v. *Staines* (60 L. J., Ch. 738; [1891] 2 Ch. 606), decided on s. 278 of the Public Health Act, 1875, which was substantially in the same words, that having regard to s. 349 of the local act it appeared to be a case where a memorial to the secretary of state for relief would lie. *West Hartlepool Corporation* v. *Robinson*, 75 L. T. 677; 45 W. R. 312; 61 J. P. 200. Affirmed, 77 L. T. 387—C. A.

**Land Registry — Registration.**] — A local authority having carried out certain drainage improvements in different streets in a town, instead of levying a private improvement rate, declared that the expenses so incurred should become charges upon the property under s. 257 of the Public Health Act, 1875, and created various charges upon the different properties which formed the streets in which the improvements had been effected:—Held, that such charges as these were not within the contemplation of the Lands Charges Registration and Searches Act, 1888, and consequently did not

require registration. *Reg.* v. *Holt* or *Vice-Registrar of Land Registry*, 59 L. J., Q. B. 113; 24 Q. B. D. 178; 62 L. T. 117; 38 W. R. 236; 54 J. P. 120.

**Assessment—Apportionment of Expenses—"Charge," when it Commences.**]—By the leases in 1875 and 1877, of two houses abutting on a private road, the lessee covenanted to pay all rates and taxes and to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life, he paying "all outgoings and performing the covenants in the leases," and after his death upon trust for the son absolutely. In July, 1884, the local board served notices on the father under s. 150 of the Public Health Act, 1875, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with, and the board themselves did the work, which was completed in February, 1885. In June, 1885, the father died and the son entered into possession of the houses. In September, 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road, and in February, 1887, he was served with demands and orders for payment of the assessed amounts by instalments, with interest:—Held, in an action by the son claiming payment of the assessed expenses out of the father's estate, (1) that the expenses were not a debt due from the father's estate, inasmuch as the relation of debtor and creditor was not created by the Public Health Act, 1875, between the board and an owner of property for expenses incurred by the board; and (2) that the charge of the expenses under s. 257 could not be recovered by the son against the estate of the tenant for life. *Boor, In re, Boor* v. *Hopkins*, 58 L. J., Ch. 285; 40 Ch. D. 572; 60 L. T. 412; 37 W. R. 349; 53 J. P. 467.

**Notice—Service by Post.**]—Sect. 267 of the Public Health Act, 1875, provides for the service of notices thereunder "by post by a prepaid letter." An affidavit by the sender of a particular notice by letter stating that he wrote and addressed the letter and put it into the post himself, but omitting to say that it was a "prepaid letter," is therefore not sufficient evidence of service under the act. *Walthamstow Urban District Council* v. *Henwood*, 66 L. J., Ch. 31; [1897] 1 Ch. 41; 75 L. T. 375; 45 W. R. 124; 61 J. P. 23.

## V. RATES.

### 1. How Made.

**Seal and Signatures.**]—The absence in the rate-book of the seal of the local board of health, and the signature of five of its members, as required by 11 & 12 Vict. c. 63, s. 149, in the case of a non-corporate district, is a fatal objection to the validity of a district rate under that act. *Reg.* v. *Worksop Local Board*, 5 B. & S. 951; 34 L. J., M. C. 220; 11 Jur. (N.S.) 1015; 10 L. T. 297; 13 W. R. 253. And see *S. C.*, 12 W. R. 710.

**Mode of Estimate.**]—The estimate for a rate, required by s. 98, may be both for prospective and retrospective expenses; at least, if the latter are within the six months limited by s. 89. *Ib.*

A rate may be made retrospectively by a local board, in order to raise money for the payment of charges and expenses that may have been incurred more than six months, notwithstanding the 11 & 12 Vict. c. 63, s. 89, provided that, under the circumstances, the delay is excusable, and shewn not to be undue. *Worthington* v. *Hulton*, 6 B. & S. 943; 35 L. J., Q. B. 61; L. R. 1 Q. B. 63; 12 Jur. (N.S.) 73; 13 L. T. 463; 14 W. R. 632.

**Under Local or General Acts.**]—By the Walsall Improvement and Market Act, 1848, commissioners had power to levy an improvement rate within a district not comprising the whole municipal borough as afterwards constituted, but the act contained a proviso that the occupiers of land used as a railway should be assessed in proportion only of one-fourth part of the net value. The Public Health Acts, 1872 and 1875, formed the whole municipal borough of Walsall into an urban sanitary district:—Held, that the assessment ought to be made under the local act and not under the Public Health Acts. *L. & N. W. Ry.* v. *Walsall Overseers*, 48 L. J., M. C. 166; 4 App. Cas. 467; 41 L. T. 106; 28 W. R. 52—H. L. (E.)

The effect of the order of the general board of health and of the 11 & 12 Vict. c. 63, is to repeal the rating powers given by local acts. *Elmer* v. *Norwich Local Board*, 3 El. & Bl. 517; 2 C. L. R. 886; 23 L. J., Q. B. 203; 18 Jur. 870; 2 W. R. 306.

**Joint Board—Component Districts—Special Expenses—Apportionment.**]—A provisional order of the local government board, confirmed by a local act, provided that the expenses incurred by the joint board for the district should be defrayed out of a common fund, to be contributed by the component districts in manner provided by s. 283 of the Public Health Act, 1875, and that the contributions of certain of the component districts should be contributed and raised as if they were required to defray "special expenses" within the meaning of the Public Health Act, 1875:—Held, on a special case, that the joint board should apportion the contributions of the component districts according to the ratable values of the properties in such districts, to be ascertained according to the valuation list, and that the ratable values of tithes, tithe commutation rent-charges, land used as arable, meadow or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water, or used as a canal or towing path, or as a railway, should be taken at the full value appearing in the valuation list, and not at one-fourth thereof. *Darenth Main Valley Sewerage Board* v. *Dartford Union*, 56 L. J., Q. B. 615; 19 Q. B. D. 270; 57 L. T. 233; 36 W. R. 43.

### 2. Validity Generally.

**Effect of Repeal of Act on.**]—Notice was given by a local board of health of an intention to make a rate under the Public Health Act, 1848, and amending acts. Before the notice had expired these acts were repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), which contained a saving of "anything duly done" under the repealed enactments, and gave power to make a similar rate upon giving a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed acts:—Held, that the rate was valid, the notice being a "thing duly done," and the accidental reference in the rate to the repealed acts being immaterial to its validity. *Reg.* v. *West Riding of Yorkshire JJ.*, 45 L. J., M. C. 97; 1 Q. B. D. 220; 35 L. T. 358.

**When Transfer of Powers to Corporation Invalid.**]—By a provisional order of the general board of health, in pursuance of 11 & 12 Vict. c. 63, a local board of health was constituted for a parish, the parish consisting partly of a town and partly of a rural district without the town. Under the order the rating powers of the board were, in the first instance, confined to an area conterminous with the town, but with power to the local board from time to time to extend the area, so as to bring into it other portions of the outlying district. The town was subsequently incorporated, whereupon the local board, under 20 & 21 Vict. c. 50, s. 2, transferred their powers to the borough corporation, which afterwards sought to extend its powers to the rural parts of the district, and made a general district rate over the entire parish. To this rate a person was assessed as owner and occupier of property in the parish, but out of the limits of the borough:—Held, that the local board, not being trustees for executing an act for lighting and paving under 20 & 21 Vict. c. 50, s. 2, the transfer by them to the corporation was invalid, and that the corporation, therefore, had no power to make the rate. *Swinford* v. *Keble*, 7 B. & S. 573; 35 L. J., Q. B. 185; L. R. 1 Q. B. 549; 12 Jur. (N.S.) 783; 14 L. T. 770; 14 W. R. 858.

**Provisional Order conflicting with Special Act.**]—The general board of health made a provisional order extending the 11 & 12 Vict. c. 63, to Tynemouth, a district within which were parts of the North Shields turnpike roads, made under local turnpike acts. A local sanitary act also applied to the district. The provisional order altered the local sanitary act, and directed, that, from and after the passing of any act of parliament confirming that order, s. 50 of the Towns Clauses Act, 1847, should be incorporated with the local sanitary act. The order was confirmed by statute, so far as authorised by the Public Health Act. The Towns Clauses Act, s. 50, forbids trustees of any turnpike road from levying toll within the limits of the special act. The surveyor of the local board of Tynemouth, by their order, removed the North Shields turnpike gates within the district. The clerk of the turnpike trustees sued him in trespass for so doing:—Held, by Coleridge, Erle, and Crompton, JJ., that the fact of the order incorporating the Towns Improvement Clauses Act, s. 50, was not authorised by 11 & 12 Vict. c. 63, and was void; and the plaintiff had judgment. Lord Campbell, C.J., dissentiente. *Clayton* v. *Fenwick*, 6 El. & Bl. 114; 25 L. J., Q. B. 226; 2 Jur. (N.S.) 635.

**Retrospective Rate—Balance of past Debt.**]—A retrospective rate is, as a rule, bad, whether made to meet expenses incurred in constructing and cleaning sewers, or in the relief of the poor. A rate made in 1885 for sewerage work done under the Public Health Act of 1872 held bad. *Saul* v. *Wigton Sanitary Authority*, 56 L. T. 438; 35 W. R. 252; 51 J. P. 406.

### 3. Lighting and Watching.

**Lighting—Special District Rate—Discretion.**]—A local board of health laid out sums of money in permanent improvements, and, for defraying the expense, borrowed money on mortgage of the special district rates. The permanent improvement consisted in works for lighting a town within the district, for supplying it with water, and for sewerage. A large part of the district, owing to the inclination of the ground and the character of the occupation, derived no direct or immediate benefit from these works. To defray the expenses, and to raise the interest and instalments of the debt, the local board laid a special district rate on the whole district, under 11 & 12 Vict. c. 63, s. 86:—Held, upon an appeal against the rate, that the rate was valid; for that it was discretionary with the local board whether they would divide the district under s. 89, and, they not having done so, the rate under s. 86 was to be laid on the whole district. *Dorling* v. *Epsom Local Board*, 5 El. & Bl. 471; 24 L. J., M. C. 152; 1 Jur. (N.S.) 956; 3 W. R. 576.

**Lighting and Watching under 3 & 4 Will. 4, c. 90—Validity—New Appointment of Inspectors.**]—Where, under the powers conferred by 5 & 6 Will. 4, c. 76, s. 88, a council of a borough had taken upon themselves the office of inspectors, and afterwards abandoned it, and inspectors were again appointed under 3 & 4 Will. 4, c. 90:—Held, that this appointment was invalid; that the town council, having once elected to act as inspectors, could not afterwards abandon that office; and that a rate made by the inspectors last appointed was therefore void. *Quick* v. *St. Ives Churchwardens*, 2 L. T. 214; 8 W. R. 414.

—— **Act adopted by part of Parish—Rate on Whole.**]—The 3 & 4 Will. 4, c. 90, so far as related to lighting, was adopted by part of a parish only, and a rate was made which in its heading purported to be a rate on the whole of the parish; but the names only of persons liable to be rated were inserted in the rate:—Held, that the rate purported to be a rate for the whole of the parish, and as there was no power to make such a rate, it was a nullity; and that a fresh rate could be made for the same purpose the first was intended for without quashing the first. *Potton Churchwardens* v. *Brown*, 10 L. T. 525.

—— **Validity of Meeting.**]—A meeting of the rated inhabitants of a parish was held to determine whether the provisions of the act should be applied to the parish. The assent of as much as two-thirds of the voters was not given. Within a year a meeting was held of the inhabitants of a district of the parish to determine whether the act should be applied to that district, when two-thirds of the voters assembled. A rate was laid upon the district in conformity with this. S., one of the parties so rated, having refused to pay the rate, was summoned before the justices, when he objected that, the latter meeting having been held within a year of the former, the proceedings were void, and the rate invalid. The parties agreed that the question was whether the two meetings were substantially the same. The justices decided in the affirmative, and refused a warrant for levying:—Held, that the question was properly put before the magistrates, and that, they having determined it, the court could not, on a rule to order the justices to issue a distress warrant, review their decision, although S. had, before he was aware of the objection, paid a rate. *Reg.* v. *Dunn*, 7 El. & Bl. 220; 26 L. J., M. C. 74; 3 Jur. (N.S.) 341.

—— **Issue of Distress Warrant—Evidence.**]—Where a local authority has made a rate under the Lighting and Watching Act, 1833, and application is made to justices for a distress warrant,

the overseers need not prove that the formalities prescribed by the act for its adoption have been complied with. *Reg.* v. *Reynolds*, or *Frodsham JJ.*, 62 L. J., M. C. 120; [1893] 2 Q. B. 75; 5 R. 423; 69 L. T. 321; 42 W. R. 32.

Upon an appeal to quarter sessions from an order of justices issuing a distress warrant for nonpayment of a rate raised under the Lighting and Watching Act, 1833—which rate had been allowed and not appealed from—the quarter sessions, on the appellant shewing that certain formalities required by the act had not been complied with, allowed the appeal:—Held, that the quarter sessions were wrong in allowing the appellant to go behind the rate. *Clown Overseers* v. *Roberts*, 61 J. P. 7.

**Appeal.**]—An order for a rate under 3 & 4 Will. 4, c. 90, s. 32, can only be questioned by appeal under s. 66. *Reg.* v. *Rye JJ.*, 10 L. T. 525; 13 W. R. 142.

—— **Recognizances.**]—The 66th section of 3 & 4 Wm. 4, c. 90 (the Lighting and Watching Act) requires recognizances to be entered into by parties appealing against the appointment of inspectors, but no such requirement is made by the 67th section, which gives the right of appeal against a rate:—Held, that when an appeal is brought against a rate, on the ground that the appointment of inspectors is bad, the party appealing need not enter into recognizances. *Reg.* v. *Brecon JJ.*, 4 W. R. 117.

### 4. Highway.

**Liability—When Road not a Highway—Conditions.**]—A landowner in a district gave notice to the local board of health of his intention to dedicate a road as a highway; to which the local board replied that they would not adopt the road, as it had not been sewered, levelled, paved, flagged and channeled to their satisfaction. The landowner, however, obtained and enrolled the certificate of two justices, under 5 & 6 Will. 4, c. 50, s. 23, and the public then used the road, which was kept in repair by the landowner for twelve months; after which, it being out of repair, an indictment was preferred against the inhabitants:—Held, that the inhabitants were not liable, inasmuch as the road had not become a highway; for that, assuming s. 23 of 5 & 6 Will. 4, c. 50, to apply to the case, the road had not been made to the satisfaction of the local board, who were the surveyors. *Reg.* v. *Dukinfield*, 4 B. & S. 158; 32 L. J., M. C. 230.

Sects. 150 and 152 of the Public Health Act, 1875, are not correlative: in order that a local authority may declare a street, not repairable by the inhabitants at large of their district, to be a highway so that it may become repairable by such inhabitants, it is necessary that each of the works specified in s. 152 of the Public Health Act, 1875, shall, at the time of declaration, have been executed upon the street to the satisfaction of such authority. Local authorities have not under s. 152 any discretion as to which of the works mentioned in the section they will require to be executed. Their discretion is limited to their being satisfied with the efficiency of each description of work then done. *Att-Gen.* v. *Bidder*, 47 J. P. 263.

Semble, that kerbing a road does not answer the requirement in s. 152 that the road must be flagged—"flagged" meaning paved with flagged stones; and that wooden paving does not come within the meaning of any of the requirements of the section. *Ib.*

Where a local act required the consent of commissioners to new streets becoming highways to make the inhabitants liable to repair them, an order of the local board on owners to repair a street in respect of which such consent had not been given, is lawful, inasmuch as such street was not a highway repairable by the inhabitants at large. *Willes* v. *Wallington*, 13 C. B. (N.S.) 865: 1 N. R. 129: 32 L. J., C. P. 86—Ex. Ch.

And see *Austerberry* v. *Oldham Corporation*, ante, col. 379.

**In District under Public Health Act.**]—*See Cases*, sub 5, infra.

**Ambit of Township—Mutual Rights of Commissioners and Surveyors within.**]—Commissioners under a local act had power from time to time to ascertain and fix the limits of a township for the purposes of the act, and were authorised to levy rates not exceeding a certain amount for, among other objects, paving and repairing, the streets within such limits:—Held, that the commissioners could from time to time diminish as well as enlarge the ambit of the township for the purposes of the act; and that their powers of rating within the ambit so fixed were not exclusive of those of the highway surveyors, under the General Highway Act, 5 & 6 Will. 4, c. 50. *Villers* v. *Hargreaves*, 5 W. R. 595.

*See further*, sub tit. Way.

### 5. General District.

**For what Purposes justifiable.**]—A general district rate under Public Health Act, 1848, was made for the purposes, first, of defending a suit in chancery, instituted to restrain the local board from emptying a sewer into a certain canal; secondly, of defending a quo warranto against certain members of the local board, the validity of whose election was disputed; and, thirdly, of opposing (without the previous consent of the ratepayers) a bill in parliament for extending the powers of a gas company, within the district, which bill, notwithstanding such opposition, became law:—Held, that the rate was bad, as, although semble the defence to the bill in chancery was justifiable, the other two objects of the rate could not be supported. *Reg.* v. *Marris*, 5 W. R. 254.

**For Maintenance of Highways.**]—Although, by 11 & 12 Vict. c. 63, s. 117, the local board of health is invested with all the powers of surveyors of the highways, the money for the repairs of the highways in a district is to be raised by a general district rate under 11 & 12 Vict. c. 63, and not by a rate under the Highway Act, 5 & 6 Will. 4, c. 50. *Elmer* v. *Norwich Local Board*, 3 El. & Bl. 517; 2 C. L. R. 886; 23 L. J., Q. B. 203; 18 Jur. 870; 2 W. R. 306.

The expense of repairing the highways within a district, under the Public Health Act, 1848, must in all cases be defrayed by a district rate, a local board having no power to impose a highway rate. A wharf in possession of a railway company, with rails placed thereon, for the purpose of loading and unloading goods carried on the railway, and in respect of which the company charges wharfage as distinct from

carriage is properly rated under the above act at the full nett annual value as a wharf, and not at the reduced rate as a railway. *South Wales Ry.* v. *Cardiff Local Board*, 6 W. R. 58.

A local board of health having made a general highway rate instead of a district rate, for the repair of the highways in a parish, an action was brought against the clerk of the board to try the validity of the rate, and a verdict taken, subject to a special case, with liberty to the parties to treat the decision as the ruling at nisi prius, before the passing of the 17 & 18 Vict. c. 69; the case was stated after the passing of that act:—Held, that the court was bound to direct a verdict for the plaintiff, for the amount of the highway rate, notwithstanding that act. *Barber* v. *Jessopp*, 1 H. & N. 578; 26 L. J., Ex. 186; 5 W. R. 366.

—— **Several Parishes in One District.**]—Where several parishes or places separately maintaining their own highways, are comprised in the district assigned to a local board of health, the highways throughout the district were, under 11 & 12 Vict. c. 63, s. 87, to be maintained by a general district rate, and not by separate highway rates on the ancient divisions. *Moseley* v. *Ely Local Board*, 6 El. & Bl. 518; 26 L. J., M. C. 23; 3 Jur. (N.S.) 42; 4 W. R. 607.

—— **Where District Conterminous with a Parish.**]—Where a district constituted under 11 & 12 Vict. c. 63, is conterminous with a parish, the local board has power by s. 117 to make a highway rate, under 5 & 6 Will. 4, c. 50, s. 27, for the expenses of repairing and maintaining the highways within the limits of the district, and are not bound to raise money for that purpose by a general district rate, under 11 & 12 Vict. c. 63. *Hansom* v. *Epsom Local Board*, 5 El. & Bl. 599; 25 L. J., M. C. 27; 2 Jur. (N.S.) 38; 4 W. R. 45.

The maintenance of the highways within the district of a local board must be provided for by a district rate, and not by a highway rate, whether the district is or is not conterminous with an ancient parochial division. *Taff Vale Ry.* v. *Cardiff Local Board*, 8 El. & Bl. 535; 6 W. R. 58.

—— **No Public Works of Paving, &c.**]—By s. 216, sub-s. 3, of the Public Health Act, 1875, it is provided that "where no public works of paving, water supply and sewerage are established in the district the cost of repair of highways in the district shall be defrayed out of a highway rate to be levied throughout the whole district by the urban authority as surveyor of highways." The appellants, a local district board, made a general district rate and a highway rate, and demanded the same from the respondents, who had constructed two compensation reservoirs in connection with the supply of water for the town of B. The respondents contended that the local board had no power to levy a highway rate, because in 1880 they laid down in their district a curbstone (about 300 yards long) as a coping to a cinder pathway of a carriage road:—Held, that putting down the curbstone did not constitute the establishment of public works of paving within the meaning of s. 216, sub-s. 3, of the Public Health Act, 1875, and therefore the appellants were entitled to levy a highway rate. *Ovenhope District Local Board* v. *Bradford Corporation*, 47 L. T. 344; 31 W. R. 322; 47 J. P. 21.

When an urban sanitary district was formed, and when the local board began in 1877 to take charge of the repairs of highways, there were some stone drains or culverts into which some houses sent their sewage, and into which storm water entered through gratings; but the board had not added to them, nor made any new works themselves. The board made a highway rate, and assessed occupiers thereto:—Held, that the existing drains sufficiently answered the description of public works within the 38 & 39 Vict. c. 55, s. 216, sub-s. 3, and therefore the expense of highway repairs should have been levied not by a highway rate, but by a general district rate. *Reg.* v. *Belper Local Board*, 46 J. P. 166.

—— **Parish comprising Three Townships.**]—A local board of health for a district consisting of a parish comprising three townships came within the description set out in the 3rd subsection of s. 37 of 21 & 22 Vict. c. 98, "where no public works of paving, water supply and sewerage are established," and the local board levied a district highway rate for one of the townships:—Held, that they had no authority to do so, for that the highway rate could alone be levied over the whole district. *Broughton Local Board, In re*, 12 L. T. 310.

**Repair of Turnpike Road—Local Act.**]—Where a portion of a parish constitutes a district under the 11 & 12 Vict. c. 63:—Held, that the board of health might be ordered to contribute to the repair of a turnpike road, within the district, under 4 & 5 Vict. c. 59, and might make a highway rate in the district for that purpose, notwithstanding a clause in a local turnpike act discharging the district from the expense of maintaining so much of the road as was situate within it. *Reg.* v. *Worthing and Lancing Roads Trustees*, 3 El. & Bl. 989; 2 C. L. R. 1678; 23 L. J., M. C. 187; 18 Jur. 907; 2 W. R. 478.

**Dedication of Road to Public—Setting out Proposed Road.**]—H., a lessee for a term of seventy-five years of a plot of building land, laid out, in 1865, a proposed road across part of the land, and built six houses on one side of it, but subsequently abandoned her intention of making the road, and, in 1874, demised the remainder of the land, including the site of the abandoned road, for use as a timber yard. The public had occasionally used the road from 1865 up to 1880, when the urban authority required H., as the owner of the houses abutting on the road, to sewer, flag and pave the same, and on the lessee declining to comply with this request, the urban authority executed the works:—Held, that the mere setting out of an intended road was not such an irrevocable act as that the person who did it, and allowed the public to traverse and use the road, was to be taken to have dedicated the same to the public; and that the urban authority had no right to cast upon the lessee the whole of the expense of sewering and paving the road. *Hall* v. *Bootle Corporation*, 44 L. T. 873; 29 W. R. 862.

**Nuisances Removal.**]—A nuisances removal committee, acting for any place under 18 & 19 Vict. c. 121, and entitled to be repaid their costs and charges in executing the act out of the poor rates, may call on the overseers to pay them the

amount of such costs and charges, without justifying the item to such overseers. *Reg.* v. *Ewell*, 9 W. R. 127.

**Amount of Assessment.**]—General district rates, made under the Local Government Act, are not required within the Union Assessment Act, 25 & 26 Vict. c. 103, s. 28, to be based on the poor-rate by reason of the option given to the local board by 21 & 22 Vict. c. 98, s. 56; and, therefore, they may still be based on a valuation made by order of the local board, if in their judgment the poor law valuation list under the union assessment act is an unfit criterion for making them. *North-Eastern Ry.* v. *Scarborough Local Board*, 38 L. J., M. C. 65; L. R. 4 Q. B. 163; 17 W. R. 574.

By 18 & 19 Vict. c. 121, s. 22, it is provided that the assessment shall in no case exceed 1*s.* in the pound on the assessment to the highway rate:—Held, that the assessment might exceed 1*s.* in the pound on the ratable value as assessed to the highway rate, if distributed over a term of years, but must not exceed 1*s.* in the pound on such ratable value for the current year. *Reg.* v. *Middleton Nuisances Removal Committee*, 1 El. & El. 98; 28 L. J., M. C. 41; 5 Jur. (N.S.) 622; 7 W. R. 37.

**Service of Demand Notice—Part of District not benefited by Works.**]—L. was owner of a dry dock which, in 1889, was included in the borough of N. It was one-and-a-half mile from the nearest highway, and three miles from any drainage, lighting, or paving. A general district rate on L. being made, and the district not having been divided under the Public Health Act, 1875, s. 211:—Held, (1) that the written demand of rate was sufficiently served by being delivered at L.'s chief place of business, though it was not part of the premises rated, and the notice was not proved to be served personally on L.; (2) that the mere fact that the dock was three miles from any paving, lighting, or drainage was no sufficient cause for nonpayment within s. 256. *Newport Corporation* v. *Lang*, 57 J. P. 199.

### 6. Liability.

#### a. Of Persons and Property Generally.

**Owner or Occupier.**]—The drainage board for a district incurred expenses in making surveys and plans for certain proposed works. The estimates for the proposed works amounted to more than 1,000*l.* The proprietors of one-half of the land dissented from the execution of these works, which were never carried out. The board made a general rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans:—Held, that the occupiers, and not the owners, were chargeable under the 24 & 25 Vict. c. 133, ss. 31, 38, with these expenses; and that the rate was properly made on the present value of the land. *Griffiths* v. *Longdon and Eldersfield Drainage Board*, 41 L. J., Q. B. 25; L. R. 6 Q. B. 738; 25 L. T. 126; 19 W. R. 1162.

The owners of small tenements are liable to be assessed in respect of them to rates for lighting and watching in parishes where the owners of such tenements are assessed to the poor rate under 13 & 14 Vict. c. 99, but only on the reduced scale prescribed by that act. *Reg.* v. *Lambert*, 2 C. L. R. 883.

**Landlord or Tenant.**]—*See* Landlord and Tenant (Covenants).

**Real Property.**]—Real property within the district of a local board of health cannot be assessed to a district rate, unless there is some person having such an occupation as would make him liable to the poor rate in respect thereof. *Hodgson* v. *Carlisle Local Board*, 8 El. &. Bl. 116; 4 Jur. (N.S.) 160.

**Churchwardens.**]—Under a local act for more effectually lighting and paving certain parts of Westminster, commissioners were empowered to make rates and assessments in respect of any cathedral, church, chapel, &c., according to the number of square yards of pavement or ground belonging to such cathedral, or church, &c., and to determine the same, and the rates and assessments to be levied or assessed upon or in respect of any other church, or any chapel, place of worship, hospital, school or other public building, wall or void space of ground, shall be paid by the churchwardens, chapelwardens, trustees, or owners or proprietors:—Held, that the churchwardens were personally liable to the commissioners for the rates, and the want of parochial funds did not exempt them from that liability. *Hopkinson* v. *Puncher*, 3 Ex. 95; 18 L. J., Ex. 6.

**Guardians.**]—By 21 & 22 Vict. c. 98, s. 55, it is provided that general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable for the relief of the poor. The guardians of the poor of an extra-parochial place, maintaining its own poor, situated partly within and partly without a borough, erected a workhouse in the part without the borough for the whole of the poor of the extra-parochial place. A local board of health constructed permanent works in the part without the borough, and made several general district rates to defray the cost of the works:—Held, that the guardians of the poor were ratable to the relief of the poor in respect of their workhouse, and consequently to the general district rate for defraying the expenses of the works. *Toxteth Park Guardians* v. *Toxteth Park Local Board*, 1 B. & S. 167; 30 L. J., M. C. 154; 7 Jur. (N.S.) 860; 4 L. T. 283; 9 W. R. 691.

**Premises outside District—Evidence.**]—Where a person is summoned for the nonpayment of a general district rate in respect of premises in his occupation, he is entitled to call evidence to shew that the premises are not situated within the area for which the rate is made. *Baglan Bay Tin Plate Co.* v. *John*, 72 L. T. 805.

#### b. Property Liable to Lower Rate.

**Railway — What included in.**]—The word railway in the proviso in 11 & 12 Vict. c. 66, s. 88, meant the way on which carriages actually go, including the line itself, the turntables and the sidings, and land used only for the purpose of supporting this way, as for embankments, &c., is within the proviso and to be assessed at the lower rate. But the adjuncts, such as stations and warehouses, though necessary for the working of the railway, did not form part of it within

the proviso, and land used for these latter purposes was assessable at its full nett annual value. *South Wales Ry.*, v. *Swansea Local Board*, 4 El. & Bl. 189; 3 C. L. R. 18; 24 L. J., M. C. 30; 1 Jur. (N.S.) 326; 3 W. R. 23.

The word "railway" in a statute for rating purposes includes not only the physical rails and the land upon which they rest, but also those things without which the railway could not be used as a highway. It does not, however, include those adjuncts which are necessary merely for the convenience of passengers, the question in each case being one of degree. *L. & N. W. Ry.* v. *Llandudno Improvement Commissioners*, 66 L. J., Q. B. 232: [1897] 1 Q. B. 287; 75 L. T. 659; 45 W. R. 350; 61 J. P. 55.

—— **Railway Wharf.**]—See *South Wales Ry.* v. *Cardiff Local Board*, ante, col. 515.

—— **Power of Local Board to alter Local Act.**]—A portion of a borough, consisting of the township of N. S. and parts of the townships of T., P. and C., were under the management of commissioners constituted under a local act. In 1849, the townships comprising the parliamentary borough of T. were incorporated, and the powers of the commissioners transferred to the corporation pursuant to 5 & 6 Will. 4, c. 76, s. 75. In 1851, the general board of health made a provisional order under 11 & 12 Vict. c. 63, which repealed the rating clauses of the local act, enlarged the area of that act, and extended its unrepealed provisions over the whole of the municipal borough. Also it applied s. 88 of 11 & 12 Vict. c. 63, except so much of it as provided that a railway and certain other property should be rated on one-fourth only of its annual value, the effect of which was to subject those parts of the line of railway which were not in the township of N. S. to a rating at full value. The order was confirmed by 14 & 15 Vict. c. 103, so far as it was authorised by 11 & 12 Vict. c. 63: —Held, first, that it was within the power of the board to repeal the rating clauses of the local act, enlarge its area, and extend its unrepealed provisions over the whole of the borough. *N. E. Ry.* v. *Tynemouth Corporation*, 9 B. & S. 616; 37 L. J., M. C. 183; L. R. 3 Q. B. 723.

Held, secondly, that the order was not authorised by 11 & 12 Vict. c. 63, s. 10, as it altered the provisions of that act with respect to rating different descriptions of property. *Ib.*

—— **Powers for lighting District—General and Special Expenses.**]—The local government board, acting under s. 276 of the Public Health Act, 1875, made an order that the provisions of s. 161 (relating to lighting streets, &c.) should be in force within part of the district of a rural sanitary authority, and that the said authority should be invested with all the powers, rights, duties, capacities, liabilities and obligations of an urban sanitary authority "under those provisions":—Held, that the effect of the order was to invest the said authority with the power of an urban authority to incur expenses under s. 161, but not to apply to it the conditions as to rating applicable under ss. 207–211 to an urban authority, and that inasmuch as the order did not declare the expenses incurred thereunder to be special expenses within s. 229, they were to be treated as general expenses:—Held, therefore, that a railway company was liable to be assessed to any rate made for meeting such expenses on the whole, not on one-fourth part only, of the nett value of land occupied as a railway. *Lancashire and Yorkshire Ry.* v. *Bolton Union*, 60 L. J., Q. B. 118; 15 App. Cas. 323; 63 L. T. 358; 54 J. P. 532—H. L. (E.)

—— **Rate in the Nature of General District Rate.**]—By 28 Geo. 3, c. 64, and 34 Geo. 3, c. 104, commissioners appointed under those acts, called improvement commissioners, were empowered to levy a rate not exceeding one shilling in the pound on the annual value of all houses, buildings and hereditaments within the town of Cambridge, for the purpose of carrying into execution certain specified improvements mentioned in those acts. At the time of the passing of those acts, and until 1856, the colleges and halls of the university, and also the corporation, were extra-parochial and not assessable to the above-mentioned rate. The respondents, acting as improvement commissioners, and as the urban sanitary authority, assessed the appellants, who were owners of land and property used as a railway within the district of the respondents, at the full nett annual value of such land and property, for the purposes of carrying into execution the provisions of the Cambridge improvement acts and of the Public Health Act, 1875: —Held, that the rate leviable by virtue of the Cambridge improvement acts was not "a rate in the nature of a general district rate leviable throughout the whole of the district," within the meaning of s. 207 of the Public Health Act, 1875: and that as regards so much of the rate levied on the appellants as was necessarily applicable to the purposes of the public health act, the appellants were liable to be assessed in the proportion of one-fourth only of the nett annual value of their land and property used as a railway within the district of the respondents. *G. E. Ry.* v. *Cambridge Improvement Commissioners*, 61 L. T. 243.

—— **"Land used only as a Railway"—Tramway.**]—The appellants occupied and worked certain tramways which ran through the streets of Swansea and communicated with a railway also worked by them:—Held, that the land occupied by the tramway was not land "used only as a railway" within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, so as to be entitled to be rated in the proportion of one-fourth part only of its nett annual value in respect of a rate levied under s. 210 of the above act. *Swansea Improvement Co.* v. *Swansea Sanitary Authority*, 61 L. J., M. C. 124: [1892] 1 Q. B. 357; 66 L. T. 119; 40 W. R. 283; 56 J. P. 248.

—— **Railway constructed under Act of Parliament.**]—By 21 & 22 Vict. c. 98, s. 55, the occupiers of land covered by water, or a railway constructed under the powers of any act of parliament for public conveyance, shall be assessed, in respect of the same, in the proportion of one-fourth part only of such nett annual value thereof:—Held, that a dock came under the description of "land covered by water," and that a railway constructed, under an act of parliament, for the transportation of traffic, and as accessory to the dock, but free to the public upon payment of certain rates and tolls, was a railway within the meaning of the proviso, although neither used nor intended for the conveyance of passengers. *Reg.* v. *Newport*

*Dock Company*, 2 B. & S. 708; 31 L. J., M. C. 266; 9 Jur. (N.S.) 73; 6 L. T. 456.

**Dock—Whether Ejusdem Generis with Land and Buildings.**]—The appellants were occupiers of docks, covering an area of 165 acres, of which ninety-five formed a wet dock or tidal basin, in a parish in which the provisions of the 3 & 4 Will. 4, c. 90, had been adopted. In a lighting rate the appellants were rated as "occupiers of houses, buildings and property other than land," within s. 33, at a rate three times greater than that at which the occupiers of land were rated:—Held, that the dock or basin was property ejusdem generis with houses and buildings, and therefore that the appellants were ratable at the higher rate. *Reg.* v. *Peto*, 5 Jur. (N.S.) 1209. *S. C.*, nom. *Peto* v. *West Ham*, 2 El. & El. 144; 28 L. J., M. C. 240; 7 W. R. 586.

—— **Land Covered by Water.**]—See *Reg.* v. *Newport Dock Co.*, supra.

—— **Railway Wharf.**]—See *South Wales Ry.* v. *Cardiff Local Board*, ante, col. 515.

**Land with Buildings thereon.**]—The question whether land with buildings upon it should be rated as "land," or as "buildings," or as "property other than land," under s. 33 of the Lighting and Watching Act, 1833, depends upon whether the buildings are to be considered as accessory to the land or the land to the buildings. *Crayford Overseers* v. *Rutter*, 66 L. J., Q. B. 506; [1897] 1 Q. B. 650; 76 L. T. 392; 45 W. R. 542; 61 J. P. 134.

Where buildings are erected upon land merely for the more convenient occupation and use of the land as a brickfield, the buildings are to be treated as accessory to the land, and the property should be rated as "land" at the lower rate mentioned in s. 33, unless it is shewn that the buildings are capable of separate assessment. *Ib.*

**"Land used as Market Gardens or Nursery Grounds."**]—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (*b*), "the occupier of any land used as . . . market gardens or nursery grounds . . . shall be assessed in respect of the same in the proportion of one-fourth part only of the nett annual value thereof." The appellant, a market-gardener and nurseryman, was the occupier of a piece of land upon which were built sixteen greenhouses or glasshouses, which practically covered the surface of the land; they were built on brick foundations, and were used by the appellant for the purpose of growing fruit and vegetables for sale in the course of his business:—Held, that the land with the greenhouses upon it constituted a market garden or nursery ground within the meaning of the act, and that the appellant was liable to be rated to the general district rate in the proportion of one-fourth part only of the nett annual value of the property. *Purser* v. *Worthing Local Board*, 56 L. J., M. C. 78; 18 Q. B. D. 818; 35 W. R. 682; 51 J. P. 596—C. A.

### c. Exemptions.

**Expenses for Sanitary Purposes.**]—By the Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 43, any limit imposed on or in respect of any rate by any local act of parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes:—Held, that this provision does not make ratable any premises which, under the local act, were altogether exempt from rates. *Walton Commissioners* v. *Walford*, 44 L. J., Q. B. 74; L. R. 10 Q. B. 180; 31 L. T. 825; 23 W. R. 292.

**Under 11 & 12 Vict. c. 63, s. 88.**]—The proviso contained in 11 & 12 Vict. c. 63, s. 88, as to the exemption of property, extended only to property exempted by a local act in respect of its kind, and not to property exempted by a local act in respect of its locality, as where the property was in an extra-parochial district. *Tait* v. *Carlisle Local Board*, 2 El. & Bl. 492; 18 Jur. 374. S. P., *Chelmsford Union* v. *Chelmsford Local Board*, 18 Jur. 376, n.

The proviso of s. 88 of Public Health Act, 1848, applied only where the exemption in the local act was in respect of the kind of property, and not where it was only in respect of its locality. *Luscombe* v. *Plymouth Local Board*, El. Bl. & El. 691; 27 L. J., M. C. 299; 4 Jur. (N.S.) 1234; 6 W. R. 745.

**"Public Charity," House used for Purposes of.**]—By a local improvement act, 6 Geo. 4, c. 132, s. 103, the commissioners of a town were authorised to make district rates for defraying the expenses of the act, provided that none of the rates or assessments which should be made by virtue of this act should be laid upon or in respect of "any houses or buildings used and occupied exclusively for the purposes of public charity":—Held, that an orphanage founded and used for the purpose of boarding, lodging, clothing and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants, but mainly by donations from the public, was open to such an extensive class of the community of the kingdom that the premises were used and occupied exclusively for the purposes of "public charity," within the proviso of the act, and therefore exempt from ratability under it. *Hall* v. *Derby Sanitary Authority*, 55 L. J., M. C. 21; 16 Q. B. D. 163; 54 L. T. 175; 50 J. P. 278.

**Borough Rates—Limitation of Amount by Local Act.**]—By the St. Helens improvement act, it is provided that no borough rate levied thereunder shall exceed in any year the sum of 1*s.* in the pound, provided that, with the consent of a majority of the persons liable to be rated thereto, the corporation may increase such rate above the amount by the act limited. The act further provides that no such increase shall be leviable upon the owner or occupier of any coal mine in respect thereof, or upon any person assessable in the proportion of one-fourth only of any rate, other than the highway rate, in respect of his property or of premises occupied by him:—Held, that this was not an exemption of property from ratability, but a limit imposed upon the borough rate leviable upon colliery, &c., property; and that, though the limit still exists so far as any rate leviable by the corporation for borough purposes is concerned, s. 227 of the Public Health Act, 1875, prevents its applying to rates leviable by the corporation for the purposes of the act, and that the corporation are unrestricted in the amount of any rate leviable

by them thereunder. *St. Helens Corporation* v. *St. Helens Colliery Co.* 48 J. P. 39.

### 7. Publication.

**Necessity for.**]—The 11 & 12 Vict. c. 63, s. 103, enacts that all rates made or collected under it shall be published in the same manner as poor-rates:—Held, that a rate made under the act was not null and void by reason of not having been so published; that, in a summons before justices to enforce it, the rate not having been appealed against, they were justified in refusing, as immaterial, evidence of non-publication, and that therefore the officer executing their distress warrant was protected by it. *Le Feuvre* v. *Miller*, 8 El. & Bl. 321; 26 L. J., M. C. 175; 3 Jur. (N.S.) 1255.

**Sufficiency of.**]—A lighting and watching rate for a township was made and published by affixing a notice to the door of the church or parochial chapel in the township, which was the only church where poor-rates had theretofore been published. There were two other churches of the established church in the township, one of which had been open about three years, and the other had been open just before the publication of the rate. There were also various dissenting chapels in the township:—Held, that the publication was insufficient under 7 Will. 4 and 1 Vict. c. 45. *Reg.* v. *Whipp*, 3 G. & D. 372; 4 Q. B. 141; 12 L. J., M. C. 64; 7 Jur. 194. See *Reg.* v. *Royds*, 1 New Sess. Cas. 456; 8 Jur. 1096.

### 8. Mandatory Proceedings to Enforce.

**Nature of—Judgment against Board—Charge within the Act.**]—Mandamus commanding a local board of health to make a rate for defraying a debt due to the prosecutors. On the record it appeared that the debt was due to the prosecutors, who commenced an action against the local board. The local board consented to a judge's order, under which judgment was signed with a stay of execution for several months. The prosecutors not having obtained satisfaction, the writ of mandamus was issued more than six months after judgment had been signed, but within six months of the time to which execution had been stayed. The local board resisted, on the ground that by 11 & 12 Vict. c. 63, s. 89, they had not power to levy retrospective rates, save for charges and expenses incurred within six months before the making of the rate:—Held, that a judgment obtained against a local board was a charge within the meaning of the act, and that a rate might be made to defray it within six months of that charge. *Reg.* v. *Rotherham Local Board*, 8 El. & Bl. 906; 27 L. J., Q. B. 156; 4 Jur. (N.S.) 261; 6 W. R. 248.

Held, also, that it was not beyond the authority of the local board to agree that execution should be stayed for a time, and that this having been done, the period within which the rate might be made was six months from the time when execution might first have been issued. *Ib.*

**Within what Time.**]—A mandamus lies to a local board of health to make a rate in aid of a judgment within six months after the judgment is obtained, though the action in which it was obtained is commenced more than six months after the claim accrued, if the delay in bringing the action is excused, and shewn not to have been undue delay. *Worthington* v. *Hulton*, 6 B. & S. 943; 35 L. J., Q. B. 61; 1 L. R. Q. B. 63; 12 Jur. (N.S.) 73; 13 L. T. 463; 14 W. R. 632.

**Commissioners Personally Liable — Statute of Limitations.**] — Commissioners under an improvement act were empowered to appoint a clerk and other officers, and to pay them reasonable salaries out of the moneys to be collected under the act, and power was given to levy rates for the purpose of paying the salaries of officers. The executors of B. sued the commissioners, the declaration alleging that the commissioners were indebted to B. for his agreed salary for his services as the clerk to the commissioners, and upon their retainer, and for other work and labour of B., as the attorney and solicitor of, and otherwise for, the commissioners, at their request, in and about the business of the commissioners, and for money paid by him for their use and on accounts stated; and that the debts and moneys were a charge upon any moneys and funds in the hands of the commissioners collected under the act; and if they should not have in their hands any such moneys and funds, then the debts became and were a charge upon a rate and assessment leviable under the act; and the executors demanded of the commissioners to pay the moneys due out of the funds in their hands, or to levy a rate under the act; and alleging a neglect and refusal, and claiming a writ of mandamus commanding the commissioners to pay or assess a rate:—Held, that the declaration was bad, it being consistent with the allegations that to part, at least, of the claim, the commissioners were personally liable, and the remedy by mandamus being therefore inapplicable. *Bush* v. *Beavan*, 1 H. & C. 500; 32 L. J., Ex. 54; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.

Held, also, that pleas of the statute of limitations and of the attorneys act, to so much of the debts and moneys as became due upon simple contract, were good. *Ib.*

**Cause of Action accruing within Six Years.**] — Commissioners under an improvement act became indebted to the plaintiffs for work done between 1848 and 1853. By a provisional order of the board of health, confirmed by a supplemental act, the 11 & 12 Vict. c. 63, was applied to the place, the powers of the commissioners under the local act were determined, and all the property of the commissioners was transferred to the local board of health, to be held on the same trusts and for the same purposes as by the commissioners. The order also declared that all debts contracted or payable by the commissioners should be satisfied by the local board out of such of the transferred property as would originally have been chargeable: provided that, if such property were insufficient, the deficiency should be charged upon the rates leviable under 11 & 12 Vict. c. 63, in the parts which would have been chargeable but for the order. Declaration by the plaintiffs against the local board, claiming a mandamus for the levying of a rate by the local board (the transferred property being insufficient) for the payment of the debt contracted by the commissioners under the local act: a plea, that the causes of action did not accrue within six years is bad. *Ward* v. *Lowndes*, 1 El. & El. 340; 29 L. J., Q. B. 40; 6 Jur. (N.S.) 247; 1 L. T. 268; 8 W. R. 81—Ex. Ch.

**Cause of Claim within Six Months.**]—A plea that the cause of claim, exclusive of the demand of a rate, did not accrue within six calendar months before suit, is bad, for s. 89 of the 11 & 12 Vict. c. 63, which gives the local board power to levy retrospective rates for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate, does not apply to rates for the payment of any of the debts contracted by the commissioners and by the provisional order, transferred to the local board. *Ib.*

A local board of health having erroneously made a special rate, B. paid his quota before the error was discovered; five years afterwards he commenced an action against the board to recover the money back, and obtained a judgment, and afterwards sued them on the judgment, demanding in his declaration a mandamus to them to make and levy a rate, for the purpose of satisfying the judgment:—Held, that, assuming the debt so contracted by the board was a charge within 11 & 12 Vict. c. 63, s. 89, B. was not entitled to a mandamus to levy a rate, as the original action was not commenced within six months after the charge was incurred. *Burland* v. *Kingston-upon-Hull Local Board*, 3 B. & S. 271; 32 L. J., Q. B. 17; 9 Jur. (N.S.) 275; 7 L. T. 316; 11 W. R. 33.

**Award of Compensation within Six Months.**]—A plaintiff in his declaration prayed a writ of mandamus to compel a board of health to levy a rate and pay him the amount awarded. The damage for which compensation was claimed occurred more than six months before the application, but the award was made within six months. The board resisted this, on the ground that the expenses for which it was sought to compel them to levy the rate had not been incurred within six months, within 11 & 12 Vict. c. 63, s. 89:—Held, that he was entitled to the writ, for that the six months must be reckoned from the time that the award was made. *Ringland* v. *Lowndes*, 15 C. B. (N.S.) 173; 33 L. J., C. P. 25; 9 L. T. 479; 12 W. R. 168. *S. C.* in Ex. Ch., post, col. 553.

**Possibility of Funds.**]—It is no answer to an application for a mandamus to levy a rate in such a case that the board may possibly have funds to pay the amount required, and that a fresh rate may not be necessary. *Ib.*

### 9. Misapplication of Rates.

**Injunction — Personal Liability.**] — When a local board of health misapplied the rates towards defraying the expenses of a bill in parliament, the court granted an injunction to restrain the further prosecution of the bill, which, however, had been abandoned before the hearing. The auditor had surcharged some of the members of the board with the amount paid for such expenses, and no order was therefore made on that part of the prayer of the information which sought to make them personally liable; but costs were decreed against them. *Att.-Gen.* v. *Tottenham Local Board*, 27 L. T. 440.

A member of the board, who proved that he had opposed the scheme embodied in the bill, was held not to be personally liable, and the information was dismissed as against him, with costs against the relator. *Ib.*

### 10. Appeal against Rates, and Proceedings.

**To Quarter Sessions—Claim to Prohibition.**]—The 11 & 12 Vict. c. 63, having been put in force within a borough, the local board made three several distinct rates, and assessed R. in sums amounting to 4*l.* 5*s.* 6*d.* in respect of premises occupied by him. He refused to pay the rates, on the ground that the greater portion of the premises occupied was not within the borough; he was thereupon summoned before two justices, who made an order whereby, after reciting the refusal to pay the rates, that the parties appeared before them, and having heard the matter of complaint, they adjudged him to pay the several rates with costs, and that if the several sums be not forthwith paid, that the same be levied by distress. He appealed against this order to the quarter sessions, who quashed the order, with costs, to be paid by the local board, who thereupon appealed to the queen's bench for a prohibition, on the ground that the appeal to the sessions would not lie:—Held, that as the matter was not free from doubt, the court ought not to grant a prohibition. *Ricardo, In re*, 2 H. & N. 257.

—— **Sum Adjudged exceeding 20s.**]—Semble, that the sum adjudged in s. 135 of 11 & 12 Vict. c. 63, means the sum in respect of which the adjudication was made, and therefore that the order of the justices was a matter or thing done by them, in which the sum adjudged exceeded 20*s.* within the meaning of that section. *Ib.*

**Jurisdiction of Justices—Rate on Mortgagor—Mortgagee in Possession.**]—The R. improvement commissioners made a rate in 1876 on P., the owner, for improvement expenses, and he paid part thereof and died, having, at the date of the rate, executed a mortgage to B. B. entered into possession in 1882, and in 1885 the justices issued a distress warrant against B. for the unpaid rate made on P.:—Held, that the justices had no power to issue a distress warrant against B., who was not named in the rate. *Rochdale Building Society* v. *Rochdale Corporation*, 51 J. P. 134.

—— **Sufficient Cause for Nonpayment.**]—A district rate, based on a new valuation list duly approved by the assessment committee, was levied on the property of the appellants by the respondents, under the powers of s. 211 of the Public Health Act, 1875. Subsequently the appellants obtained from the assessment committee a reduction in the valuation; but being still dissatisfied with the amount, they gave notice of appeal to quarter sessions. Pending the hearing of the appeal the respondents took out a summons under s. 256 of the Public Health Act, 1875, calling on the appellants to shew cause why the rate should not be paid:—Held, that the rate being based on a valuation which had been admitted by the assessment committee to be excessive, there was sufficient cause for nonpayment of the rate within the meaning of s. 256. *Sheffield Waterworks Co.* v. *Sheffield Corporation*, 55 L. J., M. C. 40; 54 L. T. 179; 34 W. R. 153; 50 J. P. 6.

On an application before justices for an order for payment of a rate under s. 265 of the Public Health Act, 1875, the rate being good on the face of it, and the property in respect of which the occupier is rated being within the district of the rating authority, the justices' duty is merely ministerial, and they have no jurisdiction to inquire into the validity of the rate. *Reg.* v. *Hannam*, 34 W. R. 355—C. A.

On an application under s. 256 of the Public Health Act, 1875, to enforce a general district rate, good on the face of it, the justices may not refuse to make an order for payment of the rate on the ground that there is a concurrent rate made for the same purpose. *Sandgate Local Board* v. *Pledge*, 14 Q. B. D. 730; 52 L. T. 546; 33 W. R. 565; 49 J. P. 342.

—— **Stating Special Case.**]—A special case may be stated by justices under the 33rd section of the Summary Jurisdiction Act, 1879, upon an application to enforce payment of a general district rate under the 256th section of the Public Health Act, 1875. *Ib.*

A. was assessed to a sewer's rate, made under a local act, incorporating 11 & 12 Vict. c. 63. He refused to pay the sum at which he was assessed; and upon the hearing of a complaint against him for such refusal, he objected that he was improperly rated, inasmuch as he derived no benefit from the sewers made under the local act. The justices ordered him to pay the rate; whereupon he required them to state a case:—Held, that they had no jurisdiction to do so; for that the proper course to be pursued by A., if he objected to the validity of the rate, was to appeal to the sessions. *Reg.* v. *Newman*, 29 L. J., M. C. 117; 6 Jur. (N.S.) 293.

**Objection forming Ground of Appeal.**]—A special district rate, good on the face of it, was duly made and published under 11 & 12 Vict. c. 63. On a summons before justices to enforce payment of it, it was objected that it was made for the purpose of paying off money advanced for works which were not permanent, for which alone a special district rate could be made, and the rate was therefore void:—Held, that the objection was ground only of appeal to the quarter sessions; and that the rate being unappealed against, the justices were bound to issue a warrant of distress. *Luton Local Board* v. *Davis*, 2 El. & El. 678; 29 L. J., M. C. 173; 6 Jur. (N.S.) 580; 2 L. T. 172; 8 W. R. 411.

**Order for Costs—Form of.**]—By a local act, commissioners were empowered to levy rates for the improvement of a town, payment of which might be enforced by distress under the warrant of a justice. The commissioners might sue and be sued by their clerk. Appeal to the sessions was given against any rate or order made, and the sessions had power to give costs to either party. No order, rate or judgment was to be quashed for want of form, or removed by certiorari. A justice made an order upon B. for payment of a rate which had been made, and B. appealed to the sessions; the sessions by judgment given after 12 & 13 Vict. c. 45, dismissed the appeal, and directed the appellant to pay costs to the clerk of the commissioners; semble, that this was right, and that it was not necessary that the order should be to pay the costs to the clerk of the court, under 11 & 12 Vict. c. 43, s. 27, and 12 & 13 Vict. c. 45, s. 5. *Reg.* v. *Binney*, 1 El. & Bl. 810; 22 L. J., M. C. 127; 17 Jur. 854.

—— **Effect of Error.**]—But held that, supposing the order erroneous in this respect, it was a mere defect in form, and there was no want of jurisdiction, so as to bring the case out of the operation of the clause taking away the certiorari. *Ib.*

**Application for Warrant—Formal Order.**]—Upon an application for a warrant under s. 103 of 11 & 12 Vict. c. 63, the justices are not required to draw up any formal order. *Reg.* v. *Tottenham Local Board*, 1 L. T. 413.

**Bankruptcy—Preferential Claim.**]—On 12th Jan., 1887, at the time of filing his petition the bankrupt was tenant of a house under a lease for twenty-one years. The trustee in bankruptcy did not disclaim, but on the 1st Feb., 1887, he sold his interest in the lease, the bankrupt remaining in occupation as tenant under the purchaser. There was due from the bankrupt at the date of the receiving order a local board rate made on 8th October, 1886, for the half-year from the 30th September, 1886, to 25th March, 1887, and payable in advance:—Held, that the estate of the bankrupt was liable to pay the rate for the whole half-year. *Ystradfodwg Local Board, Ex parte, Thomas, In re*, 57 L. J., Q. B. 39; 58 L. T. 113; 36 W. R. 143; 4 Morrell, 295.

**Distress Warrant—Action in County Court—Bill of Sale—Priority.**]—The 14th section of the Bills of Sale Act (1878) Amendment Act, 1882, is confined in its operation to cases in which taxes or poor or parochial rates are being recovered by warrant of distress, and does not apply to cases in which execution is levied upon a judgment in an action brought for their recovery, so as to displace in such cases the prior right of the holder of a bill of sale to the goods taken in execution. *Wimbledon Local Board* v. *Underwood*, 61 L. J., Q. B. 484; [1892] 1 Q. B. 836; 67 L. T. 55; 40 W. R. 640; 56 J. P. 633.

*See also* RATES — SEWERS — METROPOLIS—WAY.

## VI. LIABILITY OF AUTHORITIES.

### 1. ACTIONS.

#### a. Negligence.

**Nonrepair—Of Highway.**]—The combined effect of 10 & 11 Vict. c. 34, ss. 47, 48, is to vest the management of highways in commissioners, and to clothe them with the powers and liabilities of surveyors of highways; and commissioners neglecting to repair highways are to be deemed guilty of a misdemeanour, and liable to be indicted. Commissioners having obtained a special act incorporating the act:—Held, that an action lay against them in their corporate capacity, at the suit of a person who met with an injury in consequence of the nonrepair of a highway, within the limits of a special act. *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361; 33 L. J., Q. B. 39; 10 Jur. (N.S.) 257; 8 L. T. 574; 11 W. R. 963.

A local board, being the highway authority of the district, are not liable for damages caused to a person in consequence of the highway being

out of repair, where such nonrepair is a mere nonfeasance. *Gibson* v. *Preston Corporation* (L. R. 5 Q. B. 218) followed and approved. *Cowley* v. *Newmarket Local Board*, 62 L. J., Q. B. 65; [1892] A. C. 345; 1 R. 45; 67 L. T. 486; 56 J. P. 805—H. L. (E.)

C., who was the owner of certain cottages in a public highway, received a notice from the defendants under the Public Health Act, 1875, requiring him to connect the drains of his cottages with the main sewer, and in compliance therewith he dug a trench in the road and made the connection to the satisfaction of the defendants' surveyor, and he then filled up the trench. The soil afterwards subsided, and the subsidence was the cause of an accident to the plaintiff while driving in a pony cart. The defendants were the sewer authority and the highway authority of the district. In an action for damages for personal injuries:—Held, that the defendants were not liable as the sewer authority, on the ground that the notice did not constitute C. their agent; nor as the highway authority, on the ground that no action would lie against a local board for personal injuries arising from the non-repair of a highway. *Steel* v. *Dartford Local Board*, 60 L. J., Q. B. 256—C. A.

—— **Of Footway.**]—A local board of health is not liable to an action for permitting a public footway in their district to be out of repair, whereby the plaintiff was injured. *Gibson* v. *Preston Corporation*, 10 B. & S. 942; 39 L. J., Q. B. 131; L. R. 5 Q. B. 218; 22 L. T. 293; 18 W. R. 689.

—— **Of Fencing near Public Path.**]—A local board left unfenced a goit adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned:—Held, that the local board was not liable under s. 83 of the Towns Improvement Clauses Act, 1847, as the goit was not a hole within the meaning of that section (which refers to holes caused in the construction and repair of houses); nor under s. 68 of the Public Health Act, 1848, since that section only gives a discretionary power to the local board to place and keep in repair fences, and does not impose upon them an absolute duty to do so. *Wilson* v. *Halifax Corporation*, 37 L. J., Ex. 44; L. R. 3 Ex. 114; 17 L. T. 666; 16 W. R. 707.

Held, also, that under s. 139 of the Public Health Act, 1848, the local board was entitled to notice of action; the alleged cause of action being the continued nonperformance of a duty imposed upon them by the act, and therefore a thing "done or intended to be done" under the provisions of the act, within the meaning of that section. *Ib.*

The 10 & 11 Vict. c. 34, s. 52, imposes on the commissioners under that act an obligation to place fences on the footways for the protection of foot passengers. *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743; 33 L. J., Q. B. 296; 10 Jur. (N.S.) 1048; 12 W. R. 1079.

**In Repairing Highways.**]—A local board of health which was both the highway authority and the sewer authority of the district, employed a contractor to construct a pipe-sewer under a highway within the district. The contractor in the laying the pipes dug a trench, which he afterwards filled in with earth, and the roadway was apparently made good. The work was done under the directions and to the satisfaction of the surveyor of the local board. Some months after it was finished a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. The plaintiff's horse, in consequence of the surface giving way, fell into the trench, and was injured:—Held, that there was evidence that the work of filling in the trench had been negligently and improperly done, and that the local board, either as the sewer or the highway authority, or as both, was responsible. *Smith* v. *West Derby Local Board*, 47 L. J., C. P. 607; 3 C. P. D. 423; 38 L. T. 716; 27 W. R. 137—C. A.

—— **Stones on Highway — Negligence of Servant.**]—A local board, being surveyors of highways, are liable to an action at the suit of a person who, when passing along the highway, is injured by reason of the servants of the local board negligently leaving a heap of stones upon the highway. *Foreman* v. *Canterbury Corporation*, 40 L. J., Q. B. 138; L. R. 6 Q. B. 214; 24 L. T. 385; 19 W. R. 719.

A man driving his cart along a highway on a dark night, and using due care, came in contact with a heap of stones placed on and at the side of the carriage road, without any light to enable the obstruction to be seen. The heap had been so left by the negligence of the persons employed to repair the road by the corporation of the town, under the superintendence of the surveyor appointed by them in their capacity as constituting the local board of health of the borough:—Held, that he had a right of action against the corporation, so constituting such local board of health, as the persons by whose negligence the stones were left on the highway were their servants, and that, although the corporation would not be liable merely in their capacity of surveyors of highways under 11 & 12 Vict. c. 63, s. 117, they were not relieved by that section from their ordinary common law liability for the negligence of the servants whom they employed. *Ib.*

**Non-repair of Drain under Highway.**]—The municipality of B., incorporated under New South Wales Acts No. 13 of 1858 and No. 12 of 1867, and having thereunder the care, construction and management of the roads and streets within their municipality, constructed therein a barrel drain into which ran an open drain, the brickwork of which having broken away, and not having been repaired, a hole was caused, into which the plaintiff's horse fell. In an action claiming damages against the municipality, (a) for negligence in constructing the street, (b) for negligence in keeping and maintaining the street, and not repairing the drain, gutter, or sewer in the said street (plea the general issue), the chief justice directed the jury that the defendants under their act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and they did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it; and, further, that if the defective state in which the drain was arose from

the operation of the weather, or wear and tear, it having been properly constructed originally, they were not liable. Verdict for defendants:—Held, on motion for a new trial, that as regards (b) there was misdirection. The barrel drain was not only made by the defendants, but the sole control and management of it were by the statute vested in them. By reason of their construction of that drain and their neglect to repair it, whereby, as an indirect but natural consequence, the dangerous hole was formed, which was left open and unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, and also to an action by the plaintiff, who sustained direct and particular damage from their breach of duty. *Bathurst (Borough)* v. *Macpherson*, 48 L. J., P. C. 61; 4 App. Cas. 256—P. C.

**In Management of Highway—Limitation of Action.**]—An urban authority constituted the surveyor of highways by s. 144 of the Public Health Act, 1875, is not liable to be sued for negligence in the management of highways, unless the action be commenced within three months; the limitation under s. 109 of the Highways Act, 1835, and not that under s. 264 of the Public Health Act, 1875, being applicable. *Taylor* v. *Meltham Local Board* (47 L. J., C. P. 12) and *Kay* v. *Atherton Local Board* (42 J. P. 792) overruled. *Burton* v. *Salford Corporation* (11 Q. B. D. 286), followed. *Graham* v. *Newcastle-upon-Tyne Corporation*, 62 L. J., Q. B. 315; [1893] 1 Q. B. 643; 4 R. 358; 69 L. T. 6; 41 W. R. 424; 57 J. P. 596—C. A.

**Negligent Work—Projection of Cover of Water Valve.**]—The iron cover of a valve connected with a water main was properly fixed in a highway by the defendants, but in consequence of the ordinary wearing away of the highway, the valve cover projected an inch above it. The plaintiff's horse using the highway stumbled over the valve cover and was hurt. In an action against the defendants, who were both the water authority and the highway authority, for the injury to the horse:—Held, that it was the duty of the defendants to make such arrangements that works under their care should not become a nuisance to the highway, and that the plaintiff was entitled to recover. *Kent* v. *Worthing Local Board*, 52 L. J., Q. B. 77; 10 Q. B. D. 118; 48 L. T. 362; 31 W. R. 583; 47 J. P. 23.

—— **Projection of Sewer Gratings.**]—A local authority which, under the Public Health Act, 1875, has vested in it both the highways and the sewers of the district, and the control and management of the same, is not civilly liable for an injury caused by a sewer grating that projects beyond the road surface if the grating is in proper repair and condition, and the accident is attributable solely to the non-repair of the highway. The fact that the local authority has the control of the sewers as well as of the highways does not render the local authority liable. *Kent* v. *Worthing Local Board* (10 Q. B. D. 118) overruled; *Moore* v. *Lambeth Waterworks* (17 Q. B. D. 462) discussed; *Cowley* v. *Newmarket Local Board* (1 R. 45) followed. *Oliver* v. *Horsham Local Board*, 63 L. J., Q. B. 181; [1894] 1 Q. B. 332; 9 R. 111; 70 L. T. 206; 42 W. R. 161; 58 J. P. 297—C. A.

—— **Defect in Fire-plugs—Act of Contractors.**]—By a local act a waterworks company, at the request of the commissioners, under an act for improving the town, was required to fix proper fire-plugs in the main and other pipes belonging to the company. By a section contained in the act, "the company shall, at the costs and charges of the commissioners, from time to time repair, renew, and keep in proper order every such fire-plug; and the costs of such fire-plugs, and the expense of fixing, placing, and maintaining the same in repair, shall be defrayed by the commissioners": The company having put down plugs in the streets, the commissioners paid for them, and by subsequent acts the plugs became the property of the local board of health. A horse was injured by getting its foot into one of the plugs, the cap of which was broken:—Held, that the company, and not the local board, was liable to an action for the neglect to repair. *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J., Ex. 57.

—— **Defect in Sewer Gratings.**]—As a person was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface water off the road into the sewer. The grid, being in a defective state, gave way, and the horse's leg was injured. He brought an action against the local board of health of the district, who are the surveyors of the highway by 11 & 12 Vict. c. 63, ss. 68, 117, and in whom also the sewers are vested under ss. 43, 45:—Held, that, though the local board might not be liable as surveyors of the highway, they were liable as owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state. *White* v. *Hindley Local Board*, 44 L. J., Q. B. 114; L. R. 10 Q. B. 219; 32 L. T. 460; 23 W. R. 651.

—— **Liability to Owner of Premises for Improper Construction of Drain.**]—When a local authority by agreement with the owner of premises constructs, so as to communicate with their sewer, a drain from his premises which they could have required him to make under s. 23 of the Public Health Act, 1875, such agreement is not ultrà vires, and they are responsible to him for any damage caused to his premises by the negligent construction of the drain. *Hall* v. *Batley Corporation*, 47 L. J., Q. B. 148; 37 L. T. 710.

—— **Action within Six Months.**]—The plaintiff's house was built in 1874. The defendants in 1883, acting under statutory powers, constructed a sewer under a road near the plaintiff's house, which, owing to the defendants' negligence in the construction of the sewer, was cracked and damaged. The cracks became gradually worse, and continued so doing till December, 1888, when the plaintiff brought an action to recover damages for the injury to his house:—Held, that the action had been commenced within six months after the accruing of the cause of action, and that the defendants were not protected by s. 264 of the Public Health Act, 1875:—Held, also, that although the plaintiff was not entitled to any right of support for his house by way of easement, yet the defendants were bound to use due care in the exercise of their powers, and were, therefore, liable for negligence. *Fairbrother* v. *Bury Sanitary Authority*, 37 W. R. 544.

**Neglecting to Provide Sewer.**]—See *Robinson* v. *Workington Corporation*, post, col. 543.

**Non-repair of Sewer—Overflow.**]—A local act (11 Geo. 4, c. 47, s. 58) empowered the Manchester Improvement Commissioners to cause such sewers as they should think necessary to be made, and when made to be repaired and cleansed. By a subsequent act (6 Vict. c. 17) the powers and property of the commissioners were transferred to and vested in the defendants. Sect. 36 of 14 & 15 Vict. c. 119, made it lawful for the defendants from time to time to cause to be constructed such sewers as they might think necessary, and also to cause such sewers to be repaired or cleansed as often as they might deem proper. A sewer, some forty years after it had been constructed by the commissioners under the powers conferred by the local act, and during a violent thunderstorm, burst under a cellar which communicated with a house of which the plaintiff was owner, and, flooding the lower rooms, finally caused the whole of the house to fall down. In an action against the defendants for the injury so caused, the jury found that the bursting of the sewer was caused by defects in its original construction, and by the omission of the defendants to take reasonable means to discover such defects; also that the ignorance of the defendants as to any defect in the sewer was due to the omission on their part to take reasonable means to discover it:—Held, that the defendants were under a legal duty to use the powers given them by statute to keep the sewer in proper order, and from time to time to inform themselves as to its condition. *Fleming* v. *Manchester Corporation*, 44 L. T. 517; 45 J. P. 423. Reversed in C. A.

Held, also, that their private acts gave them power to cause the sewer to be cleansed and repaired, and that the common law superinduced upon that power a duty to use it, and to use all reasonable means to inform themselves whether there was occasion to do so. *Ib.*

Held, also, that the findings of the jury shewed that the defendants omitted to perform this duty, and so were negligent. *Ib.*

In consequence of several overflows of sewage from a defective sewer belonging to the defendants, the plaintiff was compelled to leave his house, which he had taken for three years, five quarters before the expiry of his lease:—Held, that he was entitled to recover from the defendants as damages—(i.) the expense of moving, (ii.) rent for the five quarters for which he was liable to his landlord, (iii.) an amount in respect of physical discomfort caused to him during the whole of his tenancy, and (iv.) the actual expense caused in connection with illness in his family arising from the overflows of sewage. *Touzeau* v. *Slough Urban District Council*, 60 J. P. 103.

—— **When no Negligence.**]—Where works are made and maintained under statutory powers by a public body for the benefit of the public or of a section of the public, and a member of the public in exercise of the statutory rights given to him uses those works and suffers damage thereby, the liability arising therefrom must be determined by reference to the statute, and not as if the parties were strangers. A local authority is not liable for a nuisance caused by the overflow of a sewer under s. 19 of the Public Health Act, 1875, in the absence of negligence. *Stretton's Derby Brewery Co.* v. *Derby Corporation*, 63 L. J., Ch. 135; [1894] 1 Ch. 431; 8 R. 608; 69 L. T. 791; 42 W. R. 583.

**Diversion of Sewage into Surcharged Sewer.**]—The diversion by a local authority, in the execution of their statutory powers, of sewage from one drain or sewer into another already surcharged with sewage, whereby damage is occasioned to an individual occupier of premises, is not a mere act of omission in the performance of duties imposed by the Public Health Act, 1875, and therefore only a subject for compensation under s. 308, but is the commission of a legal wrong, in respect of which the occupier can maintain an action for the damage sustained. *Dent* v. *Bournemouth Corporation*, 66 L. J., Q. B. 395.

**Compulsory Purchase — Omission to take Lands.**]—When a local authority, in exercise of their powers, serve on the owner of land intended to be taken by them for the purposes of the Public Health Act, 1875, the notice required by s. 176 of that act, they are not bound to proceed with such notice. Their omission, therefore, to take the lands specified in such notice gives the owner of the lands no right of action against them, notwithstanding the confirmation of a provisional order empowering them to take such lands. *Burges* v. *Bristol Sanitary Authority*, 50 J. P. 455.

*See* NEGLIGENCE.

### b. Nuisance.

**In performing Duties.**]—Boards of health, in performing their statutory duties, cannot create a nuisance affecting a neighbour, or cast upon him a greater burden than he is bound to bear. *Att.-Gen.* v. *Acton Local Board*, 52 L. J., Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.

The proviso in the Towns Improvement Act, 1847, restraining the creation of nuisances, qualifies all the powers given by such act, and such a power incorporated in a subsequent act not mentioning the proviso is nevertheless subject thereto. *Att.-Gen.* v. *Leeds Corporation*, 39 L. J., Ch. 711; L. R. 5 Ch. 583; 19 W. R. 19.

**Acting in Excess of Powers.**]—A local board of health constructed a sewer along the bank of a river, with trap-doors in it, communicating with the river. When the river was full, and water abundant, the board, by means of the trap-doors, drew the water off from the river, and let it into the sewer, for the purpose of flushing it. The place where the trap-doors were placed was at a part of the river above that on which a mill, occupied, was situated. On one occasion the board made a hole in the bottom of the river, and so let the stream run into the sewer for nearly two days continuously, during that time abstracting the water of the river in such quantities that the mill ceased working for want of water:—Held, that the acts of the board were in excess of the powers given them by statute; that they had injuriously affected the river; and that the owner of the mill might have brought an action for the wrong, and also, in such action, obtained an injunction against the continuance of it; that he was therefore an individual entitled by law to prevent or be relieved against the injuriously affecting the river, within 21 & 22 Vict. c. 98, s. 73; and, consequently, that he could not sustain a mandamus against the board to summon a jury to assess him compensation. *Reg.* v. *Darlington Local Board*, 6 B. & S. 562;

35 L. J., Q. B. 45 ; 10 Jur. (N.S.) 1196 ; 10 L. T. 603 ; 13 W. R. 789—Ex. Ch.

**Sending Sewage into Adjoining Districts.**]—Notwithstanding the obligation imposed on a local board by the Public Health Act, 1875, to drain their district, their right to send the sewage of their district, directly or indirectly, into the sewers belonging to the sanitary authority of an adjoining district is, in the absence of express enactment or agreement, no higher than the right of a landowner to send sewage from his land on to the land or into the drains of a neighbouring landowner. If, therefore, a prescriptive right has been acquired to send some sewage from one district into the sewers of another, the burden cannot be increased without the consent of the sanitary authority of the latter district. The ratio decidendi of *Metropolitan Board of Works* v. *L. & N. W. Ry.* (17 Ch. D. 246) applies to a local board just as it does to an ordinary landowner. *Att.-Gen.* v. *Acton Local Board*, 52 L. J., Ch. 108 ; 22 Ch. D. 221 ; 47 L. T. 510 ; 31 W. R. 153.

Injunction granted in the absence of proof of substantial damage, on the ground that the defendants by their pleading claimed a right to continue doing that which the court held they were not entitled to do. *Ib.*

In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorising or directing sewage from their district to flow into the sewers of the plaintiffs, the court granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains—(1) Because to do so would cause serious inconvenience to the district ; and (2) because it is doubtful whether a local board have power to stop up drains which they have once authorised to be connected with their sewers. And, inasmuch as the injunction granted applied only to the future, the court refused to suspend its operation. *Ib.*

**Improper Construction—Act of God.**]—In an action against a local board of health for damages sustained by an irruption of sewage caused by the sewers being improperly constructed, former applications by the plaintiff to the board for compensation on similar occasions, with their answers, awarding compensation, are admissible on his part, although the fact will not settle the question of responsibility for a particular sewer, coupled with the fact that on the occasion in question the board appeared only to dispute their liability on the ground that the occurrence was occasioned by an extraordinary storm, and with some (even though slight) evidence that it was caused by defective construction of the sewers, there will be sufficient evidence of liability. Nor will there be sufficient evidence that a storm was so extraordinary as to excuse the parties responsible for the sewers, unless the evidence extends over a considerable range of years, during which the sewers have been in existence. *Brown* v. *Sargent*, 1 F. & F. 112.

**Unauthorised Construction.**]—L., the owner of a meadow, received notice from the rural sanitary authority that they intended to enter and make a sewer under the meadow, and this being objected to, they entered forcibly. An action of trespass and injunction being brought by L., on the ground that the sewer would create a nuisance :—Held, that the order of justices mentioned in s. 305 of the Public Health Act does not apply when proceedings are taken under s. 16. *Lamacraft* v. *St. Thomas Sanitary Authority*, 42 L. T. 365 ; 44 J. P. 441.

Held, also, that the statute does not authorise a sewer which would cause a nuisance, and the injunction was granted accordingly, the jury having found that a nuisance would be created. *Ib.*

**Right to compel an Action against Third Party—Power of Local Board to stop Nuisance.**]—On a motion for an injunction to restrain a local board from allowing sewage to flow into a brook opposite the plaintiff's house, whereby a nuisance was occasioned, it appeared that the nuisance was in fact caused by C. P., not a party to the action, who had passed the sewage of his house into the brook through a pipe, which, by agreement with the defendants, he was only entitled to use for surface or rain water :—Held, that although the local board could not be compelled to construct an improved system of drainage except by mandamus, nor to bring an action for an injunction against a third party, particularly in cases where the legal right was doubtful, still where the third party was acting in violation of an agreement entered into with the local board to pass surface water only through the pipe, and where no special inconvenience would be caused to other neighbours, the plaintiff was entitled to an injunction against the defendants on the ground that they could themselves prevent any nuisance being caused, by stopping up the pipe which was being used in contravention of the agreement, under the powers given them by the public health act, and this, notwithstanding that they would be preventing the third party from exercising his right of passing surface water only through the pipe. *Att.-Gen.* v. *Dorking Guardians* (20 Ch. D. 595), distinguished. *Charles* v. *Finchley Local Board*, 52 L. J., Ch. 554 ; 23 Ch. D. 767 ; 48 L. T. 569 ; 31 W. R. 717 ; 47 J. P. 791.

**Pollution of Stream—Injunction.**]—An action was brought against a sanitary authority to restrain the pollution of a ditch running through the main street of a town past the plaintiff's lands into the sea. The ditch was covered over as it passed through the town, but was afterwards an open stream, and had been for many years seriously polluted. The plaintiff claimed an injunction to restrain the defendants, as the owners of the covered part of the ditch and as the sanitary authority of the district, from permitting any sewage or other noxious matter to come on to her lands or into her part of the ditch. In 1877 the attention of the defendants was called to the condition of the houses in two new streets, and they required the owners of those houses to improve their drains. The owners accordingly ran two drains down the two streets and made communications with the main sewer. These drains were made for the purpose of carrying off surface water, and were not connected with any privies, but in addition to the surface water the slops of the houses were allowed to be thrown down the drains. In 1885, in consequence of a complaint made to the defendants, notices were directed to be served upon the occupiers to divert all polluting matter from the sewer, and the inspector of nuisances was ordered to inspect all drains entering into the main sewer. The notices so served were all effective in causing an abatement of the nuisance

except four. Subsequent directions of the defendants as to cleansing the sewer were duly carried out, the effect of which was to diminish the pollution of it to some extent. The defence was, that the defendants had done everything in their power to prevent any nuisance from being occasioned to the plaintiff or her property; and that they were not responsible for the nuisance:—Held, that the defendants had done all they could to abate the nuisance of which the plaintiff complained, and were not responsible for it; but that the plaintiff's remedy, if any, was against the person who actually caused the nuisance:—Held, therefore, that the action could not be maintained. *Ogilvie* v. *Blything Sanitary Authority*, 67 L. T. 18—C. A.

**Cesspit "Sewer"—Vesting in Local Authority.**]—The plaintiff drained ten houses into a common cesspit, which was insufficient for the purpose, and by an act of trespass he carried the overflow across the land of a neighbouring proprietor into a river. The landowner having blocked up the overflow, which caused the sewage to flow back into the cesspit and create a nuisance, the plaintiff in March, 1891, sued the defendants, as the urban sanitary authority for the district, in respect of the nuisance:—Held, that the cesspit was not a sewer, or a work belonging thereto, so as to vest in the defendants, under s. 13 of the Public Health Act, 1875, and consequently that the defendants were under no liability to prevent the nuisance. *Meader* v. *West Cowes Local Board*, 61 L. J., Ch. 561; [1892] 3 Ch. 18; 67 L. T. 454; 40 W. R. 676—C. A.

**Supply of Water—Liability for, when Impure.**]—The defendants were empowered by a special act (32 & 33 Vict. c. 110), incorporating the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), with the exception of certain provisions, to supply water for domestic use within the limits and from the sources described in their act. By s. 66 of the special act the defendants were entitled to prescribe the material to be used for service-pipes by persons supplied with water, and by by-laws the defendants prescribed that the material might either be lead or cast-iron. Leaden service-pipes were, upon the application of the landlord of the plaintiff's house and of the plaintiff, laid down by the defendants, from their mains to the house at the expense of the landlord and the plaintiff. The service-pipes when laid belonged to the consumer of the water supplied through them. By the Waterworks Clauses Act, 1847, s. 35, "the undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special act, who shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." Water which was pure and wholesome in the mains of the defendants was supplied by them to the plaintiff, but in its passage from the mains through the service-pipes it was contaminated by the lead, and he, using the water, suffered from lead poisoning. He sued the defendants for injuries sustained from impure and unwholesome water:—Held, that he had no cause of action. *Milnes* v. *Huddersfield Corporation*, 52 L. J., Q. B. 64: 10 Q. B. D. 124; 47 L. T. 697; 31 W. R. 568. Affirmed, 53 L. J., Q. B. 12; 12 Q. B. D. 443; 50 L. T. 73; 32 W. R. 265—C. A.

**Local Authority acting under Direction of Local Government Board.**]—A hospital for small-pox was erected by the defendants, a body created under the Metropolitan Poor Act, 1867, and the plan pursued by them was sanctioned by the local government board. In an action by neighbouring occupiers for damages for a nuisance, the jury found that the hospital was a nuisance, and that the defendants had not exercised all proper and reasonable care in carrying it on:—Held, that the defendants would not be protected by the sanction of the local government board if what was sanctioned was not legal; and that the statute under which the defendants acted did not authorise the creation of a nuisance or interference with private rights. *Hill* v. *Metropolitan Asylums District Managers*, 50 L. J., Q. B. 353; 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 607; 45 J. P. 664—H. L. (E.). See also *Lamcraft* v. *St. Thomas Sanitary Authority*, supra, col. 536.

**Erection of Post.**]—The defendants as the highway and lighting authority had erected a post in the centre of a footpath, and near the post a lamp was placed, which was lighted at night. The plaintiff was injured by running against the post when the light was out or unlighted:—Held, that the defendants were liable. *Lumley* v. *East Retford Corporation*, 55 J. P. 133—C. A.

**Judgment for Costs against Authority—Execution—Land held on Trust for Contributory Place.**]—The plaintiff brought an action against the defendants, who were a rural sanitary authority, to restrain them from fouling a stream, and in 1885 recovered judgment against them with costs. The costs were not taxed until 1890. In 1891, the costs not having been paid, the plaintiff sued out a writ of elegit, under which an inquisition was taken, and the sheriff delivered in execution to the plaintiff certain lands which had been acquired by the defendants for the purpose of sewage works for the parish of N., a contributory place within their district, by means of money borrowed on the security of the separate rates of that parish. Upon motion by the defendants to set aside the writ and inquisition:—Held, that the lands in question were held by the defendants on trust for the parish of N., and could only be taken in execution for judgment debts exclusively chargeable against that place; that the costs of the action were "general expenses" not chargeable against that place or the separate rates levied within it, but against the common fund of the district; and that the judgment could only be enforced against property which had been acquired by means of that common fund. *Jersey (Earl)* v. *Uxbridge Sanitary Authority*, 60 L. J., Ch. 833; [1891] 3 Ch. 183; 64 L. T. 858.

**Encampment of Gipsies.**]—A piece of land was permitted by the owner to be occupied by gipsies and others in such numbers and in such a manner as to cause a nuisance to the neighbourhood:—Held, that an injunction should be granted to restrain the owner from allowing the land to be occupied in such a manner by such persons. *Att.-Gen.* v. *Stone*, 60 J. P. 168.

### c. Trespass.

A local board employed B. to manage its sewage farm. He had general powers of management, and was not interfered with by the board. Thinking to do good, he cut the plaintiff's land

on the bank of a stream to widen the stream :—Held, that the board was not liable for the trespass, inasmuch as B.'s authority was confined to the farm, and he acted beyond the scope of it. *Bolingbroke (Lord)* v. *Swindon New Town Local Board*, 43 L. J., C. P. 287 ; L. R. 9 C. P. 575 ; 30 L. T. 723 ; 23 W. R. 47.

And see *West Hartlepool Corporation* v. *Robinson*, ante, col. 379.

**By Engineer of Board.**]—Works were executed by the contractor of a drainage board, pursuant to contract with them and by their authority, under the superintendence of their engineer and his assistants, and according to plans and specifications prepared by the engineer, who directed and instructed the contractor, and was frequently present on the ground and saw the works in progress, but did not further interfere. Some of the works were admittedly acts of trespass to lands of the plaintiff, as the board had not obtained an assessment of compensation, or paid such compensation before entry :—Held, that the engineer was liable to the plaintiff for the trespass so committed. *Stone* v. *Cartwright* (6 Term Rep. 411) distinguished. *Monks* v. *Dillon*, 12 L. R., Ir. 321—C. A.

### d. Contract.

*See Cases* ante, cols. 369, *et seq.*

### e. Liability of Successors.

**Sanitary Authority succeeded by District Board.**]—A decree was made in 1875 against the corporation of B., as the sanitary authority of B., granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health or a nuisance to the plaintiffs ; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of that period the plaintiffs desired to enforce the injunction, but in the meantime the B., T. and R. District Board had been constituted under the Public Health Act, 1875 (38 & 39 Vict. c. 55), as the sanitary authority of the district in the place of the corporation of B. The plaintiffs brought an action against the B., T. and R. Board, claiming a declaration that they were entitled to the same benefit of the decree as against the defendants in the present action as if they had been defendants in the former suit. The defendants demurred :—Held, that the B., T. and R. Board were not made by the public health act subject to any liabilities of their predecessors except those attaching under the act, and were therefore not bound by the decree against them ; and that, there being no allegation of any nuisance committed by the B., T. and R. Board, the plaintiffs had no cause of action, and the demurrer must be allowed. *Att.-Gen.* v. *Birmingham Drainage Board*, 50 L. J., Ch. 786 ; 17 Ch. D. 685 ; 44 L. T. 906 ; 29 W. R. 793 ; 46 J. P. 36—C. A.

—— **Action to enforce Judgment.**] — The defendants were a local board constituted in November, 1875, under the Public Health Act, 1875. The plaintiff complained that for some time before and since the defendants became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it and cause a nuisance to him. He complained to the defendants in May, 1876, and nothing having been done he brought an action against them in July, 1876, for damages and an injunction : — Held, that, assuming that an actionable nuisance existed, as the defendants had themselves done no act to create or increase it, the plaintiff had no cause of action. *Glossop* v. *Heston and Isleworth Local Board*, 49 L. J., Ch. 89 ; 12 Ch. D. 102 ; 40 L. T. 736 ; 28 W. R. 111—C. A.

### f. Notice of.

**Act done under Provisions of Statute.**]—When injury was sustained by the insufficient buoying of a sunken anchor, which was part of certain works authorised by a local act, and which were to be executed subject to the provisions of the Public Health Act, 1848 : —Held, that notice of action under that act was necessary before bringing an action for such injury. *Jolliffe* v. *Wallasey Local Board*, 43 L. J., C. P. 41 ; L. R. 9 C. P. 62 ; 29 L. T. 582.

A local board left unfenced a goit adjoining a public footpath within their district, by reason of which the plaintiff's husband, while using the footpath, fell into the goit and was drowned :—Held, that under s. 139 of the Public Health Act, 1848, the local board was entitled to notice of action ; the alleged cause of action being the continued non-performance of a duty imposed upon them by the act, and thereupon a thing "done or intended to be done" under the provisions of the act within the meaning of that section. *Wilson* v. *Halifax Corporation*, 37 L. J., Ex. 44 ; L. R. 3 Ex. 114 ; 17 L. T. 666 ; 16 W. R. 707.

—— **Contractors.**]—The defendant contracted with a local board of health to dig wells for them according to a specification prepared by the surveyor, and the digging to be done entirely under his direction ; the surveyor to have power, if he considered the materials or works improper, of making the contractor remove them, or of removing them at the contractor's expense, and of ordering the dismissal of workmen with whom he should be dissatisfied, or of dismissing them himself ; the board to have the power of making alterations and additions. The defendant was sued for having left a hole excavated in working one of the wells, in a highway, without light, by night, whereby the plaintiff, who was driving a carriage along the way, fell into the hole, and was bruised, and his carriage injured :—Held, that the defendant was entitled to notice of action under 11 & 12 Vict. c. 63, s. 139. *Newton* v. *Ellis*, 5 El. & Bl. 115 ; 24 L. J., Q. B. 337 ; 1 Jur. (N.S.) 850 ; 3 W. R. 476.

**Action for Recovery of Land.**]—Sect. 264 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that no writ or process shall be sued out against any local authority for anything done or intended to be done under the provisions of the act until one month after written notice of action, &c., and that any person to whom any such notice of action is given may tender amends to the plaintiff within one month after the service of such notice—does not apply to an action for the recovery of land. *Foat* or *Holder* v. *Margate Corporation*, 52 L. J., Q. B. 711 ; 11 Q. B. D. 299 ; 47 J. P. 535.

**Action for Injunction—Damages in Substitution for.**]—Where an action against a sanitary authority was bonâ fide and in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, and he accordingly refused an injunction, but gave 25*l.* damages :—Held, that he had power to give such damages in substitution for an injunction in accordance with the chancery practice under Lord Cairns' act, though no notice of action had been given as required by s. 264 of the Public Health Act, 1875. *Chapman* v. *Auckland Union*, 58 L. J., Q. B. 504 ; 23 Q. B. D. 294 ; 61 L. T. 446 ; 53 J. P. 820—C. A.

**Mandatory Injunction—Nuisance by Erection of Urinal.**]—See *Sellors* v. *Matlock Bath Local Board*, infra, col. 544.

**Sufficiency of.**]—The notice of action under 11 & 12 Vict. c. 63, s. 139, stated that the plaintiff intended to enter a plaint against the defendants for the injury and damage caused to him through the defendants by matters or things done or omitted by them and their labourers and servants, to wit, that they did, by themselves, their labourers and servants, "negligently, carelessly, and improperly leave a certain portion of the highway in an insufficient and improper state of repair, whereby," &c. :—Held, that this was a sufficient intimation to the defendants that they were to be charged with an act of misfeasance, and not merely with a neglect of duty to repair the road. *Smith* v. *West Derby Local Board*, 47 L. J., C. P. 607 ; 3 C. P. D. 423 ; 38 L. T. 716 ; 27 W. R. 137—C. A.

**Several Documents.**] — The notice of action mentioned in s. 264 of the Public Health Act, 1875, need not be contained in one document : a series of letters will suffice if the cause of action is clearly stated, and the other requirements of the section are complied with. *Lamley* v. *East Retford Corporation*, 55 J. P. 133—C. A.

*See* PRACTICE.

### g. Limitation of Time.

**Accrual of Cause of Action.**] —The defendants, an urban sanitary authority, believing that a certain lane was not a highway repairable by the inhabitants at large, required the plaintiffs, as owners of land abutting on it, to execute certain works upon it, pursuant to the provisions of the Public Health Act, 1875 ; and on the plaintiffs failing to comply with the notice, the defendants did the work themselves, pursuant to s. 150 of the act, and charged the plaintiffs with their proportion of the expense thus incurred. The plaintiffs also believed that the lane was not a highway repairable by the inhabitants at large, and they therefore paid to the defendants the sum so claimed ; but on discovering afterwards that the lane was such a highway, and that the defendants were not entitled to require them to execute the works specified, they brought an action to recover the amount so paid by them. They gave notice of action a month before issuing the writ, but this notice was given and the action was begun more than six months after the payment made by them :—Held, that the plaintiffs could not recover the money thus paid, inasmuch as they were suing the defendants in respect of something "done or intended to be done or omitted to be done" under the public health act ; that the provisions of s. 264 of that act applied, and therefore that the action could not be brought more than six months next after the accruing of the cause of action. *Midland Ry.* v. *Withington Local Board*, 52 L. J., Q. B. 689 ; 11 Q. B. D. 788 ; 49 L. T. 489 ; 47 J. P. 789—C. A.

And see *Fairbrother* v. *Bury Sanitary Authority*, ante, col. 532.

—— **Continuous Subsidence caused by one Excavation.**]—The foundations of the plaintiff's houses, which fronted a street within the district of the defendants, an urban authority under the Public Health Act, 1875, rested upon an old ditch which crossed the street. The defendants, in excavating the street for the purpose of constructing a sewer along it, cut across the ditch, and, the excavations being lightly filled up, the oozy matter from the ditch, gradually escaping, carried away with it the sandy soil on which the foundations of the houses rested, and thereby set up a constant cause of subsidence. The defendants' works, which were negligently done, were completed in March, 1886. Cracks in the walls of the houses first appeared in March, 1886, and thenceforward continued to increase. The plaintiff having commenced an action in August, 1889, the defendants contended that his claim was barred by s. 264 of the Public Health Act, 1875, inasmuch as the action was not commenced within six months next after "the accruing of the cause of action" : —Held, that the cause of action in respect of damage sustained by the houses within six months prior to the commencement of the action did not accrue until that damage had occurred, and that in respect of such damage the plaintiff was entitled to recover, notwithstanding the lapse of six months from the completion of their works by the defendants. *Darley Main Colliery* v. *Mitchell* (11 App. Cas. 127) explained. *Crumbie* v. *Wallsend Local Board*, 60 L. J., Q. B. 392 ; [1891] 1 Q. B. 503 ; 64 L. T. 490 ; 55 J. P. 421—C. A.

**Laches.**]—As soon as certain drainage works were completed in 1854, a landowner complained of injury and called upon the town council to abate the nuisance. He was assured that steps were about to be taken to remedy the nuisance :—Held, that upon an application in 1858, the landowner had not precluded himself by laches from obtaining relief. *Att.-Gen.* v. *Birmingham Corporation*, 6 W. R. 811.

**Guardians of the Poor acting as Rural Sanitary Authority.**]—Sect. 1 of the act 22 & 23 Vict. c. 49, enacts that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. By s. 9 of the Public Health Act, 1875, the guardians of a rural union shall form the rural sanitary authority of that district, and "all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this act for the purposes of this act" :—Held, that s. 9 of the Public Health Act, 1875, does not extend the limitation of time

imposed by s. 1 of the previous act to debts contracted by guardians in their capacity of rural authority, but that that limitation still remains applicable only to debts contracted by guardians as such. *Dearle* v. *Petersfield Union*, 57 L. J., Q. B. 640; 21 Q. B. D. 447; 60 L. T. 85; 37 W. R. 113; 53 J. P. 102—C. A.

*See also Cases* sub tit. ACTION.

### h. Venue.

**Effect of Old Statutes.**]—Where in an action brought against a local board of health for a thing done under 11 & 12 Vict. c. 63, the cause of action occurred within a town and county, and a judge's order was obtained to change the venue to the adjoining county under 38 Geo. 3, c. 52, s. 1:—Held, that such order was properly made, for that the power of the court to make such order is not abrogated by 11 & 12 Vict. c. 63, s. 139. *Itchen Bridge Co.* v. *Southampton Local Board*, 8 El. & Bl. 803; 27 L. J., Q. B. 128; 3 Jur. (N.S.) 1261; 6 W. R. 75. *But see* Rules of Supreme Court, 1883, Ord. XXXVI. r. 1.

## 2. MANDAMUS AND INJUNCTION.

### a. When Applicable.

**Mandamus, and not Injunction, the Remedy for Neglect of Public Duty.**]—A local board, under the Public Health Act, 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can shew a justification under the powers of the statute. But if a local board do not act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus, and, semble, this jurisdiction, notwithstanding the 25th section of the Judicature Act, 1873, ought not to be exercised except by the queen's bench division. *Glossop* v. *Heston and Isleworth Local Board*, 49 L. J., Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111—C. A.

No action will lie against a local authority at the suit of an individual for mere nonfeasance in neglecting to perform the duty imposed upon them by s. 15 of the Public Health Act, 1875, to cause to be made such sewers as may be necessary for effectually draining their district, even though special damage may have been sustained in consequence of such nonfeasance. *Glossop* v. *Heston and Isleworth Local Board* (49 L. J., Ch. 89; 12 Ch. D. 102) and *Cowley* v. *Newmarket Local Board* (62 L. J., Q. B. 65; [1892] A. C. 345) followed. *Robinson* v. *Workington Corporation*, 66 L. J., Q. B. 388; [1897] 1 Q. B. 619; 75 L. T. 674; 45 W. R. 453; 61 J. P. 164—C. A.

**Mandamus—Neglect to enforce Orders.**]—Under 18 & 19 Vict. c. 121, the sanitary inspector for the local authority of a district obtained an order of justices for the abatement of a nuisance. The local authority was requested by the party aggrieved by the nuisance to take steps for enforcing the order, but did not do so. The court refused an application by the party aggrieved for a mandamus to compel the local authority to enforce the order. *Bassett, Ex parte, Ham Local Board, In re*, 7 El. & Bl. 280; 26 L. J., M. C. 64; 3 Jur. (N.S.) 136; 5 W. R. 290.

—— **Construction of Sewers.**]—The court will not grant a mandamus to compel a local board, established under the Public Health Act, 1848, to make such sewers as may be necessary for the purposes of that act, it being in the province of the court only to compel them to take the matter into consideration. *Reg.* v. *Maidenhead Local Board*, 4 W. R. 117.

—— **Complaint to Local Government Board—Inquiry.**]—The local government board had, under s. 299 of the Public Health Act, 1875, made orders calling upon two local sanitary authorities to perform their duty within six months in the matter of complaint in each order mentioned by executing works for the proper drainage of their respective districts. Inquiries had been held by an inspector of the board, who found default had been made, but had declined to admit evidence either as to the great difficulties and expenses attending any scheme of drainage for either district, or as to the probable cost of an efficient system of drainage if carried out. The local government board neither proposed nor suggested any definite scheme:—Held, that a mandamus must go calling upon the local authority to perform their duty in the terms of the orders. So long as there had been no legal error or omission of legal form it was not for the court to entertain questions as to whether there had been a due inquiry or whether the findings of the local government board were sufficient or not. *Reg.* v. *Staines Union*, 62 L. J., Q. B. 540; 10 R. 292; 69 L. T. 714; 58 J. P. 182.

An action for a mandamus to compel a local authority to provide necessary sewers for effectually draining their district in accordance with s. 15 of the Public Health Act, 1875, will not lie, the exclusive remedy for the default by the local authority in the performance of their duty being by complaint to the local government board under s. 299 of the act. *Peebles* v. *Oswaldtwistle Urban District Council*, 66 L. J., Q. B. 392; [1897] 1 Q. B. 625; 76 L. T. 315; 45 W. R. 454; 61 J. P. 308—C. A.

**Mandatory Injunction—Nuisance by erecting Urinal—Compensation—Notice of Action.**]—A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants, and to depreciate the value of her property:—Held, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants:—Held also, that it was not a matter in respect of which the plaintiff's remedy was by compensation under s. 308 of the act. In such a case notice of action under s. 264 is not required. *Sellors* v. *Matlock Bath Local Board*, 14 Q. B. D. 928; 52 L. T. 762.

—— **Erection of Kerb-Stones—Access to Land—Compensation.**]—The plaintiff owned land abutting upon the highway, upon which an inn and some stabling were erected. These stood back from the highway, and in front of them was an open space (forming part of the same land) which had been left open to and on a level with the highway until the defendants, in

exercise of their powers under s. 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and for the convenience of the public, placed kerb-stones and a raised footpath at the side of the highway, leaving openings so that carriages could still pass at convenient places to and from the plaintiff's land and premises:—Held, that the plaintiff was not entitled to a mandatory injunction directing the defendants to remove the kerb-stones, and that in the absence of any unreasonable conduct the remedy for any injury caused by the kerb-stones would be by compensation under s. 308 of the act. *Ib.*

**Execution of Works so as to be a Nuisance.**]—The sewerage and drainage works of a town, authorised under a local act, in which the Public Health Act, 1848, is incorporated, must, however beneficial to the inhabitants of the town, be executed in such a manner as not to be a nuisance to neighbouring landowners; nor are such landowners to be put to a series of actions at common law in respect of the nuisance, the jurisdiction of this court being interposed to afford a single and complete remedy. In such a case the court will not balance the convenience of the inhabitants of a town, however numerous, against the strict legal rights of the individual complaining. *Att.-Gen.* v. *Birmingham Corporation*, 6 W. R. 811.

**Liability for not stopping up Sewers creating a Nuisance—Pollution of Stream.**]—A sanitary authority in whom the sewers are vested have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent. Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the Public Health Acts or the Rivers Pollution Act, 1876. *Att.-Gen.* v. *Dorking Guardians*, 51 L. J., Ch. 585; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579—C. A.

—— **No sufficient Scheme provided.**]—But if they are neglecting their duty in providing a sufficient sanitary scheme for the neighbourhood the remedy of an aggrieved landowner is by mandamus. *Ib.*

Per Jessel, M.R.: The court will not make an order against a public body or against individuals to do an act unless it is satisfied that it is within their power to do it. *Ib.*

Per Jessel, M.R.: In dealing with the question of restraining a public body from continuing a state of things which existed before the commencement of their powers, the court must take into consideration the balance of convenience. *Ib.*

*Glossop* v. *Heston and Isleworth Local Board* (12 Ch. D. 102) approved and followed. *Ib.*

A corporation, which became the sanitary authority in their town in 1873, suffered sewage to continue to run from a drain in the town into a canal, by a culvert running through the plaintiff's property, which created some nuisance and some damage to the plaintiff:—Held, that an information would lie, and that the corporation was liable to be restrained by injunction from continuing such nuisance and damage, though they derived no profit from the works causing the nuisance. *Att.-Gen.* v. *Basingstoke Corporation*, 45 L. J., Ch. 726; 24 W. R. 817.

**Interference with Water-courses.**]—When a local board of health is interfering with a watercourse in a manner not authorised by the Local Government Act (21 & 22 Vict. c. 98), s. 68. art. 3, it will be restrained from so doing, and the person injured will not be left to his remedy under the compensation clause of the 11 & 12 Vict. c. 63, s. 144. *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. 483; 24 L. T. 402; 19 W. R. 569.

*See also* SEWERS (POWER TO CREATE A NUISANCE), ante, cols. 416 et seq.

**Decree against Local Board—Adding Parties after Decree.**]—In 1875 an injunction was granted restraining the defendants, the corporation of Birmingham, from polluting by sewage the river Tame; but its operation was suspended for five years, so as to give the defendants time to carry out works for the prevention of the nuisance complained of. After the passing of the Public Health Act, 1875, a new local government district for Birmingham was created, upon whom devolved all the duties and liabilities of the old local authority. On a summons by the plaintiffs at the expiration of the five years for leave to amend the information and bill by adding the new district as defendants:—Held, that no amendment in the pleadings could be made after final judgment, and that the new district could only be brought before the court by action. *Att.-Gen.* v. *Birmingham Corporation*, 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127—C. A.

**Injunction—Wrongful Exercise of Statutory Powers.**] — Where a local board of works attempted to exercise their arbitrary powers without leaving to a person affected thereby the right of appeal given by the act, the Court of Chancery restrained them by injunction from so doing, until the question should be determined by the proper tribunal. *Tinkler* v. *Wandsworth District Board of Works*, 1 Giff. 412; 3 Jur. (N.S.) 1292; 6 W. R. 50. Affirmed on appeal, 2 De G. & J. 261; 27 L. J., Ch. 342; 4 Jur. (N.S.) 293; 6 W. R. 390.

Where there is a doubt whether the arbitrary powers given to local boards are properly exercised, it is the duty of the court to take care that the checks appointed by the legislature have due operation in favour of the persons affected. *Ib.*

**Road Authority—Sprinkling Salt on Snow—Interdict.**]—Although road authorities are invested with large discretionary powers in regard to the cleaning of streets and the regulation of traffic, and a court of law would decline to interfere with a due exercise of that discretion, they have no power or discretion in the case of a nuisance, which the legislature has not expressly or by necessary implication sanctioned, either to

commit it themselves or to authorise its commission by others. *Ogston* v. *Aberdeen District Tramways*, 66 L. J., P. C. 1; [1897] A. C. 111; 75 L. T. 633; 61 J. P. 436—H. L. (Sc.)

According to the law of Scotland, any private person, whether a ratepayer or municipal elector or not, is entitled to sue for an interdict in respect of a nuisance caused in a highway. *Ib.*

The appellant sued for an interdict to prevent the respondents from continuing the practice of sweeping away the snow from their tramway-rails, and sprinkling salt on the snow in order to melt it, in such a way as to cause a nuisance. The Court of Session refused the note of suspension and interdict on the ground that the local authority, to which was intrusted the duty of seeing that the streets were cleared in such an emergency as a snowstorm, had approved the method adopted by the respondents. The House, reversing the decision, remitted the case to the Second Division of the Court of Sessions to pronounce decree of interdict. *Ib.*

### b. Notice of Proceedings.

**When Necessary.**]—It is unnecessary, before instituting proceedings in the Court of Chancery for an injunction to restrain a local board of health from continuing a nuisance, to serve the notice required by 25 & 26 Vict. c. 102, s. 106; such notice refers only to proceedings at law. *Att.-Gen.* v. *Hackney Local Board*, 44 L. J., Ch. 545; L. R. 20 Eq. 626; 33 L. T. 244.

Sect. 264 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), requiring a month's notice to be served on a local authority before commencing an action for anything done under the provisions of the act, does not apply where the object of the action is to restrain the commission of a nuisance; and this notwithstanding the plaintiff also claims compensation for past damage. *Flower* v. *Low Leyton Local Board*, 46 L. J., Ch. 621; 5 Ch. D. 347; 36 L. T. 760; 25 W. R. 545—C. A.

### 3. Certiorari.

**"Misapplication" of Funds.**]—By the Public Health Act, 1875 (38 & 39 Vict. c. 53), s. 174, every contract made by an urban authority whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority. 1 Vict. c. 78, s. 44, after reciting that "it is expedient to give all persons interested in the borough fund of every borough a more direct and easy remedy for any misapplication of such fund," enacts that any order of the council of any borough for the payment of money out of the borough fund may be removed into the court by certiorari. A resolution was passed by a corporation ordering the payment of certain sums, each exceeding 50*l.*, to contractors for costs incurred in paving a street, no contracts having been entered into under the seal of the corporation. On an application for a certiorari to bring up and quash such resolution on the ground that it was a "misapplication" of the borough funds within 1 Vict. c. 78, s. 44:—Held, that as the work was useful and done at a reasonable cost, and there was no suggestion of corruption or partiality, there had been no "misapplication," and the court in its discretion refused to grant the certiorari. *Reg.* v. *Norwich Corporation*, 30 W. R. 752.

### 4. Sequestration and Elegit.

**For Enforcing Orders.**]—The Court of Chancery will issue a sequestration against a board of health for disobeying an order of court, if it has any property on which the sequestration can operate. *Spokes* v. *Banbury Local Board*, 35 L. J., Ch. 105; L. R. 1 Eq. 42; 13 L. T. 428; 14 W. R. 128. Affirmed, 35 L. J., Ch. 105; 11 Jur. (N.S.) 1010; 13 L. T. 453; 14 W. R. 169—L.JJ.

It is immaterial that the order is made for the protection of an individual and has been disobeyed in the interest of a large body of persons. *Ib.*

On appeal, the superior court will not suspend the execution of the writ; any application for such purpose must be made to the court below. *Ib.*

Land conveyed to a board of health for the purposes of the Public Health Acts, and used as a reservoir for supplying water to the district, can be taken under a writ of elegit on a judgment obtained against the board in the name of its clerk. *Worral Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719.

### 5. Indictment.

**Non-repair of Highway — Urban Sanitary Authority.**]—An indictment will lie, under s. 10 of the Highway and Locomotives (Amendment) Act, 1878, against an urban sanitary authority, acting as the highway authority of the district, for nonrepair of a highway. *Reg.* v. *Wakefield Corporation*, 57 L. J., M. C. 52; 20 Q. B. D. 810; 36 W. R. 911; 16 Cox, C. C. 439; 52 J. P. 422.

An indictment against a municipal corporation for nonrepair of a highway alleged that the highway was in decay, and that the corporation, "acting by the council as the sanitary authority for the urban district," ought to repair and amend the same, &c.; but there was no allegation to shew how the defendants were liable, nor did the indictment conclude with the words "against the form of the statute." At the trial the judge intimated his willingness to make any amendment within his power, but no amendment was in fact made. A verdict having been found for the crown:—Held, that the indictment was bad, but that, even assuming the necessary amendments to be made, the defendants were entitled to judgment, there being nothing in the Public Health Act, 1875, to make the urban sanitary authority liable to indictment for nonrepair, in the same sense as that in which the parish or other persons liable ratione tenuræ were liable. *Reg.* v. *Poole Corporation*, 56 L. J., M. C. 131; 19 Q. B. D. 602, 683; 57 L. T. 485; 36 W. R. 239; 16 Cox, C. C. 323; 52 J. P. 84.

### 6. Compensation for Damages.

#### a. In what Cases.

**Execution of Works.**] — When, under the 11 & 12 Vict. c. 63, s. 69, a local board require the owner or occupier of premises fronting a street (not being a highway) to sewer, level, &c., the same, and the requisition not being complied with they execute the works, the owner or occupier is entitled to compensation for damage sustained by him through the execution of the works. *Reg.* v. *Wallasey Local Board*, 10 B. & S. 428; 38 L. J., Q. B. 217; L. R. 4 Q. B. 351; 21 L. T. 90; 17 W. R. 766.

A local board of health, in the execution of

certain works under the Public Health Act, 1848, occasioned some damage to property belonging to A. Compensation was claimed by A. for the damage thus occasioned to him, or to have the same ascertained by arbitration. The court refused to grant an injunction restraining A. from proceeding by arbitration under s. 123 of the Public Health Act, 1848, holding that this section could not be distinguished from the compensation clauses in the Lands Clauses Consolidation Act, 1845. *Bradford Local Board* v. *Hopwood*, 6 W. R. 818.

The defendants, a local board of health, prior to 1875 constructed a sewer under a public footpath, the soil of which belonged to the plaintiff, and they made a shaft thirty feet deep into the sewer, with an entrance or manhole upon the footpath, at a point where there was a junction of two sewers. The defendants also gave the plaintiff notice after 1875 of their intention to make similar manholes into their sewers upon other parts of the plaintiff's property:—Held, that they were parts of the sewer within the meaning of 11 & 12 Vict. c. 63, s. 45, and could be made without purchasing land for the purpose; and that the plaintiff was only entitled to compensation for the damage arising from making them. *Swanston* v. *Twickenham Local Board*, 48 L. J., Ch. 623; 11 Ch. D. 838; 40 L. T. 734; 27 W. R. 924.

**When Liability in Dispute.**]—A person who claims compensation for damage sustained by reason of the exercise of the powers of the Public Health Act, 1875, is entitled, under s. 308, to have the amount of compensation determined by arbitration in the manner provided by that act, even though a dispute exists as to the liability of those from whom he seeks to recover compensation; and the prior determination of that question of liability is not a condition precedent to the claimant's right to go to arbitration to settle the question of amount. *Pearsall* v. *Brierley Hill Local Board*, 52 L. J., Q. B. 529; 11 Q. B. D. 735; 49 L. T. 486; 32 W. R. 141; 47 J. P. 628—C. A. Affirmed, 54 L. J., Q. B. 25; 9 App. Cas. 595; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84—H. L. (E.)

**Actionable Damage.**]—A board of public health is not bound to give compensation under 11 & 12 Vict. c. 63, s. 144, for any damage which it may cause, which would not have been actionable if it had not been acting under the authority of the statute. *Hall* v. *Bristol Corporation*, 36 L. J., C. P. 110; L. R. 2 C. P. 322; 15 L. T. 572; 15 W. R. 404.

**Alteration of Level of Road.**]—A local board having been constituted in a district through which a turnpike road and footpath passed, an agreement was entered into between the board and the turnpike trustees that the former should take upon themselves the repair of the footpath within their district. Afterwards a further agreement was entered into, by which the trustees undertook to raise a part of the carriage-way and the board the corresponding part of the footpath. The necessary result of raising the footpath was to occasion damage to the plaintiff's house, who thereupon claimed to be entitled to compensation from the board under the Public Health Act, 1848, s. 144. That act, which by s. 68 vests other highways in local boards, and authorises them to alter such highways as and when occasion may require, and by s. 144 directs that they "shall make compensation to all persons sustaining any damage by reason of the exercise of any of the powers of the act," excludes by s. 2 turnpike roads from their jurisdiction. The Local Government Act, 1858, however, authorised a local board, by agreement with the trustees of any turnpike road, to take upon itself the maintenance, repair, cleansing or watering of any such road, or of any part of the road. By 15 & 16 Vict. c. 42, highway in s. 68 of the principal act shall mean "any highway repairable by the inhabitants." The question whether the plaintiff was entitled to compensation under s. 144 of the Public Health Act, 1848, as a person sustaining damage by the exercise by the local board of the powers of the act, having been raised by special case setting out these facts:—Held, that a street which is also a turnpike road is not excluded by s. 2 from the operation of ss. 68 and 144, and that the plaintiff was therefore entitled to recover compensation from the board in the manner prescribed by s. 144. *Nutter* v. *Accrington Local Board*, 48 L. J., Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802—C. A. Affirmed, 43 L. T. 710—H. L. (E.)

**For Cost of Raising Houses by Owners.**]—The plaintiffs were owners of houses abutting on a highway which was vested in the defendants, a local board acting under 38 & 39 Vict. c. 55 (Public Health Act, 1875), and having the powers and liabilities of surveyors of highways. The abstraction of salt from a bed beneath them caused from time to time a subsidence of the ground upon which the houses and highway were situate. The houses were rebuilt in 1870 on timber, so that they might be raised by screw-jacks. In 1876 the surface of the highway in front of the houses had subsided considerably, and the houses had subsided with it. The surface of the roadway remained continuous, so that traffic could pass along it as before; but the roadway was in a curved hollow, and at the level to which it had subsided was liable to be flooded, and in fact was flooded at times, so as to render traffic impossible. The defendants put materials on the roadway, so as to make the surface immediately above the point of the lowest subsidence about four feet three inches higher than it was at the commencement of the work. The plaintiffs, having had notice from the defendants, raised their houses simultaneously with the works to the roadway, and then claimed under s. 308 of the act, and were awarded compensation for the cost of raising the houses. Having regard to the obstruction to traffic caused by floods, the raising of the road was reasonably necessary to put it in a proper state for traffic; but, excluding the consideration of floods, the raising of the road to the extent described, though a reasonable and prudent act, was not necessary to put the road into a proper state for traffic:—Held, that as the highway was vested in the defendants, no action of trespass could have been maintained by the plaintiffs, even if more materials had been placed on the road than a surveyor of highways could justify, and that the plaintiffs had no right to have the road maintained at the level to which it accidentally and recently sank; and that the works of the defendants were not done "in exercise of any of the powers" of the act within the terms of s. 308—which mean powers created by the act, and not simply powers transferred by s. 144 from the surveyor to the local board—but

were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have, and, consequently, that the plaintiffs were not entitled to compensation. *Burgess* v. *Northwich Local Board*, 50 L. J., Q. B. 219; 6 Q. B. D. 264; 44 L. T. 154; 29 W. R. 931; 45 J. P. 256.

**Draining District—Discharge of Surface Water into Stream of Private Owner.**]—See *Durrant* v. *Branksome Urban Council*, ante, col. 418.

**When not the appropriate Remedy.**]—See *Sellors* v. *Matlock Bath Local Board*, ante, col. 544.

### b. Arbitration for.

#### i. *Nature of.*

**As to Amount only.**]—The 11 & 12 Vict. c. 63, s. 144, after enacting that compensation shall be made out of the rates to be levied, to all persons sustaining damage by the exercise of the powers of the act, provides, that in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by the act; or, if the compensation claimed do not exceed 20*l*., the same may be ascertained by, and recovered before, justices in a summary manner. And by s. 123, arbitrators are to be appointed in case of dispute as to the amount of any compensation to be made under the provisions of the act:—Held, that, under the act, only disputes as to the amount of compensation are to be settled by arbitration, or by justices; not disputes as to the liability to make compensation at all. *Reg.* v. *Burslem Local Board*, 1 El. & El. 1077; 29 L. J., Q. B. 242; 6 Jur. (N.S.) 696; 8 W. R. 584—Ex. Ch.

A local board of health having, under 11 & 12 Vict. c. 63, s. 145, made a sewer through the land of A., he claimed compensation for the damage sustained thereby, and proceeded to appoint an arbitrator. The local board of health declined to appoint an arbitrator, on the ground that A. had not sustained any damage, because his property was benefited by the making of the sewer, and the arbitrator appointed by A. made his award ex parte:—Held, that this was a case in which the amount of damage was disputed, and not a case in which the liability to make any compensation was denied; and therefore the award was valid under s. 123. *Bradby, In re*, 4 El. & Bl. 1014; 3 C. L. R. 771; 24 L. J., Q. B. 239; 1 Jur. (N.S.) 778; 3 W. R. 413.

**Jurisdiction of Arbitrator when Liability is disputed.**]—When a claim for compensation is made against a local authority for damage caused by the exercise of the powers conferred upon them by the Public Health Act, 1875, the arbitrator has jurisdiction to hold the arbitration and make his award as to the fact of damage, and the amount of compensation under ss. 179, 180, 308, although the local authority bonâ fide dispute their liability to make compensation at all under the act. Their proper course is to raise the question of liability in their defence to an action upon the award. *Brierley Hill Local Board* v. *Pearsall*, 54 L. J., Q. B. 25; 9 App. Cas. 595; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84—H. L. (E.)

#### ii. *Appointment of Arbitrators and Umpire.*

**Refusal by one Party to Appoint Arbitrator.**]—When an arbitrator has been appointed by one party under the provisions of the Public Health Act, 1875, ss. 179, 180, his jurisdiction is not ousted by the other party denying his liability and refusing to appear. *Burgess* v. *Norwich Local Board*, 37 L. T. 355; 26 W. R. 19.

**Appointment of Arbitrators invalid—Their Appointment of Umpire.**]—The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, enacts that "With respect to arbitrations under this act the following regulations shall be observed: (1) Every appointment of an arbitrator under this act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand . . ." "(2) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." In an arbitration under the act one arbitrator was appointed by the local authority under their common seal, and another arbitrator was appointed by the claimant, but not in writing under his hand. The arbitrators disagreed and appointed an umpire, who made an award in favour of the claimant:—Held, that the provisions of the statute not having been complied with, the appointment of the arbitrators and consequently their appointment of the umpire, and his award were invalid, and neither the original submission nor the appointment of the umpire nor the award could be made an order of court. *Gifford and Bury Town Council, In re*, 57 L. J., Q. B. 181; 20 Q. B. D. 368; 58 L. T. 522; 36 W. R. 468; 52 J. P. 119.

**Umpire—Appointment of.**]—Under 11 & 12 Vict. c. 63, s. 125, arbitrators who have failed to make their award within twenty-one days after the day upon which the last of them was appointed, may nevertheless, after the expiration of that period, appoint an umpire. *Holdsworth*, v. *Wilson*, 31 L. J., Q. B. 145; 8 Jur. (N.S.) 672; 10 W. R. 646. Affirmed on appeal, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur. (N.S.) 171; 8 L. T. 434; 11 W. R. 733—Ex. Ch.

#### iii. *Award.*

**Time for Making—Umpire.**]—Although no original limit of time is specially mentioned in the Public Health Act, 1875, within which an umpire must make his award, yet by analogy to the original limit fixed in the case of arbitrators, an original limit of twenty-one days from the date of reference to him must be inferred to have been fixed in the case of an umpire; which, under s. 180, sub-s. 9, may not be extended beyond two months. *Yeadon Local Board and Yeadon Waterworks Co., In re*, 58 L. J., Ch. 563; 41 Ch. D. 52; 60 L. T. 550; 37 W. R. 360—C. A.

Two arbitrators appointed under the Public Health Act, 1875, met on the 3rd of January, and extended the time for making their award till the 20th of February. On the 10th of January they appointed an umpire. On the 1st of February the arbitrators and umpire met, and were attended by the parties, but one of the arbitrators retired and refused to proceed any further, and the meeting was adjourned sine die. On the 19th of April the umpire made his award:—Held, that the award was made too late, and must be set aside:—and also, that the date from which the twenty-one days must be reckoned was the 1st of February, when the arbitrators finally disagreed, and not the 20th of February, when their powers expired. *Ib.*

The 11 & 12 Vict. c. 63, s. 125, places an umpire with respect to the time for making his award, in the same position as a single arbitrator; and by s. 124, a single arbitrator is required to make his award within twenty-one days after his appointment, or within such extended time as shall have been appointed by him. When therefore an umpire without extending the time for making his award, made his award after the twenty-one days from the time when he was appointed by the arbitrators had elapsed:—Held, that the award was bad. *Kellett and Tranmere Local Board, In re*, 34 L. J., Q. B. 87; 11 L. T. 457; 13 W. R. 207.

The 11 & 12 Vict. c. 63, s. 126, enacts that the time for making an award under the act, in the case of an umpire, shall not be extended beyond three months from the date of the day on which he shall have been appointed umpire:—Held, that the provisions of the 17 & 18 Vict. c. 125, s. 15, relating to the power of the court to enlarge the time for making an award, have no application to the case; and that, after the time limited had elapsed, the court has no power to enlarge. *Ib.*

**Power to enlarge Time for making.**]—The court cannot enlarge the time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55) beyond the period limited in s. 180. *Mackenzie and Ascot Gas Co., In re*, 55 L. J., Q. B. 309; 17 Q. B. D. 114; 34 W. R. 487.

**Enforcing.**]—An award of an umpire appointed under the 180th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), awarding compensation for damage to land under the 308th section of the act, cannot, although duly made a rule of court under the 180th section, be enforced by motion in the manner in which awards are ordinarily enforced. *Walker and Beckenham Local Board, In re*, 50 L. T. 207; 48 J. P. 264.

**Right to dispute Jurisdiction—Estoppel.**]—An umpire did not extend the time, nor did he make his award within twenty-one days, but he appointed a day for the reference, when both the parties attended, but the local board of health, by their clerk, protested against the proceedings. The umpire, however, proceeded with the reference. Both the claimant and the local board went into their cases, examined witnesses, and addressed the umpire:—Held, that the local board was not, by its conduct before the umpire, in going into the case and examining witnesses, and addressing the umpire, estopped from afterwards disputing the umpire's jurisdiction. *Ringland* v. *Lowndes*, 17 C. B. (N.S.) 514; 33 L. J., C. P. 337; 10 Jur. (N.S.) 850; 12 W. R. 1010—Ex. Ch.

**Action on—What a Defence.**]—Declaration upon an award by an umpire under the Public Health Act, 1848, ss. 123, 144, determining that there was due from the local board of health to the plaintiff 1,735*l.*, as compensation for the entry by the board on land of the plaintiff, and for surface and other damage occasioned by reason of the construction by the board of a sewer through a part of the plaintiff's land. Third plea, that the umpire proceeded on the assumption that the plaintiff would be prevented by the board from building on the land over the sewer. Fourth plea, that the umpire proceeded on the assumption that the plaintiff was entitled to compensation by reason of the sewer having been constructed in a defective manner. Sixth plea, that the umpire proceeded on the assumption that the plaintiff was entitled to compensation by reason of stenches proceeding from the sewer:—Held, that all the pleas were bad. *Uttley* v. *Todmorden Local Board*, 44 L. J., C. P. 19; 31 L. T. 445.

iv. *Costs.*

**Action for, before Taxation.**]—An award for costs generally, without ascertaining the amount, is good under 11 & 12 Vict. c. 63, s. 127, and the party to receive, after delivering his bill for the amount, may maintain an action to recover them. The party to pay may have the costs taxed, but the taxation is not a condition precedent to the other party's right to bring an action to recover them. *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur. (N.S.) 171; 8 L. T. 434; 11 W. R. 733—Ex. Ch. S. P., *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425; 43 L. T. 130; 29 W. R. 617.

**Taxation where Award made a rule of Court.**]—Two local authorities, whose districts were adjacent, agreed to carry out a joint sewerage scheme by an agreement, in which it was stipulated that all disputes as to the matters comprised therein should be settled by arbitration in the manner provided by ss. 179 and 180 of the Public Health Act, 1875. An award was made which provided that one of the authorities should pay to the other the costs of the reference and award, without stating the amount of such costs. Upon motion for an order directing the taxation of the costs:—Held, that as the submission to arbitration had been made a rule of court, the taxing-master was bound to tax the costs upon the application of the successful party, and that it was not obligatory to bring an action upon the award in order to enable him to do so. *Chesterfield Corporation and Brampton Local Board, In re*, 50 J. P. 824.

**Award referred back to Deal with.**]—An arbitrator or umpire appointed to determine a dispute under ss. 179 and 180 of the Public Health Act, 1875, must in his award deal with the costs of and consequent upon the reference, which are placed in his discretion by sub-s. 13 of the latter section, and if he fails to do so the court will remit the award to him for the purpose of determining the question of costs. *Peake* v. *Finchley Local Board*, 57 L. T. 882.

**When Lands Compulsorily taken.**] — When land has been taken compulsorily by a local board under the powers of the Lands Clauses Acts, incorporated by the Public Health Act, 1875, and an arbitration takes place to determine the amount of compensation to be paid to the owner of the land so taken, the procedure with regard to such arbitration and the right to costs are wholly governed by the provisions of the Lands Clauses Acts, and not by those of the Public Health Act with regard to arbitrations under that act. *Rayner, Ex parte*, 47 L. J., Q. B. 660; 3 Q. B. D. 446; 39 L. T. 232; 26 W. R. 812.

J. R.

## LOCOMOTIVE.

*See* WAY.

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**Right of Voting at Elections.**]—*See* ELECTION LAW.

**Protection of Goods from Distress.**]—*See* LANDLORD AND TENANT.

**By-laws as to Lodging Houses.**]—*See* LOCAL GOVERNMENT.

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## LODGING HOUSE.

*See* LANDLORD AND TENANT.

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## LONDON.

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**Customs of.**]—*See* CUSTOM.

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## I. DEFINITION.

There are no degrees of defect of understanding, save idiotcy and lunacy. *Hume* v. *Burton*, 1 Ridgw. 211.

There is no such thing as equitable insanity, for it must be understood according to a legal sense, a deprivation of sense, and a total want of understanding to contract, or as Lord Hale describes it, a deprivation of a man's reason. 1 H. P. C. 29, 30. Non compos is the genus, and includes both idiotcy and lunacy. *Rochfort* v. *Ely*, 1 Ridgw. 532.

Accidental or adventitious insanity, as Lord Hale calls it (1 H. P. C. 29, 30), is the only other species of insanity which the law regards on inquiries of this nature, as where a person having had a competent use of reason, loses it by some distemper in the humours of the body, or by the violence of disease, as a fever, or the palsy, or the like; and this is subdivided into that which is periodical, and has lucid intervals, and that which is permanent, without intermission. This adventitious insanity was at the common law called lunacy, and it is generally called so at this day. But the words "unsound mind" and "unsound memory" having been adopted in the reign of Edward I., the one by the statute West. 2, and the other by the statute De modo levandi fines, they have been since sometimes indiscriminately used in our law to signify not only lunacy, which is a periodical madness, but also a permanent adventitious insanity, as distinguished from idiotcy. *Ely's (Lord) Case*, 1 Ridgw. 517, n.

As to who are lunatics, see *Barnsley's Case*, 2 Eq. Abr. 580; 3 Atk. 173.

Non compos mentis is now a technical term and legitimated by divers statutes. *Ib.*

The rules of judging here and at law, in cases of insanity, are the same. *Bennet* v. *Vade*, 2 Atk. 327; 9 Mod. 312.

Persons reduced to a state of extreme mental imbecility or dotage, whether from decay of the faculties consequential on extreme old age, intemperance, or any other cause, are persons of "unsound mind" within the meaning of 8 & 9 Vict. c. 100, and are entitled to the same protection as lunatics under that act. *Reg.* v. *Shaw*, 37 L. J., M. C. 112; 16 W. R. 913.

The term "lunatic" in general implies a person suffering from some aberration of mind—frenzy or delusion, and does not properly include one who is in an unsound state of mind arising from intemperate habits or decay of the faculties. Per Cockburn, C.J. *Ib.*

Semble, a man labouring under a delusion, which may at any time be brought forth if the subject of it be alluded to, though in other respects he is perfectly rational, is in law insane, and a jury would not be justified in finding that he enjoyed a lucid interval, though at the time he is not under the influence of the delusion, if there be a tendency to its recurrence. It is not

necessary to constitute a lucid interval that the subject thereof should be restored to as vigorous and active a state of intellect as he might have enjoyed previously to the visitation of the lunacy. *Creagh* v. *Blood*, 2 Jo. & Lat. 509; 8 Ir. Eq. R. 434.

The existence of a delusion is the symptom or result of a diseased mind, and therefore so long as it continues, whether exhibiting itself more or less distinctly, there must still be unsoundness. *Dyce Sombre, In re*, 1 Mac. & G. 116; 1 Hall & Tw. 285; 13 Jur. 857.

The most satisfactory proof of recovery from an unsound state of mind is the conviction of the non-reality of the delusions which arose from the disease. *Ib.*

Where a testator is not shewn to be subject to frenzy or fatuity, it is necessary, for the purpose of establishing his insanity, to shew that, upon some particular subject, he was under a delusion, as to facts within his own observation; and that he actually believed in the existence of facts which a rational man, from the use of his senses under the same circumstances, would have known not to exist. *Ditchburn* v. *Fearn*, 6 Jur. 201.

And a gross exaggeration of slight circumstances may amount to insane delusion, as falling within the above proposition of delusion as to facts. But a testator is not to be considered insane from entertaining any opinions, however unfounded or absurd: as, where he speaks of his kept mistress, who had died before him, as having been a person of "deep religious feeling." Nor from a pretended belief in non-existing facts, assumed for the purpose of deception: as, where the testator had, in October, 1832, acknowledged a child by his second wife to be his child; and yet, in a codicil to his will, dated in the same year, disowned any daughter born of his second wife; the court thinking that the testator never really believed that such child was illegitimate, but that he only threw doubts on her legitimacy for sinister purposes. *Ib.*

Distinction between lunacy with lucid intervals, and a state of sound mind, subject to occasional unsoundness, arising from accidental and temporary causes. *J. B., In re*, 1 Myl. & Cr. 538.

Distinction between unsoundness of mind and mere dulness of intellect. *Harrod* v. *Harrod*, 1 K. & J. 4; 18 Jur. 853; 2 W. R. 612.

A weak man gives a bond; if it be attended with no fraud of breach of trust, equity will not set aside the bond only for the weakness of the obligor; if he be compos mentis, equity will not measure people's understanding or capacities; no such thing as an equitable non compos, if compos at law. *Osmond* v. *Fitzroy*, 3 P. W. 130.

Difference between imbecility or idiotcy and delusion in respect of acts of business observed upon. *Bannatyne* v. *Bannatyne*, 2 Rob. Ecc. Rep. 472; 16 Jur. 864.

**Person found lunatic by Foreign Jurisdiction.**]—A person found a lunatic by a competent jurisdiction abroad, may be considered a lunatic here. *Gillam, Ex parte*, 2 Ves. J. 588; 2 Cox, 193.

**Person lawfully detained as a Lunatic—Person out of the Jurisdiction.**]—A "person lawfully detained as a lunatic" in s. 116 sub-s. 1 (c), of the Lunacy Act, 1890, means a person lawfully detained under the provisions of that act, and consequently within the jurisdiction, and does not include a person lawfully detained in a foreign country under the laws of that country. There is therefore no jurisdiction to appoint a receiver of the income of any such person under sub-s. 2 of that section. *Watkins, In re*, 65 L. J., Ch. 636; [1896] 2 Ch. 336; 74 L. T. 504; 44 W. R. 609; 60 J. P. 500—C. A.

## II. LUNATIC SO FOUND.

### *a.* Jurisdiction of Court of Lunacy.

*The law relating to the jurisdiction over lunatics, their treatment, and the administration of their property is now regulated by the Lunacy Acts*, 1890 *&* 1891 (53 *Vict. c.* 5; 54 *&* 55 *Vict. c.* 65), *and the rules made thereunder* (*Rules in Lunacy*, 1892–93).

**Crown.**]—The custody of the persons and estate of idiots and lunatics was a power not originally in the crown, but was given to it by the statute, for the benefit of the subject. *Hume* v. *Burton*, 1 Ridgw. 224. *And see* 2 Inst. 14.

The foundation on which commissions of lunacy, out of chancery, are grounded, are these: by the common law, the king, as parens patriæ, shall have the care of the persons and personal estates of those who, from their want of understanding, are incapable of taking care of themselves; and for this reason, the king's committee shall, by the common law, have the custody of the persons and personal estates of all idiots and lunatics, to the end that provision may be made against their wasting their properties, or their injuring their own persons, or those of their fellow-subjects. And by statute De Prerog. Reg. 17 Ed. 2, cc. 9 & 10, the king shall have the real estates of idiots to his own use, only finding them necessaries, and he shall provide for the safe keeping of the real estates of lunatics, so that they shall have a competent maintenance, and the residue shall be kept for their use, to be delivered to them when they have recovered their memory, and the king shall take nothing to his own use. *Ely's (Lord) Case*, 1 Ridgw. 518.

Every person who has attained the usual age of discretion, is presumed in law to be of sound mind, until the contrary is proved, 1 H. P. C. 33; and in order to come at this proof the practice formerly was, on a petition to the Lord Chancellor, suggesting idiotcy or lunacy in a particular person of a competent age, and verified by affidavit of facts, to issue a writ to the sheriff or escheater of the county where his residence was, to try by a jury, on personal examination of the party, whether that suggestion was true or not; but now the practice is, to try these matters under a special commission of inquiry. *Ib.*, 521.

Great seal hath care of lunatics under special appointment, and acts as commissioner. *Wigg* v. *Tiler*, 2 Dick. 552.

Distinction between the jurisdiction of the Court of Chancery, and in lunacy under a special warrant from the crown usually intrusted to the keeper of the great seal. *Sherwood* v. *Sanderson*, 19 Ves. 280; G. Coop. 108; 13 R. R. 193.

Under the statute the crown commits the care of lunatics to some great officer, not of necessity the chancellor. The warrant confers no jurisdiction, but only a power of administration.

*Oxenden* v. *Compton* (*Lord*), 2 Ves. 72; 2 R. R. 131.

The jurisdiction the court exercises as to idiots and lunatics is a particular one. *Whitfield*, *Ex parte*, 2 Atk. 315.

After the court of wards was taken away, the jurisdiction over lunatics and idiots reverted back to the Court of Chancery, to whom it originally belonged. *Burford Corporation* v. *Lenthall*, 2 Atk. 553.

Jurisdiction of magistrates over lunatics only extends to poor and vagrant ones. *Anon.*, 2 Atk. 52.

An order for payment made by the Master of the Rolls on the committee of a trustee become lunatic discharged, as such order ought to be made in the lunacy; a party in such a character being responsible only to the jurisdiction of the great seal. *Ames* v. *Parkinson*, 2 Ph. 388.

**Settled Land—Lunatic Tenant for Life—Bill in Parliament—Costs of Opposition—Payment out of Corpus.**]—The lords justices sitting in lunacy have jurisdiction to order the costs, charges and expenses incurred in relation to an unsuccessful opposition to a bill in parliament, affecting the estate of a lunatic tenant for life of settled land, to be paid out of the corpus of the property subject to the settlement. *Blake*, *In re*, 72 L. T. 280—C. A.

**Jurisdiction of Judges of Appeal Court to make Orders in Chancery Division.**]—The letter of the Lord Chancellor requesting the judges of the Court of Appeal sitting in lunacy to act as additional judges of the Chancery Division is not limited to petitions under the Trustee Acts, but applies to all applications in lunacy which require also an exercise of the jurisdiction of the Chancery Division. *Platt*, *In re*, 57 L. J., Ch. 152; 36 Ch. D. 410; 57 L. T. 857; 36 W. R. 273—C. A.

**Power of Court to Bar where Tenant is Lunatic.**]—The court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the court, under the 6th section of the Partition Act, 1868, authorised the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *Pares*, *In re*, *Lillingston* v. *Pares*, 12 Ch. D. 333; 41 L. T. 574; 28 W. R. 193—C. A.

**Transfer of Fund paid in under Trustee Relief Act.**]—Where a person who has been found lunatic is entitled to a fund which has been paid into court under the Trustee Relief Act, a petition may be presented in chancery under the Trustee Relief Act and in lunacy, and the court has jurisdiction to make an immediate order for the transfer of the fund to the account of the lunatic. *Tate*, *In re*, 20 Ch. D. 135; 47 L. T. 2—C. A.

**Charging Order—Validity of—Fund in Court.**]—A charging order obtained by a judgment creditor of a lunatic does not deprive the lords justices of their power to dispose of the funds for the benefit of the lunatic, which were under their control when the charging orders were obtained. The charging orders, though not discharged, cannot be acted upon until after the lunatic's death or recovery. *Plenderleith*, *In re*, 62 L. J., Ch. 993; [1893] 3 Ch. 332; 2 R. 625; 69 L. T. 325; 42 W. R. 224; 58 J. P. 164—C. A.

**Appointment of New Trustees—Order authorising Execution of Power on behalf of Lunatic by appointing two named Persons — Vesting Order.**]—Where a person entitled to a life interest under a settlement of stock who has the power to appoint new trustees of such settlement in the event of the death of any trustee, becomes of unsound mind, there is jurisdiction on the death of the trustees to make an order authorising another person to exercise such power on behalf of such person by appointing two named persons as new trustees and vesting in them when appointed the right to call for a transfer of the stock. Such orders should in future be accompanied by a certificate of the master that the deed of appointment had been duly executed. The jurisdiction to make such an order is given by the Lunacy Acts, the power to appoint being a fiduciary one. *Bowmer*, *In re* (3 De G. & J. 658) and *Sheat's Settlement*, *In re* (42 Ch. D. 522), approved. *Shortridge*, *In re*, 64 L. J., Ch. 191; [1895] 1 Ch. 278; 12 R. 81; 71 L. T. 799; 43 W. R. 257; 63 J. P. 38—C. A.

**Bankruptcy — Property of Lunatic.**]—The court in lunacy has no power to deal with funds which are under the control of the bankruptcy court. *Farnham*, *In re*, 65 L. J., Ch. 456; [1896] 1 Ch. 836; 74 L. T. 214; 44 W. R. 465; 3 Manson, 123; 60 J. P. 389—C. A.

—— **Inquisition—Subsequent Adjudication in Bankruptcy—Void Gift by Lunatic—Title of Trustee in Bankruptcy — Maintenance of Lunatic.**]—Quære, whether a person found lunatic by inquisition can be adjudicated a bankrupt, otherwise than under the direction of the committee acting under the order of the judge in lunacy. Where a lunatic so found by inquisition was subsequently adjudicated a bankrupt, the lords justices, assuming that the adjudication was valid, and in exercise of the power given by ss. 117, 120 of the Lunacy Act, 1890, to dispose of the lunatic's property for his maintenance and otherwise, refused to hand over to the trustee in bankruptcy certain property of the lunatic in court which had been originally claimed by the committee, the wife of the lunatic, as a gift to her prior to the inquisition, but which gift was void under s. 47 of the Bankruptcy Act, 1883, by reason of its having been made within two years of the adjudication in bankruptcy. The gift being void, the property reverted to the donor, i.e. the lunatic, and as such it vested in the trustee subject to the jurisdiction of the judge in lunacy. *Sanguinetti* v. *Stuckey's Banking Co.* ([1895)] 1 Ch. 176) approved. *Farnham*, *In re*, 64 L. J., Ch. 717; [1895] 2 Ch. 799; 12 R. 554; 73 L. T. 231; 3 Manson, 109—C. A.

—— **Sufficiency of—Grant of Lands in Ireland.**]—Inquisition taken in England not sufficient to found grant of lands in Ireland. *Re Chandos* (*Duke*), 1 Sch. & Lef. 301.

**Order of Reference.**]—The vice-chancellor may direct the reference to the master, in the first instance, in the case of a lunatic trustee or mortgagee. But the order upon the master's report should be made by the Lord Chancellor. *Anon.*, 5 Sim. 322; 3 L. J., Ch. 240.

The vice-chancellor has no authority of reference under 1 Will. 4, c. 60, with respect to a lunatic trustee. *Shorrocks, In re, Wallis, Ex parte*, 1 Myl. & Cr. 31.

**Committal for Contempt.**]—Commitment in the jurisdiction of lunacy for a contempt, by the publication of a pamphlet; ignorance of the contents will not excuse the printer. *Jones, Ex parte*, 13 Ves. 237.

**Petition—1 Will. 4, c. 65, s. 27.**]—Petition under the 1 Will. 4, c. 65, s. 27, must be entitled in the lunacy as well as in the cause. *Unett* v. *Unett*, 1 Jur. 620.

**Receiver—Order for Payment by—Interest.**]—Orders in lunacy, giving the receiver liberty to pay money are not within the meaning of s. 27 of 3 & 4 Vict. c. 105, so as to bear interest. *Hoops* v. *Kingston (Lord)*, 11 Ir. Eq. R. 469.

**Costs of Partition Action — Mortgage.**]—A decree for partition was made of an estate, one share of which belonged to a lunatic as tenant in tail. It was directed that the lunatic's costs should be raised by mortgage out of the land allotted to her. The lunatic's share was, however, conveyed to her in tail, without any provision for costs. On a petition in lunacy:—Held, that the court has no jurisdiction in lunacy to authorise the committee to raise the lunatic's costs by mortgage. *Bloomar, In re*, 2 De G. F. & J. 154.

**Practice—Foreign Affidavits.**]—Foreign affidavits must be either filed or made exhibits. *Hewitson, Ex parte*, 1 W. R. 58.

**39 & 40 Geo. 3.**]—The statute 39 & 40 Geo. 3 (Lord Eldon's Act), does not apply to money paid into court in the matter of a lunatic. *Verney, Ex parte*, Jacob. 234.

**Appeals in Lunacy.**] — No appeal from a decision of the Lord Chancellor touching idiots or lunatics, except to the king in council. *Sheldon* v. *Fortescue Aland*, 3 P. Wms. 108, n.

No appeal to the house of lords lies against an order in lunacy. *Rochfort* v. *Ely (Earl)*, 1 Bro. P. C. 450; 1 Ridgw. 541; 2 Ves. 72.

An appeal from orders in lunacy lies to the sovereign in council, and not to the house of lords. *Lanesborough (Earl), In re*, Ll. & G. 503.

The appeal in lunacy is to the king in council. *Oxenden* v. *Compton (Lord)*, 2 Ves. 69, 261; 4 Bro. C. C. 231; 2 R. R. 131.

### *b.* Commission.

#### 1. Petition for.

**9 Geo. 4, c. 41, ss. 39 & 42.**]—The Lord Chancellor cannot act under the 9 Geo. 4, c. 41, ss. 39 & 42, on petition. *Knight, In re*, 9 L. J. (o.s.) Ch. 230.

**Service.**]—Where the next of kin of a lunatic are unknown, a petition in lunacy ought to be served, not on the solicitor to the treasury, but on the attorney-general. *Bourke, In re*, 2 De G. J. & S. 426.

In a case where there are no next of kin of the alleged lunatic, it is not necessary to serve the attorney-general on behalf of the crown before the inquisition is returned. *Earl, In re*, 1 Jur. 524.

Petitions in the matter of a person found an idiot must be served on the attorney-general. *Watson, Ex parte*, Jacob. 161.

**Hearing—Right of Pre-audience.**]—Petition in lunacy may be heard out of its turn when it relates to the person of the lunatic, or to his estate, if his estate be in danger. Otherwise it forms no exception to the regular course of proceedings. *Anon.*, 1 Moll. 160.

Where two petitions in the same matter are answered on the same day, that which is first presented is entitled to pre-audience. *Brookman, In re*, 1 Mac. & G. 199; 1 Hall & Tw. 435.

Where two petitions are presented in the same matter, and answered by the Lord Chancellor on the same day, that which is first lodged in the secretary's office is entitled to be first opened. *Ib.*

**Amendment.**]—In lunacy, any order, which the circumstances shewn by the evidence render expedient, may be made without an amendment of the petition. *Stair, In re*, 1 Coop. t. Cott. 227.

**When Pending—Restraining Lunatic—Protecting Property.**]—Between the presentation of a petition for an inquiry in the case of an alleged lunatic and the official finding, he may be restrained by the court from leaving the jurisdiction, and his property may be protected from any disposition or misuse by which the purpose of the inquiry might be frustrated, but this interference, being provisional and only allowed as subservient to the investigation, cannot co-exist with an order prohibiting the prosecution of the latter. *Lawler, In re, Walsh, Ex parte*, Ir. R. 8 Eq. 506.

The court will protect the property of a supposed lunatic, in the interval between the presenting of a petition for a commission of lunacy and the finding of the jury; but it will at the same time take care that ample means for resisting the commission be furnished to those who act in the inquiry on the alleged lunatic's behalf. *Holmes, In re*, 4 Russ. 186; 28 R. R. 42.

—— **Protection to Person of alleged Lunatic.**]—Protection will be granted to the person of the alleged lunatic pending inquiry. *Naylor, In re*, 1 N. R. 173—L.JJ.

**Order for Visitors in Lunacy to see the Lunatic.**]—A petition for an inquiry into the state of mind of an alleged lunatic having been presented, and disputes having arisen as to the terms under which access of medical witnesses should be allowed, the court made an order that two of the visitors in lunacy should see the alleged lunatic and report to the court. ——, *In re*, or X. Y. Z., *In re*, 18 Ch. D. 26; 45 L. T. 97—C. A.

**Medical Witnesses.**] — When the medical witnesses for the alleged lunatic had seen her alone, it was held that they were not entitled to be present when the medical witnesses for the petitioner saw her. *Ib.*

—— **Keeper of Private Asylum.**]—A certificate of lunacy will not be received, if given by a physician who keeps a private lunatic asylum. *Anon.*, Dr. 286 ; 6 Ir. Eq. R. 389.

**Issue directed to be tried before Judge of High Court.**]—When an issue is directed by an order in lunacy to try the question of the insanity of an alleged lunatic before a judge of the High Court of Justice under the Lunacy Regulation Act, 1862, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the judge. *Scott, In re*, 54 L. J., Ch. 194 ; 27 Ch. D. 116 ; 32 W. R. 801.

**Administration Action—Reference to Chambers to Inquire into Sanity of Defendant.**]—A testator left certain property to trustees for the benefit of the defendant, an infant, who from evidence appeared to be of weak intellect. The trustees filed a bill to carry the trusts of the will into execution, and moved under the 16th section of the 15 & 16 Vict. c. 86, for a reference to chambers to inquire into the state of defendant's mind, the object being to save expense of a commission of lunacy. The court, in exercising a discretion given by the 16th section of the act, refused the motion. *Adams* v. *Smyth*, 22 L. J., Ch. 968.

**Issue established by two Verdicts.**] — Issue directed as to lunacy is established by two verdicts. *Holyland, Ex parte*, 11 Ves. 10 ; 8 R. R. 67.

**Sale of Stock pending Inquiry.**]—Method by which an alleged lunatic residing abroad may obtain a sale of stock standing in his name pending an inquiry as to his sanity. *Naylor, In re*, 1 N. R. 173—L.JJ.

### 2. Issue of.

**When Directed—Primâ facie Case of Insanity.**] —On a petition for a commission of lunacy, Lord Chancellor requires all the facts and evidence to be laid before him, and a case to be made amounting at least to a probability of insanity. The mere issuing a commission may produce consequences highly detrimental, and it is not to issue without great circumspection, Lord Chancellor interposing to give directions personally to physicians to visit the supposed lunatic, and afterwards to consult with them apart, it being almost the only case in which the judge is justified and bound to use private means of obtaining information ; the expenses to be borne by the fund if it comes into the possession of the crown, by the person who is the subject of inquiry being found a lunatic. *Persse, Ex parte*, 1 Moll. 219.

—— **Imbecility.**] — The jurisdiction of the chancellor to grant a commission in the nature of a writ de lunatico inquirendo, is not confined to cases of mere lunacy. The court will extend its protection where, through imbecility of mind, the party is incapable of managing his own affairs. *Monaghan, In re*, 3 Jo. & Lat. 258 ; 9 Ir. Eq. R. 253.

The commission of lunacy is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity from any cause, as disease, age, or habitual intoxication. *Ridgeway* v. *Darwin*, 6 Ves. 65 ; 6 R. R. 227.

—— **Old Age.**]—The commission of lunacy is applicable to incapacity from cause distinct from lunacy, as old age ; but the return, if not in the words of the commission, must have equivalent words, and in such a case the proper return is, that the party is of unsound mind, so that he is not sufficient for the government of himself, &c. *Ogle, Ex parte*, 15 Ves. 112.

One, through great age, being deprived of his memory, and become almost non compos mentis, was admitted to answer by his guardian, in regard the matter in question being small ; but had the value been considerable, the regular way would have been to have taken out a commission of lunacy, and have got a committee assigned, by Lord Talbot. *Anon.*, cited in *Sheldon* v. *Aland*, 3 P. Wms. 11, n.

—— **Incapacity to manage Affairs.**] — To support a commission in nature of writ de lunatico inquirendo, it is sufficient that party is incapable of managing his own affairs. *Gibson* v. *Jeyes*, 6 Ves. 273 ; 5 R. R. 295.

—— **Discretion—Benefit of Lunatic.**]—Commission of lunacy the subject of discretion, regulated solely by the benefit of the lunatic, with reference to the care of his person and property ; not of course, therefore, upon the mere fact of lunacy. *Tomlinson, Ex parte*, *Broadhurst, Ex parte*, 1 V. & B. 57 ; 12 R. R. 191.

—— **Protection of Person or Estate.**] — In determining whether it is proper that a commission of lunacy should issue, the court is governed solely by the consideration of what is necessary for the protection of the person and property of the party, and has no regard to the possible result of the commission upon the validity of his antecedent acts, or to the motives which have actuated the proceedings. *J. B., In re*, 1 Myl. & Cr. 538.

A commission of lunacy refused where the lunatic did not require the protection of the court either for himself or his property ; the object of the petitioner being to obtain a maintenance out of the estate. *Clare, In re*, 3 Jo. & Lat. 571.

—— **On Application of Stranger.**] — Commission of lunacy in a proper case, granted upon the application of a stranger, and without regard to his motive ; the lunatic being a natural child, and his mother opposing it. *Ogle, Ex parte*, 15 Ves. 112.

This court will, on the application of a stranger, issue a commission of lunacy, where the particular circumstances of the case are such as to warrant its interference for the protection of the alleged lunatic's person or property. ——, *In re*, 23 L. T. (o.s.) 123.

Ill-treatment by the nearest relatives is a ground for granting a commission to strangers —and the former will be compelled to pay the

costs occasioned by their opposition. *Smith, In re*, 1 Russ. 348.

**Principle on which Commission Issued.**]—Upon a petition presented for an inquiry into the state of mind of an alleged lunatic, the well-being and happiness of the lunatic, as well as the security of his property, are taken into consideration; and when these points are left in obscurity the court will direct further inquiries before issuing a commission. *Holbyn, In re, Peter, Ex parte*, 29 L. T. 305.

**Against whom — Non-resident Owners.**] — Commission of lunacy against a person who was at St. Venant in France, ordered to be executed in Essex, where his mansion-house is. *Southcote, Ex parte*, Ambl. 109; 2 Ves. 401.

Upon a petition for inquiry into the alleged lunacy of S., who was resident in Australia, but whose property was wholly situate in England, the court ordered an inquiry before a jury in Middlesex, and gave permission to the petitioners to take proper steps to bring him to England. *Scott, In re*, 22 W. R. 748.

—— **Service out of Jurisdiction.**]—Where an inquiry was directed concerning the lunacy of an alleged lunatic resident abroad, and whose presence was dispensed with, service of the order to that effect was directed to be made upon her and upon her stepfather with whom she was living, by registered letter. *Lanwarne, In re*, 46 L. T. 668; 30 W. R. 759—C. A.

—— **Aliens.**]—A commission of lunacy may issue against an alien. The domicile of the party against whom a commission of lunacy is applied for, is not material to the question of jurisdiction, though it may be material to the question of discretion; if, for instance, the party has come here for a short time or for a particular purpose. *Bariatinski (Princess), In re*, 1 Ph. 374; 13 L. J., Ch. 69; 8 Jur. 157.

A person found a lunatic in Jamaica, where his property is situated, comes to England, accompanied by one of his committees; a commission of lunacy ought to issue against him here. *Houstoun, In re*, 1 Russ. 312.

A Portuguese gentleman whose domicile was in Portugal, whose property, with a very trifling exception, was in Portugal, and whose wife and only child were residing there, became lunatic in England, and had been so for some years. A petition was presented by his relations in England for an inquiry as to his state of mind. Proceedings in lunacy were at the same time taken in Portugal by his wife, and the Portuguese court issued a request to the English courts to inquire into his state of mind. The wife applied here to have an inquiry as to the time when the lunacy commenced, it being desired by the Portuguese court that such inquiry should be made in England:—Held, that the 25 & 26 Vict. c. 86, s. 3, does not take away the power of the court to direct such an inquiry where special circumstances render it desirable. *Sottomaior, In re*, L. R. 9 Ch. 677.

Held, that under the circumstances of the case, such an inquiry ought not to be directed, as it was not required for any purpose of the proceedings in England, and the finding might affect other parties who could not effectually intervene in the inquiry, and yet would probably be treated in Portugal as concluded by it. *Ib.*

—— **Person Acquitted on Criminal Charge on ground of Insanity.**]—When a person has been tried upon a criminal charge, and acquitted on the ground of his insanity, and was thereupon confined in a lunatic asylum under 39 & 40 Geo. 3, c. 94, the chancellor upon the application of a creditor, issued a commission of lunacy, the party being entitled to property of the value of 600*l.* *Pearce, In re*, 8 Jur. 89.

**Notice of Issue.**]—Where notice should be given of the issuing a commission for an inquest. *Rex* v. *Daly*, 1 Ves. Sen. 269.

**Form of Commission.**]—The form of commissions of idiotcy is now settled as arising out of the form of the writs, and they cannot be altered or adopted to any particular case, for the law only enables the judge to inquire as to the genus and species of insanity. *Rochfort* v. *Ely (Lord)*, 1 Ridgw. 539.

Ita quod, &c., in commission of lunacy, are not so material as to render their omission fatal, for these words are not descriptive of unsoundness of mind, but expressive of the effect, and they are not to be found in all commissions of this sort.

Commissions of idiotcy are now settled, and cannot be altered. *Ib.*

**Removal of Lunatic out of Jurisdiction.**]—Where a lunatic had been taken out of the jurisdiction before the commission issued, an order was made that she should be brought back to England. *Wykeham, In re*, Turn. & R. 537.

### 3. Carriage of.

**Claim of Wife to Preference.**]—The wife of a lunatic has no preference over his children in the carriage of a commission. Each case must stand on its own circumstances; but the petition which is first presented has primâ facie the best claim. *Wood, In re*, 29 L. J., Ch. 54; 1 L. T. 119; 6 Jur. (N.S.) 113; 8 W. R. 70.

**Person most likely to bring out Truth.**]—On a contest for the carriage of a commission of lunacy that party is selected who is most likely to bring out the whole truth, subject to which a preference is given to the nearest of kin. Applications by other parties for leave to attend the execution of the commission are in the discretion of the court, and mere relations are not generally allowed to do so unless they have an interest. A suggestion that a party who applied for such leave on the ground of interest, should, as the condition of its being granted, be concluded by the verdict, overruled. *Nesbitt, In re*, 2 Ph. 245.

Where there is a contest between several parties for the carriage of a commission of lunacy, the court considers only which of them is most likely to bring out the truth, and no regard is paid to proximity of relationship or other considerations of that kind, though these are of importance when the question is as to the appointment of a committee. In a contest for the committeeship of a lunatic, the party who has had the carriage of the commission is not on that ground entitled to any preference. When the issuing of a commission of lunacy is opposed, or the carriage of it contested, the court will not prospectively give leave to any party to propose himself as committee, in the event of the subject of the commission being found of unsound mind;

but in issuing the commission will direct that no proceedings be taken for the appointment of a committee until further order. *Webb, In re*, 2 Ph. 10.

**Nearest Relations preferred.**]—The nearest relations, though opposing a commission of lunacy, shall have the carriage of it, if granted, unless some reason to the contrary. *Tomlinson, Ex parte*, 1 V. & B. 57; 12 R. R. 191.

**Brother preferred to Wife.**]—In a competition between the brother and the wife of an alleged lunatic for the carriage of the commission, the Lord Chancellor gave a preference to the brother, on the ground that, in the particular case, the wife had an interest in preventing the proof of the lunacy being carried back beyond a certain period. *Whittaker, In re*, 4 Myl. & Cr. 441; 8 L. J., Ch. 313; 3 Jur. 693.

**Maternal Aunt preferred to Alien Half-brother.**]—Where a commission of lunacy issued against a lady, who was the daughter of a Russian nobleman by an English lady, and who had always resided in England, the carriage of the commission was given to the maternal aunt of the lunatic in preference to her half-brother who was an alien, although, if the lunacy was not shewn to have begun before a particular time, the aunt would be benefited by a will made by the lunatic; but leave was given for the brother to attend the execution of the commission, and to produce and cross-examine witnesses. *Bariatinski, In re*, 13 L. J., Ch. 69.

**Secretary of Lunatics' Friend Society preferred to Next of Kin.**]—The carriage of a commission of lunacy given to the secretary of the Lunatics' Friend Society in preference to the next of kin of the lunatic. *Anstie, In re*, 1 Mac. & G. 200; 1 Hall & Tw. 313.

**Priority of Petition.**]—The priority of petition for a commission de lunatico inquirendo gives a primâ facie right to the carriage of it when issued. *Wood, In re*, 1 De G. F. & J. 142; 29 L. J., Ch. 54; 6 Jur. (N.S.) 113; 1 L. T. 119; 8 W. R. 70.

Where two petitions are presented for a commission of lunacy, and the only question between the parties is, which should have the carriage of the commission, those who first presented their petition will be entitled to it; and the fact that a power of attorney was given by the lunatic to one of such last-named petitioners will not militate against him. *Ib.*

Two petitions for a commission of lunacy were presented, one by the wife of a lunatic, the other by a nephew jointly with his wife, who was the daughter of the lunatic by a former marriage. The petition of the nephew and his wife was the earlier in date:—Held, that a wife is not entitled to any preference over a child of the alleged lunatic, as to the conduct of proceedings under a commission of lunacy, and that it not being shewn that there was any impropriety on the part of the nephew and daughter, or that the petition of the wife was preferable, the conduct of the proceedings ought to be given to the nephew and daughter as having presented the earlier petition. *Ib.*

### 4. Execution of.

**Procedure prior to Inquiry—Commission not acted upon.**]—Lunacy commission kept back for several years, and not acted upon, is a contempt, and will be dismissed with costs. *Anon.*, 2 Atk. 52.

—— **Order for Medical Examination.**]—A master in lunacy has jurisdiction, under s. 26 of the Lunacy Act, 1891, to issue a writ of attachment to enforce an order requiring the attendance of an alleged lunatic for medical examination; but in ordinary cases it is better to refer the matter to the court. *Bathe, In re*, or *B., In re*, 61 L. J., Ch. 446; [1892] 1 Ch. 459; 66 L. T. 38; 40 W. R. 369—C. A.

—— **Report—Right of alleged Lunatic to see.**]—The medical examination of an alleged lunatic, which the master has power to order under s. 26, sub-s. 2, of the Lunacy Act, 1891, may be made by a medical practitioner appointed to report to the court, or by one who will see the alleged lunatic in the interest of the petitioner, and with a view to being called as a witness by him at the inquisition. In the former case the medical practitioner would have to make a report to the court; in the latter, he is not obliged to make any written report at all, and if he does make one, and send it to the petitioner's solicitor, it is in the nature of a proof of the evidence that he is to give, and the alleged lunatic has no right to see it before the inquisition. *Bathe, In re*, or *B., In re*, 61 L. J., Ch. 487; [1892] 3 Ch. 194; 67 L. T. 62—C. A.

—— **Power of Commissioners to summon Witnesses.**]—Commissioners of lunacy have power of summoning witnesses as incident to their office. *Lund, Ex parte*, 6 Ves. 783; 6 R. R. 45.

**Production of Lunatic.**]—Where the husband was a lunatic, the wife, though an Irish peeress, committed for not producing him. *Wenman's (Lord) Case*, 1 P. Wms. 701.

**Prosecution of Inquiry.**]—An alleged lunatic is entitled of right to have an inquiry which has been ordered prosecuted at once, or to have the order for such inquiry discharged. *Naylor, In re*, 1 N. R. 173—L.JJ.

—— **Lunacy Regulation Act, 1862.**]—Sect. 4 of the above act is prospective. *Ib.*

An inquiry ordered before the above act came into force ought to be prosecuted before a master in lunacy—not before a judge of a common law court. *Ib.*

**Place at which Commission should be executed.**]—The rule is not inflexible that an inquiry by a jury as to the state of mind of an alleged lunatic must take place near his place of residence, and there being reason to believe that a strong local feeling as to the proceedings existed in the neighbourhood where the alleged lunatic resided, the inquiry was directed to be held in London. ——, *In re*, or *X. Y. Z., In re*, 18 Ch. D. 26; 48 L. T. 97.

A commission of lunacy against a person who was at St. Venant in France, ordered to be executed in Essex, where his mansion-house is. *Southcote, Ex parte*, Ambl. 109; 2 Ves. 401.

A commission of lunacy is properly directed to the place where the alleged lunatic has generally resided, although a great many witnesses, to be produced and examined in the inquiry,

reside at another place, of which the lunatic is a native. *Jephson, In re*, 2 Jur. 200.

**Place at which Commission should be executed.**]—To avoid inconvenience and expense, a commission was directed to issue into Middlesex, although the supposed lunatic was residing in Herts. *Waters, In re*, 2 Myl. & Cr. 38.

Commission of lunacy, to ascertain when lunacy commenced, directed to be executed in the neighbourhood in which the lunatic resided prior to his lunacy, and as alleged by one party, not in that to which he had been since conveyed; although evidence was given of his inability to bear removal. *Smith, Ex parte*, 1 Swanst. 4.

When lunatic is unfit to go before jury, and the whole of jury cannot go to lunatic, one or two go and examine, and report to the rest his state and condition. *Ib.* 7.

Commission of lunacy uniformly executed at the residence of the party; for that purpose his mansion-house, if none, his last place of abode; no instance of exception where he was within the realm; convenience of witnesses, &c., no ground for exception. *Baker, Ex parte*, 19 Ves. 340; G. Cooper, 205.

**Application as to.**]—A fair and reasonable application as to the execution of a commission of lunacy is not discouraged, but otherwise it will be dismissed with costs. *Ward, Ex parte*, 6 Ves. 579.

**Order for Inquiry before Judge of the High Court.**]—When an issue is directed by an order in lunacy to try the question of the insanity of an alleged lunatic before a judge of the High Court of Justice under the Lunacy Regulation Act, 1862, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the judge. *Scott, In re*, 54 L. J., Ch. 194; 27 Ch. D. 116; 51 L. T. 735; 32 W. R. 801—C. A.

An inquisition of lunacy is primâ facie evidence of lunacy; but where the question of sanity is raised in a cause, the parties disputing the lunacy are ordinarily as of right entitled to an issue. *Elliott* v. *Inse*, 5 W. R. 482.

**Right to Jury.**] — The right of an alleged lunatic to demand a jury is confined to the original inquiry. *Talbot, In re*, 51 L. J., Ch. 360; 20 Ch. D. 269; 45 L. T. 730; 30 W. R. 386—C. A.

**Compromise of Commission.**]—The plaintiff being confined in a lunatic asylum, and an inquisition under a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given an agreement was signed by her counsel, and counsel attending for the promoters of the commission, that she should be released from confinement, that certain arrangements should be made as to property which she claimed, that the title-deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up, and placed in the hands of H., and that the commission should be superseded. Accordingly the plaintiff was released, and the deeds handed over to H. The plaintiff then brought detinue against H. for the deeds; an interpleader rule was obtained on the claim of the promoters, by which the proceedings were stayed, and a feigned issue brought by the plaintiff against the promoters, to try whether she was entitled to the deeds notwithstanding the arrangement:—Held, first, that on the trial of such issue it was not necessary that the plaintiff should prove her title to the deeds, the question being only whether the agreement prevented her from insisting on her title. *Cummings* v. *Ince*, 11 Q. B. 112; 17 L. J., Q. B. 105; 12 Jur. 331.

Held, secondly, that it was rightly left to the jury, on evidence of the state of the plaintiff's mind and health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint, and without her free will, and the jury having so found that the plaintiff was entitled to the verdict, and that the legality of the restraint, assuming it to have been legal, and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress. *Ib.*

### 5. Supersedeas.

**Indulgence to Lunatic.**] — In the case of infants, it is the habit of the court very much to disregard form in order better to protect their interests, and in some respects lunatics are entitled to a similar privilege. This indulgence, however, is not to be granted to the same extent to a lunatic applying for a supersedeas, for he cannot at the same time assert his soundness of mind and claim the benefit of any relaxation of practice conceded to those of unsound mind. *Dyce Sombre, In re*, 1 Mac. & G. 116; 1 Hall & Tw. 285; 13 L. J., Ch. 335; 13 Jur. 857.

**Improper Applications.**]—Semble, that for the purpose of discouraging improper applications for a supersedeas, the Lord Chancellor will not adjudicate upon a case in favour of the petitioner, where it clearly appears that improper means have been used in getting up the petition. *Ib.*

Although the great seal may withhold a commission, if not required for the protection of person or property, where the circumstances of the case create great difficulty in ascertaining whether there exists unsoundness of mind of a character to subject the party to the operation of a commission, yet very different considerations will regulate the discretion of the court in deciding upon an application for superseding a commission which has once regularly issued. *Ib.*

**Existence of Declared Illusion.**]—Semble, a commission will not be superseded when any declared illusion continues to exist. *Ib.*

**Costs of Unsuccessful Application.**]—A petition for supersedeas having failed, the court, under the circumstances, refused to make any order as to costs, but directed the matter on this point to stand over, by way of affording a security against the repetition of the application except on proper grounds. *Ib.*

Where a petition for a supersedeas was presented in the name of a lunatic and was dismissed, the court refused to make any order as to costs, although it was apparent that the petition originated with third parties, the court considering that it had no power to make those parties pay the costs. *Ib.*

**Necessity for Presence in Court of Lunatic.**]—Semble, a petition to supersede a commission of lunacy will not be entertained, unless the

lunatic be either personally present in court, or at least in such a situation as that he may be personally examined by the Lord Chancellor, or some one under his authority. *S. C.*, 1 Ph. 436; 13 L. J., Ch. 335; 8 Jur. 817.

**Lunatic declared Sane by Foreign Court.**]—Whether, if a party who has been found lunatic escapes to a foreign country, and while resident there is pronounced by a competent tribunal to be of sound mind, the Lord Chancellor will give such credit to that decision as to entertain a petition by the party to supersede the commission, without requiring him first to return to the jurisdiction for the purpose of being personally examined, quære. *Ib.*

**Petition—In whose Name presented.**]—Petition to supersede commission of lunacy should be in the quondam lunatic's name. *Stanley, Ex parte*, 2 Ves. 25.

**Recovery or Pressing Circumstances.**]—Commission superseded on the ground of the recovery of the party, or the existence of pressing circumstances. *Logan, In re*, 1 Jur. 509.

**After Verdict personal Interview required.**]—The Lord Chancellor will not in general supersede a commission of lunacy after verdict, without seeing the lunatic. A commission cannot be superseded as to the person of the lunatic, and at the same time continued in force against the parties accountable for the lunatic's estate. But a lunatic who has recovered will be allowed, without superseding the commission, to have the control of his fortune, and to superintend the prosecution of accounts against accounting parties, without the intervention of the committee. *Gordon, In re*, 2 Ph. 242.

**Sufficiency of Mental Recovery.**]—To supersede commission, it is not necessary that the mind should be restored to its original state: competence to common purposes, as to make will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence. *Holyland, Ex parte*, 11 Ves. 10; 8 R. R. 67.

An application of a lunatic for a supersedeas of the commission of lunacy, on the ground of his recovery, will not at once be granted on evidence of the lunatic no longer exhibiting unsoundness of mind, but will be ordered to stand over until it can be seen what will be the effect of removing the restraint imposed by the existence of the commission. *Blackmore, In re*, 1 De G. J. & S. 84; 1 N. R. 187; 32 L. J., Ch. 436; 9 Jur. (N.S.) 90; 8 L. T. 264, 476.

**Costs of superseded Commission.**]—After the finding of a jury upon a traverse of an inquisition of lunacy, that the alleged lunatic was of a sound mind, the court acting in the jurisdiction in lunacy has no authority, under the 6 Geo. 4, c. 53, or otherwise, to direct payment out of the property of the alleged lunatic of any costs incurred with reference to the commission, although the verdict upon the traverse does not negative the lunacy at the time of the original inquisition. *Loveday, Ex parte*, 1 De G. M. & G. 275; 21 L. J., Ch. 231; 16 Jur. 95.

Nor does a petition of the alleged lunatic for a supersedeas and the delivery up of his papers and other property by the committee and the petitioners for the commission, entitle them to their costs as part of the terms on which such an order should be made, even where the court has, by an order in the lunacy made before the verdict on the traverse, directed the costs to be taxed. *Ib.*

After a person has been found lunatic by inquisition, but before any committees had been appointed or any report as to his property made, he recovered his reason, and obtained an order for a supersedeas:—Held, that the court had no jurisdiction to make any order against him for payment of certain expenses incurred by his father in relation to the lunacy; but that the father must bear his own costs, or bring his action. ——, *In re*, 5 Jur. (N.S.) 662; 7 W. R. 471.

Where a lunatic who had recovered, petitioned for a supersedeas of the commission:—Held, that the court could not order him to pay the expenses incurred with reference to it. *Anon.*, 4 De G. & J. 103.

**Irish Inquisition—Transcript of Record—Jurisdiction of English Court.**]—Where an order in lunacy has been made in Ireland by the court having jurisdiction for that purpose, and a transcript of the record has, under the provisions of s. 25 of the Lunacy Regulation Act, 1853, been transmitted to this country, the English court must treat the order as a binding order, and has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in Ireland, or for a supersedeas. Any such application must be made to the court which originally made the order. *Talbot, In re*, 51 L. J., Ch. 360; 20 Ch. D. 269; 45 L. T. 730; 30 W. R. 386—C. A.

### *c.* Inquisition.

#### 1. Procedure upon.

**Liberty to attend Proceedings—Alleged Lunatic.**]—Privilege of the party who is the subject of commission of lunacy, to be present at the execution. *Ogle, Ex parte*, 15 Ves. 112.

—— **Persons entitled under Settlement executed by alleged Lunatic.**]—Upon an undertaking to abide by any order the court might make, both as to the costs of the petitioners and the costs as far as they might be increased by their attendance at the inquisition, the court allowed an application by persons interested under a settlement executed ten years back by an alleged lunatic, for leave to attend by counsel at the inquisition, the object of the commission being to carry the lunacy back over a period of thirty-five years. *Richards, In re*, 1 De G. M. & G. 715; 21 L. J., Ch. 739; 16 Jur. 508.

—— **Mortgagee.**]—Where a mortgagee presented a petition against the issuing of a commission of lunacy, praying, in the alternative, that if the commission issued, she might be at liberty to attend it, the court refused the prayer of the petition, unless she consented to be bound by the result of the inquiry. *Watts, In re*, 1 Ph. 512; 14 L. J., Ch. 241.

An application by a mortgagee of an alleged lunatic's estate to be allowed to attend by

counsel at the inquisition refused, the applicant declining to be bound by the result of the proceedings. *Snook, Ex parte*, 1 Ph. 512.

—— **Wife.**]—Liberty given to the wife to attend by counsel the execution of a commission of lunacy against her husband. *Parkinson, In re*, 5 Jur. 547.

—— **Person interested under Will.**]—A stranger in blood to a lunatic, who is interested under a will made by the lunatic before the commencement of the lunacy, will not be allowed to attend the proceedings in the lunacy. *Scarlett, In re*, L. R. 8 Ch. 739; 29 L. T. 232; 21 W. R. 717.

—— **Attorney-General — Lunatic Illegitimate.**]—A lunatic, who was illegitimate and unmarried, was resident in Lancashire, and part of her property consisted of copyholds held of the duchy of Lancaster:—Held, that the attorney-general of the duchy of Lancaster was not entitled to attend the proceedings in the lunacy, the Queen's rights being sufficiently represented by the Queen's attorney-general, who had leave to attend. *Kershaw, In re*, 21 Ch. D. 613; 48 L. T. 51; 31 W. R. 130—C. A.

—— **Next of Kin.**]—The question as to whether or not next of kin shall have liberty to attend the proceedings upon such an inquiry is a matter of general practice, and is therefore left to the discretion of the master. *Lanwarne, In re*, 46 L. T. 668; 30 W. R. 759.

Where an inquiry was directed concerning the lunacy of an alleged lunatic resident abroad, and whose presence was dispensed with, service of the order to that effect was directed to be made upon her and upon her stepfather, with whom she was living, by registered letter. *Ib.*

**Inquiry when Lunacy commenced.**] — The Lunacy Regulation Act, 1862, s. 3, takes away the power existing under the Lunacy Regulation Act, 1853, s. 47, of directing an inquiry from what time an alleged lunatic has been of unsound mind. Opinion expressed by James, L.J., in *Sottomaior, In re* (L. R. 9 Ch. 677), dissented from. *Danby, In re*, 55 L. J., Ch. 583; 30 Ch. D. 320; 53 L. T. 850; 34 W. R. 125—C. A.

**Inquiry to be prosecuted with Despatch.**]—An alleged lunatic is entitled of right to have an inquiry which has been ordered prosecuted at once, or to have the order for such inquiry discharged. Sect. 4 of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), s. 4, is prospective only. *Naylor, In re*, 1 N. R. 173—L.JJ.

An inquiry ordered before this act came into force ought to be prosecuted before the master in lunacy, not before a judge of a common law court. *Ib.*

**Return to Inquisition — Irregularity.**] — Omission of the date in the commissioner's return of an inquisition in lunacy remedied. *Langham, In re*, 1 Jur. 281.

Upon a search of precedents, it was held no objection to the return to an inquisition finding a person lunatic, that it does not state that the lunatic has or has not lucid intervals. *Wragg, Ex parte*, 5 Ves. 450.

**Loss of Commission after Inquisition found.**]—On the accidental loss of a commission of lunacy after inquisition found, order for a duplicate commission, and the inquisition (which was recovered) to be annexed to it. *Rain, Ex parte*, 19 Ves. 589.

**Pending Inquisition—Lunatic restrained from leaving Jurisdiction.**]—Between the presentation of a petition for an inquiry in the case of an alleged lunatic and the official finding, he may be restrained by the court from leaving the jurisdiction, and his property may be protected from any disposition or misuse by which the purpose of the inquiry might be frustrated, but this interference, being provisional and only allowed as subservient to the investigation, cannot co-exist with an order prohibiting the prosecution of the latter. *Marsh, Ex parte, Lawler, In re*, Ir. R. 8 Eq. 506.

### 2. Quashing.

**Commission improperly executed.**]—If a commission is improperly executed, the court will grant a new commission, as a melius inquirendum does not issue in lunacy. *Roberts, Ex parte*, 3 Atk. 6.

Return to a commission of lunacy, that the party is so far debilitated in his mind as to be incapable of the general management of his affairs, quashed, and a new commission issued, a melius inquirendum not issuing in lunacy. *Cranmer, Ex parte*, 12 Ves. 445.

Under a commission of lunacy, the jury found "that the party is not a lunatic, but that partly from paralysis, and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last passed." The inquisition was quashed, and a new commission was ordered to issue. *Holmes, In re*, 4 Rus. 182; 28 R. R. 42.

—— **Misbehaviour of Commissioners.**]—If the commissioners, or the jury, upon a commission of inquiry misbehave themselves, their proceedings may be set aside by the chancellor. *Rochfort* v. *Ely (Lord)*, 1 Ridgw. 541.

Return to commission of lunacy, that the party is a lunatic enjoying lucid intervals, and that during such intervals he is competent to the government of himself and his affairs, quashed, and a new commission issued. *Atkinson, Ex parte*, Jacob. 333.

Order made for a new commission in lunacy on quashing the return on a previous commission, without presenting a second petition to the court. *Bennett, In re*, 1 Jur. 469.

An inquisition in lunacy having found that a person was a lunatic, and had been in the same state of lunacy from the time of her birth, the inquisition was quashed, and a new commission issued. *Bruges, In re*, 1 Myl. & Cr. 278.

In a case where a female was found lunatic under the christian name of Jane Eliza, and there afterwards appeared strong reason to believe that her true christian name was Elizabeth Jane, but there were no means of ascertaining the fact, the Lord Chancellor directed, there being no doubt as to the identity of the person, that an order for the transfer of stock held by trustees for the lunatic under the name of Elizabeth Jane C., and the orders upon all future proceedings should be entitled, "In the matter of Elizabeth Jane C., in the commission

called Jane Eliza C." *Crawford, In re*, 1 Myl. & Cr. 240.

**Finding on Inquisition not Conclusive.**]—There is no analogy between motions for new trials and new inquiries upon commissions of idiotcy; but the finding upon the inquisition is not conclusive, for it may be executed either in law or equity. *Rochfort* v. *Ely* (*Lord*), 1 Ridgw. 546, 549.

So, if there has been a finding against the king, and a melius inquirendum granted, there must be an insufficient office. *Ib.* 547.

### 3. Traverse of.

**Leave to Traverse a Matter of Right.**]—The Lord Chancellor has no discretion as to the granting of a writ of traverse, but only a right to use due care and caution in ascertaining that it is the wish of the lunatic that it should issue, or that the party applying, when a stranger, has an interest in the question, and if he is satisfied in this respect the right to traverse the inquisition is of course, but the exercise of that right is subject to the control of the court; as where upon an examination of the lunatic it is apparent he is in a raving madness, in such case the court would not permit the traverse to issue, as it would not be apparent there had been no untrue finding, and consequently the writ would be unnecessary. The court would, under such circumstances, exercise its jurisdiction by throwing protection round the lunatic's person and property, and refuse the writ. *Cumming, In re*, 1 De G. M. & G. 537; 21 L. J., Ch. 753; 16 Jur. (N.S.) 483.

Whether, if the Lord Chancellor should not be otherwise able to satisfy himself on the points above mentioned, he would allow any and what evidence to be gone into respecting them, quære. *Ib.*

Traverse to an inquisition, finding a person lunatic, is de jure, not matter of favour. *Ferne, Ex parte*, 5 Ves. 833.

A traverse to the return to an inquisition finding a person lunatic is a right by law, though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was suspended for the purpose of taking the traverse. *Wragg, Ex parte*, 5 Ves. 450.

Traverse of a verdict of unsound mind, under a commission, being the right of the party, cannot be refused, and prevents the Crown taking the custody, and consequently allowing the costs of the proceedings, however meritorious; but they were given out of a fund of the lunatic's in court, in a cause; on the principle on which the court protects persons in a state of incapacity, though adult, and not objects of a commission, assigning guardians, &c. *Sherwood* v. *Sanderson*, 19 Ves. 280; G. Cooper, 108; 13 R. R. 193.

**Persons entitled to Traverse—Lunatic.**]—Leave to traverse an inquisition of lunacy if applied for by the party himself, who has been found a lunatic, is matter of right. *Bridge, In re*, Cr. & Ph. 338; 10 L. J., Ch. 404; 6 Jur. 69.

But, semble, the allowance of a sum of money out of the estate of the party so found lunatic towards defraying the expense of the traverse is subject to the Lord Chancellor's discretion. *Ib.*

The party against whom a commission of lunacy issued, on the different appearance he made upon a second inspection was allowed to traverse the inquisition. *Roberts, Ex parte*, 3 Atk. 7.

A man found idiot or lunatic may traverse the finding; but a finding of sanity is peremptory in the first instance. *Hume* v. *Burton*, 1 Ridgw. 213.

The Lord Chancellor refused to allow a party who had been found a lunatic under two inquisitions to traverse the second. *Barnsley, Ex parte*, 3 Atk. 184.

—— **Husband.**]—It is in the discretion of the Lord Chancellor to grant leave to any person grieved, &c., to traverse an inquisition of lunacy. Refused to the husband of the lunatic, under circumstances which made the validity of the marriage doubtful. *Fust, In re*, 1 Cox, 418.

—— **Alienee.**]—Right of alienee of lunatic to traverse. *Sherwood* v. *Sanderson*, 19 Ves. 287.

—— **Person who has entered into Contract.**]—Person having entered under a contract with a lunatic, permitted to traverse. Chancellor was inclined to quash the inquisition, the commission not having been executed near the place of abode, and an order that the lunatic should have due notice having been disobeyed. *Hall, Ex parte*, 7 Ves. 261.

—— **Heir.**]—Not only the lunatic but his heir also is bound upon the traverse of the inquisition. *Roberts, In re*, 3 Atk. 308.

—— **Stranger.**]—Quære, if a stranger can traverse an inquisition in lunacy. *Ward, Ex parte*, 6 Ves. 579.

**Pending Traverse—Appointment of Committees and Execution of Grant Stayed.**]—Where the court considered it expedient in the circumstances of the case that, pending a traverse, the system of personal care of the supposed lunatic should not be disturbed, and that she should continue to receive her income, the appointment of committees and the execution of the grant were not stayed on that account; but the order for the appointment and grant was qualified by the introduction of directions to the above effect. *Cumming, In re*, 1 De G. M. & G. 537; 21 L. J., Ch. 753, 758; 16 Jur. 483.

**Procedure on Traverse—Pleading.**]—Manner of pleading a traverse to an inquisition finding a person lunatic. *Wragg, Ex parte*, 5 Ves. 452.

—— **Appearance.**]—In case the commission is opposed or traversed, the person must appear coram rege concilio, which means in chancery. *Southcote, Ex parte*, Ambl. 109; 2 Ves. Sen. 401.

—— **Cross Petitions—Right to begin.**]—At the hearing of a petition and counter-petition in lunacy, the one praying the confirmation of the commissioner's report, and the other simply opposing it, the counsel for the first petition is entitled to begin. *Bariatinski, In re*, 1 Ph. 442; 13 L. J., Ch. 386.

A party cannot be heard against the confirmation of the master's report in lunacy, without presenting a cross petition in the nature of exceptions to the master's report. *Saunders, In re*, 3 Mac. & G. 219 ; 20 L. J., Ch. 618.

On a petition to confirm the report in lunacy, and a cross petition in the nature of exceptions to it, the counsel for the cross petition is to begin. *Townshend, In re*, 1 Ph. 804 ; 16 L. J., Ch. 266.

—— **Appointment of Interim Committee.**]—A lady who had been found lunatic obtained leave to traverse, and no committee was appointed. Her husband, who had petitioned for the inquisition, having, before the trial of the traverse, become incapable of attending to business, the court appointed interim committees of the lady's person, with liberty to take such proceedings as to the traverse as they should think fit. *Armstrong, In re*, 2 De G. & J. 123.

—— **Private Examination, Object of.**]—The private examination for the purpose of a traverse of a verdict of lunacy under a commission, is merely to ascertain the wish of the party to exercise the right to traverse. *Sherwood* v. *Sanderson*, 19 Ves. 284 ; G. Cooper, 108 ; 13 R. R. 193.

—— **Place of Trial.**]—Traverse of inquisition of lunacy directed under circumstances, to be tried in a different country from that in which the subject of the inquiry had been found a lunatic. *Nugent, In re*, 2 Moll. 517.

**Return of Traverse—Commission Superseded—Costs of Commission.**]—Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded, but the Lord Chancellor doubted the propriety of such a double issue. No costs to the party taking out a commission of lunacy which is traversed with success, however meritorious the case ; the property never coming to the Crown, there is no fund. *Ferne, Ex parte*, 5 Ves. 832.

### 4. Debts and Liabilities of Lunatic.

**Execution—Restraining Sale.**]—Every person who intermeddles in the matter of a lunatic is intended to be interested for his advantage. Therefore, where a solicitor who had acted in some of the proceedings under a commission of lunacy, afterwards acted as attorney for a creditor of the lunatic, and issued an execution, and took his household furniture, Lord Chancellor had jurisdiction to restrain the sale ; the committee entering into security for the value of the goods, to be paid by instalments out of the saving of the income. *Ball, In re*, 2 Moll. 145.

**Debts under £10.**]—Money for the discharge of the debts of a lunatic under 10*l.* will not be directed to be paid to the solicitor, but to the committee of the lunatic. *Iredale, In re*, 1 H. & Tw. 254.

**Lien of Solicitors.**]—Where the committees of a lunatic had been authorised by the court to raise money by mortgage of his estate, but were unable to do so in consequence of some of the title deeds being in the hands of solicitors who claimed a lien upon them, but the items of their accounts were disputed, the court ordered that the mortgagee should be at liberty to pay to the committees a sufficient sum to discharge the lien on the title deeds, without prejudice to their right to have the accounts investigated. *Davies, In re*, 12 L. J., Ch. 456 ; 7 Jur. 589.

**Restraining Action.**]—Order made to restrain an action brought by an auctioneer against the solicitor in a lunacy for the amount of his bill, for appraising and selling property belonging to the lunatic, such sale having been made under the authority of the court, and the auctioneer having acted on the instructions of the solicitor, and with the sanction of the master before whom he had at first carried in his claim ; and a reference was directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account. *Weaver, In re*, 2 Myl. & Cr. 441.

**Petition by Medical Man for Payment of Balance due for Maintenance.**] — A medical gentleman, in whose care a lunatic had been placed, presented a petition during her life for payment out of her estate of the balance claimed to be due to him for her maintenance :—Held, that an order for that purpose could not be made on his application ; but the committee appearing, and asking for an inquiry what was due to the petitioner, such inquiry was directed. *Townshend, In re*, 2 De G. J. & S. 519.

**Rights of Creditors—Insolvent Estate.**]—In managing the estates of lunatics the court will have regard to the maintenance and comfort of the lunatic in preference to the claims of his creditors, although the estate be insolvent. *Pink, In re*, 52 L. J., Ch. 674 ; 23 Ch. D. 577 ; 49 L. T. 418 ; 31 W. R. 728—C. A.

The master in lunacy made a certificate finding that the property of a lunatic produced an income of 163*l.*, and that his debts amounted to 7,000*l.*, including 250*l.* for his past maintenance in an asylum, and 374*l.* for the past maintenance of his wife and children expended by the committee :—Held, on a summons taken out under Ord. XLV. of the Lunacy Orders, 1883, on which some of the ordinary creditors appeared and claimed payment of their debts, that the expenses of past maintenance of the lunatic, his wife and children must be paid in full, that capital producing 110*l.* a year should be set aside for the lunatic's future maintenance, and that the residue should be divided among the ordinary creditors pro ratâ, who were to have a charge on the reserved capital, with liberty to apply on the lunatic's death. *Ib.*

No order for satisfaction of a liability of a lunatic, until information furnished shewing that enough will still be left for his maintenance. *Adey, In re*, 1 Coop. t. Cott. 225.

The Lord Chancellor will not aid creditors of a lunatic in obtaining payment of their debts, if such a proceeding will place the lunatic or his family in a state of want. *Railton, In re*, 1 Jur. 574.

**Charging Order—Fund in Court—Judgment Debt.**]—A charging order obtained by a judg-

ment creditor under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, upon stock in court in which his debtor is interested, has the same effect as if the debtor had power to charge, and had agreed to charge, the stock; the order affects the beneficial interest of the debtor in the property, and his capacity to charge ceases to be material when judgment has been properly obtained against him. *Leavesley, In re*, 60 L. J., Ch. 385; [1891] 2 Ch. 1; 64 L. T. 269; 39 W. R. 276—C. A.

Charging orders obtained by judgment creditors of a lunatic upon a sum of stock in court to the credit of the matter of the lunatic:—Held, to be valid and effective, and that the court in lunacy would order payment to the judgment creditors out of the stock. *Ib.*

—— —— **Form of Order.**]—Plaintiff, having obtained judgment against a defendant, a lunatic, applied for a charging order for the amount of his debt upon a sum of consols standing in the name of the postmaster-general to the credit of the lunatic. The judge in chambers made an order, charging with the payment of the debt so much of the defendant's interest in the fund "as the lords justices sitting in lunacy may deem applicable to the payment of the said judgment debt":—Held, that there was no jurisdiction to make a charging order leaving the amount to be charged to the discretion of the lords justices, and that the order must be varied by inserting the amount of the fund charged. *Horne* v. *Fountain*, 58 L. J., Q. B. 413; 23 Q. B. D. 264; 61 L. T. 510; 38 W. R. 240; 54 J. P. 37.

**Payment out of Estate by way of Bounty—Moral Obligation—Promissory Note.**]—The payee of a promissory note given without consideration is not, even in the administration of a solvent estate, in the same position as the payee of a voluntary bond, so as to be entitled to claim against the estate after creditors for value. A lunatic, while sane, had given a promissory note for 50,000*l.* payable in instalments of 5,000*l.* each, in discharge of what he considered was a moral obligation, and had paid three of such instalments. Upon a claim made against his estate, which was a very large one, after he had been found lunatic, by the holder of the note for the sum of 35,000*l.*, being the amount of the unpaid instalments thereon, to which claim the next of kin consented:—Held, that although, as the gift was voluntary, the payee of the note was not entitled to claim as a creditor against the lunatic's estate, the court in the exercise of its discretion would order the payment to be made thereout, by way of bounty and as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise:—Held, that the application should have been made by the committee, and that he must be joined as a co-petitioner. *Dawson* v. *Kearton* (3 Sm. & G. 186), *Lloyd* v. *Chune* (2 Giff. 441), *Arthur* v. *Clarkson* (35 Beav. 458), and *Richards, In re* (36 Ch. D. 541), criticised. *Whitaker, In re*, 58 L. J., Ch. 487; 42 Ch. D. 119; 61 L. T. 102; 37 W. R. 673—C. A.

**Lunacy Proceedings binding on Heir-at-law.**]—Upon a reference in lunacy, it was found and reported that the sum of 413*l.* 14*s.* was due to A. B. for maintenance of the lunatic and necessaries supplied by him to the lunatic during his lunacy. The heir-at-law and next of kin of the lunatic had notice and was present at the proceedings under the reference. Before A. B received payment of the sum of 413*l.* 14*s.*, or any part of it, the lunatic died intestate, and it having been ascertained that his personal estate had been exhausted, A. B. instituted a creditors' suit against the heir-at-law for payment of his debt out of the real estate of the lunatic:—Held, that the heir-at-law was bound by the proceedings in lunacy, and that A. B. had established a sufficient primâ facie case to entitle him to a reference to the master to inquire and find whether any debt was due to him from the estate of the lunatic. *Wentworth* v. *Tubb*, 12 L. J., Ch. 61; 6 Jur. 980. Affirming, *S. C.*, 1 Y. & C. C. C. 171; 5 Jur. 1150.

**Committee of Lunatic's Business—Personal Liability.**]—A committee appointed by the court to carry on the business of a lunatic cannot be made personally liable on contracts entered into in course of trading, unless it can be shewn that the goods were supplied on his credit. He is, therefore, in a different position as regards personal liability to that of a manager and receiver appointed by the court, being, in fact, merely a bailiff or trustee of the business. In the event of the assets of the business not being for a time available to pay the creditors, the committee cannot be compelled to pay them out of his own pocket, repaying himself at a later time from the funds of the business when the assets come to hand. *Isaacs* v. *Chinery*, 74 L. T. 320.

### 5. Assignees of Next of Kin.

**Stop Order.**—Order in the nature of a stop order granted on the application of the assignee of the sole next of kin of a lunatic. *Moore, In re*, 1 Mac. & G. 103.

Order in the nature of a stop order granted on the application of the assignees of the interest of the sole next of kin of a lunatic, but dispensing with notice to the assignees of any applications in the matter except those respecting payments to the next of kin. *Pigott, In re*, 3 Mac. & G. 268.

The court will not make an order in the nature of a stop order on the estate of a lunatic in favour of an assignee of the next of kin. *Wilkinson, In re*, 44 L. J., Ch. 328; L. R. 10 Ch. 73; 23 W. R. 51.

An application by one of the next of kin of a lunatic, and the mortgagee of his presumptive share of the lunatic's estate, for an order directing the paymaster-general not to transfer the mortgagor's presumptive share of certain funds in court to anyone claiming under him without notice to the mortgagee, was refused. *Ib.*

### 6. Death of Lunatic, Effect of.

**Lunacy Jurisdiction terminated on Death.**]—The jurisdiction in lunacy terminates with the life of the person found a lunatic, and no order can be made afterwards, except orders incidental to the authority to make the receiver account and take the fund into safe custody. *Barry, In re*, Moll. 414.

**Real Estate—Interference between Adverse Claimants.**]—After the death of a lunatic there is no jurisdiction in lunacy to interfere between

adverse claimants to the real estate of the lunatic, although there is jurisdiction to restrain the committee of the estate from taking advantage of his position to assert his own claims as heir-at-law, or to prejudice the rights of adverse claimants. *Carrow* v. *Ferrior*, *Ferrior*, *In re*, 37 L. J., Ch. 571, *n.*; L. R. 3 Ch. 175; 18 L. T. 65; 16 W. R. 298.

Therefore, where two rival claimants filed bills praying for a receiver of the real estates pending the decision of their rights, and then presented petitions in lunacy for the appointment of a receiver, the court refused the application in lunacy and also declined to exercise its original jurisdiction in chancery for that purpose, upon an interlocutory application in the suits. *Ib.*

—— **Appointment of Receiver pending Litigation.**]—The court will not grant a receiver of real estate pending litigation between adverse claimants where the claims are merely legal, notwithstanding the possession at the time of filing the bill is vacant. *Carrow* v. *Ferrior*, 37 L. J., Ch. 569; L. R. 3 Ch. 719; 18 L. T. 806; 16 W. R. 454, 922.

—— **Heir—Order for Possession.**]—On the application of the heir after the death of the lunatic, the court will order the committee to give up the possession, and not put the heir to his ejectment, supposing his title as heir admitted. *Fitzgerald*, *In re*, 2 Sch. & Lef. 439; 1 Ll. & G. 20.

A lunatic was so found by the court to be seised in fee of certain real estate, and certain persons were found to be his heirs. On his death intestate:—Held, that the committee of the person who had been put by the court into possession of certain parts of the real estate must deliver possession thereof to the heirs so found, but without prejudice to any question of title, and could not retain possession as an adverse claimant:—Held, that the court could not order the committee of the person and estate to deliver possession of other part of the estate which the committee of the person had taken possession of claiming adversely to the heirs, and that the committees were not accountable in lunacy for rents accrued since the death of the lunatic. Held, also, that the court could not, under its general jurisdiction, order a solicitor to account for rents so accrued and received by him as solicitor for the committee of the estate. *Butler*, *In re*, L. R. 1 Ch. 607.

—— **Payment off of Mortgage.**]—Lord Chancellor may make an order in lunatic's affairs after the death of the lunatic; mortgage on his estate paid off, and the mortgage term ordered to be assigned to attend the inheritance, and not in trust for the next of kin. *Grimstone*, *Ex parte*, Ambl. 706.

—— **Contract of Sale entered into by Lunatic.**]—The court will not carry into effect, after a lunatic's decease, a sale of his estate previously made by private contract, there having been only an order to sell by public auction. *Loft*, *In re*, 8 Jur. 206.

—— **Disputed Heirship.**]—No jurisdiction in lunacy, after the death of the lunatic, to try the question of heirship; the possession was, under the circumstances, given to parties reported by the master to be the heirs-at-law. *Clarke*, *Ex parte*, Jacob, 589; 23 R. R. 150.

—— **Death of Lunatic after Order Pronounced.**]—An order made in a lunacy matter may be carried into effect though the lunatic dies after the order pronounced. After the death of the lunatic, being tenant for life, an order made in his lifetime affecting the rights of the remainderman, who has entered since the death of the lunatic, cannot be enforced; therefore, when the tenant for life, having a leasing power, makes an agreement for a lease, and afterwards becomes lunatic, by an order in the lunacy matter the contract for a lease ordered to be executed; lunatic dies; petition in the lunacy praying to carry the order into effect refused, the court's jurisdiction being at an end. *Kingston* (*Earl*), *In re*, 2 Ir. Eq. R. 169.

—— **Claim of Committee—Notice—Application of Purchase-money.**]—After the death of a lunatic, the claim of the committee does not constitute a specific charge upon the estate, nor is the purchaser from the heir of the lunatic's real estates bound to see to the application of the purchase-money in satisfaction of the committee's claim, of which he has had notice. *Jones* v. *Noyes*, 28 L. J., Ch. 47; 4 Jur. (N.S.) 1033; 7 W. R. 21.

—— **Claim of Executor to all Documents belonging to Lunatic's Estate—Discovery—Affidavit—Exhibit.**]—The committee of a lunatic jointly interested with the lunatic in certain property under a will, being desirous of having the trusts of the will administered, obtained leave to add the lunatic as a co-plaintiff in the action on affidavit evidence with certain exhibits, which, according to the present practice, are not filed with the affidavit but retained by the deponent. The lunatic died, and her executor, disapproving of the action, and desiring to impeach the proceedings of the committee, demanded all the documents in the possession of the committee, including the exhibits to the above-mentioned affidavit and her draft and copy accounts. The committee refused to produce them:—Held (1), that the exhibits being described in the affidavit as "hereto annexed," were part of the evidence, and that the committee was bound to produce them; (2) that as to the draft and copy accounts, they could not be demanded until the committee had obtained her final discharge. *Hincheliffe*, *In re*, 64 L. J., Ch. 76; [1895] 1 Ch. 117; 12 R. 33; 71 L. T. 532; 43 W. R. 82—C. A.

**Personal Estate—Payment into Court by Committee—Service on Him of Petition for Payment out.**]—Where, after the death of the lunatic, the committee of his estate had duly passed his accounts, paid the balance certified to be due from him into court, and had his security discharged under the 44th of the new orders in lunacy, it was held that a petition for payment out of court of the lunatic's estate to the executors of the lunatic must nevertheless be served upon the committee. *Wylde*, *In re*, 5 De G. M. & G. 25; 23 L. J., Ch. 464; 18 Jur. 115.

—— **Payment of Debt.**]—Order after the death of a lunatic for payment of a debt, viz. the

attorney's bill, upon a retainer over-reached by the lunacy, and no report of debts, if the petition is presented in the life of the lunatic; but the debt must be established at law. *M'Dougal, Ex parte*, 12 Ves. 384.

—— **Ascertainment of Next of Kin—Motion by Committee.**]—A motion by the committee after the death of a lunatic for a reference to ascertain his next of kin, in order that money in his hands might be distributed, refused. Such reference only made on bill against the committee for an account of the lunatic's property. *Gilbert, Ex parte*, 1 Ball & B. 297.

—— **Claim for Money expended—Statute of Limitations.**]—A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, 21 Jac. 1, c. 16, as against the heir-at-law of the lunatic, who was not a party to the application. *Wilkinson* v. *Wilkinson*, 9 Hare, 204.

**Control of Court over Committee.**]—The control of the court over the committee of a lunatic is not determined by the death of the lunatic. *Fitzgerald, In re*, 2 Sch. & Lef. 439.

**Petition by Committee—Irregularity.**]—Petition presented on behalf of the committee, after the lunatic's death, which did not contain a statement of that fact, dismissed for irregularity. *Briscoe, In re*, 2 Dr. & War. 501.

**Injunction obtained by Lunatic and Committee Dissolved.**]—A bill was filed by a lunatic, and his committee, and an injunction granted, and a decree made directing an issue. The lunatic died, and no further proceedings had been taken by the committee. The court ordered that the injunction should be dissolved and all proceedings stayed, unless the suit should be revived within a limited time. *Price* v. *Berrington*, 11 Beav. 90.

**Master's Report.**]—Where there is a reference to a master in the case of lunacy, he shall make his report although the lunatic be dead. *Armstrong, Ex parte*, 3 Bro. C. C. 238.

Where a person found to be a lunatic has died after the reference to ascertain the nature and amount of his property, but before the master's report had been made up, the Lord Chancellor has jurisdiction to direct that the reference be proceeded with notwithstanding the death of the lunatic. *Singleton, In re*, 8 Ir. Ch. R. 263.

A report made by the master after the death of a lunatic cannot be acted on, but the costs incurred after the death may be ordered to be taxed. *Way, In re*, 3 De G. F. & J. 175; 30 L. J., Ch. 815; 5 L. T. 510; 9 W. R. 563.

—— **Death before Petition to Confirm—Costs.**]—After presentation, but before the hearing of a petition to confirm the master's report in the matter of a lunatic, the lunatic died. The court made no order on the petition, refused to allow the costs in the absence of the legal personal representative, and directed the petition to stand over, with liberty to apply as to costs when the funds in court came to be dealt with. *Popham, In re*, 44 L. T. 323; 29 W. R. 403.

**Proceedings against Committee for Account.**]—Personal representatives of a lunatic cannot obtain from committee of his person an account of expenditure of allowance for maintenance by petition to Lord Chancellor, in lunacy. Semble, an account may, under circumstances, be obtained by bill in chancery. *Grosvenor* v. *Drax*, 2 Knapp, 82.

**Death before Appointment of Committee—Costs of Inquisition.**]—A person was found to be a lunatic by inquisition, but died before a committee of her estate had been appointed. On an application under the Lunacy Regulation Act the court made a declaration that the costs of the inquisition had been properly incurred, and ought to be paid out of the deceased lunatic's estate in the due course of administration. *Meares, In re*, 48 L. J., Ch. 190; 10 Ch. D. 552; 40 L. T. 111; 27 W. R. 369—C. A. And see *Popham, In re*, 44 L. T. 323; 29 W. R. 403.

**Funeral Expenses of Lunatic.**]—A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person or of whose estate there was no committee. The heir-at-law, who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over. *Townsend, In re*, 21 L. J., Ch. 747.

A petition for this purpose is necessary; a warrant from the lunatic office is not sufficient. *Ib.*

**Will—Ordered to be Opened.**]—The will of a deceased lunatic, which had been deposited in court, ordered to be opened with a view to arrangements for the funeral. *Farren, Ex parte, Montagu, In re*, 2 Jur. 462.

—— **Fund in Court—Payment out to Trustees.**]—Where the will of a lunatic had been admitted to probate, the court, upon the petition of the executrix, ordered a fund in court belonging to the lunatic's estate to be transferred to trustees to be approved by the commissioner, and to be held by them upon the trusts of the will, although such will was made after the time from which the testator had been found by inquisition to have been of unsound mind. *Garden, In re*, 13 L. J., Ch. 439.

**Death—Allegation of.**]—The court will never act on the allegation of the decease of a lunatic, without proof of that fact by affidavit. *Fermor, Ex parte*, 1 W. R. 43.

**Proceedings in Lunacy—Privilege.**]—J. B., a lunatic, was tenant in tail in possession of an estate of which C. B., his committee, was tenant in tail in remainder. An action having been brought after the death of J. B. without issue and without barring the entail, against C. B. to enforce an agreement made in lunacy in respect

of the estate, into which it was asserted that C. B. had entered in her private capacity as well as in that of committee, a summons for production of documents was issued against her, asking that she might be ordered to produce, among other documents, counsel's briefs upon, and the shorthand writer's notes of, the proceedings in lunacy:—Held, that these documents were not privileged, and must be produced. *Brown, In re, Tyas* v. *Brown*, 42 L. T. 501; 28 W. R. 575.

*d.* COMMITTEE.

**1. Appointment of.**

**Generally.**]—An idiot is presumed in law to be incapable of ever attaining a competent degree of understanding to govern either himself or his estate. (*Beverley's Case*, 4 Co. 126; 2 Inst. 14; Reg. Brev. 267; F. N. B. 532.) Therefore the king may grant the custody of the person, and the profit of the estate during the life of the idiot without account except for necessaries, and all acts ever done by the idiot to bind his estate shall be avoided. However, since the revolution, the Crown has always granted the surplus profits of the estate of an idiot to some of his family. *Ely's (Lord) Case*, 1 Ridgw. 519. App. n.

But a lunatic is presumed in law capable of recovering that understanding which he has lost, therefore the custody of his person and estate shall be granted to the committee only during pleasure. And this committee, deducting a suitable maintenance for the lunatic and his family, shall account in chancery for the surplus profits, and shall pay them over, either to the lunatic, if he recover his understanding, or to his legal representative after his death. But all acts done by him during his lunacy to bind his estate shall be avoided. *Ib.*

**Committee of Person—Appointment—Property small—Reference dispensed with.**]—A committee of the person and estate of a lunatic appointed without a reference, where the property was small. *Farrow, Ex parte*, 1 Russ. & M. 112.

Appointment of committee of lunatic without a reference to the master, the property of the lunatic being very small. *Collins, In re*, 6 Jur. 545.

Appointment of committee of a lunatic without a reference; and the balances to be paid on an affidavit, without annual account before the master, the property being very small. *Pickard, Ex parte*, 3 V. & B. 127.

—— **Maintenance refused until Appointment.**]—Until a committee of lunatic's person be first appointed, the court will not pay out any sum, even for the present maintenance of lunatic's wife and children. *B——, In re*, 1 Ir. Eq. R. 181.

—— **Payment to surviving Committee ordered without fresh Reference.**]—Where one of two committees of a lunatic's estate had died, and the property was very small, the court, without a fresh reference to the master, ordered the income to be paid to the surviving committee on evidence of his solvency. *Noble, In re*, 2 De G. M. & G. 280; 21 L. J., Ch. 748.

—— **New Committee—Fund in Court—Payment of Dividends.**]—The dividends arising from a sum of stock in court to the credit of H. D. R., a lunatic, ex parte the metropolitan board, which represented the purchase-money of land belonging to the lunatic taken by the board under the Lands Clauses Act, 1845, were ordered to be paid to the joint committees of the estate of the lunatic. Upon the death of one of the joint committees the survivor was appointed sole committee; but the master declined to order the dividends to be paid to him, and a petition intituled in lunacy and in the chancery division was presented for that purpose:—Held, that the dividends ought to be transferred to the lunacy and paid to the committee, and that upon the appointment of a new committee the order appointing him ought to direct payment to him of the dividends, and that the metropolitan board need not be served with the application, and that the board ought to pay the costs of the petition. *Ryder, In re*, 57 L. J., Ch. 459; 37 Ch. D. 595; 58 L. T. 783—C. A.

—— **Wishes of Lunatic Consulted.**]—In the appointment of the committee of the person of a lunatic, the court will attend as far as possible to the wishes and inclinations of the lunatic. *Leacocke, In re*, Ll. & G. 498.

—— **Right of Husband to be appointed.**]—Where a married woman is found lunatic the husband is not entitled to be appointed committee of her person, either solely or jointly, if the court is of opinion that it will not be for the benefit of the lunatic. *Davy, In re*, 61 L. J., Ch. 578; [1892] 3 Ch. 38; 67 L. T. 180; 41 W. R. 96—C. A.

—— **Non-residents.**]—Persons whose places of residence admit of their frequently visiting the lunatic, and inspecting the management of his concerns, to be preferred as committees. *Fermor, Ex parte*, Jacob, 405.

—— **Person out of Jurisdiction.**]—It being proposed to appoint as committee a person resident out of the jurisdiction, the master in lunacy reported that as the proposed committee was resident out of the jurisdiction he could not approve of him. The court, though satisfied of the expediency of appointing him, declined to do so until the master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he should have approved. *Bruère, In re*, 17 Ch. D. 775; 45 L. T. 290; 30 W. R. 223.

—— —— **Property Situate Abroad—Security.**]—Where a lunatic was a widow and interested in property of considerable value situate in Russia, the court appointed her eldest son, who resided in Russia, and her daughter, who resided in England, joint committees of her estate, and accepted as security the bond of the committees and of their brothers and sisters. *Hopper, In re*, 66 L. J., Ch. 569; 77 L. T. 154—C. A.

—— **Relations.**]—In the appointment of committee of a lunatic, relations, unless some specific objection, preferred to strangers. The wife appointed committee of the person not alone,

but jointly with a relation. *Le Heup, Ex parte*, 18 Ves. 222.

Reluctance with which a stranger is appointed committee of a lunatic who has relations. *Watkins, In re*, 1 Coop. t. Cott. 225.

The old rule that next of kin of a lunatic, who is entitled to his estate upon his death, should not be appointed committee of his person is not now adhered to. *Cockayne, Ex parte*, 7 Ves. 591.

No objection that the committee of the lunatic's person is the next of kin to lunatic, and will come in for a share by the Statute of Distribution, it being for the interest of the next of kin to prolong the lunatic's life, whereby his personal estate will be increased. *Neale's Case*, 2 P. Wms. 544. *See* 7 Ves. 591.

—— **Heir.**]—The court will not grant the custody of the lunatic's person to the next heir; but his being entitled to a share of the personal estate by the Statute of Distribution is no objection. *Ludlow, Ex parte*, 2 P. Wms. 638.

—— **Heir and Next of Kin.**]—The heir and next of kin of a person found a lunatic are entitled of right to propose themselves to the master for the charge of committee of the person, any other must obtain an order to be at liberty to do so, and his petition, which must be speedy, must state the objections to the heir and next of kin, and set out particularly the facts on which he grounds his claim to be preferred. *Persse, In re*, 1 Moll. 439.

—— **Refusal of Court to appoint.**]—Court refused to appoint person committee of lunatic upon circumstances; particularly that he had agreed to give part of profits to another. *Fletcher, Ex parte*, 6 Ves. 427.

—— **Property in Ireland.**]—Where an individual is found lunatic under an inquisition taken in England, the appointment of committees of his person rests with the Lord Chancellor of Great Britain, notwithstanding that the property of the lunatic is situated in Ireland, and that a transcript of the record of the inquisition has been transmitted to the chancery of the country, with a view to the appointment of committees of his estate by the Lord Chancellor of Ireland. *Tottenham, In re*, 2 Myl. & Cr. 39; 2 Mont. & C. 39; 1 Jur. 653.

Though a lunatic's lands be in Ireland, yet if the lunatic be resident at an asylum in England the Chancellor of Ireland cannot appoint a committee of his person. *B* ——, *In re*, Ir. R. 1 Eq. 181.

Order made for payment of lunatic's maintenance to a married woman (committee of the person) on her separate receipt, her solicitor undertaking that the money should be duly applied. *Edwards, In re*, 12 Mac. & G. 134.

—— **Custody of Lunatic—Grant to Person, his Executors, Administrators and Assigns.**]—The custody of an idiot cannot be granted to a man, his executors, administrators and assigns. *Rodgers* v. *Phrazier*, 1 Vern. 9; 2 Shower P. C. 171; 2 Ch. Ca. 70.

**Committee of Estate—Mother of Infant tenant-in-tail.**]—The mother and guardian of an infant tenant-in-tail in remainder (become lunatic) preferred to the nominee of a party interested in the personal estate as committee. *Webb, In re*, 2 Ph. 532; 17 L. J., Ch. 276.

—— **Natural Daughter of Bastard Lunatic.**]—A bastard tenant for life of real estates being found lunatic leave was given to his natural daughter, who had resided with him up to the time of his confinement, to carry in proposals for a committee of the estate as well as of the person, a check upon the remainderman. *Webb, In re*, 2 Ph. 116.

—— **Master of Court.**]—The practice of appointing a master of the court committee of the estates of lunatics is objectionable, for he can have no direct knowledge, and the purpose of the office is to acquire direct knowledge, and interfere actively in the management, warrant payments, and generally guard the safe exercise of the jurisdiction. Whenever a person connected with the family can be found eligible and willing to give security, and undertake it, he ought to be appointed committee of the estate, and not a master. *Hussey, In re*, 1 Moll. 226.

—— **Partner.**]—A person who was entitled to a share in a business in partnership with a lunatic, and who was an accounting party in respect of such business, may, under special circumstances, be appointed committee of the lunatic's estate. *Millington, In re*, 2 Eq. R. 158—L.JJ.

—— **Separate Committees.**]—In a case where a lunatic had two estates, situate at a distance from each other, and of considerable value, the court, under the circumstances, appointed a separate committee for each. *Robins, In re*, 2 Russ. & M. 449.

### 2. Remuneration of.

**General Practice—Salary not allowed.**]—It is not the practice, either in England or Ireland, to allow any salary to the committee of the estate of a lunatic. Therefore, where A., who was the heir-at-law of the lunatic, had been appointed committee of his estates, which were very extensive, and appeared to have been much neglected, procured an order in the Court of Chancery in Ireland, for a reference to the master to inquire and report whether it would be for the benefit of the lunatic that he (A.) should be appointed joint-committee of the person of the lunatic; and if so, whether any and what increase should be made to the allowance for maintenance, with a view to the better care of the estate; and the master made a report approving of A. being appointed a joint-committee of the person with C., already a committee of the person of the lunatic, and on the increase of 600*l.* a year to the allowance of 1,500*l.* allowed for the maintenance of the lunatic, the said A. having undertaken the management and superintendence of the estates of the lunatic, and for that purpose to reside near to said estates:—Held, that the orders directing such reference, and confirming the master's report should be set aside, inasmuch as it was an indirect mode of compensation to the

committee of the estate in that character. *Lanesborough (Earl), In re*, Ll. & G. 503.

Observations as to paying for the management of a lunatic's estate and the impropriety of appointing his devisee committee. The decision of the privy council reversing the orders of the Lord Chancellor (Rep. Ll. & G. 503) observed on. *S. C.*, Beat. 639.

Where a lunatic's property consisted simply of public stock and moneys due in respect of half-pay, an allowance to the committee for receiving it was refused. *Powell* v. *Bonner*, 9 L. J., Ch. 139.

**Salary allowed—Circumstances peculiar.**]—A salary allowed to the committee of the estate of a lunatic under peculiar circumstances. *Fermor, Ex parte*, Jacob, 402.

**Expenses in visiting Lunatic.**]—The committee of a lunatic ought to be resident within the jurisdiction of the court, and therefore an allowance made him for expenses in visiting the lunatic discontinued on his going to live in Scotland. *Ord, Ex parte*, Jacob, 94.

**Care and Trouble.**]—No allowance to committee of lunatic's estate for care and trouble. *Anon.*, 10 Ves. 103. S. P., *Annesley, In re*, Ambl. 78.

The committee of the estate of a lunatic is not entitled to any remuneration for his trouble. Where any allowance at all is made to him it is not for his sake but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance. *Walker, In re*, 2 Ph. 630.

**Out of Pocket Expenses—Interest.**]—Allowance, not exceeding 5 per cent. on receipts, to committee of lunatic's estate for expenses out of pocket in collecting rents. *Westbrooke, In re*, 2 Ph. 631.

**Employment of Agent at Salary.**]—Order made without a reference to the master, that the committee of a lunatic should be at liberty to employ a particular person for inspecting the lunatic's property at a fixed salary, to be paid out of the rents. *Errington, In re*, 2 Russ. 567.

### 3. Security by.

**Heir-at-law required to give Security on Appointment.**]—Even the eldest son and heir-at-law of a lunatic will not be appointed one of the committees of his estate without giving security, unless the master reports that no person can be found to act as committee who will give security. *Frank, In re*, 2 Russ. 450; 26 R. R. 148.

**Appointment without Security.**]—The court may, if it see fit, appoint a committee of a lunatic's estate without requiring the usual security. *Burroughs, In re*, 2 Dr. & War. 207; 1 Con. & L. 309.

**Reduction of Security.**]—The bond of the committee delivered up and less security taken. *Northleigh, Ex parte*, 2 Ves. 673.

Securities belonging to a lunatic's estate ordered to be deposited with the master for the purpose of reducing the amount of the committee's recognizances. *Eagle, In re*, 2 Ph. 201.

**Change of Securities.**]—Securities changed on giving greater; but this not encouraged, as if lunatic recovers he may have no remedy on a concealment of part of estate. *Pereira, Ex parte*, 2 Ves. Sen. 674.

**Authority to act before Security perfected.**]—Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time. *Rutter, In re*, 22 L. J., Ch. 178; 20 L. T. 266; 1 W. R. 27.

**Property situate abroad—Appointment of Committee out of Jurisdiction.**]—Where a lunatic was a widow and interested in property of considerable value situate in Russia, the court appointed her eldest son, who resided in Russia, and her daughter, who resided in England, joint committees of her estate, and accepted as security the bond of the committees and of their brothers and sisters. *Hopper, In re*, 66 L. J., Ch. 569; 77 L. T. 154—C. A.

**Surety—Heir-at-law.**]—The heir-at-law of a lunatic, who with one other person was the next of kin of the lunatic, was appointed committee of the person. Another party being proposed, was approved of by the master in lunacy as committee of the estate. The committee of the person proposed himself as one surety for the committee of the estate. The attorney-general was willing to accept the security, but declined to do so without the sanction of the court. An order was made that, upon the allowance to the lunatic being paid direct to the committee of the person, instead of passing intermediately through the hands of the committee of the estate, the committee of the person be accepted as one of the sureties for the committee of the estate; the general rule, however, to remain unaltered. *Mount, Ex parte, Burton, In re*, 21 L. J., Ch. 221.

—— **Extent of Liability.**]—The sureties of a committee of a lunatic are liable to pay not only any balance found due from him, but also the costs and expenses incurred in consequence of his neglecting to obey the orders of the court for the payment of such balance, and that, although they may not be informed till afterwards of the default on the part of the committee. *Lockey, In re*, 14 L. J., Ch. 164.

—— **Enforcement of Bond.**]—Where it is desired to enforce against the committee of the estate of a deceased lunatic and his sureties the usual bond required of the committee of the estate, the proper course is to petition the court that the bond may be deposited by the master in lunacy with the queen's remembrancer; this court will not transfer the bond to the administrators of the estate of the deceased lunatic. *Hill, In re*, 1 De G. J. & S. 487; 7 L. T. 702; 11 W. R. 296; 1 N. R. 250.

Where it has been found that a displaced committee is indebted to his lunatic's estate, and proceedings upon the bond by him and his sureties have been ordered, and the lunatic dies before they are taken, the court will order a delivery of the bond by the master in lunacy to the queen's remembrancer, who is the proper person to enforce it, and not to the lunatic's legal personal representative. *Ib.*

Form of order enabling an administrator of a deceased lunatic's estate to enforce against a defaulting committee of the estate and his sureties the bond to the Crown, entered into by them on his appointment. *Ib.*

### 4. Termination of Office.

**Committee of Person—Removal.**]—Committee of lunatic refusing to answer, new committee appointed on application to Great Seal. *Lloyd* v. ——, Dick. 460.

On a petition to remove the committee of the person, the court not being prevented by the form of the petition from granting relief according to the nature of the case, directed an inquiry whether the comfort of the lunatic was sufficiently provided for, regard being had to the sum allowed. *Proctor, Ex parte*, 1 Swanst. 531. S. P., *Evelyn, Ex parte*, T. Vac. 1829.

A petition was presented for removal of committee. The petition was so drawn as to be in a great measure unintelligible, yet chancellor exercised his jurisdiction and inquired into truth of affidavits. *Ib.*

—— —— **Bankruptcy.**]—The committee of the person of a lunatic not removed in consequence of his bankruptcy. *Ib.*

Bankruptcy of the committee of the person of a lunatic is a sufficient cause for removing him on account of the fund for maintenance; but the custody of the person will not be changed, if the master finds it proper with regard to the comfort of the lunatic that it should continue. *Mildmay, Ex parte*, 3 Ves. 2.

**Committee of Estate—Discharge—Residence at a Distance.**]—The circumstance that a committee of a lunatic's estate resides at a distance from the property is not a ground per se for discharging such committee, although it may raise a case for inquiry before the master, as to the propriety of his being discharged. *Brown, In re*, 1 Mac. & G. 201; 1 Hall & Tw. 348; 19 L. J., Ch. 96.

—— **Irregular Proceedings — Sanction of Master.**]—Where committees of a lunatic's estate had expended large sums in draining and other improvements, and had contracted with a railway company for sale of a part of the estate, and done other acts which were not within the scope of their authority, but had as to all of them acted under the sanction of the master in lunacy:—Held, on a petition by the heir-at-law of the lunatic, that although the proceedings were irregular they formed no ground for dismissing the committees from their office. *Ib.*

—— **Termination on Death.**]—A custody of a lunatic's estate granted to baron and feme (the feme being next of kin) determines on her death. *Lyne, Ex parte*, Cas. t. Talb. 142.

### *e.* Receiver.

**Appointment.**]—Committee of the person and estate of lunatic appointed, with restriction not to receive any part of the estate. Receiver appointed of the estate. *Billinghurst, Ex parte*, Ambl. 104.

—— **Solicitor under Commission.**]—Solicitor under a commission of lunacy not to be appointed receiver of the estate of the lunatic. *Pineke, Ex parte*, 2 Mer. 452.

—— **Objection to Person appointed.**]—The person whom the master has approved for the office of receiver of lunatic's estate must, to be rejected, be shewn incompetent, not merely another person more eligible. *Bangor (Lord), In re*, 2 Moll. 518.

Report approving of a person as temporary committee of the person of a lunatic not sent back to be reviewed on the application of sister and some of the next of kin of lunatic, no disqualification in the person approved of being shewn. *Ib.* 519.

—— **Committee.**]—A reference under special circumstances directed to inquire whether it would be beneficial that the committee of the lunatic's estate should be appointed receiver. *Langham, In re*, 1 Jur. 281.

—— **Inability to procure Committee.**]—Receiver of a lunatic's estate appointed, when no one would act as committee. *Radcliffe, Ex parte*, 1 J. & W. 639.

Where no one could be procured to act as committee of lunatic, a receiver was appointed with a salary, but to be considered and give security as committee. *Warren, Ex parte*, 10 Ves. 622.

—— **Property not exceeding £1,000—25 & 26 Vict. c. 86.**]—Under 25 & 26 Vict. c. 86, the Lord Chancellor has power to appoint persons to recover and receive funds of a lunatic without inquisition, and in a summary manner, in the alternative either of his income being under 50*l.*, or his property not exceeding 1,000*l.* in value. *Harvey* v. *Trenchard*, 34 Beav. 240.

The court cannot entertain an objection that an order was made by the lords justices in lunacy in the absence of proper parties. *Ib.*

The lords justices made an order under 25 & 26 Vict. c. 86, which appointed two persons to receive from the trustees, and apply for his benefit, the property of a prisoner acquitted on the ground of his lunacy. The court decreed execution of the order. *Ib.*

—— **Interim Receiver—Appointment Ex parte—Pending Application for Inquisition.**]—In a proper case the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent will do so upon an ex parte application. *Fountain, In re*, 57 L. J., Ch. 465; 37 Ch. D. 609; 59 L. T. 76—C. A.

*f.* CUSTODY OF PERSON.

**Grant to Person, his Executors, Administrators and Assigns.**]—The custody of an idiot cannot be granted to a man, his executors, administrators and assigns. *Rogers* v. *Phrazier*, 1 Vern. 9; 2 Shower, P. C. 171; 2 Ch. Ca. 70.

**Mode of obtaining Grant.**]—Mode of proceeding by the committee to obtain possession of the person of a lunatic who before inquisition found had been committed to custody under the 1 & 2 Vict. c. 27. *Flanagan, In re*, 2 Jo. & Lat. 343.

**Order for Delivery—Habeas Corpus.**]—Order that a person against whom a commission of lunacy was established should be delivered up to the committee: habeas corpus not necessary. *Cranmer, Ex parte*, 12 Ves. 445.

**Criminal Lunatic.**]—Where a lunatic had been tried for murder and acquitted on account of his lunacy, but ordered by the judge to be detained, the Lord Chancellor declined ordering him to be removed out of gaol to a proper receptacle for lunatics, the proper application being to the king in council. *Hill, Ex parte*, G. Cooper, 54.

When a lunatic, who had been so found after he had been committed to prison for a breach of the peace, upon being so found, had been transferred, by virtue of the warrant of the lord-lieutenant, to a lunatic asylum pursuant to 1 & 2 Vict. c. 27, and the period of his imprisonment had expired: —Held, that the Lord Chancellor had jurisdiction to order the lunatic to be placed in such asylum as the committee, with the approbation of a master, should appoint. *M'Dermott, In re*, 2 Con. & L. 293; 3 Dr. & War. 480.

Where a person has been tried upon a criminal charge, and acquitted on the ground of his insanity, and was thereupon confined in a lunatic asylum under the provisions of 39 & 40 Geo. 3, c. 94, the chancellor, upon the application of a creditor, issued a commission of lunacy, the party being entitled to property of the value of 600*l*. In such case, the chancellor has no jurisdiction to interfere in any way except by a commission, and has no power over the person of the individual. *Clark, Ex parte, Pearce, In re*, 8 Jur. 82.

**Residence of Lunatic.**]—Where a person has been declared a lunatic on petition, the Lord Chancellor will not, in the absence of special circumstances, send him to reside out of Ireland. The nature of the Lord Chancellor's jurisdiction in lunacy explained. *Birch, In re*, 29 L. R., Ir. 274—L. C.

Leave given for a lunatic, under particular circumstances, to reside in Scotland, his committee, who resided in England, undertaking to bring him within the jurisdiction whenever it should be required. *Jones, In re*, 1 Price, 461.

Security for the return of a lunatic permitted to go out of the jurisdiction must be of a kind available in the courts of this country. *Stair, In re*, 1 Coop. t. Cott. 227.

**Access to Lunatic.**]—Access to a lunatic by a person entitled upon the death of the lunatic, in default of appointment by her, to see whether she was in a state to exercise the power refused. *Lyttleton, Ex parte*, 6 Ves. 7; 5 R. R. 202.

*g.* MAINTENANCE AND ALLOWANCES.

**1. Principles Regulating.**

**Comfort of Lunatic.**]—The court will, without application to it for that purpose, where the estate of a lunatic has been increased, direct the master in lunacy to inquire whether, by an additional expenditure, any increase of comfort can be procured for the lunatic. *Melhuish, In re*, and *Haran, In re*, 1 W. R. 236.

Lunatic's comfort considered in exclusion of the presumptive right of his next of kin, etc. Lunatic not stripped of support by act of the Lord Chancellor, even for creditors. *Wright, Ex parte*, 2 Ves. Sen. 25.

The Lord Chancellor will not, even for creditors, make an order in lunacy the effect of which must be to put the lunatic in a state of absolute want. *Dikes, Ex parte*, 8 Ves. 79.

No order upon petition in lunacy for payment of the lunatic's debts out of the funds, not within the reach of the creditors; except for his accommodation, and it clearly appears that he will have a sufficient maintenance. *Hastings, Ex parte*, 14 Ves. 182; 9 R. R. 272.

A lunatic is never to be looked upon as irrecoverable. The lunatic's comfort to be regarded, and not the benefit of his administrators or next of kin. *Dormer's Case*, 1 P. Wms. 265.

A liberal application of the property of a lunatic is to be made to secure every comfort his situation will admit. *Baker, Ex parte*, 6 Ves. 8; G. Cooper, 205.

Lunatic is to have every comfort his situation and fortune will admit of, without any regard to expectants. *Chumley, Ex parte*, 1 Ves. 296.

**Not limited to Income.**] — Maintenance of lunatic is not limited, like infant's, to amount of income. *Persse, In re*, 3 Moll. 94.

**Income Tax not deducted.**]—The allowance for the maintenance of a lunatic previously directed to be paid, ordered to be continued by the accountant-general without any deduction in respect of income tax. *Liebenrood, In re*, 6 Jur. 721.

**Amount of Allowance.**]—The king's grant of a lunatic's estate without account is void; but the king or Lord Chancellor may allow such a yearly maintenance to a lunatic as amounts to the yearly value of the lunatic's estate. *Sheldon* v. *Aland*, 3 P. Wms. 110.

**Increase of Allowance.**] — Under circumstances, the court will increase the allowance for maintenance which will answer the allowance for trouble. *Annesley, In re*, Ambl. 78.

—— **Near Relations.**]—The court, on a proper case being made, will grant an increased maintenance to the lunatic in order that the same may be applied for the support of the near relations of the lunatic. *Creagh, In re*, 1 Dr. & Wal. 323.

**Illegitimate Children of Deceased Brother.**] —The court will not increase the allowance of a lunatic, on the ground of there being illegitimate children of a deceased brother of the lunatic, to whose support the lunatic would probably

have contributed if not in a state of incapacity. *Grace, In re*, 13 L. J., Ch. 262.

**Allowance — Father.**]—A fund in court to which a lunatic was entitled, paid to the father in part discharge of moneys expended in the lunatic's maintenance. *Law, In re*, 30 L. J., Ch. 512; 7 Jur. (N.S.) 410.

—— **Wife.**]—Interest ordered to be paid to wife, husband being in a state of imbecility of mind. *Bird* v. *Lefevre*, 4 Bro. C. C. 100.

The trustees under a will, in which a life annuity of 6,000*l.* a year, and other considerable benefits, were given to a person who at the death of the testator was confined in a lunatic asylum, filed a bill for the directions of the court in executing the trusts of the will relative to the lunatic. The wife of a lunatic presented a petition, praying an allowance out of the income given to the lunatic, and the court thereupon referred it to the master to inquire into his state of mind; and the master having reported that he was of unsound mind, and not competent to the management of his affairs, the court, upon the petition of the wife to confirm the report, directed the trustees to apply to the Great Seal for a commission of lunacy, and referred it to the master, to inquire what, in the meantime, would be a proper allowance to be made to the wife. *Exeter (Bishop)* v. *Ward (Lord)*, 2 Myl. & K. 54.

—— **Wife as against Creditors.**]—In sanctioning a scheme for the maintenance of a lunatic under ss. 116 and 117 of the Lunacy Act, 1890, the lords justices will not allow the lunatic's wife maintenance out of his property as against his creditors. *Winkle, In re*, 63 L. J., Ch. 541; [1894] 2 Ch. 519; 7 R. 255; 70 L. T. 710; 42 W. R. 513—C. A.

An action was brought against a person of unsound mind not so found, and judgment was on March 16th, 1894, obtained. On March 17th, the judgment creditor lodged a writ of fi. fa. with the sheriff, and he, on the morning of March 19th, executed the writ and seized the lunatic's goods. The lunatic's wife, on the afternoon of the same day, obtained an order appointing her interim receiver pending the hearing of a summons in lunacy, which had been taken out by her on March 12th, asking for leave to sell the lunatic's property and to retain out of the proceeds of sale a certain sum weekly for the maintenance of herself and the lunatic. The sheriff thereupon gave up possession of the goods to his wife. On the hearing of the summons the scheme for maintenance was approved of by the master in lunacy. The lords justices confirmed this scheme so far as the maintenance of the lunatic was concerned, but refused to include the maintenance of the wife in the scheme, and made the order without prejudice to any priority or charge the executors might have acquired by lodging the writ of fi. fa. with the sheriff. *Ib.*

—— **Wife and Son.**]—An annuity of 100*l.* directed to be paid to the wife and son of a supposed lunatic, without reference to the master. *Conduit* v. *Soane, Gandy, In re*, 5 Myl. & Cr. 111.

—— **Son.**]—Application for a reference as to the propriety of advancing a large sum of money out of the capital of a lunatic's estate, to enable his eldest son to purchase an estate, refused. *Thomas, In re*, 2 Ph. 169.

Master to see what was fit to be allowed for maintenance of lunatic's son. *Foster* v. *Marchant*, 1 Vern. 263.

—— **Daughter for Outfit.**]—The allowance made out of a lunatic's estate for the maintenance of himself and his daughters was increased in consideration of the intended marriage of one of the daughters, and a portion of such increased allowance was appropriated to the joint establishment of her and her husband, and was directed to be settled to her separate use: and a sum of money, approved by the master, was also ordered to be paid to her out of her father's estate by way of outfit on her marriage. *Drummond, In re*, 1 Myl. & Cr. 627; 6 L. J., Ch. 58.

Semble, that the court will not direct an advancement by way of outfit and additional annual allowance to be made out of a lunatic's property to his daughter upon her marriage, except upon the terms of the daughter making a settlement, to be approved by the master, of all the property that may eventually come to her as next of kin and heir-at-law of the lunatic. *Fowler, Ex parte*, 6 Jur. 431.

—— **Tenant in Tail in Remainder—16 & 17 Vict. c. 70, s. 116.**]—Application to charge settled estates with the maintenance of a lunatic, tenant in tail in remainder, by the father, tenant for life, refused: no proper case having been made for it. *Pugh, In re*, 3 De G. M. & G. 416; 17 Jur. 979; 2 W. R. 22.

—— **Children entitled in Remainder.**]—An allowance out of an estate belonging to a lunatic, to assist in educating children entitled to the estate in remainder after the lunatic, and whose mother (the petitioner) was entitled to a jointure which would, under a covenant, be chargeable on the estate, refused. *Laneshorough (Earl), In re*, 7 Ir. Eq. R. 606.

—— **Next of Kin.**]—Payments out of a female lunatic's income, for the better maintenance and support of her nephews, ordered, under the circumstances. The court, however, makes such orders with great jealousy and caution. *Blair, In re and Ex parte*, 1 Myl. & Cr. 300; 5 L. J., Ch. 150.

Under special circumstances the court made an allowance out of a lunatic's estate to one of the next of kin (a first cousin) of the lunatic, the other next of kin consenting. *Croft, In re*, 1 N. R. 185; 32 L. J., Ch. 481—L.JJ.

The modern practice of making allowances out of lunatics' estates for their collateral relations disapproved and to be kept within narrow limits. A comparatively small sum, which the master had approved as proper to be allowed out of the surplus income of the lunatic, which was very considerable, for drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed by the Lord Chancellor, though no one objected to it. *Clarke, In re*, 2 Ph. 282.

—— **Bankruptcy of Next of Kin—Petition for Increased Allowance—Service on Assignee.**]—One of the next of kin of a lunatic having become bankrupt, it was held, that on a petition for increased allowance, it was unnecessary to serve the assignees. *Chambers, Ex parte*, 4 L. J., Ch. 175.

—— **Collaterals — Surplus Income.**]— The court will not make an allowance out of the surplus income of a lunatic to collaterals unless the evidence shews that the lunatic, if sane, would in all probability have made the proposed allowance himself. Different considerations apply when the lunatic is entitled to landed property and the collateral is also the heir-at-law of the lunatic. *Darling, In re*, 57 L. J., Ch. 891; 39 Ch. D. 208; 59 L. T. 761—C. A.

The court refused to make an allowance to some of the next of kin of a lunatic, first cousins, who were in indigent circumstances, although the lunatic was aged eighty-two, and there was a large surplus income beyond the proposed allowance and the application was not opposed. *Ib.*

Practice of making an allowance to the immediate relations of a lunatic, other than those whom the lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the lunatic's lifetime, but upon the principle that the court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would have acted, if of sound mind. The amount and proportions of such an allowance are therefore entirely in the discretion of the court. *Whitbread, Ex parte*, 2 Mer. 99; 16 R. R. 148.

—— **Needy Relative.**]— Weekly allowances ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. *Frost, In re*, 39 L. J., Ch. 808; L. R. 5 Ch. 699; 23 L. T. 233; 18 W. R. 986.

—— **From what Time made.**]—Allowances were ordered to be paid out of the surplus income of a lunatic to certain poor members of her family and to certain other persons, the husband of the lunatic, and after his death the lunatic herself, having been accustomed to make them, though the surplus income after payment of them amounted to about 50*l.* only. Such allowances, however, were ordered to commence at the date when the lunatic was so found, and not when they stopped in consequence of her becoming of unsound mind. *Mackenzie, In re*, 43 L. T. 681.

—— **When Granted.**]—The court will not sanction the making of allowances out of the lunatic's surplus income to his relatives, or other persons, unless the lunatic was, prior to his lunacy, under some legal or moral obligation to contribute to their support, and the principle involved in making allowances ought to be narrowed rather than extended in its operation. *Evans, In re*, 21 Ch. D. 297; 46 L. T. 785; 30 W. R. 645—C. A.

—— **Nearest Relatives—Cousins.**]— The income of a lunatic being much more than was required for his maintenance, a respectable aged clergyman, a first cousin, and one of the next of kin of the lunatic, who had been reduced to indigence by unavoidable misfortune, applied for an allowance out of the surplus income. It was not shewn that the lunatic had even known of the existence of the applicant, and it was not suggested that any evidence could be obtained that the lunatic, when sane, had ever done anything for him or expressed any intention in his favour:—Held, that the application must be refused. *Ib.*

—— **Upon Terms.**]—A lunatic, aged sixty-four, was tenant for life of certain real estates, producing a considerable yearly income, of which his nephew, aged twenty-eight, was tenant in tail in remainder. The nephew had been found heir-at-law and one of the next of kin of the lunatic. The court, upon the nephew's petition, directed an allowance of 500*l.* per annum to be made to him out of the surplus income of the lunatic, after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of the petitioner charging the estate with the repayment of the sums received in respect of such allowance, the lords justices consenting as protectors of the settlement to the petitioner barring his estate tail, but only so far as to let in the charge. *Sparrow, In re*, 51 L. J., Ch. 497; 20 Ch. D. 320; 46 L. T. 785; 30 W. R. 373—C. A.

—— **Collateral Tenant in Tail in Remainder—Increase of Allowance.**]—A lunatic bachelor, who was incurable and aged sixty-four, was tenant for life, there being a large surplus income after providing for his maintenance. In 1882 the court made an allowance of 500*l.* per annum to his nephew, the tenant in tail in remainder, who was then unmarried and in possession of an income of 220*l.* per annum, and, as protector of the settlement, consented to the entail being barred to secure the allowance. The remainderman having married and had a son who would take as tenant in tail in remainder if he survived his father, and having an income of 300*l.* per annum without the allowance of 500*l.*:—Held, that the allowance ought to be increased by 200*l.* to be charged in the same way as the 500*l.* *Beridge, In re*, 50 L. T. 653—C. A.

—— **Heir-at-law and Sole Next of Kin on Application of Creditor.**]—The Lord Chancellor has not jurisdiction in lunacy, upon the application of a creditor of the heir-at-law, and sole next of kin of the lunatic, to order an allowance made to him (the heir-at-law) out of the lunatic's estate, for the support and maintenance of the lunatic, to be applied in payment of the debts of the heir-at-law. *Linehan, Ex parte, Hennessy, In re*, 1 Jo. & Lat. 29.

—— **Illegitimate Children.**]— An allowance will be made out of a lunatic's estate for his illegitimate children, but not for their mother. The court will not direct property to be sold which the lunatic, by a will made when he was of sound mind, has bequeathed specifically, though the master has reported that the sale of it will be beneficial to the estate. *Haycock, Ex parte*, 5 Russ. 154; 29 R. R. 16.

The court will not increase the allowance of a lunatic, on the ground of there being illegitimate children of a deceased brother of the lunatic, to whose support the lunatic would probably have contributed if not in a state of incapacity. *Grove, In re*, 13 L. J., Ch. 262.

**Pension to Servant.**]—Annuity of 60*l.* given to old servant of lunatic, who retired on account of age, the next of kin consenting. *Carysfort (Earl), In re*, Cr. & Ph. 76.

**Subscription to Charity by Committee.**]—A lunatic was tenant for life of seventy houses in London, situate in the same neighbourhood, and producing a gross rental of 2,440*l.* His surplus income, after providing him with every comfort, was about 900*l.* a year. Three of the houses were sold to a church building committee as a site for a church to a new district parish, and the incumbent and the church committee solicited subscriptions for building the church and parochial schools in connection with it. Leave was given to the committee of the estate, who was also heiress-at-law and sole next of kin, to contribute out of the lunatic's income 250*l.* towards building the church, and a like sum for the schools. *Strickland, In re*, L. R. 6 Ch. 226; 24 L. T. 530; 19 W. R. 515.

### 2. Out of What Property.

**Fund for Maintenance—Discretion of Trustees.**] — A mother, whose only daughter, a lunatic, was entitled to a large real and personal estate under her father's will, bequeathed the residue of her estate and effects to trustees, upon trust to apply the interest amounting to about 1,600*l.* a year towards the maintenance and support of her daughter, and otherwise for her comfort and advantage, as they should think proper, without being liable to account: and after her decease to pay the principal, and also such interest as should not have been actually so applied, to the testatrix's nieces: —Held, that the allowance of the lunatic ought to be borne exclusively by the maternal estate, as the arrangement, in the event of her recovery, would be most beneficial to her. *Ashley, In re*, 1 Russ. & M. 371.

A testator gave a fund to trustees in trust to pay the income to his sister for her life or "apply the same, or so much as may be necessary for her support and maintenance, in such manner as may be most to her comfort and advantage." He then directed the surplus, if any, to be accumulated and added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life interest under a settlement of which the testator was a trustee. After the testator's death she was found lunatic, and the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund:—Held, that this income was the primary fund for her maintenance, and that, therefore, the whole of it must be applied. *Rudland* v. *Crozier*, 2 De G. & J. 143; 27 L. J., Ch. 261; 4 Jur. (N.S.) 675; 30 L. T. (O.S.) 330; 6 W. R. 305.

Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the court will not exercise its ordinary power. The fund so specially provided will be left to the exercise, bonâ fide, of the discretion of the trustees. *Gisborne* v. *Gisborne*, 46 L. J., Ch. 556; 2 App. Cas. 300; 36 L. T. 564; 25 W. R. 516.

A testator (whose wife had, in her own right property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only of the annual income, of my real and personal estate and investments, as they shall think expedient, to or for the clothing, board, &c., for the personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee:—Held, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will. *Ib.*

Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the court will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have an absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit. Therefore where property was held upon trust to pay the income in such way, at such time, and in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the court to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property. *Gisborne* v. *Gisborne* (2 App. Cas. 300) distinguished. *Weaver, In re*, 21 Ch. D. 615; 48 L. T. 93; 31 W. R. 224; 47 J. P. 68.

**Property in Ireland—Money transmitted for Maintenance to England.**]—Where, in the case of a lunatic so found in England, whose property is in Ireland, the record of the inquisition is transmitted to and enrolled in Ireland, and lunacy percentage is paid on the clear annual income there, no further percentage is payable in England on a portion of such income when transmitted by order of the court to this country for the maintenance of the lunatic here. *Grehan, In re*, 64 L. J., Ch. 505; [1895] 2 Ch. 12; 12 R. 210; 72 L. T. 383; 43 W. R. 433; 59 J. P. 325; —C. A.

**Separate Income of Feme Covert.**]—A wife was insane before and during the time of her being entitled to a separate maintenance, left by the will of a testator who knew her to be insane; no commission had issued; she had an only child, an infant, entitled to the capital in the event of surviving his mother. Upon the husband's application for an allowance out of the wife's separate maintenance for her support, a reference was directed to the master to inquire who had maintained the wife, at what expense, how far the husband was able and willing to maintain her, and if any part of this fund was to be advanced to anyone, what securities should be taken for its due application. *Brodie* v. *Barry*, 2 V. & B. 36; 13 R. R. 37.

A wife, being of unsound mind and in confinement, and her husband being poor and unable to

maintain her, the court ordered that the surplus income of her separate property, after providing for her maintenance, should be paid to the husband; but refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance. Whether, if the expenses of her past maintenance had been still unpaid, that circumstance would have made any difference, quære. *Edwards* v. *Abrey*, 2 Ph. 37; 15 L. J., Ch. 404; 10 Jur. 650.

**Charging Estate of Lunatic Tenant in Tail.**]—On the petition of the lunatic's father, tenant for life of large landed estates, the Lord Chancellor declined to make an order under the act 16 & 17 Vict. c. 70, charging the estate of the lunatic tenant in tail in remainder with a sum found by the master to be proper for the lunatic's maintenance, there being no special circumstances, nor any evidence that the state of the petitioner's family was such as to make the charge just or reasonable. *Pugh, In re*, 7 De G. M. & G. 416; 17 Jur. 979; 2 W. R. 22.

### 3. Income Insufficient.

**Maintenance out of Capital.**]—A person of unsound mind was entitled to a life interest under a settlement in certain funds. The income being insufficient for her maintenance, a summons was taken out by her son, who was absolutely entitled to the funds in default of appointment by the person of unsound mind to remoter issue, asking that sums should be raised out of income and capital for her maintenance:—The court made the order, and charged her interest in the trust funds with the recouping to the trustees of all sums raised and paid under the order out of the capital. *Hirst, In re*, 2 R. 409; 67 L. T. 702; 68 L. T. 557—C. A.

Refusal of the Lord Chancellor to order a lunatic to be maintained out of principal, upon the probability of the lunatic being admitted into an hospital within six years. *Fisher, In re*, 19 L. J., Ch. 521; 14 Jur. 233.

—— **Purchase of Annuity.**] — Where the whole income of the lunatic amounted to only 21*l.* 16*s.* 11*d.*, being the dividends arising out of a sum of stock to which the lunatic was entitled, the court allowed an annuity of 30*l.* for the life of the lunatic, to be purchased and paid for out of the fund. *S. C.*, 2 H. & Tw. 449.

—— **Intestacy—Lunatic Sole Next of Kin—Debts of Intestate.**]—Stock of an intestate dead nearly twenty years being brought into court, an order for selling part thereof, for costs in the lunacy of the sole next of kin, and for applying the dividends for such lunatic's maintenance, before any report of the debts of the intestate, was refused. *Radcliffe* v. *Carter*, C. P. Cooper, 250.

Residue of a lunatic's property beyond his debts invested in a government annuity for his maintenance upon the master's report that it was for his benefit. *Stonard, Ex parte*, 18 Ves. 285.

**Reference to Master dispensed with.**]—Where the sum is of small amount, the court will decide, without putting the estate to the expense of a reference to the master, whether the application of money sought for is for the benefit of the lunatic or infant. *Barnwall, Ex parte*, 1 Moll. 4.

**Sale of Reversionary Interest.**]—On the petition of the committee of the person and estate of a lunatic, reference directed to inquire as to the expediency of raising a fund for his maintenance by sale of his reversionary interest. *Burbidge, In re*, 3 Mac. & G. 1.

### 4. Liability of Committee to Account.

**Account — Petition in Lunacy.**] — Personal representatives of lunatic cannot obtain from committee of his person an account of expenditure of allowance for maintenance, by petition to Lord Chancellor, in lunacy. Semble, an account may, under circumstances, be obtained by bill in chancery. *Grosvenor* v. *Drax*, 2 Knapp, 82.

—— **Bill for.**]—The court allowed the profits of the lunatic's estate to the committee for the maintenance of his person. The lunatic dies, his administrator brings a bill for an account of these profits; the defendant, the committee, pleads this order of court, of the allowance of the profits for the lunatic's maintenance. The plea ordered to stand for an answer; but the court declared they would not relieve in such case, without gross fraud. *Sheldon* v. *Aland*, 3 P. Wms. 104.

**Savings out of Lunatic's Allowance.**]—A., devisee for life, and B., remainderman in fee, were directed by the testator to apply "any sum, not exceeding 400*l.* a year," for the maintenance of testator's eldest son, a lunatic, and charge that sum upon his estates. Testator then appointed A. and B. to be the committee of the lunatic. After A. and B. had died, the court fixed the allowance at 280*l.* a year:—Held, after the lunatic's death, as between the owner of the estate charged and the administrator of the lunatic, that the owner of the estate was entitled to the difference between 280*l.* and 400*l.* a year, and not the administrator of the lunatic. *Ponsonby, In re*, 2 Con. & L. 30; 3 Dr. & War. 27; 5 Ir. Eq. R. 268.

The committee of a lunatic is beneficially entitled to the savings out of the lunatic's allowance. *Ib.*

**Allowance of fixed Sum—Mortgage or Arrears.**]—An order was made that the brother of a lunatic, who was committee of his estate, should be allowed to retain the family mansion and grounds and the heirlooms therein for his own occupation and use, and that of his unmarried sisters, and that 4,000*l.* a year should be allowed him for his expenses in reference thereto. The committee with his sisters occupied the mansion accordingly, and incurred heavy and, as it was alleged unreasonable expenses about the establishment The income being insufficient to pay the allowance, it fell into arrear, and the committee mortgaged the arrears. He subsequently was removed from being committee and became bankrupt, and a large amount of bills incurred in keeping up the establishment remained unpaid. A surplus having arisen applicable to payment of the arrears, the new committee presented a petition for direction as to its application:—Held, that although the allowance was made to the former committee without any obligation to account, and with an intention indirectly to confer a benefit on him and his

sisters, still it was an allowance made to a person in a fiduciary position for a particular purpose, and which he had no right to mortgage, and that the mortgagee could stand in no better position than the committee himself. *Weld, In re*, 51 L. J., Ch. 913; 20 Ch. D. 451; 46 L. T. 397; 30 W. R. 385—C. A.

Held, also, that the person to whom an allowance of this kind is made has no such right to arrears as will prevent the court from dealing with them in such way as it may consider just, and, if the court finds that the expenses incurred for the purposes for which the allowance was granted remain unpaid, it will stop the arrears, and make provision for payment of such expenses. An inquiry was therefore directed as to which of the debts of the committee were properly incurred in keeping up the establishment at the mansion. *Ib.*

### 5. Interest taken by Committee in Allowance.

**Allowance out of Rent—Committee entitled under Will to Personalty.**]—Bequest of all testator's personal estate to the wife, and charge of all debts, and testamentary expenses, on his real estate, expressly exempting the personalty therefrom: after pecuniary legacies to his two children charged on the real estate, he directed maintenance for them, not exceeding 4 per cent. on their legacies; the testator subsequently becoming a lunatic, an order was made for —*l.* per annum to be paid to the wife out of the rents and profits of his estate; and upon his death:—Held, that the widow being entitled to the whole personal estate and rents of the real estate due at the testator's death, she could not also be entitled to receive the last payment under the order in lunacy, for which the only fund was the rents of the real estate. *Jones* v. *Bruce*, 11 Sim. 221.

### 6. Past Maintenance.

**Infant—Allowance to Father.**]—After an order has been made for the maintenance of an infant lunatic out of his own estate, the court will not allow anything to the lunatic's father in respect of past maintenance. *Booth, In re*, 22 L. T. 249.

**Debt for Maintenance due from former Committee—Reference to Master to ascertain Amount.**]—Where the committee of a lunatic's estate had passed his accounts and resigned his office, leaving a debt for maintenance of the lunatic still due to a third person, and the new committee repudiated the debt, the court, on the petition of the creditor served on the new committee, directed a reference to the master to ascertain the amount of the debt. *T——, In re*, 5 N. R. 481.

**Claim for Arrears—Statute of Limitations.**]—A claim for the past maintenance of a lunatic being simply a debt of the lunatic, the court will not pay out of the lunatic's estate in court more than six years' arrears of such maintenance. *Harris, In re*, 49 L. J., Ch. 327.

The brother of a lunatic lady, not so found by inquisition, advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the court made an allowance to the testator's estate for past maintenance, but limited it to advances made within six years before the testator's death. *Weaver, In re*, 21 Ch. D. 615; 48 L. T. 93; 31 W. R. 224.

A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the master thereon, followed by a report, finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, 21 Jac. I. c. 16, as against the heir-at-law of the lunatic, who was not a party to the application. *Wilkinson* v. *Wilkinson*, 9 Hare, 204.

**Maintenance in Asylum—Fund in Court—Application in Discharge.**]—When a person of unsound mind, not found lunatic by inquisition, had been maintained in a lunatic asylum by his parish, the whole of the capital of a fund belonging to him, which had been paid into court under the Trustee Relief Act, was ordered to be applied, so far as it would extend, in discharge of the past charges of the parish for maintenance. *Phelps' Trusts, In re*, 28 L. T. 350.

A lunatic, not so found by inquisition, was maintained for some years by her brothers in a private lunatic asylum, and they expended more than 700*l.* in so maintaining her. Afterwards, they being unable any longer to pay the expense of her maintenance, she was removed to a county asylum. After she had been there some years a legacy of nearly 650*l.* became payable, which had been bequeathed to her, to be paid to her brothers, as acting on her behalf, and to apply the bequest "for her benefit at such times and in such manner as to them may seem most for her interest." The brothers presented a petition and asked that they might be allowed to retain the legacy, offering to undertake to provide for the future maintenance of the lunatic. The justices of the county claimed to be paid in priority the sum of 310*l.*, which was the cost of the lunatic's maintenance during the time she had been in the county asylum. An order was made that the brothers should retain the legacy, they giving the undertaking which they offered to give. *Gibson, In re*, L. R. 7 Ch. 52; 25 L. T. 551; 20 W. R. 107.

Expenses incurred by the overseers for the maintenance of a lunatic paid to them, upon petition, out of his share in a sum of stock standing in court. *Ward's Estate, In re*, 2 W. R. 406.

—— **Past Maintenance.**]—Where a pauper lunatic has been placed in an asylum, and expenses incurred by the parish to which he belongs in his maintenance and that of family, and he comes into property, the court will order payment to the overseers and guardians out of the fund, for the past maintenance of himself, his wife and child. *Drewery's Trust, In re*, 2 W. R. 436.

## *h.* Property, Care and Management of.

### 1. Generally.

**Committee of Estate—Jurisdiction of Court.**]—The care of the person and property of a lunatic is a trust reposed in the king, who

discharges it by bailiff, which bailiff is appointed by the person holding the great seal by virtue of a warrant from the Crown. But the superintendence of the conduct of the committee originates in the authority of the court itself, as being the court from which the commission issues, into which the inquisition is returned, and which makes the grant founded thereon. In this case A. was found next heir by the inquisition. B. (who would have been next heir if A. had been out of the way) had got into possession of the estates as committee of the deceased lunatic, and refused to deliver it to A., whom he alleged to be illegitimate. B. was restrained from interfering with the rents, under the colour of the authority vested in him as committee, and each party left at liberty to assert their claims as they should be advised. *Fitzgerald, In re*, 2 Sch. & Lef. 432; 1 L. & G. 20.

——— **Not determined by Death of Lunatic.**]—The control of the court on the committee of a lunatic is not determined by the death of the lunatic. 2 Sch. & Lef. 441.

—— **Employment of Agent by.**]—Order made without a reference to the master, that the committee of a lunatic should be at liberty to employ a particular person for inspecting the lunatic's property at a fixed salary to be paid out of the rents. *Errington, In re*, 2 Russ. 567.

It is competent for committees to employ an agent to superintend the details of the management of the estate of the lunatic. *Brown, In re*, 1 Mac. & G. 201; 1 Hall & Tw. 348; 19 L. J., Ch. 96.

—— **Exceeding Authority.**]—General rule, that the committee of a lunatic's estate exceeding his authority in the expenditure of money, shall, himself, pay the costs of the additional reference thereby occasioned. *Langham, In re*, 1 Coop. t. Cott. 228.

—— **Assumption of Office by Stranger.**]—When a party, without authority, but bonâ fide, assumes the management of the property of one mentally incompetent, this court will not, on his recovery, restore to him his property without making an equitable allowance for the expenses and liabilities. *Selby* v. *Jackson*, 6 Beav. 192; 13 L. J., Ch. 249.

—— **Expenditure without previous Sanction by Court.**]—Expenditure by the committee of a lunatic's estate, without a previous application to court, not to be allowed. *Barton, Ex parte*, 11 Ves. 397. S. P., *Hilbert, Ex parte*. *Ib.*

Where alterations, additions, or improvements are requisite in or to a lunatic's estate, the committee of the estate, in future, must apply to the Lord Chancellor for his lordship's order, sanctioning the necessary outlay, before the commencement by the committee of any such alterations, &c. *Buckle, In re*, 8 L. J., Ch. 264.

If a committee expend the lunatic's property without the sanction of the Lord Chancellor, the court will direct a reference to the master to inquire whether the expenditure has been beneficial or not, and even if it turns out to have been beneficial, will make the committee bear the costs of the inquiry; but the court refused to act on this rule, where the expenditure had been incurred with the sanction of the master, although such sanction was irregular. *Brown, In re*, 1 Mac. & G. 201; 1 Hall & Tw. 348; 19 L. J., Ch. 96.

—— **Interference with Control.**]—The control of the committee over a lunatic's estate will not generally be interfered with, except in cases of improper conduct on the part of the committee; and, therefore, a petition presented on behalf of a joint-stock company, in which a lunatic was a shareholder, praying for a reference, whether it would be for the benefit of the lunatic that the amount due in respect of his shares, by virtue of a call which had been made by the company, should be paid out of his estate, which petition was opposed by the committee, was dismissed with costs. *Hitchon, In re*, 15 L. J., Ch. 126.

—— **Interest of Lunatic alone to be regarded.**]—In managing the estate of a lunatic, the general principle is to attend solely to the interest of the owner without any regard to the succession. *Oxenden* v. *Compton* (*Lord*), 2 Ves. 72; 2 R. R. 131.

In administering the estate of a lunatic, the chancellor may apply personal estate in payment of debts to any extent; and is to take every advantage that tends fairly towards ordinary improvement, considering only the immediate interest of the proprietor; but consistently with that, alteration of property is, as far as possible, to be avoided; and great care must be taken that nothing extraordinary is attempted, as purchasing estates, disposing of interests, engaging in adventures, &c. *Ib.* 73.

Distinction in lunacy, the Lord Chancellor acting under a special commission, does what is for the lunatic's benefit, taking the advice and assistance of the presumptive representatives in managing the property; thus, cutting timber, or selling real estate to pay debts, &c., not regarding the different forms of disposition, the power over each species of property upon a lucid interval being the same. *Phillips, Ex parte*, 19 Ves. 118; 12 R. R. 151.

—— **Nature of Property or Right of Succession not to be changed.**]—It is a rule never to change the property of a lunatic, nor to effect any alteration as to the succession to it. Money of lunatic lent in discharge of incumbrances on his estate in Scotland shall go as his personal in England. *Annandale, Ex parte*, Ambl. 81. *And see* 2 Ves. 381.

Committees have not power to change nature of estate, real or personal. *Audley* v. *Audley*, 2 Dick. 16; 2 Vern. 192.

Committees of a lunatic invest part of his personal estate in purchase of lands in fee. This shall be taken as personal estate, and in case of his death shall go to the next of kin, and not to his heir. *Ib.*

Rules in lunacy derived from 17 Edw. 2. The first and paramount is to provide for the personal care and comfort of the lunatic. The second and subordinate is, not to vary the nature of the property so as to affect the right of succession, unless it be necessary for the benefit of the lunatic. *Weld* v. *Tew*, 1 Beat. 268.

On the petition of a curator ad bona, appointed by a foreign court to administer the estate of a lunatic, to have transferred to him as such curator the share of the lunatic in the proceeds of real estate in England sold in a partition suit by direction of the court:—Held, that, as the fund

retained its character of realty the curator was not entitled to call for a transfer thereof. *Grimwood* v. *Bartels*, 46 L. J., Ch. 788 ; 25 W. R. 843.

—— **Advice of Master.**] — The court will not, except in a very special case, supported by affidavits, make a general order authorising the committee of a lunatic's estate to act under the opinion and advice of the master in the management of the estate. *Cooper, In re*, 1 Myl. & Cr. 33.

The thirteenth Order in lunacy of the 27th October, 1842, does not authorise the master to take upon himself the direction of the lunatic's estate in the matters last mentioned, but was intended solely to enable him to conduct inquiries respecting the person and property of the lunatic, without any previous order for that purpose. *Brown, In re*, 1 Mac. & G. 201.

—— **Power to Sue for Rent accruing after Death of Lunatic.**]—The committee of a lunatic's estate cannot maintain an action for rent issuing out of a lunatic's freehold estate, which has accrued after the death of the lunatic, though reserved by lease made by the committee on behalf of the lunatic in which the lessee covenanted with the committee (as such) for payment of rent, and though the lunacy matter has not been dismissed out of lunacy, and the committee has been directed, by order in the matter, to continue in receipt of the rents and income of the lunatic's property. *Foot* v. *Leslie*, 16 L. R., Ir. 411.

—— **Power to Negotiate Debts.**] — Quære, whether the committee of a lunatic has a power to negotiate debts due to the lunatic ; so, for instance, as to convert a separate liability into a joint one. *Parker, Ex parte, Stocks, In re*, 2 Mont. D. & D. 511 ; 11 L. J., Bk. 26 ; 6 Jur. 541.

**Money Paid into Court—39 & 40 Geo. 3, c. 56.**] —The statute 39 & 40 Geo. 3, c. 56, does not apply to money paid into court in the matter of a lunatic. *Verney, Ex parte*, Jacob, 234.

**Investment — Government Securities.**] — The property of a lunatic is to be invested into government securities only, except under peculiar circumstances. *Ellice, Ex parte*, Jacob, 234.

—— **Private Security.**]—The court will never permit any part of the lunatic's estate to be laid out on private security. *Calthorpe, Ex parte*, 1 Cox, 182.

The court will not lend out the money of an infant or lunatic on mortgage or other private security. *Ridgways, In re*, 1 Hog. 309.

—— **Particular Form.**] — An investment of lunatic's property ordered in a particular form. *Magnus* v. *Bingley*, 2 W. R. 130.

**Partition.**] — Order made in lunacy and chancery directing committee to carry into effect decree for partition. *Sherard, In re, Lowther* v. *Cuff*, 1 De G. J. & S. 421.

**Applications affecting Ownership of Property.**] —In ex parte applications seeking to affect the ownership of property, the strictest proof of title will be required, and the bar are expected to assist the court with any authorities that may exist upon the point. *Chorley, In re*, 16 Jur. 233.

### 2. Timber.

**Authority of Court to order decaying Timber to be Cut.**]—Lord chancellor thought that, notwithstanding the words of the statute 17 Ed. 2, s. 1, cc. 9, 10, the court has authority to order timber, decaying on the estate of a lunatic, to be cut ; but did not absolutely decide the point, or whether the produce should be considered as real or personal estate, directing the point to be argued on a bill filed. *Bromfield, Ex parte*, 3 Bro. C. C. 510. *And see* 1 Ves. 453 ; Dick. 762 ; 2 R. R. 126.

**Timber for Repairs.**] — A committee of a lunatic's real estate may cut down timber for repairs. *Ludlow, Ex parte*, 2 Atk. 407.

**Authority of Committee to Cut Timber.**]—Committees have no authority of themselves to cut timber, or to expend sums in draining and other improvements, or to consent to an act of parliament for making a railway. *Ib.*

**Purchase-money of Timber.**]—The purchase-money of timber belonging to a lunatic estate permitted to be paid to the receiver in order to be by him paid into court. *Clayton, Ex parte, Starkie, In re*, 1 Russ. 476.

**Timber Cut without Authority — Personal Assets.**]—If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets, and the heir has no action against the personal representative, nor is there any equity between them on the subject. *Oxenden* v. *Compton (Lord)*, 2 Ves. 74 ; 2 R. R. 131.

**Real and Personal Representatives—Equities between.**]—There is no equity between the real and personal representatives after the death of a lunatic, to have property which was altered by the court restored ; therefore the produce of timber on the estate of a lunatic cut and sold by order, on report that it would be for his benefit, is personal assets. *Ib.*

**Management in usual Manner.**]—The statute of lunatics does not introduce any new right in the crown. The words "waste and destruction" in it are to be construed in the ordinary, not technical sense. Where timber makes part of the general rental of an estate in case of lunacy, it would be a breach of duty not to manage it in the usual manner. *Ib.*

### 3. Repairs and Improvements.

**Repairs—Ordinary and Extraordinary.**]—The ordinary repairs upon a lunatic's real estate will be directed to be borne by the personal estate ; but any extraordinary outlay of the personal estate on the land should retain its character of personalty. *Badcock, In re*, 4 Myl. & Cr. 440 ; 8 L. J., Ch. 283 ; 3 Jur. 694.

—— **Expense allowed as being beneficial to Estate.**]—A payment to a lunatic's son, tenant in tail in remainder out of accumulated rents to furnish the mansion house in which he lived, refused ; but a sum was allowed for repairs, it being beneficial to the estate that the son should inhabit it. *Tottenham, Ex parte*, 11 Ir. Eq. R. 414.

**Repairs and Improvements—Expense of—How raised.**]—The court will not order the lunatic's personal estate to be turned into real estate, though it might be laid out in repairs. *Weld* v. *Tew*, Beat. 270.

The court has allowed part of a lunatic's personal estate to be laid out in repairs, and even upon improvements of his real estate. *Sergeson* v. *Sealey*, 2 Atk. 414; 9 Madd. 370.

Repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in court a sufficient fund of personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements. The amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate. *Gist, In re*, 5 Ch. D. 881; 26 W. R. 22—C. A.

A lunatic was tenant for life of the H. estate, and tenant in tail in possession of the D. estate. Expenses were incurred by the committee in improvements on both estates, but chiefly on the former:—Held, that there was no jurisdiction to charge the D. estate with the expenses incurred on the H. estate. *Vavasour, In re*, 29 Ch. D. 306; 53 L. T. 412—C. A.

—— **Premises Destroyed by Fire—Order to Rebuild.**]—A. B. being devisee for life of premises, with a condition against committing any manner of waste, and for keeping the same in good and tenantable repair, became lunatic, and the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person, who was also remainderman, praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, and a reference as to the amount of such expense, and out of what fund it ought to be defrayed. The Lord Chancellor made an order for the reference, holding that the words of the will created an obligation upon the tenant for life to rebuild the premises, and that the question of such liability was rightly brought before the court on the petition. *Skingsley, In re*, 3 Mac. & G. 221; 20 L. J., Ch. 142; 15 Jur. 958.

—— **Sanction of Court to Expenditure.**]—Where alterations, additions, or improvements are requisite in or to a lunatic's estate, the committee of the estate, in future, must apply to the lord chancellor, for his lordship's order sanctioning the necessary outlay, before the commencement by the committee of any such alterations, &c. *Buckle, In re*, 8 L. J., Ch. 264.

—— **Expenditure without previous Sanction.**]—Expenditure by the committee of a lunatic's estate, without a previous application, not to be allowed. *Marton, Ex parte*, 11 Ves. 397. S. P., *Hilbert, Ex parte*. *Ib.*

Receivers and committees not to apply the trust fund in repairs to any considerable extent without a previous application. Upon a receiver's application to be allowed for repairs done, an inquiry was directed whether the repairs were reasonable. *Att.-Gen.* v. *Vigor*, 12 Ves. 563.

Repairs made without previous order, though reported necessary, not allowed to committee of lunatic's estate. *Anon.*, 10 Ves. 104.

—— **Expenditure beyond Amount Sanctioned.**]—A committee, who having been authorised by the court to expend a certain sum in rebuilding a farm-house, expended half as much again in building one of larger size on a different site, was not allowed the excess; although what he had done appeared to be beneficial to the estate. *Langham, In re*, 2 Ph. 299.

### 4. Discharge of Incumbrances.

**Charge on Real Estate Paid off out of Personalty.**]—Where a charge on a lunatic's real estate is paid off out of her personal property by order of the court, the securities are to be assigned without prejudice to the conflicting claims of the real and personal representatives of the lunatic to the benefit of the assignment. *Digby (Earl), Ex parte*, 1 J. & W. 640.

**Redemption of Land Tax.**]—Land tax on a lunatic's estate redeemed, by order, out of the produce; decaying timber ordered to be cut for payment of debts, under the master's report that it was for his benefit, no equity for a charge in favour of the next of kin. *Phillips, Ex parte*, 19 Ves. 118; 12 R. R. 151.

**Mortgage—Payment off.**]—Timber on a lunatic's estate, ex parte paternâ, cut and applied in discharge of a mortgage on his estate, ex parte maternâ, no equity between the heirs. *Ib.*

In the management of a lunatic's property, his benefit alone is considered. Lord chancellor may make an order in lunatic's affairs, after the death of the lunatic; mortgage of his estate paid off, and the mortgage term ordered to be assigned to attend the inheritance, and not in trust for the next of kin. *Grimstone, Ex parte*, Ambl. 706. *See also* 2 Sch. & Lef. 432.

—— **By Committee and Heir Presumptive—Repayment out of Surplus Rents.**]—The committee and heir presumptive of a lunatic, who was absolute owner of a freehold estate, subject to a charge of 900*l.*, paid off the charge out of his own moneys, and had it assigned to a trustee for him. He subsequently applied to the court for leave to apply the surplus rents of the estate towards payment of the charge, but there were then judgments affecting the lunatic personally, and the application was refused. When the judgments were paid, the committee, in the lifetime of the lunatic, paid off the charge out of the surplus rents, without any order, but was allowed the amount in passing his account:—Held, that the next of kin of the lunatic had no equity to have it kept alive for their benefit. *Newcombe* v. *Newcombe*, 3 Ir. Eq. R. 414; Dr. 358.

—— **Savings out of Real Estate—Equities as between Heir-at-law and Next of Kin.**]—G. M., who was a lunatic, was seised of an estate in fee, subject to a charge. Pending the lunacy, the owner of the charge applied for payment thereof, whereupon an order was pronounced in the lunacy matter, whereby it was referred to the master to inquire and report whether it would be for the benefit of the lunatic that any part of the charge should be paid off, and if so, out of what funds such payment should be made. The master reported that it would be for the benefit of the lunatic that the charge should be paid off, and that such payment should be made out of the funds to the credit of the lunacy matter (consisting of the savings of the real estate). The court directed the charge to be paid off, and

ordered it to be assigned to a trustee, in trust to attend the inheritance, or for the lunatic, his executors and administrators, as should be thereafter determined, without prejudice to any question which might arise upon the death of the lunatic between his heir-at-law and next of kin. In conformity with this order the charge was paid off and assigned to a trustee; and the lunatic subsequently died intestate. Upon a bill filed by the plaintiff, one of the next of kin, and also the personal representative of the lunatic, claiming the benefit of the charge:—Held, that there was no equity in favour of the next of kin, and that the heir-at-law was entitled to hold the estate freed from the charge. *Leitrim* (*Earl*) v. *Enery*, 6 Ir. Eq. R. 357; Dr. 330.

—— **Payment out of Personalty—Next of Kin.**]—Real estate descended on a lunatic, subject to a mortgage, afterwards exonerated by the lunatic's personalty, not in any way derived from, or connected with, descended estate:—Held, that the order and course of succession was not thereby changed, for the next of kin were entitled, on the death of the lunatic, to have so much of the personalty as had been applied in discharge of the mortgage, considered as a lien on the real estate, and raised accordingly. *Weld* v. *Tew*, Beat. 266.

Freehold cottages and hereditaments descended upon a lunatic, subject to an existing mortgage. By an order in lunacy, in 1856, it was ordered that the estates should be conveyed to a trustee for the lunatic, and that the amount due upon the mortgage should be paid out of a portion of the personal estate of the lunatic in court, without prejudice to any question. Upon the death of the lunatic, intestate and unmarried, a question arose between his heir-at-law and his next of kin as to the amount paid off:—Held, that such amount ought to be raised out of the freeholds, and paid to the personal representative of the lunatic. *Leeming, In re*, 3 De G. F. & J. 43; 30 L. J., Ch. 263; 7 Jur. (N.S.) 115; 3 L. T. 686; 9 W. R. 403.

—— **Payment off—Ademption.**]—Where part of a lunatic's estate was subject to a mortgage, which it was desired to pay off, an order was made that the mortgage be paid off without prejudice to the question how the debt should ultimately be borne, and that the mortgage must be kept on foot by transferring it to the committee to be disposed of as the court might direct. *Leeming, In re* (3 De G. F. & J. 43), followed. *Melly, In re*, 53 L. J., Ch. 248; 49 L. T. 429; 31 W. R. 898—C. A.

—— —— **Time for Deciding as to Exoneration of Inheritance.**]—The proper time to decide whether the payment of a charge affecting the real estate of a lunatic is to have the effect of exonerating the inheritance is when the payment is made; and the decision ought not to be deferred until after the lunatic's death. *Leitrim* (*Earl*) v. *Enery*, Dr. 333; 6 Ir. Eq. R. 357.

—— **By Lunatic when Sane.**]—Mortgage made by a lunatic, when sane, for 50*l.* or more, money taken upon it by the committee, ordered to stand as security only for the first 50*l.* *Foster* v. *Marchant*, 1 Vern. 262.

**Trust for Purchase of Land varied by Act of Parliament.**]—A sum devised to be laid out in land, in England, in trust for A. with remainders over, was by act of parliament secured on A.'s estate in Scotland during his minority. A. attained twenty-one, and became a lunatic:—Held, it might be called in and laid out pursuant to the trust; and that it was to be considered as if it were a real estate in England, the interest thereon, however, to be considered as personal estate in England. The master was ordered to settle a rateable proportion for the lunatic's maintenance and his debts, between the real and personal estate in England, and those in Scotland respectively; another sum in the exchequer in England arising from the sale of heritable jurisdiction in Scotland, considered as real estate in Scotland. *Annandale* (*Marquis*) v. *Annandale* (*Marchioness*), 2 Ves. Sen. 381.

**Lunatic entitled to Estate and Charge thereon—Right of Heir.**]—A representative must take his interest as fortune has directed it, and has no equity to vary it; therefore, where a lunatic dies, entitled to an estate, and also to a charge upon it, the heir takes it discharged: a trust term to secure the charges makes no difference, for it remains inert, unless required to be executed for proper purposes; the trustees have no discretion. *Oxenden* v. *Compton* (*Lord*), 2 Ves. J. 261; 4 Bro. C. C. 231; 2 R. R. 131.

### 5. Leases.

**Committee—Lease by—Jurisdiction of Court to sanction.**]—The court possesses the discretion of a landlord in the management of the real estate of lunatics and infants, and should exercise it in making lettings, to give a preference to the old tenant. It ought to be governed solely by the highest bidding. *Ball, In re*, 1 Moll. 141.

A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the master in lunacy applied for, but the tenant was let into possession, and expended a considerable sum in repairs and in improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by petition to have the terms of his arrangement with the agent carried into effect:—Held, that the court had jurisdiction to make an order giving effect to that arrangement. *Wynne, In re*, 7 Ch. D. 229; 26 L. T. 406; 20 W. R. 348.

—— **Consent of Court.**]—Committee of a lunatic cannot make leases or encumber the lunatic's estate, without leave of the court. *Foster* v. *Marchant*, 1 Vern. 262.

The committee of a lunatic cannot, without statutory authority, make a lease of the lunatic's lands, and if he does, cannot bring an action of covenant on such lease. *Knipe* v. *Palmer*, 2 Wils. K. B. 130.

—— **Lease without consent—Liability of Committee.**]—The committee of a lunatic's estate, who, in conjunction with the wife and heir-at-law of the lunatic, had let the estate at a certain rent, without obtaining the sanction of the court, three years afterwards, upon the report of the master finding that a larger rent might have been obtained, was held responsible for the

amount of such larger rent, and ordered to pay all the costs occasioned by his having let the property at an under-value. *Wilkins, In re*, 6 Jur. 308.

—— **Allowing Rent to Fall in Arrear—Personal Liability.**]—Where the committee of the estate of a lunatic permitted the solicitor whom he employed in the lunacy to become tenant of a mansion-house, forming part of the lunatic's estate, and allowed the rent to be in arrears for four years, none having in fact been paid except by means of a set-off of a smaller sum, being the amount of the solicitor's bill of costs accruing from time to time:—Held, that the committee was personally liable to make good the deficiency. *Swindell, Ex parte*, 2 De G. M. & G. 91; 21 L. J. (N.S.) Ch. 748.

Committee not to be allowed for buildings and improvements on the lunatic's estate. *Ib.*

—— **Agreement for Working Coal under Lunatic's Property.**]—Agreement by committee of a lunatic, that coal under a lunatic's estate should be worked by owner of adjoining land, established under circumstances. *Tabbert, Ex parte*, 6 Ves. 428.

**Reduction of Rent.**]—An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference, under the circumstances, on the application of the committee. *Fitch, In re*, 1 Russ. & M. 354.

—— The court will not direct a reference to the master as to the reduction of rent upon the petition of a tenant of lunatic's estate. *Town, Ex parte*, Turn. & R. 137.

As to reduction of tenant's rent where landlord is lunatic. *Anon.*, 2 Moll. 343.

—— **Apportionment of Costs.**]—Apportionment of the costs of granting a lease of a lunatic's estate between the estate and the lessee. *Prickett, Ex parte*, 3 Swanst. 130.

Upon granting a lease of the lunatic's estate, the usage is, that the committee pays the expenses of the inquiry, and the lessee of the lease. *Ib.*

Where a lunatic was bound by covenant to grant a renewal of a lease, the expenses incurred by the lessee in applying to the court, under the 1 Will 4, c. 65, s. 19, for a direction to the committee to execute a lease instead of the lunatic, must be borne by the lunatic's estate. *Barnes, Ex parte*, 17 L. J., Ch. 436.

—— **Renewal—In whose Name to be taken.**]—A lease renewed for the benefit of the lunatic's estate, ought to be taken in the name of the lunatic if it were so at the time of the lunacy; but if originally in trust for the lunatic, then to the committee. *Jermyn, Ex parte*, 3 Swanst. 131.

**Lease of Glebe Lands—Patron a Lunatic.**]—An act of parliament having authorised the vicar of C. to grant leases of the glebe lands with the consent of the patron in writing, the patron being a lunatic, a petition by the committees of his person and estate, for a reference to the master to inquire whether it would be fit that they, on his behalf, should consent to a lease, was refused. *Smyth, Ex parte*, 2 Swanst. 393.

**Building Leases.**]—The court will not sanction the granting of building leases of part of a lunatic's estate for 999 years. *Starkie, In re*, 2 Russ. 197.

**Tenant in Tail in Possession.**]—The court has no jurisdiction under the 1 Will. 4, c. 65, and 3 & 4 Will. 4, c. 74, to authorise the committee of the estate of a lunatic tenant in tail in possession, to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remaindermen. *Starkie, In re*, 3 Myl. & K. 247.

**Restraining Commission of Waste.**]—Tenant on a lunatic's estate restrained on petition from committing waste, no bill being filed. *Creagh, In re*, 1 Ball & B. 108.

Injunction to restrain waste issued without bill filed, in a lunacy matter, on application of the receiver. *Chinnerys, In re*, 6 Ir. Eq. R. 469; 1 Jo. & Lat. 90.

**Relief against Forfeiture.**]—Tenant of a lunatic's estate, relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Vaughan, Ex parte, Edridge, In re*, Turn. & R. 434.

**Execution of Lease by Committee.**]—By a lease expressed to be made between a lunatic by A. B. & C. D., his two committees, and other parties, the lunatic acting by his committees demised certain property therein mentioned to the lessee. The testimonium clause was "In witness whereof the said parties to these presents have hereunto set their hands and seals." A. B. signed his name against one seal, and C. D. his against another; and the attestation clause was "Signed, sealed and delivered by A. B. and C. D. in the presence of," &c. Held, that the lease was well executed on the part of the lunatic. *Lawrie v. Lees*, 51 L. J., Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 185—H. L. (E.)

**Lease at Rack Rent.**]—Practice as to granting leases of lunatic's estate at rack rent. *White, In re*, 1 W. R. 294.

**Costs of Heir-at-law appearing on Petition.**]—The heir-at-law of a lunatic appearing on a petition to approve a lease determinable on the death of the lunatic, is not entitled to costs. *Dyneby, In re*, 1 W. R. 294.

*See also* post, V. INSANITY IN RELATION TO CERTAIN ACTS OF PARLIAMENT AFFECTING REAL ESTATE, col. 662.

### 6. Enfranchisement of Copyholds.

**Devolution of Enfranchised Estate.**]—The court on sanctioning proceedings for carrying into effect the enfranchisement of a copyhold estate belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, made a declaration that in the event of his dying intestate as to the enfranchised property, his heir-at-law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs according to the custom of the manor if it had not been enfranchised. *Ryder, In re*, 20 Ch. D. 514; 30 W. R. 417.

### 7. Sale, Portion, Exchange.

**Real Estate—Sale—For Payment of Debts.**]—The Lord Chancellor cannot, upon a petition in lunacy, order part of the lunatic's real estate to be sold for payment of his debts to prevent a bill by his creditors. *Smith, Ex parte*, 5 Ves. 556.

Estate devised away from the heir charged with payment of debts, ordered to be sold in aid of the personal estate where the devisee was insane and the heir abroad. *Williams* v *Whingates*, 2 Bro. C. C. 399.

—— **In Consideration of Rent-charge.**]—The court has power under ss. 117 and 120 of the Lunacy Act, 1890, to authorise a sale of the real estate of a person "lawfully detained as a lunatic," in consideration of a perpetual rent-charge instead of a price in cash, and will do so where it is proved that such a sale will be for the lunatic's benefit. *Ware, In re*, 61 L. J. Ch. 279; [1892] 1 Ch. 344; 66 L. T. 389—C. A.

—— **Administration Action—Consent of Master—Appointment of Committee to convey.**]—A devisee of real estate, subject to payment of debts, became of unsound mind, and was so found by inquisition. A committee was appointed, and an action for the administration of the testator's real and personal estate was commenced with the sanction of the master in lunacy, in the chancery division, by the lunatic and his committee, and, the testator's personal estate proving to be insufficient for payment of his debts, an order was made for the sale of all the testator's real estate upon payment of the purchase-money into court. Under this order the real estate was sold, and the purchaser paid the purchase-money into court. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—Held, that the administration action in which the order for sale was made, having been properly commenced with the sanction of the master in lunacy, the lunatic plaintiff was entitled to carry on the action, and was, therefore, also bound by the order for sale made in it; that the lunatic was, therefore, a trustee within the Trustee Extension Act, 1852, s. 1, of the real estate, and that his committee should be appointed to convey. *Stamper, In re, Stamper* v. *Stamper*, 46 L. T. 372.

—— **Disentailing Deed—Execution by Committee.**]—A lunatic was tenant in tail of an estate, subject to a charge for portions. In a suit in the court of chancery a decree had been made ordering the charge to be raised by a sale or mortgage of the estate. On a petition by the committee, asking that he might execute a disentailing deed on behalf of the lunatic for the purpose of raising the charge by a mortgage:—Held, that the interest of the remainderman ought not to be barred further than was necessary, and that the mortgage should be made for a term of years, and without a power of sale. *Pares, In re*, 2 Ch. D. 61; 24 W. R. 619—C. A.

—— **Trusts of Proceeds of Sale.**]—The court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the court, under the 6th section of the Partition Act, 1868, authorised the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *Pares, In re, Lillingston* v. *Pares*, 12 Ch. D. 333; 41 L. T. 574; 28 W. R. 193—C. A.

—— **Sale to Redeem Land Tax—Sanction of Lord Chancellor.**]—Notwithstanding the provisions contained in the Land Tax Redemption Act (42 Geo. 3, c. 116, it is the duty of the committee of a lunatic to obtain the sanction of the lord chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land-tax. *Wade, In re*, 1 Hall & Tw. 202.

—— **Sale for Building Purposes.**]—Land of which a lunatic is tenant for life cannot be sold for building purposes, under 16 & 17 Vict. c. 70, s. 125, which applies only to lands of which a lunatic is seised or entitled in fee. *Corbett, In re*, 35 L. J., Ch. 793; L. R. 1 Ch. 516; 12 Jur. (N.S.) 679; 14 L. T. 748; 14 W. R. 904.

Neither can such land be sold under the powers conferred by s. 116, unless the sale is actually for one of the purposes specified in that section. *Ib.*

Semble, where it is desirable that the land of a lunatic tenant for life, who has a sufficient maintenance, should be sold for building purposes, the proper course is to apply to the court under the Settled Estates Act. *Ib.*

By s. 125 of the Lunacy Regulation Act, 1853, "where a lunatic is seised of or entitled to land in fee simple, and it appears to the Lord Chancellor . . . to be for his benefit that the same or any part thereof should be made available for building purposes, and to that end the same should, in lieu of being demised for long terms of years, be absolutely sold, he may order the same to be sold accordingly, to such persons, in such quantities, upon such terms and in such manner as to him may seem expedient." A lunatic was seised in fee simple of land on which was a house. The house having been burnt down, the committee contracted (subject to the sanction of the court) to sell the land to a person who intended to build thereon:—Held, that the case was not within the section. *Tomkins, In re*, 60 L. T. 402—C. A.

—— **Share of Real Estate.**]—The court has no jurisdiction under s. 124 of the Lunacy Regulation Act, 1853, to authorise the committee of a lunatic to sell the lunatic's undivided share of land to the owner of the other shares. *Weld, In re*, 28 Ch. D. 514; 52 L. T. 703; 33 W. R. 845—C. A. S. P., *Woolhouse, In re*, 28 Ch. D. 515, n.; 52 L. T. 703, n.; 33 W. R. 845.

—— **Sale under Settled Land Act—Tenant in Tail.**]—The court will give leave to the committee of a lunatic tenant in tail to take proceedings under the Settled Land Act, 1882, for the sale of his undivided shares to the owner of the other shares. *Weld, In re* (28 Ch. D. 514) considered. *Gaitskell, In re*, 58 L. J., Ch. 262; 40 Ch. D. 416—C. A.

—— **Conveyance by Married Women.**]—The Lunacy Regulation Acts of 1853 and 1862 contain no machinery by means of which a conveyance of the legal estate of a married woman of unsound mind in freehold property can be obtained; and in a case where this was sought, an order was made simply directing a sale, and declaring all beneficial interest of the married woman bound by the order. *Stables, In re*, 4 De G. J. & S. 257; 3 N. R. 620; 33 L. J., Ch. 422; 10 Jur. (N.S.) 245; 10 L. T. 1; 12 W. R. 513.

—— **Covenants for Title—Tenant for Life—Committee's Powers.**]—A tenant for life, who is a lunatic so found by inquisition, can sell and convey the fee as a beneficial owner, and the court has power to authorise a committee to enter into covenants for title so as to bind the lunatic. *Ray, In re*, 65 L. J., Ch. 316; [1896] 1 Ch. 468; 73 L. T. 723; 44 W. R. 353; 60 J. P. 340—C. A.

*Fox, In re* (33 Ch. D. 37), did not decide that the court could in no case authorise a committee to enter into covenants on behalf of a lunatic. *Ib.*

Per Kay, L.J.: The word "covenants" in s. 122, sub-s. 2, of the Lunacy Act, 1890, refers to covenants by a lessor as well as to those by a lessee. *Ib.*

**Copyholds, Sale of.**]—Sale of copyhold estates of a lunatic are not authorised by statute 43 Geo. 3, c. 75. The statute 59 Geo. 3, c. 80, s. 2, extends the power of sale to estates held by ancient demesne or copy of court roll. *Birch, Ex parte*, 3 Swanst. 98.

A committee of the person and estate of a lunatic may levy a fine, or suffer a recovery of copyhold lands of which the lunatic is tenant in tail, with immediate reversion to himself in fee, under 1 Will. 4, c. 65, s. 28, for effecting a sale for the purposes of the act. *Flint, Ex parte, Brand, In re*, 1 Myl. & K. 150; 2 L. J., Ch. 12.

The 28th section of the act applies only to lands, of which the lunatic is tenant in tail, with immediate reversion to himself. *Ib.*

**Title—Reference to Master.**]—The Lord Chancellor cannot make a title to a lunatic's estate, but will direct the usual reference to the master if the purchaser be willing to accept the title. *Halford, In re*, 1 Jur. 524.

**Partition—Committee—Execution of Assurance.**]—A decree having been made for partition of lands, an undivided share in which was vested in a lunatic, as tenant in tail, an order was made in lunacy and in chancery, directing the committee to execute all necessary assurances for giving effect to the partition. *Sherrard, In re, Lowther* v. *Cuffe*, 1 De G. J. & S. 421.

Where a decree has been made by a vice-chancellor for a partition of lands of which a lunatic was entitled to an undivided share as tenant in tail in possession, the court, on the committee appearing and expressing his opinion that the partition would be for the benefit of the lunatic, made an order, intituled in the Trustee Act, 1850, the Lunacy Regulation Act, 16 & 17 Vict. c. 70, the matter of the lunacy, and the suit in which the decree had been made, directing the partition to be carried out, and a conveyance to be executed by the committee. *Singleton* v. *Hopkins, Blomar, In re*, 2 De G. & J. 88; 27 L. J., Ch. 173; 4 Jur. (N.S.) 546; 6 W. R. 178.

**Exchange of Land—Jurisdiction of Court.**]—The court has power under the Lunacy Regulation Act, 1853, s. 124, to make an exchange of the land of the lunatic without the minerals under it. *Dicconson, In re*, 15 Ch. D. 316; 29 W. R. 222.

**Ecclesiastical Lease—Sanction of Court to Sale.**]—When the sanction of the court of chancery is required to the sale of an ecclesiastical lease to the ecclesiastical commissioners, by reason of a beneficiary being of unsound mind, the application should, under 23 & 24 Vict. c. 124, s. 38, be made in chancery, and not in lunacy. *Cheshire, In re*, 41 L. J., Ch. 208; L. R. 7 Ch. 50; 25 L. T. 721; 20 W. R. 49.

**Sale to Railway Company—Contract—Sanction of Court.**]—The sanction of the Lord Chancellor ought to be obtained in all cases, by the committees of a lunatic, to a contract for sale of a portion of a lunatic's land to a railway company. *Taylor, In re*, 1 Mac. & G. 210; 1 Hall & Tw. 432.

**Purchaser—Liability of—Notice of Charge—Payment of Purchase-money in accordance with Order in Lunacy.**]—A purchaser under an order in lunacy paid his purchase-money, in the manner directed by the lords commissioners in lunacy, disregarding a charge of the plaintiff and a suit to enforce it, of which he had notice. The amount was principally applied in payment of the costs of the receiver in lunacy relating to the sale, &c. Upon a bill by the plaintiff to make the purchaser liable for not seeing to the due application of the purchase-money, the master of the rolls, considering himself bound by the order in lunacy, and as having no jurisdiction to alter it, retained the bill, with liberty to the plaintiff to apply in lunacy for the discharge or variation of the order. *Norris* v. *Dudley Stuart (Lord)*, 16 Beav. 359.

*See also* post, V. INSANITY IN RELATION TO CERTAIN ACTS OF PARLIAMENT AFFECTING REAL ESTATE, col. 662.

### 8. Mortgages.

**Power to Mortgage—Allowance to Committee—Arrears.**]—An order was made that the brother of a lunatic, who was committee of his estate, should be allowed to retain the family mansion and grounds and the heirlooms therein for his own occupation and use, and that of his unmarried sisters, and that 4,000*l.* a year should be allowed him for his expenses in reference thereto. The committee with his sisters occupied the mansion accordingly, and incurred heavy and, as it was alleged, unreasonable expenses about the establishment. The income being insufficient to pay the allowance, it fell into arrear, and the committee mortgaged the arrears. He subsequently was removed from being committee, and became bankrupt, and a large amount of bills incurred in keeping up the establishment remained unpaid. A surplus having arisen applicable to payment of the arrears, the new committee presented a petition for direction as to its application:—Held, that although the

allowance was made to the former committee without any obligation to account, and with an intention indirectly to confer a benefit on him and his sisters, still it was an allowance made to a person in a fiduciary position for a particular purpose, and which he had no right to mortgage, and that the mortgagee could stand in no better position than the committee himself. *Weld, In re*, 51 L. J., Ch. 913 ; 20 Ch. D. 451 ; 46 L. T. 397 ; 30 W. R. 385.

Held, also, that the person to whom an allowance of this kind is made has no such right to arrears as will prevent the court from dealing with them in such way as it may consider just, and if the court finds that the expenses incurred for the purposes for which the allowance was granted remained unpaid, it will stop the arrears, and make provision for payment of such expenses. An inquiry was therefore directed as to which of the debts of the committee were properly incurred in keeping up the establishment at the mansion. *Ib.*

**Power to bar Estate tail.**]—When a lunatic is tenant in tail of an estate subject to a charge for portions which it is requisite to raise, the estate tail and the subsequent remainders will be barred only so far as is necessary for that purpose. A mortgage for a term of years without power of sale authorised accordingly. *Pares, In re*, 2 Ch. D. 61 ; 24 W. R. 619—C. A.

**Debts of Prior Owner.**]—A lunatic was entitled in fee to one moiety of real estate as one of the two co-heiresses of an ancestor who had died intestate. The real estate was liable as assets for payment of a considerable amount of simple contract debts of the ancestor which his personal estate was insufficient to pay. The court authorised the committee to concur with the other co-heiress in a mortgage of the entirety to raise the amount of the debts, the mortgage being so framed that the lunatic's moiety was only liable for one moiety of the mortgage debt and interest, and could not be made liable for any default of the other co-heiress in payment of the other moiety of the principal and interest, but the court declined to authorise the committee to enter into any covenant on behalf of the lunatic. *Foæ, In re*, 33 Ch. D. 37 ; 55 L. T. 39 ; 35 W. R. 81—C. A.

**Costs.**]—A lunatic being tenant in tail of an undivided share of an estate, a decree for partition was made, which directed that the lunatic's costs should be raised by mortgage of the land allotted to her in severalty. On the completion of the partition, the lands allotted to the lunatic were conveyed to her simply in tail, without any provision for raising the costs :—Held, by the lords justices, sitting in lunacy, that they had no jurisdiction to authorise the committee to mortgage the land for the purposes of raising the costs. *Bloomar, In re*, 2 De G. F. & J. 154.

**Duty of Committee to keep down Interest.**]—Where a committee of a lunatic, against whom judgment had been obtained, but not duly docketed, paid over rents to a mortgagee of a date subsequent to the judgment :—Held, that he was not liable as for money had and received to the use of one who claimed as tenant by elegit under the judgment ; for it was his first duty as committee to keep down the interest on the mortgage. *Braithwaite* v. *Watts*, 2 Tyrw. 293 ; 2 C. & J. 318; 1 L. J., Ex. 97*.

### 9. Investment.

**Real Securities.**]—Money belonging to the personal estate of the lunatic, under particular circumstances, to accommodate the family, not a stranger, and on a first mortgage, not otherwise, will be ordered to be laid out on real security, instead of bank annuities, on procuring a report that it is for the benefit of the lunatic. *Johnson, Ex parte*, 1 Moll. 128.

**Government Securities.**]—A lunatic's property ought not to be laid out on anything but government securities, except in very peculiar cases. *Ellice, Ex parte*, Jacob, 234.

### 10. Transfers.

**Railway Stock.**]—Railway stock standing in the name of a lunatic in the books of a company, by the constitution of which transfers of stock are required to be by deed, is stock within the meaning of the Lunacy Regulation Act (16 & 17 Vict. c. 70), and transferable by an order under s. 140. *Ives, In re*, 3 De G. J. & S. 453 ; 2 N. R. 2 ; 32 L. J., Ch. 673 ; 9 Jur. (N.S.) 611 ; 8 L. T. 266 ; 11 W. R. 578.

**Unclaimed Stock.**]—A sum of 600*l.* consols standing in the name of a lady, now of unsound mind and residing abroad, having been transferred to the commissioners in consequence of the dividends having been unclaimed since 1839 :—The fund ordered, under the 56 Geo. 3, c. 60, to be transferred into the name of the attorney-general in trust in this matter, and the arrears of dividends ordered to be paid to the "curator" of the lunatic. *Sargazurieta, In re*, 1 W. R. 171.

**Stock held by Trustees—Mistake in Name of Beneficiary.**]—In a case where a female was found lunatic, under the christian name of Jane Eliza, and there afterwards appeared strong reason to believe that her true christian name was Elizabeth Jane, but there were no means of ascertaining the fact, the lord chancellor directed, there being no doubt as to the identity of the person, that an order for the transfer of stock held by trustees for the lunatic, under the name of Elizabeth Jane C., and the orders upon all future proceedings should be entitled, "In the matter of Elizabeth Jane C. in the commission called Jane Eliza C." *Crawford, In re*, 1 Myl. & Cr. 240.

—— **Lunatic Trustee—Jurisdiction.**] — The court of chancery has no jurisdiction to transfer stock standing in the name of two trustees, one of whom is a lunatic. *Jeffreys* v. *Drysdale*, 7 Jur. (N.S.) 667 ; 4 L. T. 454 ; 9 W. R. 428—L.JJ.

**Debentures.**]—A debenture bond of a limited company, according to the constitution of which debentures were transferred by deed, and the deeds of transfer upon presentation to the company were registered in the company's book of mortgages, ordered to be transferred under s. 141 of the Lunacy Regulation Act, 1853. *Mitchell, In re*, 17 Ch. D. 515; 45 L. T. 60—C. A.

**Fund in Court—One of Trustees Lunatic—Reference to Master.**]—The lord chancellor declined to order the transfer of funds standing in the joint names of the lunatic and another to the party claiming such transfer, without a previous reference to the master. *Were, In re*, 3 Mac. & G. 233.

—— **Payment in under Trustee Relief Act—Separate Account—Notice to Trustees.**] — A fund having been paid into court by trustees under the Trustee Relief Act, one-third was carried to the separate account of one of the cestui que trust, who was a lunatic. Afterwards a petition was presented in lunacy for a transfer of one-third belonging to the lunatic :—Held, that the trustees need not be served with notice of the petition. *Young, In re*, 5 W. R. 400.

### 11. Vesting Orders.

**Estate under 200*l*.—County Court—Jurisdiction.**]—Where the estate of a lunatic is under 200*l*. and the judge of a county court makes an order under s. 132 of the Lunacy Act, 1890, directing some person to take possession of and realise the lunatic's property, the judge has no jurisdiction to direct further that the Bank of England transfer to such person stock standing in the name of the lunatic. *Noyce, In re*, 61 L. J., Q. B. 628; [1892] 1 Q. B. 642; 66 L. T. 331; 40 W. R. 371; 56 J. P. 564—C. A.

## *i.* Deposit, &c., of Deeds and Documents.

### 1. Deposit.

**Securities.**]—Securities belonging to a lunatic's estate ordered to be deposited with the master for the purpose of reducing the amount of the committee's recognisances. *Eagle, In re*, 2 Ph. 201.

**Will.**]—Will of a testator subsequently found a lunatic, directed to be deposited in the custody of the master. *Thompson, In re*, 1 Russ. & M. 355.

### 2. Inspection.

**Proceedings.**]—According to the practice in lunacy no person except the parties and those claiming under them may as a right inspect the proceedings; other persons claiming the right to do so must make a case for the purpose. *Wood, In re, Banner* v. *England*, 4 De G. J. & S. 134; 33 L. J., Ch. 334; 10 Jur. (N.S.) 63; 9 L. T. 698; 12 W. R. 293.

J. B., a lunatic, was tenant in tail in possession of an estate of which C. B., his committee, was tenant in tail in remainder. An action having been brought after the death of J. B. without issue and without barring the entail, against C. B. to enforce an agreement made in lunacy in respect of the estate, into which it was asserted that C. B. had entered in her private capacity as well as in that of committee, a summons for production of documents was issued against her, asking that she might be ordered to produce, among other documents, counsel's briefs upon, and the shorthand writer's notes of, the proceedings in lunacy:—Held, that these documents were not privileged, and must be produced. *Brown, In re, Tyas* v. *Brown*, 42 L. T. 501; 28 W. R. 575.

**Privilege.**]—No person can inspect documents in the lunacy office without an order of one of the masters in lunacy or of a judge in lunacy, but any person who can satisfy the master or the judge that he desires to see the documents for any reasonable and proper purpose is allowed to do so, provided the lunatic if living is not prejudiced thereby. If the lunatic is dead and the applicant wants to see documents in the custody of the court in order to make good a claim to the lunatic's property, such a purpose is primâ facie sufficient to induce the court to allow inspection, even although the request is opposed by a rival litigant. The court would not under any circumstances make an order for the inspection of the reports confidently made to the court by its own medical advisers, but with this exception the general rule is to allow inspection by any person claiming an interest in the property of the deceased lunatic or alleged lunatic, and who can satisfy the court that he wants inspection for some reasonable and proper purpose. Documents in the custody of the masters in lunacy are not in the possession or power of a litigant, and if a judge in lunacy is applied to for inspection, privilege from discovery is an irrelevant topic for discussion, except so far as it may bear upon the exercise by the court of its discretion in the matter. The duty of the court is to act with perfect impartiality between the parties before it, not assisting either against the other or more than the other where neither can establish any right to such assistance. Therefore, where an inquiry in lunacy was directed, but the alleged lunatic died before anything further was done, and the same issues were raised in a subsequent probate action, a party to such action who claimed under the deceased was not allowed to inspect affidavits filed in the lunacy proceedings, inasmuch as the applicant wanted inspection, not to support her own case but to enable her to ascertain what allegations of mental incapacity were intended to be made at the trial of the probate action, so that she might have an opportunity of rebutting them. *Strachan, In re*, 64 L. J., Ch. 321; [1895] 1 Ch. 439; 12 R. 148; 72 L. T. 175; 43 W. R. 369; 59 J. P. 102; 60 J. P. 36—C. A.

**Deeds and Documents.**]—Before a committee had been appointed of a lunatic's estate the court made an order for the official solicitor to inspect the securities and other documents which the lunatic had deposited with a company for safe custody. *Campbell, In re*, 13 Ch. D. 323; 42 L. T. 108; 28 W. R. 480.

According to the practice in lunacy the court will order production of all documents in the custody of the master or registrar relating to the estate of a deceased lunatic on the application of a person claiming under him. But he must make out a primâ facie title to the estate. *Smyth, In re*, 50 L. J., Ch. 34; 15 Ch. D. 286; 43 L. T. 234; 28 W. R. 925.

A lunatic having died intestate, and an action having been commenced for recovery of his real estate:—Held, that the defendant, who produced primâ facie evidence of his being heir-at-law of the lunatic, was entitled to an order to inspect the documents relating to the estate which were in the custody of the registrars in lunacy, although it was sworn on the other side, and not contradicted, that the lands had descended to the lunatic from his mother, and that the

defendant was no relation to the mother. *Smyth, In re*, 16 Ch. D. 673; 29 W. R. 585—C. A.

A party claiming to be heir to the lunatic, permitted after the possession of the estate had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the master's office, which it seems may be retained till a proper investigation has taken place. *Clarke, Ex parte*, Jacob, 589; 23 R. R. 150.

But the court made an order in lunacy for the deeds to be retained in the master's office for inspection by the claimants. *Ferrior, In re, Carrow* v. *Ferrior*, 37 L. J., Ch. 571, n.; L. R. 3 Ch. 175; 18 L. T. 65; 16 W. R. 298.

—— **Lunatic Deceased.**]—Order of lunacy requisite for production and inspection of documents, &c., filed in office of master in lunacy where lunatic is deceased. *Silcock, In re*, 1 N. R. 4—L.JJ.

—— **Lunatic Living.**]—Order in lunacy requisite for production and inspection of documents filed in office of master in lunacy, where lunatic is living. *Sartoris, In re*, 1 N. R. 4—L.JJ.

### 3. Delivery out.

**Title-deeds—Heir-at-Law.**]—Heir-at-law of a lunatic applying for title-deeds out of court, after his death, must pay the costs of preliminary order. *Pearson, In re*, C. P. Cooper, 314.

Deeds delivered out upon report as to heir-at-law under order made after the lunatic's death. *Ib.*

—— **Committee.**]—Where the title-deeds of a lunatic's estate have been deposited in the master's office, the court will not direct them to be delivered out to the committee, unless circumstances are stated in affidavit showing that the due administration of the estate requires that they should be placed in the custody of the committee. *Cooper, In re*, 1 Myl. & Cr. 33.

### *j.* Accounts.

**Passing Accounts—Default by Committee—Costs.**]—A committee should have the previous sanction of the court for not passing his accounts annually. *Anon.*, 1 Russ. & M. 113.

The negligence of a committee is a sufficient reason, though there be no fraud, to induce the court to refuse him costs. *Clarke, Ex parte*, 1 Ves. 296.

Costs to committee of lunatic refused, because he had not passed his accounts regularly, though no fund. *Ib.*

**Interest.**]—Committee of lunatic, neglecting to pass his accounts, and retaining balances, charged with interest on the petition of a creditor. *Hall, Ex parte*, Jacob, 160.

Brother of lunatic, committee of the estate, had managed it nine years before the commission, during which time there were considerable savings; ordered to pay interest, though alleged he made no use of it, unless particular circumstances to justify that. *Chumley, Ex parte*, 1 Ves. 156.

—— **Inquiry as to Money in Hands of Committee.**]—Committee of lunatic's estate not permitted to pass his accounts without inquiry what money in his hands from time to time. Master to state particular circumstances. *Catton, Ex parte*, 1 Ves. 156.

—— **Notice.**]—In passing accounts of a lunatic's estate, notice should be given to the parties next entitled, but they are not allowed any costs. *Wright, Ex parte*, 2 Ves. 25.

**Misapplication of Funds by Solicitor to Committee.**]—A solicitor to committees received and misapplied part of the estate of the lunatic, and then died insolvent. The court, although it held the committees answerable, yet considering that, under the circumstances, the lunatic, if he recovered, would not enforce the liability, made a declaration that they were not to be charged with the loss, but the costs were not to be allowed out of the estate. *Moore, In re*, 23 L. J., Ch. 153—L.JJ.

**Liability of Surety.**]—The sureties in the recognisance of the committee of a lunatic for his obeying the orders of the lord chancellor, with respect to the lunatic's estate:—Held liable, on his making default, not only for the balance reported due from him, but also for the costs of the proceedings taken for enforcing the payment of such balance, although they may have had no notice of the default of their principal until after such proceedings taken. *Lockey, In re*, 1 Ph. 509; 14 L. J., Ch. 164.

**Fixed Amount allowed for Maintenance.**]—Where a fixed amount is allowed to the committee of a lunatic for maintenance, as a general rule the committee will not be required to pass accounts in a formal manner with vouchers. *French, In re*, 37 L. J., Ch. 537; L. R. 3 Ch. 317; 18 L. T. 139; 16 W. R. 657.

Where, however, an order allows the committee of the person such sum, not exceeding a certain fixed amount, as shall be applied for maintenance, the liability to keep accounts and prove how much has been expended is imposed upon the person receiving the money. *Ib.*

These rules, however, do not apply if the special circumstances of the case require them to be disregarded, as the court has jurisdiction to investigate the expenditure of the committee. *Ib.*

**Passing Accounts—Payment of Rents by Committee to Wrong Person—Claim by Representatives of Lunatic.**]—Where a committee of a lunatic received rents of his estate, and on the supposition that the right to those rents was not in the lunatic, but in a third person, paid them to such third person, the committee was not allowed to set up their final account passed in the lunacy as an answer to the claim of the lunatic's personal representative to the rents. *Wright* v. *Chard*, 4 Drew. 673; 5 Jur. (N.S.) 1334; 1 L. T. 138; 8 W. R. 35. Affirmed, 1 De G. F. & J. 567; 29 L. J., Ch. 415; 6 Jur. (N.S.) 476; 2 L. T. 104; 8 W. R. 334.

Where such a committee and trustee wrongly takes upon himself to decide to which of his

two titles preference is to be given, he must, on appeal, bear all the costs of the whole suit, except so far as they may have been increased by a claim which failed in the court below. *Ib.*

On the death of a tenant for life of an estate in 1849, the estate, according to one view of the construction of a will disposing of it, devolved upon C. as trustee for Mrs. V.; according to another view it devolved upon W., a lunatic, the committee of whose estate C. was. Mr. and Mrs. V. entered into occupation of part of the estate, and C. received the rents of the remainder and paid them over to Mrs. V., with full notice that the persons who would, according to the second view of the construction, become entitled on the death of W. intended to assert their title. W. died in 1851. A bill was afterwards filed in 1856 by W.'s personal representative to compel C. to account for the rents received by him:—Held, that whether C., if he had not been committee of the lunatic, would have been liable so to account or not, his having filled that position made him clearly liable so to account. *Ib.*

**Death of Lunatic—Order for Payment for past Maintenance without Reference.**]—Where, on the death of the lunatic, no order having been made for maintenance, the former committee offered to consent to a payment by the interim committee for past maintenance to avoid the expense of a reference, the estate being inconsiderable, the court refused to sanction such payment, unless with consent of all parties interested in the surplus of the estate. *Patrick, In re*, 2 Ph. 394.

—— **Lien of Committee.**]—A committee of a lunatic has no special lien upon the estate after the death of the lunatic for money expended by him on his behalf: and a purchaser having notice of the claim of the committee, is no more bound to see to the application of the purchase-money than if he bought with notice of simple contract debts. *Jones* v. *Noyes*, 28 L. J., Ch. 47; 4 Jur. (N.S.) 1033; 7 W. R. 21.

—— **Rents accrued since Death—Liability of Committee to Account.**]—A lunatic was found by the court to be seised in fee of real estate, and certain persons were found to be his heirs. On his death intestate:—Held, that the committee of the person who had been put by the court into possession of certain part of the real estate, must deliver possession thereof to the heirs so found, but without prejudice to any question of title, and could not retain possession as an adverse claimant. *Butler, In re*, L. R. 1 Ch. 607.

Held, that the court could not order the committees of person and estate to deliver possession of other part of the estate, which the committee of the person had taken possession of claiming adversely to the heirs, and the committees were not accountable in lunacy for rents accrued since the death of the lunatic. *Ib.*

—— **Liability of Solicitor for Committee to Account.**]—Held, also, that the court could not, under its general jurisdiction, order a solicitor to account for rents so accrued and received by him as solicitor for the committee of the estate. *Ib.*

**Action for Account—Jurisdiction.**]—The court of chancery, in the exercise of its ordinary equitable jurisdiction, can entertain a suit against a committee of a lunatic's estate, asking for an account of his dealings therewith during the period of his committeeship. *Scammell* v. *Light*, 32 L. J., Ch. 53; 8 Jur. (N.S.) 1122; 7 L. T. 414; 11 W. R. 83; 1 N. R. 83.

L. and T. were appointed executors and trustees of the will of S., who was subsequently, by inquisition, found to be a lunatic. T. only proved the will. He had previously thereto been appointed committee of the person and estate of the lunatic. A bill was filed against L. and T. for the administration of the estate, and that accounts of the dealings and transactions of L. and T., in respect of the estate, between the date of lunacy of S. and his death, and of the moneys received by them in respect thereof, might be ascertained, and that the defendants might be charged with the balances and interest thereon. T. demurred to so much of the bill as prayed for accounts, between the date of lunacy and the death of the testator, and as sought for discovery for the purpose of taking such accounts upon the ground that the court of chancery had not jurisdiction to take such account, and that it should be taken in lunacy, and that the plaintiffs were not entitled to any relief or discovery against him. But the demurrer was overruled with costs. *Ib.*

**Trustee—Injunction against—Costs of Committee.**]—The costs of lunatic's committee not entitled to be paid by a trustee, the costs of an injunction to restrain the transfer of a fund standing in the name of the trustee, on the death of the lunatic. *Toledo* v. *Vieta*, 7 Jur. 336.

*k.* Costs of Proceedings.

**Commission — Groundless Petition.**] — If a petition for a commission be wholly groundless, it will be dismissed with costs. *Ward, Ex parte*, 6 Ves. 579.

—— **Never acted upon.**]—Lunacy commission kept back for several years, and not acted on, is a contempt of court, and will be discharged with costs. *Anon.*, 2 Atk. 52.

No costs to a party suing out a commission of lunacy, which was never acted upon and afterwards superseded; because the property never having come into the possession of the crown, there is no fund out of which the costs can be given. *Glover, Ex parte*, 1 Mer. 269.

—— **Death of Lunatic before Taxation.**]—The wife of A. B. sued out a commission of lunacy, under which he was found a lunatic, and an order was made for taxation of the costs; but before taxation the lunatic died:—Held, that assuming the proceedings to have been proper, the solicitor of the wife was entitled to stand as a creditor against the lunatic's estate in respect of his bill of costs, and to institute a creditor's suit to enforce his right. *Chester* v. *Rolfe, Rutter, In re*, 4 De G. M. & G. 798; 23 L. J., Ch. 233; 18 Jur. 114; 2 Eq. R. 19.

Whether he would have been so entitled if employed by a person who was sui juris, quære. *Ib.*

—— **Payment of Costs out of Real Estate.**]—Payment of costs of commission out of lunatic's

real estate, and the lunatic having died since the return of the commission, leaving no personal estate, refused, the act 11 Geo. 4 & 1 Will. 4, c. 65, s. 28, not applying. *Tubb, In re*, 1 Jur. 653.

Held, that the costs of a commission of lunacy, and of the trial of a traverse, in which the commission was confirmed, constituted a debt within the meaning of the 3 & 4 Will. 4, c. 104, against the real estate of the lunatic, who had died before any order made for payment of the costs. *Williams* v. *Wentworth*, 5 Beav. 325.

—— **Costs of Opposition.**]—Where costs are incurred in opposing a commission of inquiry as to the state of mind of a party and the opposition fails, although circumstances are stated showing previous knowledge and that the opposition was vexatious, a solicitor will be allowed the costs of opposition as between solicitor and client. *Field* v. *Turner*, 3 W. R. 469.

—— **Recovery of Lunatic—Costs of Petition.**]—The wife of a gentleman alleged to be a lunatic, and who was separated from her, presented a petition praying an inquiry into the state of his mind. The petition being ordered to stand over, the husband in the meantime recovered, and it was held, that, unless there were grave reasons against such a course, the costs of the petition must be paid by the alleged lunatic. *F——, In re*, 2 De G. J. & S. 89; 33 L. J., Ch. 333; 9 L. T. 698.

A father sued out a commission of lunacy against his son, under which he was found lunatic. Before, however, committees either of his person or estate were appointed, and before also his property had come into the possession of the crown, he recovered his sanity. Upon an application by the son to supersede the commission:—Held, that the court had not jurisdiction to make any order against the son for payment of the father's costs of the commission; but such decision was without prejudice to any action the father might bring against his son. *Anon.*, 4 De G. & J. 103; 28 L. J., Ch. 644; 5 Jur. (N.S.) 662.

—— **Pendency of Traverse.**]—The costs of issuing a commission of lunacy, if for the lunatic's benefit and after the lunatic's death, may be proved against the lunatic's estate, notwithstanding the pendency of a traverse of the inquisition. *Cumming, In re*, 5 De G. M. & G. 30; 23 L. J., Ch. 261; 18 Jur. 181; 2 W. R. 248.

—— **Death of Lunatic—Fund in Court.**]—Costs of a commission of lunacy, which had been taxed during the lifetime of the lunatic, ordered to be paid after his death out of funds to which he was entitled, and which at his death were standing to the credit of a cause to which he was a party. *Tayler* v. *Tayler*, 3 Mac. & G. 426.

—— **Procedure for obtaining Payment.**]—Where a commission de lunatico inquirendo has been properly sued out by a solicitor, at the instance of the lunatic's wife, and there is no fund in the lunacy, the solicitor may, in the event of the death of the lunatic, proceed by summons upon his personal representatives, calling upon them for payment of his demand for the costs of the commission, or for the usual administration accounts. *Chester* v. *Rolfe*, *Rutter, In re*, 4 De G. M. & G. 798; 23 L. J., Ch. 233; 18 Jur. 114; 2 Eq. R. 19.

—— **Petition—Attendance of Parties Interested.**]—Where a petition for a commission of lunacy stated that the alleged lunatic had been of unsound mind for upwards of thirty years, a cestui que trust, under a settlement made during this period, was allowed to attend the execution of the commission, upon an undertaking to abide by such order as the court might make as to the increased costs occasioned by the attendance. *Richards, In re*, 1 De G. M. & G. 719; 21 L. J., Ch. 739; 16 Jur. 508.

—— **Opposition by Nearest Relatives.**]—The nearest relations of a supposed lunatic ordered to pay the costs occasioned by their opposition to a petition for a commission of lunacy presented by strangers to the family. *Smith, In re*, 1 Russ. 348.

**Inquiry—Costs of Petitioner.**]—In an inquiry as to an alleged lunacy, the costs of the petitioner were ordered to be paid out of the estate of the alleged lunatic, notwithstanding that the alleged lunatic had recovered and was certified to be of sound mind. *Anon.*, 3 N. R. 272.

—— **Expenses and Costs of Defence.**]—The court has jurisdiction, where an inquiry as to the unsoundness of mind of an alleged lunatic is pending, to sanction an allowance for the necessary household expenses of the alleged lunatic, and for the expenses of preparing his defence upon the inquiry. *Bullock, In re*, 55 L. T. 722; 35 W. R. 109—C. A.

—— **Charges of Witness.**]—An inquiry having been ordered under the Lunacy Regulation Acts whether or not the defendant was of unsound mind, the plaintiff, a medical man, was employed by the defendant's solicitor to examine the defendant, for the purpose of giving evidence at the inquiry, but notwithstanding such evidence the defendant was found to be a lunatic. The plaintiff subsequently brought an action in the county court against the defendant for his charges in respect of the services so rendered by him, but was nonsuited on the ground that he could not recover such charges without an order under the above-mentioned section:—Held, that s. 11 of the Lunacy Regulation Act, 1862, did not take away or affect the plaintiff's right of action, assuming the action to be in other respects maintainable, and therefore that the nonsuit was wrong and there must be a new trial. *Brockwell* v. *Bullock*, 58 L. J., Q. B. 289; 22 Q. B. D. 567; 37 W. R. 455; 53 J. P. 405; 54 J. P. 19—C. A.

—— **Medical Witnesses—Remuneration of.**]—Previously to an inquisition of lunacy held in the case of Mrs. C., who was alleged and found to be of unsound mind, she was attended by several physicians, as well in their ordinary capacity as for the purpose of preparing themselves to give evidence in her favour upon the inquisition in question. They received at the time no remuneration for their services except in the case of one of them, to whom a promissory note was given by the lady, bearing date subsequently to the period at which her imbecility

was afterwards declared to have begun. Under a suit to administer her estate, these gentlemen applied by motion to vary a certificate of the chief clerk, by adding their names to the schedule of creditors, in respect of their claims for the above services : — Held, that they were not entitled to be included in such schedule, and that their fees ought to have been paid and claimed by the solicitor of the lady; but the amount of the promissory note given to one of their number was ordered to be allowed to him. *Elliott* v. *Ince*, 4 W. R. 515.

—— **Costs—Alleged Lunatic found of Sound Mind.**]—When an inquiry as to the lunacy of a supposed lunatic had been based upon the report of the commissioners in lunacy, and had resulted in his being declared of sound mind, the court ordered the costs of the proceedings in lunacy and of the inquiry to be paid out of the supposed lunatic's estate. *C——, In re*, L. R. 10 Ch. 75 ; 23 W. R. 377.

A petition presented by a husband for an inquiry into the mental condition of his wife resulted in a finding that she was of sound mind and capable of managing herself and her affairs. The petitioner applied that the court should, in the discretion given to it by s. 109 of the Lunacy Act, 1890, direct his costs to be paid by the respondent. The costs were very large, and the petitioner would have been almost ruined if obliged to pay his own costs. The respondent had considerable property. The court was of opinion that there were ample grounds for instituting an inquiry, and that the petitioner had acted bonâ fide in the interests of his wife, but his conduct had been such as to excite great hostility in her, thereby probably causing extra expense :—Held, that the petitioner's costs must be taxed as between party and party, and two-thirds of the taxed amount must be paid out of a sum of 10,000*l.*, part of his wife's estate, in which he claimed an interest, but which claim he waived so far as was necessary for the payment of the costs. The points to be considered by the court in exercising its discretion under s. 109 of the act stated and discussed. *Cathcart, In re*, 61 L. J., Ch. 99 ; [1892] 1 Ch. 549 ; 66 L. T. 9 ; 40 W. R. 257—C. A.

**Discretion of Judge in Lunacy—Appeal.**]—Where the result of a lunacy inquiry is that the person who was alleged to be a lunatic is found to be of sound mind, the judges sitting in lunacy, in exercising their discretion over the costs of the inquiry under s. 109 of the Lunacy Act, 1890, may, if the application for the inquiry seems to them to have been prompted by a desire to protect the person and property of the alleged lunatic, and to have been made on reasonable grounds and in a reasonable manner, order the costs of the applicant to be paid by the person who was alleged to be a lunatic. An appeal lies to the Court of Appeal from the Lords Justices sitting in lunacy, where the latter have made an order under s. 109 of the Lunacy Act, 1890, dealing with the costs of a lunacy inquiry. *Cathcart, In re*, 62 L. J., Ch. 320 ; [1893] 1 Ch. 466 ; 2 R. 268 ; 68 L. T. 358 ; 41 W. R. 277—C. A.

**Inquiry—Costs—Alleged Lunatic found of Sound Mind—Costs of Alleged Lunatic.**]—An inquiry was ordered as to the sanity of a young man of large property, on the application of a number of his relations. The inquiry was proceeded with, and the verdict was that the alleged lunatic was of sound mind. He then presented a petition praying that the applicants might be ordered to pay him his costs incurred on the application for the inquiry in the proceedings, on the inquiry, and on the present application. The court being satisfied that the conduct of the alleged lunatic had been such as to render it very doubtful whether he was sane, and that the application had been made bonâ fide, without any personal motive, and with a view to his best interests :—Held, that assuming the court to have jurisdiction to order the applicants to pay the costs, such an order ought not to be made. *Windham, In re*, 4 De G. F. & J. 53 ; 31 L. J., Ch. 720 ; 8 Jur. (N.S.) 448 ; 6 L. T. 479 ; 10 W. R. 499.

**Traverse—Successful—Costs of Commission.**]—After the finding of a jury upon a traverse of an inquisition of lunacy, that the alleged lunatic is of sound mind, the court acting in the jurisdiction in lunacy has no authority, under the 6 Geo. 4, c. 53, or otherwise, to direct payment out of the property of the alleged lunatic, of any costs incurred with reference to the commission, although the verdict upon the traverse does not negative the lunacy at the time of the original inquisition. *Loveday, Ex parte*, 1 De G. M. & G. 275 ; 21 L. J., Ch. 231 ; 16 Jur. 95.

Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage, and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded ; but the lord chancellor doubted the propriety of such a double issue. No costs to the party taking out a commission of lunacy which is traversed with success, however meritorious the case : the property never coming to the possession of the crown, there is no fund. *Ferne, Ex parte*, 5 Ves. 832.

Traverse of a verdict of unsound mind, under a commission, being the right of the party, cannot be refused, and prevents the crown taking the custody, and consequently allowing the costs of the proceedings, however meritorious ; but they were given out of a fund of a lunatic in court in a cause, on the principle on which the court protects persons in a state of incapacity, though adult, and objects of a commission, assigning guardians, &c. *Sherwood* v. *Sanderson*, 19 Ves. 280 ; G. Cooper, 108 ; 13 R. R. 193.

—— **Wife's Costs—Application made without Leave.**]—Held, upon the wife's petition, that court had no power to order money to be paid to her out of the produce of the lunatic's property, to enable her to traverse the inquisition, which she had got leave to do. *Nugent, Ex parte*, 2 Moll. 486.

—— **Unsuccessful—Costs.**]—The costs of an unsuccessful traverse of an inquisition of lunacy allowed out of the lunatic's estate. *Wentworth* v. *Tubb*, 2 Y. & C. C. C. 537 ; 5 Jur. 1150 ; 6 Jur. 980 ; 7 Jur. 738.

**Solicitor—Lien for Costs.**]—Where a suit was instituted against A. and his wife, and B. and his wife, and others, by a solicitor, for the purpose of obtaining a declaration that the amount of his bill of costs, incurred in lunacy

proceedings taken against C., the mother of the married women, at their and their husbands' request, and upon the faith of representations made by them in reference to C.'s estates, was payable out of the copyhold estates which, upon the death of C., descended upon the married women as her co-heiresses in tail:—Held, that as there was no allegation that the property which the married women, as co-heiresses, sought to protect was to be subject to any demand in respect of costs, and as there was no evidence that they clearly and distinctly represented to the solicitor that their estates in the copyholds should be liable to make good the remuneration for his professional services; but that as it appeared that the person and estates sought to be protected were C.'s; that it was, according to the solicitor's allegations, her property to which he must look for his reimbursement of the expenses of the proceedings; that his evidence showed that the representations made related to, and that the married women were desirous of having, proceedings taken in regard to her lunacy to protect her property and their own interests as co-heiresses, the case failed, and that the bill, as against A. and his wife, and the wife of B., and the trustee of the settlement of A. and his wife, must be dismissed, but without costs. *Turner* v. *Ince*, 5 Jur. (N.S.) 1072.

But B. and his assignees in bankruptcy consenting, it was declared that the solicitor had a lien for his bill of costs against the interest, if any, of B., in right of his wife, in a moiety of the property. *Ib.*

**Solicitor—Order to Tax—Delay.**]—Solicitors, who claimed costs for taking out the commission, and for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order, the lunatic died, leaving real estate, but no personal property. The solicitors sued the committees at law, but they set up the statute of limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings to make the real estate liable, and the court made the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate. *Hart, In re*, 21 L. J., Ch. 810.

An order in lunacy directing the taxation of the costs, charges, and expenses incurred by the solicitors employed in prosecuting the commission in lunacy, and subsequently as the solicitors of the committees, and directing an inquiry whether it would be fit and proper to raise these costs, &c., by sale or mortgage of the lunatic's real estate, did not constitute them a judgment debt, nor make them a charge in equity upon such real estate; but such costs, &c., were considered as a simple contract debt due by the lunatic for necessaries. The lapse of six years during the lunatic's life will not bar a debt of this description, for the court of chancery will take judicial notice in a suit to obtain payment out of his assets after his death, that any action against the lunatic for the recovery of the claim would have been restrained by the lord chancellor on petition in lunacy. *Stedman* v. *Hart*, Kay, 607; 23 L. J., Ch. 908; 18 Jur. 744; 2 W. R. 462.

—— **Petition presented for Personal Profit of.**]—A petition for inquiry into the state of mind of a lady was presented by a neighbour who was no relation of the supposed lunatic. The medical visitor appointed by the court reported that there were grounds for an inquiry, and an inquiry was held some months later before a jury. The jury returned a verdict that the lady was of sound mind and capable of managing her own affairs. After the verdict the petitioner obtained a letter from his solicitor indemnifying him against the costs of the petition. The petitioner then presented a second petition, asking for the payment of his costs out of the lady's estate under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), s. 11. Another petition was presented by the lady asking that her costs should be paid by the petitioner for the inquiry. The court declined to make any order as to costs on either petition, being of opinion that, though the visitor's report showed that an inquiry was justified, the inquiry in this case had been really set on foot by the petitioner's solicitor for his own profit. *S., In re*, 46 L. J., Ch. 233; 4 Ch. D. 301; 35 L. T. 828; 25 W. R. 133—C. A.

—— **Action for Costs.**]—A solicitor employed on part of a lunatic can have no action against him for his bill of costs. *Barnesley* v. *Powell*, Ambl. 102.

—— **Misappropriation by — Proceedings against Estate—Benefit of Lunatic.**]—Where the committee of a lunatic allowed a solicitor to receive part of the estate of the lunatic, and the solicitor misapplied the money so received, and died insolvent:—Held, that although the committees were answerable for the acts of their agent, yet, under peculiar and special circumstances, the court made a declaration that the committees should not be charged with the loss to the lunatic's estate; but costs of ascertaining whether it would be for the benefit of the lunatic that proceedings should be commenced against the estate of the deceased solicitor, were not allowed to the committees out of the lunatic's estate. *Moore, In re*, 23 L. J., Ch. 153—L.JJ.

**Heir-at-law—Petition.**]—The heir-at-law of a lunatic appearing on a petition relating solely to the life estate of a lunatic, is not entitled to costs. *Dyneby, In re*, 1 W. R. 294.

**Solicitor—Death of Lunatic—Charging Order.**]—Various costs were incurred in the lunacy of Mrs. C., who before her death took steps to traverse the lunacy. She died in June, 1853, intestate, equitably seised of an estate tail in copyhold estates, and in February, 1854, her solicitor in the lunacy obtained an order for the taxation of his bill of costs, and the taxation was completed in February, 1855. In October, 1860, he presented a petition under the 29th section of the 23 & 24 Vict. c. 127, praying for an order charging the lunatic's real estate with the costs:—Held, that whether his right to recover his costs accrued on the death of the lunatic, or when the order for taxation was obtained, his case was within the proviso of the 29th section, and that therefore his remedy under the statute against the real estate was barred. *Turner, Ex parte, Cumming, In re*, 2 De G. F. & J. 376; 30 L. J., Ch. 29; 3 L. T. 391; 9 W. R. 213.

**Order charging Costs on Stock belonging to alleged Lunatic—Order for Sale or Transfer of**

**Stock.**]—If an order made under s. 109 of the Lunacy Act, 1890, charges the amount of such costs on stock standing in the name of the alleged lunatic, this does not constitute a charging order within the meaning of Ord. XLVI. r. 1; and, therefore, the procedure laid down in 1 & 2 Vict. c. 110 is not applicable. *Cathcart, In re*, 62 L. J., Ch. 320; [1893] 1 Ch. 466; 2 R. 268; 68 L. T. 358; 41 W. R. 277—C. A.

Such order may direct the alleged lunatic to transfer an amount of stock sufficient to satisfy the said costs; and if the alleged lunatic fails to comply with this direction, an order may be made under s. 14 of the Judicature Act, 1884, directing the official solicitor to make the necessary transfer. *Ib.*

**Sale of Stock to Pay Costs.**]—Stock of an intestate dead nearly twenty years being brought into court, an order for selling part thereof for costs in the lunacy of the sole next of kin, and for applying the dividends for such lunatic's maintenance before any report of the debts of the intestate, was refused. *Radcliffe* v. *Carter*, C. P. Cooper, 250.

**Inquiry—To Pay Costs—Transfer of Mortgage vested in Lunatic.**]—There was no available property of a lunatic wherewith to pay the costs of the inquiry as to his lunacy, and he was entitled to a mortgage of freeholds. The mortgage had been made under a power in a settlement. The trustee was dead, and there was no one competent to take a reconveyance, but a person had been found who was willing to take a transfer of the mortgage:—Held, that the court could effect this by ordering the lunatic's interest in the land to be sold, under s. 116 of the Lunacy Regulation Act, 1833, to pay the costs. *Brown, In re*, 50 L. T. 373—C. A.

**Costs incurred by Wife of Lunatic.**]—A gentleman was placed under restraint by his relations as being incapable of managing his affairs. He had previously had temporary fits of mental aberration, from which he had recovered. His wife, who was living separate from him, on hearing of this attack, sent medical men to inquire into his state, but they were not allowed to see him, nor was she allowed any communication with him. She thereupon took proceedings in lunacy. The husband in a few months recovered:—Held, that the wife's costs of the proceedings ought to be paid by the husband. *F——, In re*, 2 De G. J. & S. 89; 33 L. J., Ch. 333; 9 L. T. 698.

**Death of Lunatic before Appointment of Committee of Estate—Costs of Inquisition.**]—A person was found to be a lunatic by inquisition, but died before a committee of her estate had been appointed. On an application under the Lunacy Regulation Act, the court made a declaration that the costs of the inquisition had been properly incurred, and ought to be paid out of the deceased lunatic's estate in a due course of administration. *Meares, In re*, 48 L. J., Ch. 190; 10 Ch. D. 552; 40 L. T. 111; 27 W. R. 369.

The petitioner having sued out a commission of lunacy at his own expense against a party, under which he was found to be a lunatic, and the party having died before a grant had been made of his estate, the lord chancellor refused to refer the bill of costs for taxation, or to make an order that the costs and expenses of the petitioner had been properly incurred for the benefit of the lunatic. *Pinks, In re*, 12 L. J., Ch. 57.

—— **Before hearing of Petition to confirm Master's Report.**]—After presentation, but before hearing of a petition to confirm the master's report in the matter of a lunatic, the lunatic died. The court made no order on the petition, refused to allow the costs in the absence of the legal personal representative, and directed the petition to stand over, with liberty to apply as to costs when the funds in court came to be dealt with. *Popham, In re*, 44 L. T. 323; 29 W. R. 403.

**Proceedings before Master for appointment of Committees.**]—Proposals laid before the master for appointment of committees were disapproved of; a petition was then preferred that he might review his report, which he was ordered to do. Other proposals were laid before the master by the same party, and also disapproved of; and an unsuccessful opposition was made to the petition for confirming the report. Costs of all these proceedings granted. *Fust, Ex parte*, 1 Collins, Lun. 461. And see *Ib.* 306.

**Refusal to produce Lunatic.**]—If the person in whose custody a lunatic is, refuse to produce him to the commissioners, the court has made them pay costs. *Southcot, Ex parte*, 2 Ves. Sen. 401; Ambl. 111.

**Costs incurred after Death of Lunatic.**]—A report made by the master after the death of a lunatic cannot be acted on, but the costs incurred after the death may be ordered to be taxed. *Way, In re*, 30 L. J., Ch. 815; 5 L. T. 519; 9 W. R. 563.

## III. LUNATIC NOT SO FOUND.

### *a.* Jurisdiction in Lunacy.

**Appointment of Receiver of Dividends.**]—Where a person is, through mental infirmity arising from disease or age, incapable of managing his affairs, a master in lunacy has jurisdiction to appoint a receiver of the dividends of government and other securities without ordering a transfer of such securities into the name of the receiver. *Browne, In re*, 63 L. J., Ch. 729; [1894] 3 Ch. 412; 7 R. 580; 71 L. T. 365; 43 W. R. 175—C. A.

Although a judge has jurisdiction to appoint a receiver of dividends only, the usual practice both in chancery and lunacy, namely, to order the securities to be transferred into court, and to allow the receiver to obtain the dividends from the paymaster-general, ought not without sufficient reason to be departed from, but ought in general to be adhered to. *Ib.*

**Appointment of new Trustee.**]—The Duchy Court of Lancaster has no jurisdiction to appoint a new trustee in the place of a trustee of unsound mind, not so found by inquisition. The jurisdiction in such cases does not belong to the court of chancery but to the Lord Chancellor in Lunacy. *Ormerod, In re*, 28 L. J., Ch. 55; 4 Jur. (N.S.) 1289; 7 W. R. 71.

—— **Trustee Act, 1850.**]—The case of an imbecile trustee is not within the jurisdiction of this court, and an application to the lords justices or lord chancellor is necessary. *Good Intent Benefit Society, In re*, 2 W. R. 671.

**Person declared Lunatic by Foreign Jurisdiction.**]—The lord chancellor has no jurisdiction, under the s. 34 of 1 Will. 4, c. 65, to deal with the property of a party declared lunatic by a foreign jurisdiction, except only in conformity with the laws of the country where the lunacy has been declared. *Newton* v. *Manning*, 1 Mac. & G. 362.

A lunatic abroad, under a judicial proceeding in nature of a commission of lunacy, is not within the statute 36 Geo. 3, c. 99, s. 3. See 6 Geo. 4, c. 74, which repeals and re-enacts this statute. *Sylva* v. *Da Costa*, 8 Ves. 316.

**Directions as to Property.**]—The court will not give any directions touching the property of a person of unsound mind, where no commission of lunacy has issued, though the fortune of such person consist only of an annuity of 50*l.* and 150*l.* of arrears, and though the next of kin and the parties who have to pay the annuity submit to such order as the court may make. *Ridgway, Ex parte*, 5 Russ. 152.

**Maintenance—Fund in Court.**]—An idiot, aged 29, residing with his brothers and sister, was entitled to 4,446*l.* 11*s.* consols, paid into court under the Trustee Relief Act, and also to other property, the whole income of which was under 300*l.* a year. Upon a petition presented in lunacy and under the said act, an order was made for the payment of the dividends of the fund in court to the brother and sister of the idiot so long as he should reside with them on their undertaking to maintain him. *Burke, In re*, 2 De G. F. & J. 124; 29 L. J., Ch. 608; 6 Jur. (N.S.) 717; 2 L. T. 587; 8 W. R. 534.

**Maintenance — Reference to Master.**] — The trustees under a will in which a life annuity of 600*l.* a year, and other considerable benefits were given to a person, who, at the death of the testator, was confined in a lunatic asylum, filed a bill for the directions of the court, in executing the trusts of the will relative to the lunatic. The wife of the lunatic presented a petition, praying for an allowance out of the income given to the lunatic, and the court thereupon referred it to the master to inquire into his state of mind; and the master having reported that he was of unsound mind, and not competent to the management of his affairs, the court upon petition of the wife directed the trustees to apply to the great seal for a commission of lunacy, and referred it to the master to inquire what in the meantime would be a proper allowance to be made to the wife. *Exeter (Bishop)* v. *Ward (Lord and Lady)*, 2 Myl. & K. 54.

**Property of Small Amount — Payment of Debts.**] — The power given by the Lunacy Regulation Act, 1862, s. 12, of making orders for the purpose of rendering the small property of a lunatic available for his maintenance or benefit, is to be exercised only for his benefit, and not for the purpose of enabling his creditors to obtain payment. *Price, In re*, 56 L. J., Ch. 292; 34 Ch. D. 603; 56 L. T. 77; 35 W. R. 340—C. A.

A person of small means was confined as a criminal lunatic in Broadmoor Asylum, and there appeared no reasonable prospect of his ever being released. His mother and brother applied for an order that his property, along with some property in which they were interested together with him, might be applied in payment of moneys for which the lunatic had given security, the mother undertaking to pay his other debts:—Held, that the application must be refused as not being for his benefit. *Ib.*

**"Property" in Lunacy Regulation Act.**]—The word "property" in the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), s. 12, which empowers the lord chancellor to make a summary order for rendering the property of an alleged lunatic available for maintenance, where such property does not exceed 1,000*l.*, means beneficial property, or property clear of debt; and where this did not satisfactorily appear to be the case, a reference was directed to the master in lunacy to inquire whether the fact was as stated, and also whether a proposed compromise affecting part of the property was proper to be carried into effect. *Adams, In re*, 4 De G. J. & S. 182; 3 N. R. 339; 10 Jur. (N.S.) 137; 9 L. T. 626; 12 W. R. 291.

In ascertaining whether the property of a person of unsound mind is of the amount of 1,000*l.* or less, so as to bring the case within 25 & 26 Vict. c. 86, s. 12, his debts and the expenses incurred in his past maintenance since he became of unsound mind are to be deducted. *Faircloth, In re*, 13 Ch. D. 307; 42 L. T. 72; 28 W. R. 481—C. A.

**Petition for Application of Income—Opposition by alleged Lunatic.**]—The power given to the lord chancellor by s. 12 of the Lunacy Regulation Act, 1862 (extended by s. 3 of the Lunacy Regulation Amendment Act, 1882), to make an order for the application of the property of a person of unsound mind for his maintenance or benefit, when the property is below a specified amount, without directing any inquiry under a commission of lunacy, ought not, even if the jurisdiction extends to cases in which the alleged lunatic appears and denies unsoundness of mind, to be exercised in such cases. *Lees, In re*, 53 L. J., Ch. 1022; 26 Ch. D. 496; 50 L. T. 489; 32 W. R. 1005—C. A.

**Petition for Application of Property—Notice signed by Agent of Solicitor.**] The notice of a petition under the Lunacy Regulation Act, 1862, ss. 12, 13, 14, 15, which was served on an alleged lunatic, was signed by the London agent of the petitioner's solicitor, expressly as agent:—Held, that this was not a compliance with the 59th rule of the Lunacy Order, 1883, which directs the notice to be signed by the petitioner or his solicitor. *Summerville, In re*, 55 L. J., Ch. 367; 31 Ch. D. 160; 54 L. T. 143; 34 W. R. 185—C. A.

**Payment of Dividends without Reference.**]—Upon petition, praying reference to the master, as to the state of the plaintiff and her fortune, and direction for her maintenance, the property being too small to bear a commission of lunacy, an order was made upon affidavits, without a reference for payment of the dividends for the two ensuing quarters. *Eyre* v. *Wake*, 4 Ves. 795.

**Lunatic out of Jurisdiction—Fund in Court—Transfer to Curator.**] — Order made, on the

application of the curator of a lunatic resident in Holland, for the transfer to him of the corpus of funds in England to which the lunatic was entitled. *Elias, In re*, 3 Mac. & G. 234.

—— **Stock—Transfer to curator Bonis.**]—The Act 1 Will. 4, c. 65, does not render it imperative on the lord chancellor, on the application of a curator bonis of a lunatic, appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England (the property of the lunatic) into the curator's name. *Morgan, In re*, 1 H. & Tw. 212.

A bill was filed by an English lunatic resident in Scotland, and by his curator bonis duly appointed in Scotland, praying the transfer by one of two trustees into the name of the curator, who was the other trustee of English Government Stock standing in the name of the curator and his co-trustee. The court, upon motion that the defendant might be at liberty to make a transfer, after requiring the bill to be amended, by making the plaintiff sue by his curator and next friend, made an order, by consent, as upon a motion for a decree. *Hessing* v. *Sutherland*, 25 L. J., Ch. 687; 4 W. R. 820.

—— **Past and Future Dividends—Payment to Curator Bonis.**]—The lord chancellor will order payment by the bank to the curator bonis of the past dividends due on the stock, but not future dividends. *Ib.*

—— **Future Dividends—Payment to Curator's Attorney.**]—Where a curator of the property of a lunatic residing in Malta had been appointed by the court there, and such curator had authorised a person residing in England to receive dividends of shares in companies and of consols belonging to the lunatic, which had theretofore been received by an attorney appointed by the lunatic, the court, no opposition being made by the companies or the Bank of England, made an order that they should respectively be at liberty to pay the accrued and future dividends to the curator's attorney. *Baynes, In re*, 44 L. T. 322.

—— **Lunatic so found by German Court—Transfer of Fund in Court to German Commission.**]—Where a German lady, whose only connection with England was that her mother was English, was found lunatic by, and made a ward of, the German court, whereby her person and property were put under the charge of such court, which also had power to give receipts for her property, the (English) court ordered the transfer of a fund in court, the lunatic's sole property, to a commission of the German court, appointed for the purpose of taking charge of the property of lunatics. *Barlow, In re* (56 L. J., Ch. 795; 36 Ch. D. 287), distinguished. *De Linden, In re. Spurrier. In re, De Hayn* v. *Garland*, 66 L. J., Ch. 295; [1897] 1 Ch. 453; 76 L. T. 180; 45 W. R. 342.

**Declaration that Person of Unsound Mind by Scotch Court—Sufficiency.**]—On the application by the curator of T., a person resident in Scotland, for the transfer of stock standing in his name to the curator, it appeared that the petition on which the Scotch court had appointed the curator stated that T. had been for several years of unsound mind, and was at that time incapable of managing his affairs. The only ground for the petition, stated in the affidavits annexed, was that T. was of unsound mind. By a memorandum indorsed on the petition the Scotch court appointed the curator, but the order contained no express declaration that T. was of unsound mind. It was shown that curators were appointed in Scotland, not only in cases of unsoundness of mind, but also when persons were, by illness or absence abroad, incapable of managing their own affairs: —Held, that the memorandum indorsed on the petition amounted to a declaration within the meaning of s. 141 of the Lunacy Regulation Act, 1853, that T. was of unsound mind. *Tarratt, In re*, 51 L. T. 310; 32 W. R. 909—C. A.

*b.* JURISDICTION OF THE CHANCERY DIVISION.

**1. Generally.**

**Person—Protection of.**]—Jurisdiction of the court to interfere for the protection of a lunatic not found so by inquisition. *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J., Ch. 296; 10 Jur. 399.

**Appointment of Guardian.**]—Although the chancery division has power, in the administration of the trusts of the property of a person of unsound mind not so found, to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person. *Vane* v. *Vane*, questioned. *Bligh, In re*, 49 L. J., Ch. 56; 12 Ch. D. 364; 41 L. T. 570; 27 W. R. 876—C. A.

The chancery division has jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found, but will not exercise it unless the property is small and proceedings are not intended to be taken in lunacy. *Vane* v. *Vane*, 45 L. J., Ch. 381; 2 Ch. D. 124; 34 L. T. 613; 24 W. R. 602. And see *Bligh* v. *O'Connell*, 38 L. T. 217; 26 W. R. 311; *Brandon's Trusts, In re*, 13 Ch. D. 773; 41 L. T. 755.

—— **Infant Ward.**]—The jurisdiction of the court over its infant ward is not taken away by any physical or mental disability to which the infant may be subject, and such directions ought to be given as to his treatment, whether in a lunatic asylum or not, as the court considers to be most for his benefit. *Edwards, In re*, 48 L. J., Ch. 233; 10 Ch. D. 605; 40 L. T. 113; 27 W. R. 611—C. A.

**Property—Applications as to.**]—Applications relating to the property of persons not found lunatic by inquisition, which is in or under the administration of the court of chancery, are entertainable by the court in its ordinary jurisdiction. *Macfarlane, In re*, 2 J. & H. 673; 31 L. J., Ch. 335; 8 Jur. (N.S.) 208; 6 L. T. 154; 10 W. R. 369.

—— **Directions as to Management.**]—The court of chancery, in its ordinary jurisdiction, can entertain applications, relating to the property under its control, of persons of unsound mind, not found lunatic by inquisition. *Ib.*

—— **Interim Order for Protection.**]—Where the lunacy of a person is in question, the court will make a provisional order as to his effects,

till the point of the lunacy is determined. *Hele, In re*, 3 Atk. 635.

—— **Administration.**]—When the property of a person of unsound mind not so found is small, and it is not desirable to take proceedings in lunacy, the court will administer such property, and give directions as to guardianship and maintenance. *Bligh* v. *O'Connell*, 38 L. T. 217; 26 W. R. 311.

Where the property of an intestate was small, and his next of kin and only known relation was a lunatic, but had not been so found by inquisition, the court declined to make a grant of administration to a stranger in blood for the use and benefit of the next of kin, until an application had been made to the Court of Chancery under the 12th section of the Lunacy Regulation Act, 1862, for an order rendering the property of the intestate available for the maintenance and benefit of the lunatic. *Slumbers, In re, the Goods of*, 34 L. J., P. 93; 11 Jur. (N.S.) 396; 13 W. R. 696.

—— —— **Inquiry as to State of Mind of Infant Devisee.**]—In a suit to administer the estate of a testator, a devisee infant being incapable of managing his own affairs, a motion was made under s. 16 of 15 & 16 Vict. c. 86, for a reference to inquire into the devisee's state of mind:—Motion refused, and no order made. Costs reserved. *Adams* v. *Smith*, 1 W. R. 475.

### 2. Maintenance.

**Jurisdiction — Property under Control of Court.**]—The Chancery Division has no jurisdiction to direct the application of the property of a person of unsound mind (not so found) for his maintenance unless there is either money belonging to him in court, or the court has control over his property by reason of there being an action or some other proceeding pending relating to the property. *Grimmett's Trusts, In re*, 56 L. J., Ch. 419.

An order cannot be made for the maintenance of a lunatic not found so by inquisition, unless proceedings have been taken for placing the property under the administration of the Court of Chancery. *Tayler, In re*, 2 De G. F. & J. 125.

—— **Maintenance out of Capital.**]—The jurisdiction of the Chancery Division to give directions as to the maintenance of a person of unsound mind not so found is not confined to applying the income for his maintenance, but extends to the application of capital for that purpose. *Tuer's Will, In re*, 55 L. J., Ch. 454; 32 Ch. D. 39; 54 L. T. 910; 34 W. R. 751—C. A.

Part of the capital of a fund in court belonging to a married woman, who was deranged, and had been deserted by her husband, ordered to be applied for her maintenance. *Peters* v. *Grote*, 7 Sim. 238.

—— **Past Maintenance.**]—The court ordered a fund of 379*l.* stock and 5*l.* cash paid into court under the Trustee Relief Act, and constituting nearly the entire fortune of a lunatic, not found such by inquisition, to be paid to his father in part discharge of moneys expended for past maintenance. *Law, In re*, 30 L. J., Ch. 512; 7 Jur. (N.S.) 410; 5 L. T. 464.

The court ordered the corpus of a fund, to which a lunatic was entitled, and which had been paid into court under the Trustee Relief Act, to be applied in satisfaction of a claim by the churchwardens and overseers for the maintenance, &c., of the lunatic. *Buckley's Trusts, In re*, Johns. 709.

Stock transferred into court under the Trustee Relief Act, and constituting the entire fortune of a person of unsound mind, not found lunatic by inquisition, ordered, with the dividends thereon, to be paid to his father in part discharge of moneys expended for past maintenance, the father undertaking to continue the maintenance in future. *Macfarlane, In re*, 2 J. & H. 673; 31 L. J., Ch. 335; 8 Jur. (N.S.) 208; 6 L. T. 154; 10 W. R. 369.

A sum of 390*l.*, which constituted the whole fortune of a lunatic, not so found by inquisition, was ordered to be paid to the mother of the lunatic in respect of past maintenance, she undertaking to continue to maintain her daughter. *Williams* v. *Allen*, 9 Jur. (N.S.) 1219; 9 L. T. 405; 12 W. R. 94. *S. C.*, nom. *Williams* v. *Atlen*, 33 Beav. 241.

—— **Legacy—Payment to Brothers on undertaking to maintain.**]—A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1832 to 1859, at a total expense of more than 700*l.* The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding 300*l.* In 1871, a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future. *Gibson, In re*, L. R. 7 Ch. 52; 25 L. T. 551; 20 W. R. 107.

**Fund in Court—Payment of Income to Lunatic.**]—A fund in court belonging to a person of weak intellect ordered, by consent, to be carried over to his separate account, the dividends to be paid to him until further order, with liberty for him to apply. *Barker* v. *Wallis*, 11 L. J., Ch. 120.

—— **Father.**]—Order directing the dividends of a sum in court belonging to a person of unsound mind, though not so found by inquisition, to be paid to her father for her maintenance. *Berry, In re*, 13 Beav. 455.

—— **Mother.**]—An infant, who was entitled to dividend of stock standing in court was found a lunatic by the laws of the United States of North America. The court made an order for payment of the dividends to the infant's mother for his support, she undertaking duly to apply the same, without requiring that the fund should be paid to a separate account, and an application be made to the Lord Chancellor. *Volans* v. *Carr*, 2 De G. & Sm. 242; 12 Jur. 643.

—— **Husband.**]—Upon a petition presented by the trustees of certain marriage settlements respecting the management of the trust funds, it was ordered that the whole of the income thereof which was settled to the separate use of the wife, who had become lunatic, and was being supported by her husband in a private

lunatic asylum, should be paid to the husband until the further order of the court, he undertaking to apply the same towards the maintenance and support of his wife and the children of the marriage. ——, *In re*, 6 Jur. (N.S.) 386; *S. C.*, nom. *Spiller, In re*, 2 L. T. 71; 8 W. R. 333.

The costs of incidental to this application were directed to be paid out of the income of the trust property. *Ib.*

Where the wife, become of unsound mind after marriage with one of the defendants, was entitled to an annuity out of a fund in court, and also to an annuity to her separate use, the court allowed the husband to receive the former, but, in the absence of any affidavit as to his means, directed the latter to be carried to a separate account, and accumulated. *Nettleshipp* v. *Nettleshipp*, 10 Sim. 236.

—— **Wife.**]—On a petition by a person of unsound mind, not so found, who was married but had no children, and whose sole property consisted of a fund in court, for payment of the whole income of the fund, amounting to 212*l.* per annum, to the wife of the petitioner, the court made an order as asked, upon the undertaking by the wife to apply the income for the maintenance, comfort and support of the petitioner. *Silva's Trusts, In re*, 57 L. J., Ch. 281; 58 L. T. 46; 36 W. R. 366.

Where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had been issued against him, the court, on a bill filed by the husband and wife for payment of the legacy, transferred the fund into court to the joint account of the plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order on the petition of the wife that the dividends should be paid to her for her life. *Steed* v. *Calley*, 2 Myl. & K. 52.

—— **Payment of Income—Wife and Son without Reference.**]—An annuity of 100*l.* directed to be paid to the wife and son of a supposed lunatic, without reference to the master. *Conduit* v. *Soane, Gandy, In re*, 5 Myl. & Cr. 111.

—— **Next Friend.**]—On the petition of a person of weak mind by his mother as next friend, who was entitled to 838*l.* 15*s.* 9*d.*, consols, the court ordered the dividends to be paid to the next friend, to be applied in his maintenance. *Perry's Trusts, In re*, 31 L. T. 775; 23 W. R. 335.

S., a person alleged to be lunatic (but not so found by inquisition), was entitled absolutely to 720*l.*, which had been paid into court under the Trustee Relief Act. The father of S. presented a petition in his own right, and as next friend, praying that the income of the fund might be paid to him during the life of S., or until further order, he undertaking to apply it towards the maintenance of S. The evidence shewed that S. was quite imbecile, and was not entitled to any property other than the 720*l.*, and that the father was not of ability to maintain her. The court made the order, but directed an application to be made once a year in chambers, shewing the state of mind of S., and of what her property then consisted. *Sturge, In re*, 5 Jur. (N.S.) 423; 7 W. R. 395.

—— **Several Funds.**]—An order made as to property and income of a lunatic (not found so by inquisition) decreed under three different titles applicable to their support. *Woodhead* v. *Marriott*, C. P. Cooper, 62.

—— **Curator—Lunatic out of Jurisdiction.**]—A., being entitled to property under an English settlement, and being resident in Jersey, was found of unsound mind by a formal proceeding there, and his brother E. appointed his curator. The trustee of the settlement having paid the fund into court under the Trustee Relief Act, the curator petitioned to have the dividends paid to him, he undertaking to apply them for the benefit of A.:—Order made on production of official and verified copy of the proceedings in Jersey. *Albo's Trust, In re*, 7 L. T. 778; 11 W. R. 80.

—— **Payment of Income for Maintenance of Lunatic Refused.**]—A fund producing upwards of 200*l.* a year, belonging to A. B., a person of unsound mind, though not so found by inquisition, was paid into court under the Trustee Relief Act. A petition to the Master of the Rolls for the application of the income towards his maintenance was refused. *Irby, In re*, 17 Beav. 334.

—— **Payment out to Guardian.**]—On a petition by a person of unsound mind not so found, for payment of a fund in court and for the appointment of a guardian, the fund was ordered to be paid to the person proposed as guardian, he undertaking to apply it for the maintenance, comfort and support of the petitioner. *Vane* v. *Vane* (2 Ch. D. 124) corrected. *Brandon's Trusts, In re*, 13 Ch. D. 773; 41 L. T. 755.

—— **Payment out to Curator.**]—An Englishman while resident in France was found a lunatic by the law of that country, and a curator bonis was appointed by the French court. The fund in this country to which the lunatic became entitled was paid into court under the Trustee Relief Act:—Held, upon petition by the curator bonis for payment of the fund to him as a matter of right, that the court could exercise a discretion; and, it appearing that the lunatic was sufficiently provided for, an order was made for retaining the corpus of the fund in court, and the payment of the dividends only to the curator. *Garnier, In re*, 41 L. J., Ch. 419; L. R. 13 Eq. 532; 25 L. T. 928; 20 W. R. 288.

On the petition of a curator ad bona, appointed by a foreign court to administer the estate of a lunatic, to have transferred to him as such curator the share of the lunatic in the proceeds of real estate in England sold in a partition suit by direction of the court:—Held, that, as the fund retained its character of realty, the curator was not entitled to call for a transfer thereof. *Grimwood* v. *Bartels*, 46 L. J., Ch. 788; 25 W. R. 843.

Application by the curator bonis of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the Bank of England refused, the court not being satisfied that the security given by the curator in Scotland was sufficient, and holding that it was a matter of discretion to refuse or accede to the application. *Stark, In re*, 2 Mac. & G. 174.

The court had directed a reference to inquire whether the lunatic had been found lunatic according to the rules of the place where she was resident; whether the stock formed a part of her personal estate, and whether the peti-

tioner had been duly appointed curator bonis and had given security accordingly, and was properly qualified to have the stock transferred to him. *Ib.*

—— **Lunatic out of Jurisdiction—Person in New South Wales of Unsound Mind not so found—Payment to Master in Lunacy in New South Wales.**]—A lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled for life to the income (about 30*l.* a year) of one-third of a testator's residuary estate, and was absolutely entitled to a fund of about 2,000*l.* which had arisen from accumulations of this income. She had for years been maintained by the colonial government at a total expense of 803*l.* By the New South Wales Lunacy Act, extensive powers of management of the property of "lunatic patients" (i.e. persons detained as lunatics but not so found by inquisition) were given to the master in lunacy of New South Wales, and he was enabled to sue for and receive debts due to the patient, but the act did not vest the patient's property in him. The master claimed to have the accumulations, which were in England, paid to him, upon which the trustees paid them into court under the Trustee Relief Act. The master petitioned to have them paid out to him. Kay, J., ordered payment to him of the 803*l.*, and also payment to him of the income of the remainder of the fund so long as the patient should be detained as an insane patient in New South Wales, and authorised the trustee to pay to him the patient's share of the income of the residuary estate, which the trustee undertook to do. The master in lunacy appealed:—Held, that although the master could enforce payment in New South Wales of any sums due to the patient, still as the patient had not been found lunatic, and her property was not vested in the master, he could not compel payment of any moneys due to the patient from persons in this country, and that his claim as of right to have the whole of the accumulations made over to him could not be sustained:—But held, that a trustee here, or the court acting as trustee, was justified in paying over to the master anything which the competent authority in New South Wales decided to be necessary for the maintenance or benefit of the patient, and that the order therefore was right in ordering the payments which had been directed:—But held, that it was also right in declining to go further, no case having been made to shew that more was required for the comfort or benefit of the patient. *Barlow, In re, Barton* v. *Spencer*, 56 L. J., Ch. 795; 36 Ch. D. 287; 57 L. T. 95; 35 W. R. 737—C. A.

**Person so found in Colony of Victoria—Personal Property in this Country standing in Lunatic's Name—Property "vested" in Colonial Master—Transfer to Colonial Master.**]—Where a person resident in the colony of Victoria had been there found lunatic, and an order of the supreme court in the colony had appointed one of the masters of that court guardian of the lunatic, and had assigned to him the care and management of her property (part of which consisted of English stocks), and it appeared that the whole of such stocks was required for her maintenance and support, the court held that the stocks were vested in the colonial master within the meaning of s. 134 of the Lunacy Act, 1890, sufficiently to warrant the exercise of their discretion, and ordered the transfer to such master accordingly. *Barlow's Will, In re* (36 Ch. D. 287), distinguished. *Brown, In re*, 64 L. J., Ch. 808: [1895] 2 Ch. 666; 12 R. 587; 73 L. T. 375; 44 W. R. 17—C. A.

**Married Woman out of Jurisdiction—Separate Estate—Payment of Income to proper Officer in Victoria.**]—Accrued and future dividends of a fund settled on a married woman for her life for her separate use, without power of anticipation, were ordered to be paid to the officer charged with the care of lunatics in the colony of Victoria to provide for her past and future maintenance as a pauper lunatic in the colony. *Baker's Trusts, In re*, 41 L. J., Ch. 162; L. R. 13 Eq. 168; 25 L. T. 783; 20 W. R. 325.

**Purchase of Annuity.**]—Investment of a fund belonging to a lunatic in an annuity for his life. *Dodsworth's Trust, In re*, 10 Hare, 16.

An investment of lunatic's property ordered in a particular form. *Magnus* v. *Bingley*, 2 W. R. 130.

A lunatic, not found so by inquisition, was entitled to a sum of consols in court and other property, the income of which was not sufficient for her necessary expenses and maintenance; on the petition of the mother and brother of the lunatic, the court ordered part of the consols to be invested by the brother in the name of the lunatic in the purchase of a government annuity, to be paid by the commissioners for the reduction of the national debt to the brother until further order, he undertaking to apply the same for the maintenance of the lunatic. *Davies* v. *Davies*, 2 De G. M. & G. 51; 21 L. J., Ch. 419; 16 Jur. 419.

The court ordered stock standing to the account of a woman aged sixty-two, a lunatic, but not so found by inquisition, to be invested in the purchase of a government annuity in her name and for her life, and to be paid to a person named until further order, he undertaking to apply the same for her maintenance and support. *Ward, In re*, 29 L. J., Ch. 784; 6 Jur. (N.S.) 717; 2 L. T. 685; 8 W. R. 333.

**Sale of Reversionary Interest.**]—Order made, upon petition, for the sale of the reversionary interest in a fund in court belonging to a person of unsound mind, there being no other fund out of which to provide for his past and future maintenance. *Walker* v. *Symons, Walker, In re*, 8 Jur. 49.

**Pauper—Receiver in Lunacy—Order of Magistrates—Guardians.**]—Where an order has been made appointing a receiver of the personal property of a pauper lunatic, it is improper for guardians to take steps to enforce, by distress, against trustees, who have money of the lunatic in their possession, an order (previously made by magistrates under s. 299 of the Lunacy Act, 1890) for payment of that money to the guardians; and an injunction will be granted to restrain them from so doing. *Winkle* v. *Bailey*, 66 L. J., Ch. 181; [1897] 1 Ch. 123; 75 L. T. 577; 61 J. P. 135.

**Stock standing in joint Names of Lunatic and Sister—Debts and Costs—Transfer for Payment refused.**]—Investment of stock by the father (since deceased), in the joint names of the lunatic and her sister, not within either of the

statutes relating to lunatics' estates. The court refused to order a moiety of the stock to be transferred for payment of the lunatic's debts, costs of commission, &c. *Lynn, In re*, 2 Jur. 200.

**Reference as to State of Mind and Amount for Maintenance.**]—The court refused a reference to inquire into the state of mind of an alleged lunatic, and what should be allowed for his maintenance, although there was a suit pending in which the lunatic was a party, and in which there was stock and money standing in his name, but his property, consisting of 4.252*l.* 3 per cents., 906*l.* cash, and a freehold worth 7*l.* a year; the court thought it was no case for dispensing with a commission. *Gillbee* v. *Gillbee*, 1 Ph. 121.

**Appointment of Receiver of Dividends.**]—Where a person is, through mental infirmity arising from disease or age, incapable of managing his affairs, a master in lunacy has jurisdiction to appoint a receiver of the dividends of government and other securities without ordering a transfer of such securities into the name of the receiver. *Browne, In re*, 63 L. J., Ch. 729; [1894] 3 Ch. 412; 7 R. 580; 71 L. T. 365; 43 W. R. 175—C. A.

Although a judge has jurisdiction to appoint a receiver of dividends only, the usual practice both in chancery and lunacy, namely, to order the securities to be transferred into court, and to allow the receiver to obtain the dividends from the paymaster-general, ought not without sufficient reason to be departed from, but ought in general to be adhered to. *Ib.*

**Marriage Settlement by Infant—Election by Court.**]—If a wife having become of unsound mind had not elected as to a marriage settlement executed by her when an infant, the court would make an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics not so found by inquisition, when it appears to be for their benefit. *Jones* v. *Lloyd*, (L. R. 18 Eq. 265) followed. *Wilder* v. *Pigott*, 52 L. J., Ch. 141; 22 Ch. D. 263; 48 L. T. 112; 31 W. R. 377.

## IV. INSANITY IN RELATION TO CIVIL RIGHTS AND DUTIES.

### *a.* Contracts and Conveyances.

**Subject to Delusions, Effect of.**]—The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract. It is a question for the jury whether the delusion affected the disposition or contract. *Jenkins* v. *Morris*, 14 Ch. D. 674; 42 L. T. 817—C. A.

**Plea of Incapacity—Admissibility.**]—Lunatic may stultify himself as to acts done in prejudice of himself, though not of others, especially where his committee joins with him in the suit. *Ridler* v. *Ridler*, 1 Eq. Abr. 279.

H. was found a lunatic by inquisition, with a retrospect of seventeen years. It was also found that he had assigned a debt due to him for the purchase of a manor. On a bill by the attorney-general, it was held that the lunatic ought to be relieved, but that he need not be made a party, though the defendant should have leave to traverse the inquisition. *Att.-Gen.* v. *Parkhurst*, 1 Ch. Ca. 113. And see *Ib.* 153, where it was held necessary that the lunatic should be made a party; sed secus, of an idiot, for he shall not be admitted to stultify himself. See also *Yates* v. *Boem*, 2 Str. 1194; *Thompson* v. *Leach*, 3 Mod. 296.

**Lunacy unknown to other contracting Party.**]—Unsoundness of mind will not vacate a contract if unknown to the other contracting party, and no advantage is taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position. *Molton* v. *Camroux* (*in error*), 4 Ex. 17; 18 L. J., Ex. 356—Ex. Ch. Affirming, *S. C.*, 2 Ex. 487; 18 L. J., Ex. 68; 12 Jur. 800.

Therefore, where a lunatic purchased annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, and fair and bonâ fide on the part of the society:—Held, that after the death of the lunatic, his personal representatives could not recover from the society the premiums paid for the annuities. *Ib.*

The plaintiff contracted to purchase an estate from the defendant, and paid a deposit on the terms that unless he objected to the title within a certain time the same should be considered as accepted. No objection was made by him to the title. The plaintiff at the time of the contract, and of the payment of the deposit, was a lunatic incapable of understanding the meaning of a contract or of managing his affairs, and derived no benefit from the contract, but these facts were unknown to the defendant, who made the contract with him fairly and bonâ fide, believing him capable of understanding the same:—Held, that as the contract was entered into by the defendant, and the money received fairly and in good faith and without knowledge of the lunacy, and, so far as concerned the deposit, the transaction was completely executed, the plaintiff was not entitled to a return of the money so deposited. *Beavan* v. *M'Donnell*, 9 Ex. 309; 2 C. L. R. 474; 23 L. J., Ex. 94; 22 L. T. 243.

To constitute a defence to an action for use and occupation of a house, taken by a defendant under a written agreement at a stipulated sum per annum, it is not enough to shew that she was a lunatic, and that the house was unnecessary for her; but it must also be shewn that the plaintiff knew this, and took advantage of her situation, and if that is shewn the jury should find for her; and they cannot on these facts find a verdict for the plaintiff for any smaller sum than that specified in the agreement. *Danes* v. *Kirkwall* (*Viscountess*), 8 Car. & P. 679.

Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding; but this doctrine is inapplicable to a case where the question is whether the deed of a lunatic, altering the provisions of a settlement, is void. *Elliot* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

The rule both of law and of equity, as to a contract entered into by a person apparently of sound mind, and not known by the other contracting party to be insane, is, that such a

contract, if fair, bonâ fide and completely executed, is valid; and, even though such a contract might be void at law, it will only be set aside in equity for fraud. *Hassard* v. *Smith*, Ir. R. 6 Eq. 429.

To vitiate a contract, the knowledge of the lunacy or incapacity must be, not merely actual, but presumably sufficient—from circumstances known to the other contracting party—to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind. *Ib.*

The insanity of a mortgagor at the date of the mortgage will not annul the right of a mortgagee to a foreclosure decree in equity, unless the mortgagee knew of the mortgagor's insanity, and took advantage of it. *Campbell* v. *Hooper*, 3 Sm. & G. 153; 3 Eq. R. 727; 24 L. J., Ch. 644; 1 Jur. (N.S.) 670; 3 W. R. 528.

C. C., in April, 1848, mortgaged her estates at M., and in November, 1849, she borrowed a further sum on the same security. In April, 1850, A. B. (the plaintiff) paid off these mortgages, and took a conveyance of the estates, subject to the repayment of 3,250*l*. In 1846 a commission of lunacy was issued out against C. C., and she was placed in an asylum, but an arrangement having been agreed to before a verdict was given, the proceedings were discontinued, and C. C., though, as alleged, still of unsound mind, was discharged from the asylum. The arrangement not having been carried into effect, another commission was in October, 1851, sued out against C. C., and in January, 1852, she was, as from May, 1846, found a lunatic. Later in 1852 the Lord Chancellor, on the application of C. C., granted her leave to traverse the finding of the jury, but before any further proceedings were commenced C. C. died intestate. The mortgagees alleged that they, previously to the execution of the deeds, had no knowledge of any unsoundness of mind in C. C., although it was, as alleged by the defendants, public and notorious. In July, 1848, a compromise was effected, and confirmed by a decree of the court, whereby C. C. gave up a considerable benefit to some of the defendants. A. B., by his will, prayed for the usual decree of foreclosure, which was opposed, on the ground, that owing to the lunacy of C. C. at the date of the deed, he had no legal title to the estates, and that he must establish his claim at law:—Held, assuming C. C. to have been a lunatic at the time when the mortgage was executed, that the plaintiff had established his right to equitable relief, and to the usual decree for foreclosure. *Ib.*

The cases of *Snook* v. *Watts* (11 Beav. 105) and *Jacobs* v. *Richards* (18 Beav. 308, n.) observed upon. *Ib.*

**Sanity of Person executing Deed—Onus probandi.**]—A party claiming under a deed is not bound to prove the sanity of the person executing it; the burden of proof lies on the other side. *Jacobs* v. *Richards*, 18 Beav. 300; 2 Eq. R. 299; 23 L. J., Ch. 557; 18 Jur. 527; 2 W. R. 174.

A deed, though overreached by the finding of an inquisition in lunacy, is not, therefore, necessarily primâ facie void. *Ib.*

A mortgage was executed by S., who was afterwards found lunatic by inquisition as from a date prior to the mortgage. The mortgagee filed his claim for foreclosure against the mortgagor and his committee, but did not set out the date from which the mortgagor had been found lunatic. The deed was proved by the surviving attesting witness, who was not cross-examined by the defendants, but they went into evidence to shew that the mortgagor was lunatic both prior to and at the time of the mortgage being executed:—Held, first, that the suit was properly by claim, and was not defective in not setting out the prior lunacy of the mortgagor; secondly, that the deed being a good one primâ facie, the defendants could not be permitted to shew its invalidity in the present suit (except, semble, by cross-examination of the attesting witness), and that the court would act upon it until it was set aside by a court of law. The usual foreclosure decree was made, with a direction for it not to be drawn up for six months, the defendants to be at liberty in the meantime to take proceedings to set aside the deed. On appeal, the lords justices gave liberty to the plaintiff to proceed at law, and reserved further consideration, but, in default, dismissed the claim. *Ib.*

Though the finding of a person's insanity, by an inquisition, upon a commission of lunacy, is not binding on third parties, still it destroys the natural presumption in favour of sanity, and casts the burden of proving the person's sanity on the party alleging it. *Snook* v. *Watts*, 11 Beav. 105; 12 Jur. 444.

**Capacity to Contract—Knowledge of other Party—Burden of Proof.**]—A party to a contract cannot avoid it on the ground of his insanity at the time he entered into it, unless his insanity was at the time known to the other contracting party. The burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract. *Imperial Loan Co.* v. *Stone*, 61 L. J., Q. B. 449; [1892] 1 Q. B. 599; 66 L. T. 556; 56 J. P. 436—C. A.

In an action for work by an attorney, for a defendant, who pleaded lunacy:—Held, that this was no defence unless the plaintiff knew it; and it appearing that the defendant had been duly placed in an asylum while he suffered under delirium tremens, and was mad from time to time when under the influence of drink, but that the plaintiff did not do business with him at those times, it was for the jury, whether, when he took his instructions, the defendant was insane to his knowledge. *Moss* v. *Tribe*, 3 F. & F. 297.

No person can, in defending an action, be allowed to stultify himself; and therefore a defendant cannot, in an action for work and labour, set up his own insanity as a defence, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility. *Brown* v. *Jodrell*, 3 Car. & P. 30; M. & M. 105. S. P *Lery* v. *Baker*, M. & M. 106, n.

**Setting aside—Contract.**]—Court of equity will not interfere to set aside a contract overreached by an inquisition in lunacy, if fair and without notice, especially where the parties cannot be reinstated. *Niell* v. *Morley*, 9 Ves. 478.

—— **Recovery.**]—There is no instance of a recovery suffered by an idiot; which can only be accounted for from the consciousness that such an act could not stand. *Hume* v. *Burton*, 1 Ridgw. 90.

—— **Alienation not of Record.**]—Alienations, not of record, by an idiot, after inquisition, may be avoided by scire facias. *Ib.*, 214.

—— **Fine.**]—Where a lunatic has levied a fine, his heir-at-law cannot set it aside on the ground that it was obtained by fraud and therefore void. *Murley* v. *Sherren*, 8 A. & E. 754; 1 P. & D. 126; 8 L. J., Q. B. 152.

—— **Conveyance.**]—Whether a conveyance executed by a lunatic is absolutely void in the absence of notice of the lunacy to the party claiming under the conveyance, and of all circumstances of fraud (*Molton* v. *Camroux*, 2 Exch. 487, and in error, 4 Exch. 17), quære. Whether such a conveyance is voidable, and. if so, under what circumstances, quære. Such a conveyance, executed under circumstances of fraud, the lunacy being one of those circumstances, might be set aside. *Price* v. *Berrington*, 3 Mac. & G. 486; 15 Jur. 999.

In a suit to set aside a conveyance of an estate twenty-seven years after the transaction, on the ground of fraud, which was alleged to consist in the imbecility (lunacy) of the vendor insufficient consideration, suppression and coercion on the part of the purchaser, the plaintiff failed in proving any of the alleged grounds of fraud, but established the fact of lunacy. This court will not interfere to set aside the conveyance. *Ib.*

Where an equitable interest in an estate has been conveyed by a person of unsound mind to a party taking without fraud or notice of the unsoundness of mind, and the case is one in which the deed would be void at law on the ground of the lunacy, equity will relieve against the conveyance by the lunatic. *S. C.*, 7 Hare, 394.

In a suit in which a person found lunatic sought to set aside a deed executed by her as a security for moneys advanced at a time subsequent to that from which she was found lunatic, and in which the defendant by his answer denied notice of the lunacy, the deed was not set aside, although at the hearing the defendant by his counsel admitted that the plaintiff was at the time of executing the deed of unsound mind; inquiries were directed as to the fact of the advance and the circumstances attending it, and as to the application of the money; and upon further directions the deed was ordered to stand as security for the money reported to have been actually advanced, with interest and costs. *Kirkwall* v. *Flight*, 3 W. R. 529.

A. obtains a conveyance from insane person long before commission issues, or is executed:—Held, fraudulent, and set aside, though consideration-money was near the value of the estate. *Evans* v. *Blood*, 3 Bro. P. C. 632.

The plaintiffs sought to set aside a conveyance made by their ancestor, as they alleged, while a lunatic under undue influence, and for an inadequate consideration. The defendant, who claimed under a derivative title from the purchaser, insisted that he was a purchaser for valuable consideration without notice. No notice, actual or constructive, having been proved, the court refused to interfere, and dismissed the bill with costs. *Greenslade* v. *Dare*, 20 Beav. 284; 24 L. J., Ch. 490; 1 Jur. (N.S.) 294; 3 W. R. 220.

The court, under the circumstances of the case, refused to set aside deeds executed by one under restraint in a lunatic asylum, under medical certificates. *Selby* v. *Jackson*, 6 Beav. 192; 13 L. J., Ch. 249.

—— ——**Issue as to Sanity directed.**]—On a bill to set aside deeds and recoveries on the ground of the lunacy of the party at the time he executed them:—Held, that the finding of the jury on an inquisition which overreached that period, afforded a presumption that he was then insane, but there being some evidence that after the time when the lunacy was stated to have commenced, the party was not of unsound mind, an issue was directed to inquire whether he was of unsound mind at the time of executing the deeds, &c. *Frank* v. *Mainwaring*, 2 Beav. 115.

Form of issue for trying the validity of deeds executed by a party found by inquisition to have been a lunatic from a time anterior to the execution of the deed. *Ib.*, 4 Beav. 37.

A bill was filed on behalf of an infant, with the sanction of the master, to set aside deeds executed by a lunatic, at a time subsequent to that to which he had been found lunatic by inquisition. An issue having been directed, the jury found in favour of the deeds. The bill was dismissed with costs of suit, and of the issue. *Ib.*

An issue as to sanity is not directed merely upon a suggestion in an award, but such suggestion must be supported by evidence, occasioning a reasonable doubt as to the sanity. *Harrod* v. *Harrod*, 1 K. & J. 4; 18 Jur. 853.

A degree of imbecility below what would be sufficient to justify a finding of lunacy under a commission de lunatico, &c., will be sufficient to enable a court of equity to set aside a deed, if it appears that undue advantage has been taken of that weakness, such as it is, to obtain the execution of the deed. *Blachford* v. *Christian*, 1 Knapp, 73.

—— **Voluntary Disposition.**]—A settlement made by a lunatic, though reasonable, and for the convenience of the family, ought to be set aside in equity. *Clerk* v. *Clerk*, 2 Vern. 414.

—— **Power of Attorney.**]—A lunatic tenant in tail of copyholds having executed powers of attorney authorising her attorney, first, to procure her admission as tenant in tail in the several manors of the copyholds; and, secondly, to surrender them after admission, and take a readmission in fee:—Held, that the transaction was invalid, and that the estate tail was not barred; though, at the instance of a creditor disputing the lunacy, an issue was directed as to whether the lunatic was, at the time of her executing the powers of attorney, of sound mind. *Elliot* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

—— **Gift.**]—What degree of weakness of intellect in a donor is sufficient, when coupled with the fact of habitual confidence reposed by him in the donee, to avoid a gift, considered, quære. *Steed* v. *Calley*, 2 Myl. & K. 52; 1 Keen, 620.

**Compromise of Action.**]—Any man who is not a lunatic must be considered competent to agree to a compromise of litigation in which he is engaged, the circumstances under which the compromise was made not being such as to afford evidence of fraud. *Manby* v. *Bewicke*, 3 K. & J. 342.

**Necessaries—Liability for.**]—A lunatic may contract for necessaries suitable to his degree, and an action will lie against him, notwithstanding an inquisition of lunacy, for the amount. *Baxter* v. *Portsmouth* (*Earl*), 7 D. & R. 614; 5 B. & C. 170; 2 Car. & P. 178.

Therefore, where a person of rank ordered carriages suitable to his condition, and the coachmaker supplied them bonâ fide and without fraud, and they were actually used by the party:—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *Ib.*

An action of debt for necessaries supplied will lie against a lunatic. *Stedman* v. *Hart*, Kay, 607; 23 L. J., Ch. 908; 18 Jur. 744; 2 W. R. 462.

Whether a person who supplies a lunatic with necessaries, knowing him to be a lunatic, can maintain an action against him on the ground of an implied contract, quære. *Weaver, In re*, 21 Ch. D. 615; 48 L. T. 93; 31 W. R. 224; 47 J. P. 68—C. A.

—— **Implied Contract.**]—The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate for moneys expended for the necessary protection of his person and estate. *Williams* v. *Wentworth*, 5 Beav. 325.

Semble, a contract may be implied in favour of a person who has supplied a person of unsound mind, though not so found by inquisition, with necessaries, or has provided him with proper protection and support. *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J., Ch. 296; 10 Jur. 399.

A person furnishing necessary supplies to a de facto lunatic, not so found by commission, if it appears that he did not do it from charity, or upon the credit of another party, may prove for the amount as a creditor against the lunatic's real or personal estate. *Wentworth* v. *Tubb*, 1 Y. & C. C. C. 171. Affirmed, 5 Jur. 1150; 12 L. J., Ch. 61; 6 Jur. 980.

Whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. Accordingly an obligation may be implied on the part of a lunatic (whether so found or not) to repay a person who has supplied necessaries for him, when the necessaries supplied are suitable to the position in life of the lunatic. But the provision of money or necessaries must be made under circumstances which would justify the court in implying the obligation, i.e. with the intention on the part of the person making the provision to be repaid for so doing, and to constitute a debt against the lunatic's estate. *Rhodes, In re, Rhodes* v. *Rhodes*, 59 L. J., Ch. 298; 44 Ch. D. 94; 62 L. T. 342; 38 W. R. 385—C. A.

Where a stepfather of a lunatic (not so found by inquisition) had contributed to his maintenance and paid his funeral expenses:—Held that on neither of these accounts was a debt created, chargeable on the real estate of the lunatic under 3 & 4 Will. 4, c. 104. *Carter* v. *Beard*, 10 Sim. 7; 3 Jur. 532.

A lady of unsound mind who was never found a lunatic, and whose income was under 96*l.* a year, was confined from 1855 down to her death in 1881 in a private lunatic asylum at a cost of 140*l.* a year. Her brother received the income of her property and applied it in part payment of the 140*l.*, paying the deficiency out of his own pocket until his death in 1875. After his death his son, who was his executor, continued to receive and apply the lady's income in the same manner, and the deficiency was made good partly by him and partly by his brother and sisters. No claim was ever made by any of these persons against the lady's estate during her life, nor did any of them appear to have kept any account against her after her death:—Held, that the deficiency was provided under circumstances from which no implied obligation could arise. *Carter* v. *Beard* (10 Sim. 7) doubted; *Weaver, In re* (21 Ch. D. 615), explained. *Ib.*

**Contract made by Wife of Lunatic.**]—The plaintiff was a tradesman, and the defendant had given his wife authority to deal with the plaintiff, and had held her out as his agent and as entitled to pledge his credit. Afterwards, the defendant became insane, and whilst his malady lasted his wife ordered goods from the plaintiff, who accordingly supplied them. At the time of supplying the goods the plaintiff was unaware that the defendant had become insane. The defendant afterwards recovered his reason, and then refused to pay for the goods supplied to his wife by the plaintiff:—Held, that the defendant was liable for the price of the goods. *Drew* v. *Nunn*, 48 L. J., Q. B. 591; 4 Q. B. D. 661; 40 L. T. 671; 27 W. R. 810—C. A.

A husband is liable for necessaries supplied to his wife during the period of his lunacy. *Read* v. *Legard*, 6 Ex. 637; 20 L. J., Ex. 309; 15 Jur. 494.

Proof was allowed in equity against the estate of a testator, for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income. *Wood, In re, Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L. J., Ch. 400; 9 Jur. (N.S.) 589; 8 L. T. 476; 11 W. R. 791.

—— **Separate Estate.**]—A wife was entitled to separate estate derived from her first husband. Her second husband became lunatic, and she incurred a debt in order to pay for necessaries for him and herself during his lunacy. Upon his death the lender carried in a claim against his estate:—Held, that the wife was entitled to pledge her husband's credit for necessaries. *Ib.*

—— **Repairs to House.**]—In an action for the price of necessary repairs done to the defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of the plaintiff of the husband's lunacy. The wife had always received a sufficient allowance from her husband's estate:—Held, that the husband was not liable, as, under the circumstances, the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessaries. *Richardson* v. *Du Bois*, 10 B. & S. 830; 39 L. J., Q. B. 69; L. R. 5 Q. B. 51; 21 L. T. 635; 18 W. R. 62.

**Lucid Interval.**]—Acts done by lunatic, during lucid intervals, are valid. *Hall* v. *Warren*, 9 Ves. 610; 7 R. R. 306.

**Specific Performance.**]—Upon bill for specific performance of contract overreached by commission of lunacy, the plaintiffs not having traversed the inquisition, an issue was directed whether the defendant was lunatic at the execution; if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval; the difficulties in executing the contract, which was for sale of estate vested in lunatic, viz. that the price was to be paid by persons to be nominated, not appearing strong enough to preclude the previous inquiry with a view to performance, the plaintiff being willing to take the title. *Hall* v. *Warren*, 9 Ves. 605; 7 R. R. 306.

Specific performance of an agreement decreed against one who afterwards became a lunatic. *Owen* v. *Davies*, 1 Ves. Sen. 82.

On a claim by vendor for specific performance by purchaser, found by inquisition to have been lunatic at the time of the contract, the court declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges and expenses, to be repaid to the committee of the lunatic's estate. *Frost* v. *Beavan*, 22 L. J., Ch. 638; 17 Jur. 369.

—— **Delusions — General Enfeeblement.**]—Action by purchaser against executors of vendor for specific performance of an agreement to sell an estate. Defence, unsoundness of mind and incapability. It was held on the evidence that the vendor, who was eighty years of age, suffered from brain disease and insanity produced thereby as well as, and distinct from, insanity evidencing itself in delusions, and also from enfeeblement of mind. One of such delusions did to some extent enter into the matter of the contract, but, in the opinion of the court, not so far as to form the foundation of it. The medical evidence was that the vendor, though capable to some extent of transacting business, was not competent to enter into the contract in question, which, however, was reasonable and simple. There was strong lay evidence that the vendor perfectly understood the transaction. The court being of opinion on the whole evidence, notwithstanding the medical testimony, that the vendor was sufficiently sane at the time to understand, and did understand, the transaction, granted specific performance. *Birkin* v. *Wing*, 63 L. T. 80.

**Contract by Lunatic before Lunacy—Contract Executed or Executory—Vesting Order.**]—M., by writing, agreed to sell his leasehold premises and his business to T. and G. for a sum of which 2,535*l.* was to be paid at once, the residue, 3,050*l.*, at the end of five years. Possession was given, and the 2,535*l.* duly paid. After this M., who resided abroad, was found lunatic abroad, and a curator was appointed, with authority to receive the 3,050*l.* T. and G., and the curator, petitioned that on payment of the 3,050*l.* and interest to the curator, the leasehold premises might be ordered to vest in T. and G.:—Held, that under the Lunacy Act, 1890, s. 135, an order could be made vesting the leasehold in T. and G., such order to be dated and drawn up after payment of the 3,050*l.* to the curator. *Pagani's Trust, In re*, [1892] 1 Ch. 236; 65 L. T. 244—C. A.

**Covenants by Lunatic before and after Lunacy.**]—A previous covenant by a person of sound mind must prevail against any subsequent mental incapacity. *Affleck* v. *Affleck*, 3 Sm. & G. 394.

Covenant by G., on his marriage, that if he came into possession he would exercise the power of jointure, which, by the terms of the bill, could only be exercised by a tenant for life in possession. G., before coming into possession, became of unsound mind:—Held, the covenant was a defective execution of the power, which the court would enforce against the remainderman. *Ib.*

*b.* MARRIAGE.

**Promise of Marriage.**]—After a promise of marriage the man discovered that the woman had, before the promise, been a lunatic, and confined as such, and on that ground he refused to marry:—Held, that these facts formed no answer to an action for breach of the promise. *Baker* v. *Cartwright*, 10 C. B. (N.S.) 124; 30 L. J., C. P. 364; 7 Jur. (N.S.) 1247.

**Husband Lunatic—Conversion by Wife of his Property.**]—An action was brought by the representative of a deceased husband against the representatives of his deceased wife, and the statement of claim stated that the wife during the lifetime of the husband (who was a lunatic, though not so found by inquisition) took possession of and sold certain of the chattels and applied the proceeds of sale to her own use, and claimed to recover the proceeds from the wife's estate in the hands of her executors:—Held, on demurrer, that the action was sustainable. *Williams, In re, Williams* v. *Stratton*, 50 L. J., Ch. 495; 44 L. T. 600.

—— **Property of Wife—Reduction into Possession.**]—A married woman who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing, in the name of a trustee, for her; this stock was, under an order made in the lunacy, transferred into the name of the accountant-general, in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs; the lunatic died, leaving his wife him surviving:—Held, that the stock had been reduced into the possession of the lunatic, and that the wife was not entitled to it by right of survivorship. *Jenkins, In re*, 5 Russ. 183.

—— **Separate Estate of Wife—Maintenance.**]—The court will not allow the wife of a lunatic to convey her separate estate, under 3 & 4 Will. 4, c. 74, s. 91, without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support. *Sarah Cloud, In re*, 15 C. B. (N.S.) 833; 3 N. R. 429.

**Wife Lunatic—Arrears of Pin-money—Action for not maintainable.**]—F., upon her marriage with C., under the trusts of a marriage settlement executed in 1771, became entitled to annuities charged upon land, by way of pin-money, amounting to 1,000*l.* per annum: C., who afterwards became Duke of Norfolk, died in 1815. In 1816, upon a commission of lunacy, F. was found a lunatic, without a lucid interval, from December, 1782. During all this time she had lived with her husband, and in general society according to her rank. In 1820 F. died intestate. Upon a bill filed in chancery by the administrator of F., against the executor of C. claiming

arrears of pin-money from December, 1782, to the death of C. :—Held, that the claim, under the circumstances, was not sustainable. *Howard* v. *Digby* (*Earl*), 8 Bligh (N.S.) 224 ; 2 Cl. & F. 634 ; 5 Sim. 330. Reversing, *S. C.*, nom. *Digby* (*Earl*) v. *Howard*, 4 Sim. 588 ; 1 L. J., Ch. 3.

—— **Portion directed to be paid to Husband on making Settlement — Assignment by Husband to Creditors.**]—The portion of a lunatic was ordered to be paid to the master, and the husband was to have it on making a settlement. He made no settlement, but assigned it to his creditors, and died without issue ; then the wife died. Decreed, the creditors of the husband to have this portion. *Nightingale* v. *Lockman*, Moseley, 230 ; Fitzg. 148.

**Judicial Separation — Allowance out of Lunatic's Estate—Assignment of.**]—On a decree for judicial separation an order was made for payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in lunacy and chancery the dividends of a sum of stock to which he was entitled in a chancery suit were ordered to be carried to his account in the lunacy, and 60*l.* a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in lunacy, and in the suit to have the annuity paid to her :—Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the court in lunacy, it was not assignable. *Robinson, In re*, 53 L. J., Ch. 986 ; 27 Ch. D. 160 ; 51 L. T. 737 ; 33 W. R. 17—C. A.

**Dissolution of Marriage—Suit by Committee.**]—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the lunatic. *Baker* v. *Baker*, 6 P. D. 12 ; 49 L. J., P. 83—C. A.

*See also* HUSBAND AND WIFE—MARRIAGE.

*c.* PARTNERSHIP.

**Dissolution of Partnership.**]—A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the dissolution is for the benefit of the lunatic, and the court will entertain the suit, in order to protect the property of the lunatic. *Jones* v. *Lloyd*, 43 L. J., Ch. 826 ; L. R. 18 Eq. 265 ; 30 L. T. 487 ; 22 W. R. 785.

—— **Notice.**]—When parties enter into a partnership at will, notice to one by the others that they wish to dissolve the partnership must be considered as an overture to an effectual dissolution. For this purpose, a notice to a person of unsound mind, not found a lunatic by inquisition, held good and dissolution decreed from the date of the notice. *Mellish* v. *Keen*, 7 W. R. 629.

Three persons mutually agreed to carry on and work together certain mineral property ; the deed of partnership providing that each party should be at liberty to sell his share after giving notice to the others, who were to have a right of pre-emption. One of the partners became a lunatic, and committees of his estate were appointed. On a bill filed by the plaintiff (who had purchased the shares of the other two partners) against the committees of the lunatic, praying a dissolution of the partnership and the usual accounts :—Held, that the partnership must be dissolved, and the property offered for sale as a going concern by some person to be appointed other than the parties. *Rowlands* v. *Evans*, 31 L. J., Ch. 265 ; 8 Jur. (N.S.) 88 ; 5 L. T. 658 ; 10 W. R. 186.

The court will not compel a person to carry on partnership with the committees of a lunatic or to have the share of a lunatic partner ascertained by an inquiry what a stranger would give for it. *Ib.*

Notice to the lunatic partner before his lunacy of the intention of another partner to sell his share :—Held, to bind the committees afterwards appointed, and that they had no right of pre-emption under the deed. *Ib.*

—— **Service of Writ—Business carried on by Lunatic in the Name of a Firm.**]—Ord. IX. r. 6*a*, of the Rules of Court, which permits, in certain cases, the service of a writ at the principal place of business carried on by one person in the name of a firm apparently consisting of more than one person, does not apply where such person is a lunatic or of unsound mind. In such a case the proper mode of service is that laid down in Ord. IX. r. 5. *Fore Street Warehouse Co.* v. *Durrant*, 52 L. J., Q. B. 287 ; 10 Q. B. D. 471 ; 48 L. T. 531 ; 31 W. R. 765.

*See also* PARTNERSHIP.

*d.* TRUSTS.

*See* TRUST AND TRUSTEE (VESTING ORDERS).

*e.* MORTGAGES.

**Lunatic Mortgagee—Payment off.**]—If the mortgagor be ready to pay, the committee of a lunatic mortgagee should apply for a reference under the statute, and it seems he would not be allowed to bring an action. *Richards, Ex parte*, 1 J. & W. 264.

—— **Petition—Costs.**]—When a mortgagee becomes of unsound mind, and the mortgagor desires to pay off the mortgage debt, and presents a petition, to obtain a vesting order, he must pay the whole of the mortgage debt and interest into court, and will not be allowed the costs of his petition, nor will he have to pay the mortgagee's costs. *Sparks, In re*, 6 Ch. D. 361 ; 37 L. T. 301 ; 25 W. R. 869.

*And see* TRUST AND TRUSTEE (VESTING ORDERS).

*f.* POWERS.

**Consent to exercise of Power of Advancement by Committee.**]—A marriage settlement contained a power of advancement exercisable by the trustees after the death of the husband and wife, or at any time previously if they or the survivior of them should direct. The husband was found lunatic : — Held, that under the Lunacy Regulation Act, 1853, s. 137, the court had jurisdiction to authorise the committee to consent on behalf of the lunatic to the exercise

of the power. *Neville, In re*, 55 L. J., Ch. 435; 31 Ch. D. 161; 54 L. T. 290—C. A.

—— **Land of which Lunatic Mortgagee—Power of Sale.**]—The master in lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the court declined to make an order authorising the committee to sell and to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850. *Harwood, In re*, 56 L. J., Ch. 974; 35 Ch. D. 470; 56 L. T. 502; 36 W. R. 27—C. A.

**Ord. I. 1850, art. 3.**] — Article 3 of Ord. I. 1850, applies to the case where the donee of a power is lunatic. *Tilt* v. *Jesselyn*, 14 Jur. 848. *See* 19 L. J., Ch. 572, as to Article 11 of the same Order.

**Appointment of new Trustees—Order authorising Execution of Power on behalf of Lunatic by appointing two named Persons — Vesting Order.**] — Where a person entitled to a life interest under a settlement of stock who has the power to appoint new trustees of such settlement in the event of the death of any trustee, becomes of unsound mind, there is jurisdiction on the death of the trustees to make an order authorising another person to exercise such power on behalf of such person by appointing two named persons as new trustees, and vesting in them when appointed the right to call for a transfer of the stock. Such orders should in future be accompanied by a certificate of the master that the deed of appointment had been duly executed. The jurisdiction to make such an order is given by the Lunacy Acts, the power to appoint being a fiduciary one. *Bowmer, In re* (3 De G. & J. 658), and *Sheat's Settlement, In re* (42 Ch. D. 522), approved. *Shortridge, In re*, 64 L. J., Ch. 191; [1895] 1 Ch. 278; 12 R. 81; 71 L. T. 799; 43 W. R. 257; 60 J. P. 38—C. A.

—— **Committee — Lunacy Regulation Act, 1853, ss. 137, 138.**]—Form of order directing the committee of the estate of a lunatic to exercise a power of appointing new trustees vested in lunatic. *Bowmer, In re*, 3 De G. & J. 658; 28 L. J., Ch. 618; 5 Jur. (N.S.) 348; 7 W. R. 313.

The court declined to make an order under the Trustee Act, 1850, appointing a new trustee, in a case where there was an existing power of appointment vested in a lunatic tenant for life, in the absence of the committee of the lunatic, and directed the petition to stand over, with liberty to serve the committee with the petition. *Parke's Trust, In re*, 8 L. T. 378; 11 W. R. 655.

—— —— **Consent of Lunatic Tenant for Life.**]—A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life, who had been found lunatic, presented a petition in lunacy and chancery by the committee of her estate as next friend for the appointment of new trustees:—Held, that there was no jurisdiction in lunacy to appoint new trustees, and that the only proper application in lunacy was to ask for an order authorising the committee to consent on behalf of the lunatic to an appointment of trustees under the power. *Garrod, In re*, 55 L. J., Ch. 311; 31 Ch. D. 164; 54 L. T. 291; 34 W. R. 157—C. A.

**Lunatic Protector of Settlement.**] — For the principles by which the Lord Chancellor, when protector of a settlement in the place of a lunatic will be guided, in giving or withholding his consent to a deed of disposition under the Fines and Recoveries Act. *Newman, In re*, 2 Mont. & C. 112.

Order made by the Lord Chancellor, as protector under the 3 & 4 Will. 4, c. 74, to enable a quasi tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund. *Grant* v. *Yea*, 3 Myl. & K. 245.

Under the act 3 & 4 Will. 4, c. 74, for the abolition of fines and recoveries, the Lord Chancellor is not the protector of the settlement in the place of a lunatic, when the lunatic is tenant in tail in possession. *Wood, In re*, 3 Myl. & C. 266; 7 L. J., Ch. 144; 2 Jur. 201.

Semble, that where a lunatic has a particular estate, in respect of which the Lord Chancellor is protector of the settlement, and has also the remainder or reversion fee, subject only to an intervening estate tail, his lordship will not concur in any deed for barring the estate tail. *Ib.*

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement, in the place of a lunatic, of estates situated in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland. The Lord Chancellor, in acting as protector of a settlement in the place of a lunatic, considers the moral as well as the legal result of his consent to bar remainders over. And where the only child of the lunatic, who, upon her marriage, had converted her estate tail into a base fee, reserving a power of appointment, required his consent to bar the remainders over, the Lord Chancellor refused his consent, the remainder over being to the brother of the lunatic. *Graydon, In re*, 1 Mac. & G. 655; 2 H. & Tw. 182; 14 Jur. 157, 211.

The Lord Chancellor refused his consent in the absence of the remainderman, and where the effect of such consent would have been to vest the estates in the husband of the tenant for life, to the exclusion of her issue, and also of the brother of the lunatic, that brother being the remainderman. *Ib.*

Where the tenant in tail in possession is a lunatic, the Lord Chancellor has an authority under the 3 & 4 Will. 4, c. 74, to consent to the first tenant in tail in remainder barring the subsequent limitations, on a proper case being made out for the exercise of that authority. *Blewitt, In re*, 6 De G. M. & G. 187; 25 L. J., Ch. 393; 2 Jur. (N.S.) 217; 4 W. R. 195.

**Barring Entail—Powers of Court in relation to.**]—A lunatic was tenant for life of real estates, including the advowson of a rectory. A lease of this property had been granted by order of the court for ninety-nine years, if the lunatic should so long live. This lease had become vested in a person who was also first tenant in tail in remainder expectant on the death of the lunatic

without issue male. The lunatic was over eighty years of age, and had never had any issue. The first tenant in tail in remainder wishing to sell the next presentation to the rectory presented a petition praying the court, as protector of the settlement, to consent to the barring of the entail of the advowson:—Held, that the court ought not to interfere, as the application was not made for the benefit of the lunatic's estate. *Thorp* or *Tharp*, *In re*, 3 Ch. D. 59; 35 L. T. 293.

Where there was a devise of real estate to trustees, upon trust to raise, by sale or mortgage, certain sums of money, and subject thereto, to the use of A. for life, remainder to his first and other sons in tail, with remainders over; and in a suit instituted in the Court of Exchequer, a decree for a sale of the real estate had been made, and a sale accordingly had: but pending the proceedings A. died, leaving three sons, of whom S., the eldest, and first tenant in tail, under the will, was a lunatic, and so found by inquisition:—Held, that the court had no jurisdiction under 1 Will. 4, c. 65, s. 28, to order the committee of the lunatic to execute the deed for barring the entail of the estates. *Skerrett*, *In re*, 2 Dr. & War. 585.

Where a lunatic has an equitable estate tail, it may be barred without the concurrence of the committee of his estate. *Ib.*

—— —— **Copyholds.**]—A person who was tenant in tail of copyhold estates was, by inquisition, found lunatic in 1852, and the lunacy was dated back to the 1st May, 1846. The lunatic subsequently obtained permission to traverse the inquisition, but died without having done so. In 1847 the lunatic had executed deeds (not pursuant to any contract with third parties) appointing an attorney to surrender the copyhold to uses, so as to enlarge her estate tail into a fee simple, and the surrender was made accordingly. Upon a claim by a simple contract creditor to make this copyhold property liable:—Held, that the entail was not effectually barred, there being no analogy to the old doctrine that fines and recoveries were good although made by a lunatic, which depended on a fiction, a deed barring an entail being now open to every objection that might be taken to any other deed. *Elliot* v. *Ince*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

*g.* Executor or Administrator.

**Administration—To Guardians of Poor.**]—A person died lunatic and intestate, having been maintained since 1862 in the county lunatic asylum at the cost of the Totnes Union; he was nevertheless entitled to 440*l.* His only next of kin was a lunatic sister:—The court granted administration to the nominee of the guardians of the Totnes Union, as being creditors under 12 & 13 Vict. c. 103, s. 16, the grant to be for the use and benefit of the lunatic sister during her lunacy. *Windeatt* v. *Sharland*, 41 L. J., P. & M. 9; L. R. 2 P. & M. 266; 25 L. T. 574; 20 W. R. 211.

—— **Grant to Administrator durante animi vitio.**]—Where the next of kin of a deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person, to whom administration durante animi vitio of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Court. *Evelyn*, *Ex parte*, 2 Myl. & K. 3.

**Lunatic Husband—Wife Executrix.**]—Where a feme covert had been appointed one of the executors of a will, and her husband was a person of unsound mind, the court refused to restrain her from applying for and obtaining probate, but intimated that if probate was granted to her, an injunction might issue to restrain her from receiving or intermeddling with the estate. *Yetts* v. *Palmer*, 2 N. R. 255; 8 L. T. 528; 11 W. R. 765.

*See also* Powers.

V. Insanity in Relation to Certain Acts of Parliament Affecting Real Estate.

*a.* Settled Estates Acts.

**Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), s. 36—Lunatic Tenant in Tail—Application by or Consent of Committee—Practice.**]—The committee of a lunatic tenant in tail, before making or consenting to an application to the Court of Chancery under the Leases and Sales of Settled Estates Act for the sale of the lunatic's estate, must obtain the authority of the jurisdiction in lunacy by an application to the master in lunacy, whose report must be approved by the lords justices. *Woodcock's Settled Estates*, *In re*, L. R. 3 Ch. 229; 16 W. R. 469, 532.

—— **Service of Application on Lunatic having remote Contingent Interest.**]—The service of an intended application under the Settled Estates Acts (19 & 20 Vict. c. 120), on a person of unsound mind, not so found by inquisition, who had only a remote contingent interest was dispensed with, there being others in the same interest who concurred. *Frankling's Settled Estates*, *In re*, 7 W. R. 45.

—— **Appointment of Guardian to concur in Petition.**]—A guardian may be appointed to concur for a lunatic in a petition under the Leases and Sales of Settled Estates Act. *Venner's Settled Estates*, *In re*, L. R. 6 Eq. 249; 16 W. R. 1033.

The court cannot appoint a guardian to consent on behalf of a lunatic not so found by inquisition, to a sale of his estate. *Clough's Estate*, *In re*, 42 L. J., Ch. 393; L. R. 15 Eq. 284; 28 L. T. 261; 21 W. R. 452.

—— **Person of Unsound Mind—Jurisdiction of Court.**]—There are no provisions in the Leases and Sales of Settled Estates Act, enabling the court to act on behalf of persons of unsound mind. *Turbutt's Estate*, *In re*, 2 N. R. 158; 8 L. T. 603.

In the case where such a person was entitled to a charge, the court dispensed with his being made a party to the petition, and protected his interest by making the order subject to his charge. *Ib.*

**Notice of Application.**]—A notice under 37 & 38 Vict. c. 33, s. 2, of an application under the Leases and Sales of Settled Estates Act, may be given to a person not so found by inquisition. *Crabtree's Settled Estates*, *In re*, 44 L. J., Ch. 261; L. R. 10 Ch. 201; 32 L. T. 349; 23 W. R. 761.

**Payment into Court of Purchase-money.**]—The payment of money into court to the credit of the lunacy is not a payment "to a person becoming absolutely entitled" within the meaning of s. 23 of the Settled Estates Act (19 & 20 Vict. c. 120). *Barker, In re*, 50 L. J., Ch. 334; 17 Ch. D. 241; 44 L. T. 33; 29 W. R. 873.

*b.* SETTLED LAND ACTS.

**Leases—Tenant for Life Lunatic—Appointment of Trustees for purposes of Act.**]—Where a tenant for life is a lunatic, and his committee wishes to exercise the powers of leasing given by the Settled Land Act, 1882, if there are no trustees of the settlement in existence new trustees must be appointed for the purposes of the act. *Taylor, In re*, 52 L. J., Ch. 728; 49 L. T. 420; 31 W. R. 596.

**Power of Committee to Lease.**]—Where a tenant for life is a lunatic and his committee wishes to exercise the powers of leasing given by the Settled Land Act, 1882, if there are no trustees of the settlement in existence new trustees must be appointed for the purposes of the act. *Taylor, In re*, 52 L. J., Ch. 728; 49 L. T. 420; 31 W. R. 596—C. A.

Under s. 116 of the Lunacy Act, 1890, the court has jurisdiction to authorise the person appointed to act as committee of the estate of a person lawfully detained as a lunatic, though not so found by inquisition, to exercise the power of leasing vested in such lunatic as tenant for life, under the Settled Land Act, 1882. *Baggs, In re* (68 L. J., Ch. 612; [1894] 2 Ch. 416, n.), distinguished. *Salt, In re*, 65 L. J., Ch. 152; [1896] 1 Ch. 117; 73 L. T. 598; 44 W. R. 146—C. A.

**Sale—Power of Committee to Sell.**]—Where a person has been appointed to exercise the powers of a committee of the estate of a tenant for life of settled estate, who is lawfully detained as a lunatic, the court has no power to authorise him to exercise on behalf of the lunatic the power of sale vested in the latter by the Settled Land Act, 1882. To enable this to be done it is necessary that the lunatic should be so found by inquisition. *Baggs, In re*, 63 L. J., Ch. 612; [1894] 2 Ch. 416, n.; 71 L. T. 138—C. A.

The court will give leave to the committee of a lunatic tenant in tail to take proceedings under the Settled Land Act, 1882, for the sale of his undivided shares to the owner of the other shares. *Weld, In re* (28 Ch. D. 514) considered. *Gaitskell, In re*, 58 L. J., Ch. 262; 40 Ch. D. 416—C. A.

—— **Mansion-house.**]—Where a tenant for life under a settlement which contained a general power of sale of all or any of the settled hereditaments has become through mental infirmity incapable of managing his affairs, and a person has been appointed to manage the property and to exercise the powers vested in the tenant for life by statute or under the settlement of granting leases, the court has jurisdiction under ss. 120 and 128 of the Lunacy Act, 1890, to authorise the person so appointed to act on behalf of the tenant for life to exercise the power of sale in reference to the mansion-house. *X., In re*, 63 L. J., Ch. 613; [1894] 2 Ch. 415; 7 R. 365; 71 L. T. 139; 42 W. R. 657—C. A.

—— **Notice by Committee.**]—The committee of a lunatic tenant for life cannot give a valid notice under s. 45 of the Settled Land Act, 1882, unless he has previously obtained authority from the Court of Lunacy to do so. *Ray's Settled Estates, In re*, 53 L. J., Ch. 205; 25 Ch. D. 464; 50 L. T. 80; 32 W. R. 458.

*c.* LANDS CLAUSES CONSOLIDATION ACT, 1845.

**Sale by Committee.**]—Sect. 7 of the Lands Clauses Consolidation Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorises the committee of a lunatic to sell. *Tugwell, In re*, 53 L. J., Ch. 1006; 27 Ch. D. 309; 51 L. T. 83; 33 W. R. 132.

Where freehold land of a lunatic had been taken by a corporation under the provisions of the Lands Clauses Consolidation Act and the committee petitioned for leave to convey to the corporation and to have the purchase-money carried over to the credit of the lunacy and invested:—Held, that the next of kin of the lunatic were the proper parties to the application, and that their costs, as well as those of the heirs-at-law must be paid by the corporation. *Briscoe, In re*, 2 De G. J. & S. 249; 4 N. R. 311; 10 Jur. (N.S.) 859.

**Application of Purchase-money.**]—Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be re-invested in or considered as land, but to be paid to his executors. *Flamanck, Ex parte, East Lincolnshire Ry. Act, In re*, 1 Sim. (N.S.) 260.

Land belonging to a lunatic having been purchased by a railway company under the powers of its act, an order was made for the payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the company, without its being first paid into court under the Lands Clauses Act, 1845, s. 69. *Milnes, In re*, 1 Ch. D. 28; 34 L. T. 46; 24 W. R. 98.

The application for such an order must not be made in the lunacy only, but also in the Chancery Division. *Ib.*

The purchase-money of a lunatic's land taken by a public body under the Lands Clauses Act, 1845, s. 69, was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a re-investment in land. *Buckingham, In re*, 2 Ch. D. 690.

Lands which were the subject of a rentcharge in favour of a lunatic during his life were taken by a corporation acting under the Lands Clauses Act. The court authorised the committee of the lunatic to release the lands from the rentcharge upon the corporation purchasing in the name of the lunatic a government annuity of the same yearly amount for his life. *Brewer, In re*, 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465.

## VI. ACTIONS AND PROCEEDINGS BY AND AGAINST.

### *a.* LUNATIC SO FOUND.

#### 1. Plaintiff or Petitioner.

**Action by Committee—Trustee in Bankruptcy of Lunatic made Defendant—Attendance at Proceedings in Chambers—Subsequent Application by Trustee for Stay of Proceedings—Relief notwithstanding Delay.**]—The principle laid down in *Beall* v. *Smith* (L. R. 9 Ch. 85), with reference to a lunatic suing by his next friend, is equally applicable to a lunatic suing by his committee, with this difference, that in the case of the latter the committee should be added as co-plaintiff. The committee of a lunatic who has been adjudicated a bankrupt subsequently to the inquisition cannot bring an action to assert a right which is vested in the trustee in bankruptcy of the lunatic, and if the trustee refused to be made a co-plaintiff the committee cannot make him a defendant. Where the committee of a lunatic so found by inquisition, and subsequently made a bankrupt, brought an action against the solicitors of the bankrupt for an account of certain moneys received by them, and the trustee in bankruptcy who refused to be a co-plaintiff, but was on May 2 by order in chambers made a defendant, and attended certain proceedings in chambers on the account, took out a summons on June 15 for a stay of proceedings against himself on the ground that they were vexatious, the court made the order asked for notwithstanding the delay on his part. *Whatman, In re, Hoar* v. *Whatman* (W. N. 1889, p. 213), and *Farnham, In re* ([1895] 2 Ch. 795), discussed and explained. *Farnham* v. *Milward*, 64 L. J., Ch. 816; [1895] 2 Ch. 730; 13 R. 810; 73 L. T. 434; 44 W. R. 135.

—— **Sanction of Court.**]—A committee of a lunatic ought, before bringing or defending an action on behalf of a lunatic, to have the sanction of the court. *Nottley, In re*, 3 Jur. 719.

**Jurisdiction of Master in Lunacy.**]—Under s. 27, sub-s. 1, of the Lunacy Act, 1891, a master in lunacy has jurisdiction to authorise the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by the trustees of a will under which the lunatic is a beneficiary, without any confirmation of his order by the judge in lunacy. *Hinchliffe, In re*, 73 L. T. 522—C. A.

—— **Parties.**]—Where a committee sues in the right of the lunatic, in such case the committee and the lunatic are made parties. *Fuller* v. *Lance*, 1 Ch. Ca. 18.

**Administration Action by Lunatic Devisee of Realty and his Committee.**]—A devisee of real estate, subject to payment of debts, became of unsound mind, and was so found by inquisition. A committee was appointed, and an action for the administration of the testator's real and personal estate was commenced with the sanction of the master in lunacy, in the chancery division, by the lunatic and his committee, and, the testator's personal estate proving to be insufficient for payment of his debts, an order was made for sale of all the testator's real estate upon payment of the purchase-money into court. Under this order the real estate was sold, and the purchaser paid the purchase-money into court. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—Held, that the administration action in which the order for sale was made, having been properly commenced with the sanction of the master in lunacy, the lunatic plaintiff was entitled to carry on the action, and was, therefore, also bound by the order for sale made in it; that the lunatic was, therefore, a trustee within the Trustee Extension Act, 1852, s. 1, of the real estate and that his committee should be appointed to convey. *Stamper, In re, Stamper* v. *Stamper*, 46 L. T. 372. See also *Windeatt* v. *Sharland*, ante, col. 662, and *Bligh* v. *O'Connell*, 38 L. T. 217; 26 W. R. 311.

**Action to set aside Mortgage.**]—In a suit in which a person found lunatic to set aside a deed executed by her as a security for moneys advanced, at a time subsequent to that from which she was found lunatic, and in which the defendant by his answer denied notice of the lunacy, the deed was not set aside, although at the hearing the defendant by his counsel admitted that the plaintiff was at the time of executing the deed of unsound mind: inquiries were directed as to the fact of the advance and the circumstances attending it, and as to the application of the money, and upon further directions the deed was ordered to stand as a security for the money reported to have been actually advanced, with interest and costs. *Kirkwall* v. *Flight*, 3 W. R. 529.

**Claim as Heir-at-law—Failure of Action—Costs.**]—A lunatic claimed as heir-at-law of T., and certain estates having been devised by T. to trustees for charitable purposes by an instrument, the validity of which as a will was impeached, a suit was instituted, and an issue to try the validity of the will directed, as necessary for freeing the lunatic's estate from doubts, and the trustees directed to conduct the issue as plaintiffs. The issue was found against the will:—Held, that though the trustees were not entitled to their costs under the decree, yet the court could give them, upon petition, out of the lunatic's estate. *Turnley, In re*, 12 Ir. Eq. R. 581.

The court will not make any order for the payment of extra costs out of the estate of a lunatic until such costs have been incurred. *Manson, In re*, 21 L. J., Ch. 249.

**Impeaching Settlement by—Action by next Friend—Costs.**]—A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence shewing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:—Held, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement. *Gordon, In re*, 44 L. J., Ch. 208; L. R. 10 Ch. 192; 32 L. T. 348; 23 W. R. 760.

**Action by Receiver—Abandoned Proceedings—Costs.**]—Receiver of estate of lunatic proceeding in a wrong form of action, which he was advised to abandon and adopt another form of action, in which he succeeded for the lunatic, refused the costs of the abandoned proceeding, although the master reported that he had acted bonâ fide, and ought to be allowed the costs. *Montgomery, In re*, 1 Moll. 419.

**Unauthorised Proceedings by Solicitors after Inquisition—Costs.**]—Solicitors who took proceedings after the date of the inquisition were, on the petition of the committee of the lunatic's estate, ordered to refund costs and expenses which had been paid out of the estate under an order in the suit, and to pay the costs of the petition, and of an appeal, as between solicitor and client. *Beall* v. *Smith*, 43 L. J., Ch. 245; L. R. 9 Ch. 85; 29 L. T. 625; 22 W. R. 121.

**Petition by Receiver for Renewal of Lease—Concurrence of Committee.**]—A petition to grant a renewal to a tenant under a lease, with covenant of renewal, presented by the receiver in a lunacy matter without the concurrence of the committee of the estate, will be dismissed with costs. *Kilkenny (Earl), In re*, 7 Ir. Eq. R. 594.

**Action by Curator bonis — Property in England.**]—A curator bonis duly appointed in Scotland to a person found lunatic there, can recover and give a good discharge for personal property of the lunatic in this country. *Scott* v. *Bentley*, 1 K. & J. 281; 24 L. J., Ch. 244; 3 Eq. R. 428; 1 Jur. (N.S.) 394; 3 W. R. 280.

Where the owner of an estate charged with annuity in favour of the lunatic had acknowledged that she had in hand certain arrears of the annuity which she was ready to pay to any person on his behalf who could give a good receipt for it:—Held, that this was a declaration of trust which entitled the curator to sue in equity for those arrears. *Ib.*

**Action by Representatives—Pleading.**]—An action was brought by the representatives of a lunatic against an auctioneer, by the agent of the committee, for moneys come to his hands, part of the lunatic's estate. The auctioneer pleaded that he had paid some of these moneys by the order of the committee's agent, for the use of the lunatic. The fact of such payment, in manner pleaded, was disputed:—Held, that the principal question was the question of fact, whether the plea could be proved or not; that without deciding whether the plea, if proved, afforded either a legal or an equitable defence, a court of equity would not (having regard to the 17 & 18 Vict. c. 125) restrain the action. *Farebrother* v. *Welchman*, 3 Drew. 122; 24 L. J., Ch. 410. *See* 1 Jur. (N.S.) 126; 3 Eq. R. 383; 3 W. R. 257.

**Action by Wife of Lunatic.**]—An action having been brought by a wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt due to him, the defendant paid the amount into court. The court made absolute a rule for payment of the money out of court to the wife. *Gleddon* v. *Trebble*, 9 C. B. (N.S.) 367; 30 L. J., C. P. 160.

**Action against Wife's Executors for Conversion of Husband's Property during his Insanity.**]—Such an action is sustainable. *Williams, In re, Williams* v. *Stratton*, 50 L. J., Ch. 495; 44 L. T. 600.

**Supplemental Order.**]—Where a sole plaintiff, after issue joined and before decree, becomes lunatic, and a committee is appointed, such committee is entitled to a supplemental order under s. 52 of 15 & 16 Vict. c. 86. *Dangar* v. *Stewart*, 3 L. T. 770; 9 W. R. 266. S. P., *Timpson* v. *L. & N. W. Ry.*, 1 N. R. 562; 11 W. R. 558.

The jurisdiction to make such an order is in chancery, not in lunacy. *Ib.*

### 2. Defendant or Respondent.

**Lunatic Defendant — As Next of Kin.**]—A lunatic was made a defendant as one of the next of kin of an intestate. He and his committee presented a petition entitled in the suit and also in the lunacy, praying that the lunatic might defend by his guardian, and that the committee might be appointed such guardian. The committee prayed that as such he might be at liberty to prosecute the claim of the lunatic as next of kin, and that all such costs as should be properly incurred and as should not be paid out of the estate to be administered might be raised and paid out of the lunatic's estate. The court gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, and directed the title in the cause to be struck out. *Manson, In re*, 21 L. J., Ch. 249.

—— **Evidence.**]—A defendant of unsound mind answering by a guardian, unable to give a full discovery, on a motion to dissolve an injunction, affidavits cannot be read by the plaintiff to prove facts that might be given in evidence. *Barrett* v. *Tickell*, Jacob, 155.

—— **Bill Filed by Committee—Practice.**]—Practice as to lunatic answering where he is made defendant to a bill filed by the committee of his person and estate. *Worth* v. *Mackenzie*, 3 Mac. & G. 363.

—— **Substitution of New Committee—Pendente Lite.**]—In a suit to which a lunatic and his committee were defendants, the court declined before decree to make an order on motion, substituting a new committee as defendant. *Rudd* v. *Speare*, 3 De G. & Sm. 374.

After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed. Ordered upon motion that the name of the new committee should be substituted for the deceased in all future proceedings in this cause. *Bryan* v. *Twigg*, 3 Eq. R. 62; 3 W. R. 42.

—— **Death of Committee after Decree.**]—If a lunatic and his committee be defendants, and the committee die after the decree, and a new one be appointed, the court on motion will order that the future proceedings in the cause be carried on in the name of the new committee. *Lyon* v. *Mercer*, 1 Sim. & S. 356.

—— **Service of Writ — No Committee appointed.**]—In an action for specific performance of contract, where one of the parties to the contract had become a lunatic so found by inquisi-

tion, but no committee had been appointed of her person or estate, the court directed service of the writ upon the keeper of the asylum at which she was residing, or upon the person with whom she was residing. *Than* v. *Smith*, 27 W. R. 617.

The court will not allow substituted service to be made upon the medical officer of the asylum where a lunatic defendant is confined. Semble, such service is to be effected upon the lunatic himself in the presence of the medical officer. *Morgan* v. *Jones*, 4 W. R. 381.

When a defendant is a lunatic the court has no power under the 15 & 16 Vict. c. 76, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ has come to his knowledge, and that he wilfully evades service. *Holmes* v. *Service*, 15 C. B. 293; 24 L. J., C. P. 24; 1 Jur. (N.S.) 258; 3 C. L. R. 234.

When a lunatic cannot be served with a writ of summons, leave cannot be granted to proceed without service. *Williamson* v. *Maggs*, 28 L. J., Ex. 5; 7 W. R. 50.

But the court has power to allow a plaintiff to proceed in an action as if personal service of the writ of summons had been effected, although the defendant is a lunatic, and will so order, if satisfied that reasonable efforts have been made to effect personal service, and that the writ has come to his knowledge. *Kimberley* v. *Alleyne*, 2 H. & C. 223; 9 Jur. (N.S.) 650; 8 L. T. 398; 11 W. R. 757.

—— **Service of Process.**]—When the medical officer of an asylum refused to allow service of a bill in equity on a lunatic who was not so found by inquisition, the court allowed substituted service on the medical officer. *Raine* v. *Wilson*, 43 L. J., Ch. 469; L. R. 16 Eq. 576; 29 L. T. 51.

—— **Service of Writ — Distringas.**] — The defendant being a lunatic, the court granted a rule nisi for a writ of distringas to compel an appearance, upon an affidavit stating that two calls had been made at the house where he resided, when the party was informed that he could see neither the defendant nor the keeper, and on the last occasion had stated to the servant the object of his visit, and left a copy of the writ with him. *Banfield* v. *Darrell*, 2 D. & L. 4; 13 L. J., Q. B. 202.

The governor of a lunatic asylum having refused to permit a writ of summons to be served upon the defendant, a lunatic, the court allowed a distringas to issue to be served upon the wife of the lunatic. *Limbert* v. *Hayward*, 13 M. & W. 481; 2 D. & L. 406; 14 L. J., Ex. 46.

—— **Inrolling Decree.**]—After decree a defendant had been found lunatic. After six months had elapsed from the date of the decree, the court allowed the decree to be inrolled, on notice to the lunatic's solicitor, on the record. *Smith* v. *Whitmore*, 11 L. T. 507.

—— **Quare impedit.**]—It seems that, if a defendant in quare impedit is a lunatic, the action is properly brought against him and not against his committee. *Tyrrell* v. *Jenner*, 3 M. & P. 648; 6 Bing. 283; 8 L. J. (O.S.) C. P. 57.

**Arrest.**]—A lunatic may be arrested. *Hall, Ex parte*, 1 Jacob, 161.

—— **Discharge.**]—The court would not discharge a defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest. *Nutt* v. *Verney*, 4 Term Rep. 121.

Nor that he had since become so. *Kernot* v. *Norman*, 2 Term Rep. 390. S. P., *Ibbotson* v. *Galway (Lord)*, 6 Term Rep. 133.

Even where there had been a commission of lunacy. *Steel* v. *Alan*, 2 Bos. & P. 362; 5 R. R. 647.

—— **Answer by Committee—Admissions.**]—A bill was filed against a lunatic and her committees, A., B. and C. After answer by the committees, and replication, and evidence having been taken, but before the hearing, the lunatic died. Administration having been granted to A., D. and E., by bill of revivor; and in the answer to the bill of revivor the defendants claimed the benefit of the previous answers of the committees. To this answer no replication was filed:—Held (affirming the decree of the court below), by the Lord Chancellor, that although the answer of the committees might not in general be binding on the estate of a lunatic, yet that the representatives, being really the same parties as the committees, and having adopted their answer, must be concluded by it; and by Lord St. Leonards, that the answer of the committees is in general binding on the lunatic's estate, and that under the circumstances there was nothing to take the case out of the general rule: also, that although an answer is not replied to, the court may read parts of it as admissions against the defendants, and may discredit other parties in their favour. *Stanton* v. *Percival*, 5 H. L. Cas. 257; 24 L. J., Ch. 369; 3 W. R. 391.

Quære, is an answer by committees binding upon the estate of the lunatic. It is binding on them in any other character. *Ib.*

**Committee Defendant—Evidence as to Sanity of Lunatic.**]—In a suit seeking relief against a deceased lunatic's estate, the defendants, her committees and legal personal representatives, endeavoured, and produced some evidence, to establish the lunatic's insanity at the date of a particular transaction, before the period to which the jury under the commission of lunacy had carried it back; but the court being of opinion that the evidence and circumstances appearing on the pleadings preponderated in favour of the then sanity of the lunatic, granted immediate relief, without further investigation at law as to the then state of the lunatic's mind. *Percival* v. *Caney*, 14 Jur. 1056.

—— **Bankruptcy—Fund in Court—Petition for payment out.**]—In 1854 a person entitled to a contingent future interest in a fund took the benefit of the Insolvent Act, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the chancery division for its

recovery. The court ordered a transfer of the fund as prayed. *Hinds, In re*, 7 Ch. D. 26; 37 L. T. 768; 26 W. R. 193.

—— **Order to Inspect Documents.**]—In an action of trespass to land brought against the committee of a lunatic whose title-deeds are in the custody of the court having jurisdiction in lunacy, an order on the defendant for inspection of the documents ought not to be made, as they are not in his possession or control. *Vivian* v. *Little*, 32 L. J., Q. B. 771; 11 Q. B. D. 370; 48 L. T. 793; 31 W. R. 891; 47 J. P. 566.

**Executors Defendants—Evidence—Effect of Inquisitions.**]—Where, to an action against executors on the bond of their testator, they pleaded non est factum, and set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against the testator, after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence. *Faulder* v. *Silk*, 3 Camp. 126.

*b.* LUNATIC NOT SO FOUND.

**1. Plaintiff or Petitioner.**

**Next Friend.**]—A bill may be filed by the next friend on behalf of a person of weak mind, and the fit subject for a commission of lunacy, his property being too small to bear the expense of a commission. *Carr* v. *Boyce*, 13 Ir. Eq. R. 102.

A bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one professing to be his next friend; and such a person may be sued as a defendant, and the court then appoints a guardian to answer for him. In such cases, the court imposes all the restraints of infancy, and the party is bound by the acts of the guardian so appointed. The court having proper evidence, that they are incapable of protecting their own interests, treats them as infants or as insane, though not so found by inquisition, and being satisfied that their next friend or guardian pays proper attention to their interests, and making all necessary inquiries to ascertain their rights, and what is beneficial to them; or, if necessary, directing that a commission may be applied for, ultimately deals with their rights and property as justice may require. *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J., Ch. 296; 10 Jur. 339.

Suit instituted by an imbecile person in the name of her next friend. *Wilkinson* v. *Harwood*, 4 Jur. 957.

Jurisdiction of the court to entertain a suit instituted in the name of a person of weak mind by a next friend. *Light* v. *Light*, 25 Beav. 248.

Decree made in such a suit for the protection of the plaintiff's property, and liberty given to apply in lunacy as to its application. *Ib.*

A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in his status. *Beall* v. *Smith*, 43 L. J., Ch. 245; L. R. 9 Ch. 85; 29 L. T. 625.

If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the crown, the suit should be continued only with the sanction of the court in lunacy. *Ib.*

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void, and a contempt of the court in lunacy. *Ib.*

—— **Inquiry as to Capacity.**]—Where an action has been commenced in the name of a person alleged to be of unsound mind not so found by a next friend, and such person denies that he is of unsound mind, and applies to have his name removed from the record, the court will direct an inquiry as to the competency of the person alleged to be of unsound mind. *Howell* v. *Lewis*, 61 L. J., Ch. 89; 65 L. T. 672; 40 W. R. 88.

—— **Partition.**]—An action for partition was brought, whereby the sale and distribution of the proceeds of certain real estate were asked for. One of the two plaintiffs was alleged to be a person of unsound mind not so found by inquisition, suing by his next friend. The defendant and the plaintiff said to be of unsound mind moved that the name of the person of unsound mind might be struck out:—Held that a person of unsound mind not so found may be plaintiff suing by his next friends in an action for the partition or sale of real estate. *Porter* v. *Porter*, 37 Ch. D. 420; 58 L. T. 688; 36 W. R. 580—C. A.

Under the Partition Act, 1876 (39 & 40 Vict. c. 17, s. 6), a person of unsound mind not so found by inquisition may, by his next friend, be plaintiff in an action instituted for the purpose of obtaining a sale. *Watt* v. *Leach*, 26 W. R. 475.

—— **Bill filed by, to dispose of Real Estate.**]—It is irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind. *Halfhyde* v. *Robinson*, 43 L. J., Ch. 398; L. R. 9 Ch. 373; 30 L. T. 216; 22 W. R. 448.

A bill was filed by a person of unsound mind not so found, by his next friend, for a partition or sale of real estate, and a decree for sale was made. A petition was afterwards presented under the Trustee Act, 1852, for an order vesting the estate of the plaintiff in the purchaser. The court refused to make the order, considering that the suit was irregular, but as the plaintiff's share was only 200*l.*, and she had no other property, the court directed an application to be made in lunacy, under the Lunacy Regulation Act, 1862, s. 13, for a sale, and permitted the petition to be amended for that purpose. *Ib.*

—— **Bill to avoid Lease.**]—Bill to avoid a lease for that the lessor was a lunatic, the attorney-general must be a party. *Leigh* v. *Wood*, Rep. t. Finch, 135.

—— **Action for Recovery of Land—Stay of Action as not beneficial to Plaintiff.**]—An action for the recovery of land may be brought under Ord. XVI. r. 17, by the next friend of a person of unsound mind not so found by inquisition; and a writ issued in such an action by the next friend, in the name of the person of unsound mind is regular. But where the court is of opinion on the facts of the case that such action

is not a beneficial one to the lunatic plaintiff, it will be stayed by the court on that ground. *Waterhouse* v. *Worsnop*, 59 L. T. 140.

—— **Suit by—Change of Status.**]—A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in his status. *Beall* v. *Smith*, 43 L. J., Ch. 245; L. R. 9 Ch. 85; 29 L. T. 625; 22 W. R. 121.

If he becomes of sound mind there is no pretext for the continued intervention of the next friend: if he is found a lunatic by inquisition, and is thus placed under the protection of the crown, the suit should be continued only with the sanction of the court in lunacy. *Ib.*

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the court in lunacy. *Ib.*

—— —— **Allegation of Insanity—Sanity of Lunatic established—Costs.**]—M. filed a bill as next friend of P., whom he alleged to be of unsound mind. An application in lunacy was directed, and P.'s sanity was established. P. thereupon applied to have the bill taken off the file, which was ordered, but without any directions as to costs. P. moved the court of appeal to vary this order by directing the next friend to pay his costs as between solicitor and client, and the defendant moved to vary it by inserting a direction for the next friend to pay her costs:—Held, that P. was entitled to indemnity against all consequences of the suit having been instituted in his name, and that M. must pay P.'s costs as between solicitor and client of the application to the court below, and of P.'s appeal motion, and must pay the defendant's costs of the suit as between party and party, including the costs of motions in the court below and on appeal. *Palmer* v. *Walesby*, L. R. 3 Ch. 732; 16 W. R. 924.

—— **Lunacy established — Leave to Committee to continue Action.**]—Where the plaintiff, a person of unsound mind, not so found, suing by a next friend, becomes a lunatic, during the progress of the action, and a committee is appointed, the committee may obtain an order, under Ord. L. r. 4, for leave to continue the action. *Green's Estate, In re, Green* v. *Pratt*, 48 L. J., Ch. 681; 41 L. T. 30.

—— **Affidavit of Documents.**]—Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents, to be made by the next friend, or by someone acquainted with the facts. *Higginson* v. *Hall*, 48 L. J., Ch. 250; 10 Ch. D. 235; 39 L. T. 603; 27 W. R. 469.

**Proceedings commenced by Solicitor on Behalf of Client alleged to be Lunatic—Misconduct—Costs.**]—A solicitor is not prevented from taking legal proceedings on behalf of his client by the mere fact that to his knowledge a petition in lunacy for an inquiry into the state of mind of the client is pending, provided that he believes the client to be sane. The court will, however, in a proper case, when informed of the petition, stay the proceedings until the inquiry is completed. *Hartley* v. *Gilbert* (13 Sim. 596) and *Beall* v. *Smith* (43 L. J., Ch. 245; L. R. 9 Ch. 85) explained. *Armstrong and Sons, In re*, 65 L. J., Ch. 258; [1896] 1 Ch. 536; 74 L. T. 134; 44 W. R. 281.

A solicitor who was aware that a petition in lunacy against his client was pending, obtained on her behalf an order ex parte without disclosing the fact. He believed her to be sane, but she was subsequently found to be of unsound mind. Upon the order being discharged:—Held, that he had not been guilty of such professional misconduct as to make him liable for the costs. *Ib.*

**Non-compliance with Order for Discovery—Incapacity arising after Writ.**]—Where, after writ issued, the plaintiff became incapable of transacting business, and his brother, on his behalf, made an affidavit of documents and answered interrogatories, the defendant took out a summons to dismiss the action for non-compliance with orders to make an affidavit of documents, and to answer interrogatories; the plaintiff then took out a summons for leave to amend by adding a next friend:—Held, that the defendant was not entitled, under r. 21 of Ord. XXXI. of the Rules of Court, 1883, to have the action dismissed. The action still subsisted, and the plaintiff must have leave to amend by adding a next friend; the plaintiff to pay the costs of both summonses. *Cardwell (Lord)* v. *Tomlinson*, 54 L. J., Ch. 957; 52 L. T. 746; 33 W. R. 814.

**Order for Protection of Property.**]—Decree made for the protection of the plaintiff's property, and liberty given to apply in lunacy as to its application. *Light* v. *Light*, 25 Beav. 248.

**Petitioner Deaf, Dumb and Blind—Dispensing with next Friend.**]—A deaf, dumb and blind person petitioned for payment to herself of 7,000*l.*, carried to her separate account:—Held, that she might be a petitioner without a next friend, but the court declined, without special reasons assigned, to make an order for payment of more than the income for her benefit. Form of the order. *Biddulph's and Poole's Trusts, In re*, 5 De G. & Sm. 469.

**Taking Bill off File.**]—A bill may be taken off the file, if filed in the name of a plaintiff who is in a state of mental incapacity, semble. *Wartnaby* v. *Wartnaby*, Jac. 377.

Where one of several co-plaintiffs was of imbecile understanding at the time of the filing of the bill, and his name was used without authority, the court would not order the bill to be taken off the file. Aliter, if he were the sole plaintiff. *Brangan* v. *Gorges*, 7 Ir. Eq. R. 225.

Quære, could the court under such circumstances order the imbecile plaintiff's name to be struck out of the bill. *Ib.*

The court, upon the motion of a defendant, supported by affidavits, suggesting that the bill had been filed without any authority from the person named as the plaintiff, such person being so imbecile as to be unable to give any authority for the purpose, and that the suit was instituted for litigious purposes in the name of the plaintiff, but by another defendant in the suit, referred it to the master to inquire whether any authority was given by the plaintiff for the filing of the bill, and whether the institution of the suit was for his benefit, and whether it was

for his advantage that the same should be prosecuted. On the master's reporting in the negative, and that the bill was filed under the authority of one of the defendants, the court ordered the bill to be taken off the file, and the costs of the other defendants to be paid by the defendant who had instituted the suit. *Blake* v. *Smith*, Younge, 594.

### 2. Defendant or Respondent.

(a) *Guardian ad litem.*

i. Appointment or Change, Proceedings for.

**Jurisdiction to appoint.**]—A guardian to an infant defendant of unsound mind, not so found by inquisition, should be appointed by the court of chancery, and not under the jurisdiction in lunacy. *Pidcock* v. *Boultbee*, 2 De G. M. & G. 898 ; 22 L. J., Ch. 611. *S. C.*, nom. *Piddocke* v. *Boultbee*, 1 W. R. 94.

**Infirmity of Mind disputed.**]—When it is disputed whether a defendant is, from infirmity of mind, incompetent to answer, it will be referred to the master to inquire as to the fact. *Lee* v. *Ryder*, 6 Madd. 294.

**Respondent to Petition presented under Statutory Jurisdiction.**]—A guardian ad litem appointed to a person of unsound mind, but not found lunatic by inquisition, who was respondent to a petition presented under statutory jurisdiction, there being no suit. *Greaves, In re, G. N. Ry., In re*, 2 Eq. R. 516 ; 2 W. R. 355.

**Defendant to Foreclosure Action.**]—Decree for foreclosure made upon a claim to foreclose a mortgage, one of the defendants being a person of unsound mind not so found by inquisition, and confined in an asylum where she had been served with the claim ; the court directing a reference as to the appointment of a guardian in the suit for such defendant. *Elliston* v. *Sheldrake*, 2 L. T. 48.

**Appointment on Application of Plaintiff.**]—Upon motion of plaintiff, guardian ad litem was appointed to take answer of defendant, upon affidavit that he was a lunatic. *Howlett* v. *Wilbraham*, 5 Madd. 423. S. P., *Mauleverer* v. *Warren*, 2 Jones, Ex. (Ir.) 47.

—— The order appointing a solicitor to be the guardian ad litem of a lunatic not found so by commission, may be made under the twenty-eighth Order of October, 1842, on the application of the plaintiff, but it cannot be made without service of notice upon the alleged lunatic. *Brooks* v. *Jobling*, 2 Hare, 155 ; 8 Jur. 186.

**Appointment without Commission.**]—Guardian ad litem to lunatic defendant (not so found by inquisition) appointed without a commission. *Piddocke* v. *Smith*, 9 Hare, 395 ; 21 L. J., Ch. 359 ; 15 Jur. 1120.

**Appointment on Production of Affidavit of Fitness of Person to be Appointed.**]—Motion granted for a commission to appoint a guardian ad litem, for a party of unsound mind, but not found so by inquisition, upon the production of an affidavit of the fitness of the party proposed to be appointed. *White* v. *Kimpton*, 14 Jur. 845.

In an administration summons against the administratrix and her husband, the husband became lunatic, though not so found by inquisition, and the court, on motion ex parte, supported by affidavit of fitness, appointed a guardian ad litem. *Osbaldiston, In re*, 1 Sm. & G. (App.) xii.

**Lunatic confined in Asylum.**]—Where it appears that a defendant, having been tried for a misdemeanour, is confined in a lunatic asylum by order of the secretary of state, the court will direct a commission to issue to appoint a guardian, without the affidavit of a medical man. *Lucas* v. *Cole*, 10 L. J., Ch. 315 ; 5 Jur. 930.

**Appointment of New Guardian.**]—Where a guardian ad litem of a person of unsound mind, though not so found by inquisition, dies, a special application is necessary to obtain the appointment of a new guardian, and an appointment by an order of course is irregular. *Needham* v. *Smith*, 6 Beav. 130.

**Appointment on Summons.**]—Appointment of a guardian ad litem to a person of unsound mind to appear upon an administration at chambers by summons. *Osbaldiston* v. *Crowther*, 1 W. R. 255.

**Sufficiency of Affidavit in Support of Application for Appointment.**]—When one of the defendants in a suit was alleged to be of unsound mind, but had not been found to be so by commission, on an application by the plaintiff to appoint a guardian ad litem :—Held, that an affidavit of the plaintiff was insufficient which only referred to a statement in the answer of the other defendants in the suit alleging that the defendant to whom it was sought to appoint a guardian was "imbecile." *Watson* v. *Knilans*, 22 W. R. 639.

**Service of Notice of Motion for Appointment.**]—In an administration action commenced by originating summons when the defendant is a lunatic not so found by inquisition, and makes default in appearance, notice of motion for the appointment of a guardian ad litem should be served in the same manner as in the case of default of appearance to a writ of summons. *Pepper, In re, Pepper* v. *Pepper*, 50 L. T. 580 ; 32 W. R. 765.

**Appointment improperly obtained.**]—A plaintiff and his sister had given a mortgage to M., a solicitor, and the bill was filed against M. and the sister to have accounts taken of what was due, and for redemption. The sister was alleged to be of unsound mind though not found so by inquisition. The plaintiff's solicitor did not serve the bill on the sister, but, by the plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the Rolls the appointment of a guardian ad litem. The appearance and the appointment of a guardian were discharged by Wickens, V.-C., on evidence that the sister had sufficient capacity to authorise a solicitor to act for her, and that she had authorised M. so to act :—Held, on appeal, that whether the capacity of the sister was proved or not, the order of the Vice-Chancellor was right, for that the appearance and the appointment of a guardian founded on it

were irregular. *Camps* v. *Marshall*, L. R. 8 Ch. 462.

**Co-defendants.**]—A guardian ad litem to a defendant may, under circumstances rendering it necessary, be appointed at the instance of a co-defendant by analogy to r. 1 of Ord. XIII. of the Rules of Supreme Court, 1883. *Dawson, In re, Johnston* v. *Hill*, 58 L. J., Ch. 734; 41 Ch. D. 415; 37 W. R. 733.

ii. Who Appointed.

**Committee.**]—Committee of estate appointed guardian in suit. *Westcomb* v. *Westcomb*, Dick. 233.

**Person resident out of Jurisdiction.**]—The court would not appoint as guardian ad litem a party not resident within the kingdom where the party was found lunatic, in Ireland, and the committee a resident there:—Held, that the course was to have the Irish commission recorded in England under 1 Will. 4, c. 65, s. 41, and then for the lunatic and his committee to answer together. *Hartland (Lady)* v. *Atcherley*, 7 Beav. 53; 13 L. J., Ch. 122.

**Senior Six-clerk.**]—If the return to an attachment issued against a defendant for want of appearance, be, that the defendant is lunatic, the senior six-clerk not towards the cause will, on motion, be appointed guardian of the lunatic defendant, and be ordered to enter an appearance for him. *Kitson* v. *Cutts*, 9 L. J., Ch. 138; 4 Jur. 67.

**Solicitor of Suitors' Fund.**]—The solicitor of the suitors' fund, appointed under the twenty-eighth Order of October, 1842, guardian ad litem of a lunatic, not so found by inquisition. *M'Keverakin* v. *Cort*, 7 Beav. 347.

It is not absolutely necessary in the case of a defendant, a lunatic, but not found so by inquisition, that the solicitor to the suitors' fund be appointed his guardian for the purpose of his appearing to and answering the plaintiff's bill, but any other solicitor may be appointed his guardian who will undertake the duty of appearing to and answering the bill for the party. In the present case, the solicitor for the wife was appointed the guardian of the husband, on the production of an affidavit shewing that the husband had no interest adverse to the wife. *Biddulph* v. *Dayrell*, 15 L. J., Ch. 320.

If a defendant in the progress of a suit becomes insane, it is the practice to appoint the solicitor to the suitors' fund guardian ad litem, when the application for the appointment of guardian is made by the plaintiff; but if that application is made by the family of the defendant, the court will appoint any one whom the family may select, on being satisfied of his fitness for the office. *Charlton* v. *West*, 30 L. J., Ch. 815; 7 Jur. (N.S.) 614; 4 L. T. 455; 9 W. R. 511.

**Solicitor.**]—On an application to appoint a solicitor guardian ad litem to a defendant of unsound mind, not so found, the court required to be first satisfied that no relative would undertake the defence. *Moore* v. *Platel*, 7 Beav. 583.

—— The court refused to appoint the plaintiff's solicitor guardian ad litem of a lunatic defendant. *Biddulph* v. *Camoys (Lord)*, 9 Beav. 548; 10 Jur. 485.

In appointing such guardian, the court will not interfere with his discretion. *Ib.*

On an application that the solicitor of a feme covert might be appointed, under the thirty-second Order of 1845, guardian to defend her husband, who was a lunatic, the court required evidence that the husband and wife had no adverse interests. *Ib.*

The court refused to appoint the solicitor of a trustee his guardian ad litem to put in an answer to a bill of complaint filed against him, though from age and infirmity he was incapable of transacting business. *Patrick* v. *Andrews*, 22 L. J., Ch. 240; 1 W. R. 96.

**Son.**]—Where an aged defendant was imbecile, and incapable of attending to business, his son, a co-defendant, but whose interest in the subject-matter of the suit was not adverse to that of his father, was appointed his guardian ad litem. *Newman* v. *Selfe*, 8 L. T. 487; 11 W. R. 764.

The defendant being of unsound mind, though not so found by inquisition, the court, on motion ex parte, appointed his son guardian ad litem, upon an affidavit averring that there was no conflict of interest between the father and son. *Dobbin* v. *Billing*, Ir. R. 6 Eq. 623.

**Brother.**]—Where a defendant was a lunatic, not so found by inquisition, the court, on an application of the plaintiff, appointed his brother, who was a co-defendant, but had no adverse interest, his guardian ad litem. *Bonfield* v. *Grant*, 11 W. R. 275.

iii. In What Cases.

**Committee One of Plaintiffs.**]—Committee of lunatic defendant being one of plaintiffs, guardian appointed. *Snell* v. *Hyat*, Dick. 287.

**Insanity after Decree.**]—Defendant becoming insane after decree, guardian appointed. *Gason* v. *Garnier*, Dick. 286.

**To put in Examination.**]—Guardian appointed for defendant to put in his examination, he being incapable. *Att.-Gen.* v. *Waddington*, 1 Madd. 321.

**Infant Heir-at-Law.**]—Whether it is necessary for any purpose in lunacy, that an infant heir-at-law should appear by a testamentary or legal guardian, or whether there is any process in lunacy by which a legal guardian can be appointed, quære. *Brown, In re*, 1 Mac. & G. 201.

**Property of small Value.**]—One, through a great age, being deprived of his memory, and become almost non compos mentis, was admitted to answer by his guardian, in regard the demand in question was but small; but had the value been considerable, the regular way had been to have taken out a commission of lunacy, and have gotten a committee assigned. Per Lord Talbot. *Anon.*, cited in *Sheldon* v. *Fortescue Aland*, 3 P. W. 111, n.

**Refusal of Court to appoint Guardian—Default in putting in Answer.**]—Where defendants had taken no proceedings until the last day allowed for putting in their answer, when

they obtained an order for further time, but afterwards obtained the appointment of a guardian ad litem, on the ground that they were of unsound mind, the court refused an application of the plaintiff, under the thirty-second Order of May, 1845, to appoint a guardian for them, on the ground that they were in default for want of answer. *Saunders* v. *Walter*, 2 Hall. & Tw. 199; 19 L. J., Ch. 409.

—— **Bad Health only.**]—Where a defendant, in consequence of bad health only, and not from any mental incapacity, is unable to put in his answer, the proper course is to apply to the master for further time: and the Lord Chancellor discharged an order made by the Vice-Chancellor Knight Bruce, that a defendant so circumstanced might have a guardian assigned him for the purpose of putting in his answer. *Willyams* v. *Hodge*, 1 Mac. & G. 516; 1 Hall. & Tw. 575; 19 L. J., Ch. 196.

When a defendant, not required to put in an answer, was a person of great age, and had been afflicted with a paralytic stroke, and was incapable of giving a continuous attention to business, but whose health was not absolutely destroyed, the court declined to appoint a guardian to act for him in the suit, but intimated that if in the course of the cause it became necessary to obtain his consent to an arrangement or a compromise, it might be necessary to appoint a guardian. *Steel* v. *Cobb*, 1 N. R. 302; 11 W. R. 298.

—— **Committee—Leave to Defend.**]—A lunatic was made a defendant as one of the next of kin of an intestate. He and his committee presented a petition, intituled in the suit and also in the lunacy, praying that the lunatic might defend by his guardian, and that the committee might be appointed such guardian. The committee prayed, that, as such, he might be at liberty to prosecute the claim of the lunatic as next of kin, and that all such costs as should be properly incurred, and as should not be paid out of the estate to be administered in the suit, might be raised and paid out of the lunatic's estate. The court gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, and directed the title in the cause to be struck out. *Manson, In re*, 21 L. J., Ch. 249.

**Imbecility and Old Age.**]—Where an aged defendant was imbecile, and incapable of attending to business, his son, a co-defendant, but whose interest in the subject-matter of the suit was not adverse to that of his father, was appointed his guardian ad litem. *Newman* v. *Selfe*, 8 L. T. 487; 11 W. R. 764.

(b) *Other Matters.*

**Answer by Guardian—Evidence as against Lunatic.**]—The answer of a superannuated person put in by guardian, shall be read against him as an answer of one of full age; secus, of an infant, who is to have a day to shew cause. *Leving* v. *Caverly*, Pre. Ch. 229.

—— **Insufficiency of.**]—A plaintiff cannot except for insufficiency to the answer of a defendant of unsound mind, but who had answered by his guardian, against whom a commission of lunacy has not issued. *Micklethwaite* v. *Atkinson*, 1 Coll. C. C. 173.

**Necessity for Appointment of Guardian—Service of Writ—Non-appearance of Defendant.**]—When the writ of summons in an action has been served upon a defendant to the action, being a person of unsound mind not so found by inquisition, in manner provided in that behalf by Ord. XIII. r. 1, and the defendant does not appear, the action can proceed (at all events if the defendant is only a formal party) under Ord. XIII. r. 9, as if such party had appeared, and it is not imperative on the plaintiff to apply for the appointment of a guardian to such defendant. *Taylor* v. *Pede*, 44 L. T. 514; 29 W. R. 627.

**Service of Decree.**]—Lunatic defendant, not found so by inquisition. Service of copy decree must be personal on him. *Anon.*, 2 Jur. (N.S.) 324.

**Service on Medical Officer of Asylum.**]—When the medical officer of an asylum refused to allow service of a bill in equity on a lunatic who was not so found by inquisition, the court allowed substituted service on the medical officer. *Raine* v. *Wilson*, 43 L. J., Ch. 469; L. R. 16 Eq. 576; 29 L. T. 51.

After appearance, but before answer, one of the defendants became lunatic, and to enable the plaintiff to bring on his cause to a hearing, an order was obtained by him appointing the solicitor to the suitors' fee fund his solicitor. An answer was then put in for this defendant, submitting his interests to the court. Before the hearing the lunatic defendant became sane, but took no step to discharge the order. At the hearing, a question arose as to who was to pay the costs of the solicitor to the fee fund:—Held, that the defendant was bound to pay these costs, and add them to his own costs of suit. *Frampton* v. *Webb*, 2 N. R. 547; 9 L. T. 114; 11 W. R. 1018.

**Bill taken Pro Confesso against Guardian—Service of Notice of Order.**]—On motion to take a bill pro confesso, against the guardian ad litem, of a lunatic, the order was made on the terms of serving notice on the nearest relations of the lunatic and guardian. *Crawford* v. *Kernaghan*, 1 Dr. & Wal. 195.

*c.* PLEADING.

**Citation—Service.**]—Form of order for service of citation on a person of unsound mind, not so found by inquisition. *M'Cormick* v. *Heyden*, 17 L. R., Ir. 338.

**Refusal to appear.**]—The statute 7 Geo. 2, c. 14, enabling plaintiffs to proceed where defendants refuse to appear, does not apply to defendants labouring under incompetency, as idiotcy, &c. *Carew* v. *Johnston*, 2 Sch. & Lef. 292.

**Equitable Defence—Set-off.**]—Auctioneers are employed to sell by the agents of a committee of a lunatic, and they hand over the proceeds of such sale to such agents, partly by the direction of committee. The lunatic dies, and his representative brings an action of assumpsit for the proceeds of sale against the auctioneers. To this

action pleas of payment by the direction of the committee, and the application of the moneys for the benefit of the lunatic, are put in. Upon a bill filed to restrain that action and a motion for an injunction :—Held, that the payment, being a question of fact, could be tried at law, and the question of privity and set-off did not affect the question, the Common Law Procedure Act giving defendants in an action a greater liberty than they before had to resist it on equitable grounds. Proceedings in lunacy are as distinct from proceedings in chancery as chancery from common law. *Farebrother* v. *Welchman*, 3 Drew. 122 ; 3 Eq. R. 383 ; 24 L. J., Ch. 410 ; 1 Jur. (N.S.) 126 ; 3 W. R. 257.

**Allegation of Insanity—Sufficiency of.**]—A charge in the bill that A. "was of a weak and feeble understanding, approaching almost to idiotcy," was an allegation sufficiently precise (no demurrer being taken), to put in issue that A. was "of insane memory." It being proved that A "was incapable of managing himself or his affairs," he was held to be within the saving of the statute 7 Geo. 2, c. 14, s. 8. But this allegation would not have been sufficiently precise on a plea, nor on a bill, if demurred to. The heir of the mortgagor may take advantage of the saving in s. 8 of the statute. *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

**Evidence—Action for Account.**]—A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a pass-book. A. became a lunatic, but the account continued to be kept with his family, and in the pass-book, the entries in which were in B.'s handwriting, a balance was stated to the credit of A. :—Held, that this was not evidence to support an account stated with A., in an action brought by his representative against B. to recover the amount of such balance. *Turbuck* v. *Bispham*, 2 M. & W. 2 ; 6 L. J., Ex. 49.

—— **Action to perpetuate Testimony—Costs of Evidence to substantiate Will.**]—A lunatic, so found by inquisition, had made two wills before the finding. Upon the petition of the committee of the estate, it was ordered that such costs as the master should think proper of a suit to perpetuate testimony as to the wills should be paid out of the lunatic's estate, the suit being instituted with the approbation of the master. *Tayleur, In re*, L. R. 6 Ch. 416 ; 19 W. R. 462.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime, made before his lunacy. *Sackville* v. *Aylesworth*, 1 Vern. 105.

**Information—Relator.**]—In an information at the relation of a lunatic, a proper relator was directed to be appointed, who might be responsible for the costs of the suit. *Att.-Gen.* v. *Tyler*, 2 Eden, 230 ; Dick. 378.

**Demurrer.**]—A bill praying for an account for delivery up of property, for a receiver, and for an injunction pending a suit in the Ecclesiastical Court to recall probate of the will, will lie at the suit of one of the next of kin of a lunatic against the executors and one of the legatees in a will fraudulently obtained by them from the lunatic ; and a demurrer for want of equity by the defendant, the legatee overruled, on the ground that the bill alleges fraud, and that the demurring defendant was a legatee under the will which was impeached. *Dimes* v. *Steinberg*, 2 Sm. & G. 75.

Where a bill was brought to have a guarantee delivered up on the ground of fraud, and A. and his wife were made parties to the bill upon an allegation that the wife was concerned in a conspiracy to defeat the guarantee, and no act was alleged against the husband, but it was stated that he was imbecile :—Held, that a demurrer to the bill by the husband was sustainable. *Price* v. *Chippendale*, 4 Y. & C. 469.

**Specific Performance—Mental Incapacity of conveying Party.**]—A demurrer will not lie to a bill for specific performance of an agreement to buy land, on the ground that the present mental incapacity of a necessary party to the conveyance, to join therein and concur in a parol variation of the original written contract appears on the face of the bill. *Beaufort (Duke)* v. *Glynn*, 23 W. R. 463, 502.

**Lunatic necessary Party.**]—A lunatic must be a party to a suit for his own benefit, otherwise perhaps in case of an idiot. *Att.-Gen.* v. *Woolrich*, 1 Ch. Ca. 153.

Where the suit is to be relieved against an act done by the lunatic as assigning a debt, he need not be a party. *Att.-Gen.* v. *Smith*, 1 Ch. Ca. 113.

**Subpœna.**]—A senseless dumb man is not to answer upon subpœna. *Altham* v. *Smith*, Cary, 93.

**Partition—Parties—Costs.**]—To a suit for partition of property one undivided share of which was vested in a lunatic tenant in tail in possession, with remainder to an infant tenant in tail, with remainder to a married woman in tail, with remainders over, the persons interested in remainder after the lunatic and infant tenants in tail were made defendants, and they by their answers claimed such interest in the undivided share as they were alleged to have by the bill :—Held, that the persons so named as defendants were not unnecessary parties to the suit ; and that, having regard to the remoteness and uncertainty of their interest in the property, their costs up to the decree on the hearing should be a charge on the property, which should be allotted in severalty in respect of the undivided share in which they were so interested. *Singleton* v. *Hopkins*, 25 L. J., Ch. 50 ; 1 Jur. (N.S.) 1199 ; 4 W. R. 107.

—— **Form of Decree.**]—Where one of the parties entitled to land, the subject of a partition suit, is a person of unsound mind, the proper form of decree, after allotting portions in severalty and directing conveyances by the other parties is to declare the person of unsound mind a trustee for the other parties of the portions allotted to them. *Moorehead* v. *Moorehead*, Ir. R. 2 Eq. 492.

**Property vested in Lunatic Trustee—Transfer by Committee—Petition for.**]—A petition praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee ought to be entitled in the lunacy, and need not be entitled in the matter of the Act

which authorises the Lord Chancellor to make the order. *Fowler, In re*, 2 Russ. 449.

**19 & 20 Vict. c. 120.**]—The service of notice, of an intended application under the act to facilitate leases and sales of settled estates, upon a person of unsound mind, not so found by inquisition, who had only a remote contingent interest in the property, was dispensed with, there being others in the same interest who concurred. *Franklin's Settled Estate, In re*, 7 W. R. 45.

## VII. WILLS.

**Testamentary Capacity—Weakness of Mind.**]—Weakness of mind and forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of testator was, when called to exertion, capable of attention and application. *Tufnell* v. *Constable*, 3 Knapp, 122.

—— **Insane Delusions—Medical Evidence—Onus probandi when Commission of Lunacy has been issued and not superseded at Date of Will.**]—When a testator has been found to be of unsound mind under a commission of lunacy, which commission has not been superseded, the legal presumption is against the validity of any testamentary instrument, and the onus of proving the soundness of mind of the testator is imposed on the person setting up the instrument. *East India Co.* v. *Dyce Sombre*, 4 W. R. 714—P. C.

Under such circumstances it is competent to the party setting up a testamentary instrument to maintain either that the testator was always of sound mind; or, that though he may have been formerly of unsound mind, he had completely recovered; or, that the will was made during a lucid interval. *Ib.*

In such a case, where unsoundness of mind has been before proved, though previous circumstances are entitled to some weight, the true inquiry is, whether the deceased testator had entirely recovered, or was of sound mind at the time of giving instructions for and the execution of the instrument in question. *Ib.*

A will and codicil made and executed under such circumstances, when it was clearly proved that at the time of their execution the insane delusions of the testator which existed at the time the commission of lunacy was issued, still continued to exist, were held by the judicial committee of the privy council, affirming the judgment of the prerogative court, to be invalid. The circumstances of the case being deemed to be such as to make it essential to the purposes of justice that the validity of the testamentary instruments should be submitted to judicial decision, the appellants (the executor of the parties interested under the will) were allowed one set of costs between them out of the estate, including the costs of the appeal. *Ib.*

**Validity—Lucid Interval.**]—A testator, who had been in confinement as a lunatic between the years 1815 and 1817, executed his will in 1820. He was again placed in confinement in 1822. In November, 1838, a commission in the nature of a writ de lunatico inquirendo was issued, and the testator was found, in January, 1839, a lunatic without any lucid interval from the 1st August, 1815. Will pronounced for. Difference between imbecility or idiotcy and delusion in respect of acts of business observed upon. The witnesses against the will deposed to a case of idiotcy. *Bannatyne* v. *Bannatyne*, 2 Rob. Ec. Rep. 472; 16 Jur. 864.

*See also* WILL.

## VIII. CONVERSION, ADEMPTION, ELECTION.

**Conversion—Sale of Real Estate—16 & 17 Vict. c. 70, s. 124.**]—Money realised by the sale of real estate sold under s. 124 of the 16 & 17 Vict. c. 70, is personalty in the hands of the heir. *Wheeler, In re*, 4 De G. F. & J. 540; 8 Jur. (N.S.) 785; 6 L. T. 846.

A., B. and C. were tenants in common in fee of land. C. became of unsound mind. A. and B. sold part of the land, and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts, and demised their shares to the lessee, in consideration of a gross sum of money payable by instalments, called in the lease rent, within a limited time. In both deeds they covenanted that C. should concur, and that they would hold her share of the moneys payable in trust for her. B. afterwards became also of unsound mind, and A. sold other parts of the land, and granted leases of minerals under other parts for a like consideration, covenanting in like manner that B. and C. should concur, and that he would hold their shares of the moneys payable in trust for them. B. and C. were both found lunatic by inquisition; and the court confirmed the sales and leases, and ordered the committee to execute the deeds. C. died, leaving B. her heir-at-law and sole next of kin. Afterwards B. died also:—Held, that the leases were in the nature of absolute sales of portions of the real estate; that the confirmation of the sales and leases were sales under the Lunacy Regulation Act, 1853, s. 124, and that as between the real and personal representatives of B. the proceeds both of the sales and the leases effected after B. became of unsound mind belonged to her heir-at-law as real estate. *Smith, In re*, L. R. 10 Ch. 79; 23 W. R. 297.

Held, also, that as to the shares both of B. and C. in the proceeds of the sale and lease in which B. concurred they were converted into personalty, and belonged to B.'s next of kin. *Ib.*

—— —— **Subsequent Lunacy of Beneficiary.**]—On the 21st May, 1879, P. N. died intestate, leaving M. H. P. one of four co-heiresses-at-law. On 18th February, 1880, an action was brought asking for sale of P. N.'s real estate in lieu of partition. On the 15th June, 1880, an order was made for sale. The sale took place on the 30th August, 1880, and the proceeds of sale were carried to the credit of the action, "proceeds of the sale of the testator's real estate." On the 22nd April, 1882, by the order on further consideration in the said action, one-fourth part of the money standing to that account was ordered to be paid to M. H. P., subject to duty. M. H. P. left the money in court, and took no steps concerning it. On the 14th January, 1884, by an order made on a petition presented in lunacy, T. was authorised to apply to the Chancery Division for a transfer of the said one-fourth, amounting to 434*l.* 17*s.* 9*d.*, to the account of M. H. P., a person of unsound mind, "proceeds

of the sale of the real estate of P. N.," and the transfer was made accordingly. M. H. P. died on the 10th June, 1884:—Held, that there being no evidence that M. H. P. was of unsound mind at the date of the sale and the order for payment to her, the fund then ordered to be paid to her belonged to her absolutely without any trust or equity for re-conversion, and went on her death to her personal representatives. *Pickard, In re, Turner* v. *Nicholson*, 53 L. T. 293.

—— **Proceeds of Sale — Real and Personal Representatives.**]—Where the real estate of a lunatic has been sold, the proceeds of the sale are, as between the real and personal representatives of the lunatic, to be treated for the purpose of transmission as realty; but for other purposes the proceeds are to be considered as personalty, so that the same will be paid out of court to the husbands of married women, who were the real representatives, with their consent, as personalty, and without their executing a deed under the 3 & 4 Will. 4, c. 74. *Trevylyan, In re*, 31 L. J., Ch. 560; 10 W. R. 828.

—— —— **Land Acquired by Descent.**]—Proceeds of sale of a lunatic's land acquired by descent will not by virtue of ss. 124 and 135 of the Lunacy Regulation Act, 1853, be treated as land acquired by the lunatic by purchase. *Matson, In re, James* v. *Dickinson*, 66 L. J., Ch. 695; [1897] 2 Ch. 509; 77 L. T. 69.

—— **Transfer to Married Woman.**]—Under the 16 & 17 Vict. c. 70, ss. 124 and 125, a married co-heiress of a deceased intestate lunatic can consent in court to the payment of her share of the proceeds of the lunatic's real estate to her husband, and an acknowledged deed is unnecessary. *Wheeler, In re*, 4 De G. F. & J. 540; 8 Jur. (N.S.) 785; 6 L. T. 846.

—— **Sale of Stock-in-Trade.**] — Testator, having made his will, became lunatic, but no commission was sued out; his wife and friends disposed of his business and stock-in-trade, and invested the proceeds in the funds:—Held, that at his death the sum invested would pass to the legatee entitled to the stock-in-trade, and not to the residuary legatee. *Taylor* v. *Taylor*, 17 Jur. 583; 21 L. T. 213; 1 W. R. 198, 398.

—— **Contract — Purchase-money.**] — Where, before inquisition of lunacy, a person who was found a lunatic has made a purchase, with the approbation of his only son, the court will not change the disposition that has been made of this sum of money, but the purchase will stand. *Sergeson* v. *Sealey*, 2 Atk. 412; 9 Mod. 370.

**Ademption—Mortgage by Court—Will—Proviso in Mortgage Deed altering Effect of Will.**]—The court, under the powers of the Lunacy Regulation Act, mortgaged one of the lunatic's estates, and introduced a proviso that as between the lunatic, his heirs and devisees, the estate should be primarily liable for the mortgage debt. The lunatic had, before his lunacy, made a will, in which he had directed certain devised estates (not including the mortgaged estate) to be sold for payment of his debts:—Held, in the administration of his estate, that the proviso in the mortgage deed was not intended to alter the effect of the will, and that the mortgage debt must be primarily paid out of the devised estates. Quære, whether the court would have had the power to make a proviso altering the effect of the will. *Freeman* v. *Ellis*, 1 H. & M. 758; 3 N. R. 243.

—— **Specific Bequest of Shares—Sale by Order of Court.**]—A testator bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of the will he was found a lunatic, and by an order in the lunacy the shares were directed to be sold, and the proceeds were invested in consols:—Held, that as the provisions of the 16 & 17 Vict. c. 70, whereby the rights of owners of property sold by order of the Lord Chancellor in lunacy are preserved, extend only to land, the gift of income was adeemed by the sale, and the sum of consols fell into the residue. *Jones* v. *Green*, 37 L. J., Ch. 603; L. R. 5 Eq. 555; 16 W. R. 603.

—— A testator made a specific bequest of stock in the G. railway company. After the date of his will he was found a lunatic. Under an order in the lunacy, the stock was sold and the proceeds were invested in a sum of consols, which was carried to the credit of the lunatic to an account intituled "Proceeds of the sale of stock in the G. railway company." In an action for the administration of the testator's estate:—Held, that the specific legacy was adeemed by the sale in the lunacy, and that the consols therefore fell into the residue. Observations on *Jones* v. *Green* (L. R. 5 Eq. 555), and *Leeming, In re* (3 De. G. F. & J. 43). *Freer, In re, Freer* v. *Freer*, 52 L. J., Ch. 301; 22 Ch. D. 622; 31 W. R. 426.

A bequest of consols standing in the name of a testatrix at her death is not adeemed by a transfer of the same during her life into the name of the paymaster-general under an order in lunacy. *Wood, In re, Anderson* v. *City of London Mission*, 63 L. J., Ch. 772; [1894] 2 Ch. 577; 8 R. 817.

The bequest does not take effect upon consols by order of the court purchased on behalf of the lunatic testatrix, and which never stood in her name. *Ib.*

A sale by order of the court of a portion of stock in court, directed for payment of costs, was treated as a sale of part of the stock purchased as above-mentioned, so as not to injure the rights of the legatees. *Ib.*

**Election—Sale of Land for Payment of Mortgage—Surplus Money.**]—Under 11 Geo. 4 and 1 Will. 4, c. 65, authorising moneys to be raised by sales or mortgages of lunatics' estates, and providing that the lunatic's heirs, next of kin, &c., shall have the like interest in the surplus moneys so raised as they would have had in the estate if it had not been so dealt with, and that such moneys shall be of the same nature as the estate:—Held, that where the lunatic's heir had died also a lunatic and without having elected to take such surplus moneys as personalty, they were impressed with the character of realty. *Wharton, In re*, 5 De G. M. & G. 33; 23 L. J., Ch. 522; 18 Jur. 289; 22 L. T. 298; 2 W. R. 248.

## IX. LUNATIC IN MISCELLANEOUS RELATIONS.

### *a.* ADVOWSON.

The 28th section of the act 1 Will. 4, c. 65, confers no power to sell the right to the next presentation to a rectory of the advowson of which a lunatic is tenant in tail in possession, except for one of the purposes specified in the section. *Vavasour, In re*, 3 Mac. & G. 275 ; 20 L. J., Ch. 619.

### *b.* BANKRUPT.

**Act of Bankruptcy.**]—Semble, a lunatic cannot commit an act of bankruptcy by omitting to pay or give security. *Stamp, Ex parte, Spence, In re*, 1 De G. 345.

A judgment debtor not appearing to a summons issued under s. 76 of the Bankruptcy Act, 1861, the reason of his absence being that he was in confinement in a private lunatic asylum, was adjudicated bankrupt under s. 83, it appearing that he had whilst in confinement executed a trust-deed under s. 192. *Farr, Ex parte, Kulp, In re*, 10 L. T. 44.

**Commission in Bankruptcy — Defence.**]—Lunacy is no defence against a commission of bankruptcy, as it would not be so against an action. *Anon.*, 13 Ves. 590.

**Petition for Liquidation, by whom signed.**]—A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition. Semble, that in the case of a lunatic so found by inquisition, the court of lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf. *Cahen, Ex parte*, 10 Ch. D. 183 ; 39 L. T. 645 ; 27 W. R. 387—C. A.

**Bankruptcy Petition—Affidavit.**]—When the petitioning creditor is lunatic so found by inquisition, the affidavit verifying the petition may be sworn by the committee of the lunatic. *Brady, In re*, 19 L. R., Ir. 71.

**Leave to Committee to file Declaration of Insolvency.**]—Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the court will give leave to the committee in the name of the lunatic to file a declaration of insolvency, or to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f). *James, In re*, 53 L. J., Q. B. 575 ; 12 Q. B. D. 332 ; 50 L. T. 471—C. A.

**Leave to Committee to take Proceedings to annul Bankruptcy—Benefit of Lunatic.**]—The court in lunacy will not authorise the committee of a bankrupt lunatic to apply in the bankruptcy for payment to him of moneys of the lunatic which are in the hands of the trustee in bankruptcy, or to take proceedings to annul the adjudication, where such proceedings are likely to fail and would not be for the benefit of the lunatic. *Farnham, In re*, 65 L. J., Ch. 456 ; [1896] 1 Ch. 836 ; 74 L. T. 214 ; 44 W. R. 465 ; 3 Manson, 123 ; 60 J. P. 389—C. A.

**Leave to Committee to consent to Adjudication.**]—Leave given to the committee of the estate of a lunatic trader to consent to an adjudication in bankruptcy against the lunatic. *Lee, In re*, 23 Ch. D. 216 ; 48 L. T. 193 ; 31 W. R. 802.

**Jurisdiction of Judge in Lunacy.**]—Quære, whether a person found lunatic by inquisition can be adjudicated a bankrupt, otherwise than under the direction of the committee acting under the order of the judge in lunacy. Where a lunatic so found by inquisition was subsequently adjudicated a bankrupt, the lords justices, assuming that the adjudication was valid, and in exercise of the power given by ss. 117, 120 of the Lunacy Act, 1890, to dispose of the lunatic's property for his maintenance and otherwise, refused to hand over to the trustee in bankruptcy certain property of the lunatic in court which had been originally claimed by the committee, the wife of the lunatic, as a gift to her prior to the inquisition, but which gift was void under s. 47 of the Bankruptcy Act, 1883, by reason of its having been made within two years of the adjudication in bankruptcy. The gift being void, the property reverted to the donor, i.e. the lunatic, and as such it vested in the trustee subject to the jurisdiction of the judge in lunacy. *Sanguinetti* v. *Stuckey's Banking Co.* ([1895] 1 Ch. 176), approved. *Farnham, In re*, 64 L. J., Ch. 717 ; [1895] 2 Ch. 799 ; 12 R. 554 ; 73 L. T. 231 ; 3 Manson, 109—C. A.

**Contingent Interest in Fund—Concealment—Payment into Court—Transfer to Insolvency Account.**]—In 1854 a person entitled to a contingent future interest in a fund took the benefit of the Insolvent Act, but did not mention this interest in his schedule. In 1876 the contingent interest vested in possession. In the same year he was found lunatic, and shortly afterwards an order was made giving the holder of the fund liberty to pay it into court to the credit of the lunacy, and directing it to be invested and the income paid to the committee. Shortly afterwards the provisional assignee presented a petition in the lunacy, praying that the fund might be transferred to the credit of the insolvency, or that he might be at liberty to take proceedings in the chancery division for its recovery. The court ordered a transfer of the fund as prayed. *Hinds, In re*, 7 Ch. D. 26 ; 37 L. T. 768 ; 26 W. R. 193—C. A.

### *c.* AGENT OR ATTORNEY.

**Revocation of Power of Attorney.**]—A., a creditor of B. & C., gives D. a general power of attorney for the management of his affairs, dated 4th July, 1834, under which D. consents to an arrangement between B. & C. on the dissolution of their partnership, that C. should become solely responsible for A.'s debt ; that being still unpaid, C. becomes bankrupt, B. remaining solvent ; and D. proves the debt against the separate estate of C. After the fiat, A. is found to have been lunatic since 1st July, 1834. On petition to expunge, on the ground that D.'s adoption of C. as sole debtor was under a void power, and without authority, and that B. remained solvent, and therefore liable :—Held, that the proof was properly made ; lunacy is not per se a revocation of power of attorney. *Bradbury, Ex parte, Walden, In re*, Mont. & C. 625 ; 4 Deac. 202 ; 9 L. J., Bk. 7 ; 3 Jur. 1108.

### *d.* WITNESS.

**Competency.**]—A lunatic under confinement in a lunatic asylum is admissible as a witness if the judge considers him competent in point of

understanding, and to be aware of the nature and sanctity of an oath. *Reg.* v. *Hill*, 2 Den. C. C. 254; T. & M. 582; 20 L. J., M. C. 222; 15 Jur. 470.

A habeas corpus ad testificandum may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit shewing that he is not a dangerous lunatic, and that he is in a fit state to be brought up. *Fennell* v. *Tait*, 1 C. M. & R. 584; 5 Tyrw. 218; 3 D. P. C. 161.

—— **To make Affidavit.**]—The jurat of an affidavit sworn by a person suffering from monomania, and confined in a lunatic asylum, should state the fact that it was sworn in an asylum, otherwise it is irregular, and will be taken off the file. *Spittle* v. *Walton*, 40 L. J., Ch. 368; L. R. 11 Eq. 420; 24 L. T. 18; 19 W. R. 405.

Before the evidence of a lunatic, subject to insane hallucinations, can be received there must be an inquiry as to his mental condition. *Ib.*

*e.* INSURANCE.

**Policy of Insurance—Suicide of Lunatic.**]—A policy of insurance is not rendered void by the suicide of the assured while in a state of insanity. *Horn* v. *Anglo-Australian and Universal Family Life Insurance Co.*, 30 L. J., Ch. 511; 7 Jur. (N.S.) 673; 4 L. T. 142; 9 W. R. 359.

*f.* DOMICIL.

H., a Scotchman by birth, after a service of 40 years in India, became insane, and was sent to England on leave. He never recovered his faculties, and died in England:—Held, that his domicil was Anglo-Indian. *Hepburn* v. *Skirving*, 9 W. R. 764.

*g.* PAYMENTS TO.

**Payment out of Court on Lunacy of Plaintiff.**]—A defendant, being sued for a sum which he admitted to be due to the plaintiff, paid the money into court under a judge's order. The plaintiff, before and at the time of action and of the application, was suffering from temporary derangement, and an inmate of Bethlehem Hospital; but no commission of inquiry into the state of his mind had been issued, and no committee of his estate or person had been appointed. On application by his wife, the court ordered the money to be paid out to her or to the plaintiff's attorney in the action. *Gliddan* v. *Treble*, 9 C. B. (N.S.) 367; 30 L. J., C. P. 160. S. P., *Rock* v. *Slade*, 7 D. P. C. 22; 1 Arn. 346; 2 Jur. 993.

## X. INSANITY IN RELATION TO CRIME.

*See* CRIMINAL LAW.

## XI. ILL-TREATMENT OF LUNATICS.

*See* CRIMINAL LAW.

## XII. EVIDENCE OF INSANITY.

**Presumption, as to Sanity.**]—The ordinary presumption of sanity is removed by an inquisition finding a person to be of unsound mind; and, in the case of a contract subsequently entered into by him, the burthen of proof is shifted; but the finding, being usually ex parte, is not conclusive, and the court has jurisdiction (which, however, it will be slow in exercising) to arrive at a contrary conclusion without the aid of another party. *Hassard* v. *Smith*, Ir. R. 6 Eq. 429.

**Inquisition — Finding of Insanity — Lucid interval—Onus of Proof.**]—General lunacy being established, the proof is thrown upon the party alleging a lucid interval, and he must establish, beyond a mere cessation of violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act. *Hall* v. *Warren*, 9 Ves. 611; 7 R. R. 306.

—— **Presumption of Sanity destroyed—Third Parties.**]—Though the finding of a person's insanity by inquisition upon a commission of lunacy, is not binding on third parties, still it destroys the natural presumption in favour of sanity, and casts the burden of proving the person's sanity on the party alleging it. As to the difficulties in ascertaining a man's sanity, and the proper tests to be employed. *Snook* v. *Watts*, 11 Beav. 105; 12 Jur. 444.

—— **Not conclusive as to Date of Commencement.**]—An inquisition of lunacy is not conclusive evidence of the precise date at which the lunacy commenced. *Bradbury, Ex parte, Walden, In re*, Mont. & C. 625; 4 Deac. 202; 9 L. J., Bk. 7; 3 Jur. 1108.

—— —— **Leave to traverse—Primâ facie Evidence of Insanity rebutted.**]—An inquisition finding a person lunatic is primâ facie evidence of insanity, but where leave has been granted to traverse the same, this, in part, rebuts the evidence, and entitles a creditor to an issue to try the question of the party's sanity on a day on which a deed, subsequent to the finding, and objected to as invalid by reason of insanity, has been executed by the lunatic. *Elliot* v. *Luce*, 7 De G. M. & G. 475; 26 L. J., Ch. 821; 3 Jur. (N.S.) 597; 5 W. R. 465.

—— **Finding of Sanity—Not conclusive.**]—A commission of idiotcy and inquisition returned thereon, finding the party not to be of unsound mind, is not conclusive evidence of his sanity; but in this case the commission, inquisition, and return, together with a fine, præcipe, and concord, and caption of the said fine, and warrant of attorney, and the caption thereof, were held to be conclusive evidence of the sanity of Lord Ely to make a warrant of attorney and suffer a recovery, the issue upon his sanity being joined after his death, and the warrant of attorney and caption thereof, appearing to have been made, and acknowledged before the chief justice of the chancery bench at the time that the caption of the fine was taken and acknowledged by and before him, and the tenant to the præcipe, in said recovery being made, by fine levied by Lord Ely. *Hume* v. *Burton*, 1 Ridgw. 204.

The writ dum non fuit compos lies only for privies in blood, and not for privies in estate. *Ib.*, 232.

**Relative Value of Evidence.**]—Fits of mania extending for twenty years anterior to, and down to the year in which deeds were executed by a man found some years afterwards, by commission de lunatico, to have been all along insane are not an answer to a primâ facie case on an

issue as to his sanity at the time of executing the deeds. *Ferguson* v. *Borrett*, 1 F. & F. 613.

**Conduct before and after contract—Admissibility.**]—A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside:—Held, upon an issue whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff's conduct both before and after the signing of the contract, in order to shew that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger. *Beavan* v. *M'Donnell*, 10 Ex. 184; 23 L. J., Ex. 326.

**Partial Insanity.**]—A deed was executed by a person who at the time was insane upon particular subjects. Quære, whether the jury, being satisfied of the existence of the morbid feeling at the time of the execution of the deed, though not then called into activity, are at liberty to say, that as the lunatic was reasonable in all other respects his deed was valid. Quære, if a man is partially insane, and that partial insanity is never removed from his mind, is he capable of entering into solemn acts which he would not have entered into if the subject of his delusion had been touched upon. The acts of the parties to a particular instrument are properly to be taken into consideration of the question whether it was executed during a lucid interval. If a man has been insane and afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to shew that he was not as sound a man in his judgments as before his insanity. All that the law requires is, that a man should have possession of his reason so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect. *Creagh* v. *Blood*, 2 Jo. & Lat. 509; 8 Ir. Eq. R. 434.

**Hereditary Insanity.**]—Quære—How far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded. *Frere* v. *Peacocke*, 3 Curt. 664.

**Medical Opinion.**]—On a plea of insanity, at the time of making a contract, the opinion of the medical men who gave certificates on which the defendant was confined as insane, at or about the time, is only evidence for the jury, who must judge of the grounds on which it was formed. *Lovatt* v. *Tribe*, 3 F. & F. 9.

**Knowledge of Insanity.**]—Where the plaintiff himself, according to his own evidence, was in personal communication with the defendant at the time, that, in itself, is some evidence that the plaintiff knew of the insanity, supposing the jury find the fact of insanity established. *Ib.*

**Report of Chancery Visitors—Admissibility.**]—Sect. 186 of the Lunacy Act, 1890, provides that (1) the reports of the chancery visitors shall be filed and kept secret in their office, and shall not be open to the inspection of any person save the members of the board of visitors and the judge in lunacy, and such persons as he specially appoints; (2) all reports relating to any particular patient shall be destroyed on his death, &c. On the trial of a probate action, where the testatrix had been found of unsound mind on inquisition, a visitor stated that these reports had not been destroyed:—Held, that the reports must be treated as destroyed on the death of the testatrix, and could not be produced even on subpœna. Subsequently the visitors gave evidence of the state of mind of the testatrix at the times when their reports were made. *Roe* v. *Nix*, 62 L. J., P. 36; [1893] P. 55; 1 R. 472; 68 L. T. 26.

**Conflict of Evidence.**] — Where sanity is impeached, and the evidence is conflicting, the question is not whether the facts adduced in support of it are not in general indications of sanity, but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity, produced on the other side on which the onus lies. *Steed* v. *Calley*, 1 Keen, 620.

**Inspection of Lunatic.**]—Motion that a lunatic, who had recovered his understanding, might be inspected, and make a settlement of his estate. *Wright, Ex parte*, 1 Vern. 155.

**Existence of Delusions — Contract.**] — The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract. It is a question for the jury whether the delusion affected the disposition or contract. *Jenkins* v. *Morris*, 14 Ch. D. 674; 42 L. T. 817.

**Issue on Non compos mentis.**]—In an issue on non compos mentis, you may give particular acts of madness in evidence, and not general, only that he is insane. *Clark* v. *Periam*, 2 Atk. 340; 9 Mod. 346.

—— **Evidence of General Reputation in neighbourhood.**]—Evidence of the general reputation of the insanity of a person in the neighbourhood in which he resides, is inadmissible to prove that a person was cognisant of that fact. *Greenslade* v. *Dare*, 20 Beav. 284; 24 L. J., Ch. 490; 1 Jur. (N.S.) 294; 3 W. R. 220.

**Execution of Deed.**]—On a question whether a person was sane at the time of her executing a certain deed, witnesses cannot be asked whether the sister of the party be not insane. *Doe* d. *Mather* v. *Whitefoot*, 8 Car. & P. 270.

**Testator, Sanity of.**]—Upon a question as to the general sanity of a devisor, the treatment of the devisor by other persons is immaterial, unless there is some evidence of his conduct with respect to such treatment, and is admissible in evidence only as being explanatory of such conduct. *Doe* d. *Tatham* v. *Wright*, 6 N. & M. 132; 5 L. J., K. B. 124. *Wright* v. *Doe* d. *Tatham*, 7 A. & E. 313; 7 L. J., Ex. 340.

## XIII. LUNATIC ASYLUMS.

### *a.* PRIVATE.

**Previous to 14 Geo. 3, c. 40.**]—Before Geo. 3, c. 40, s. 1, private madhouses were not authorised by law, but the keepers were excused in their conduct when it was exercised properly. *Rex* v. *Coate*, Lofft, 73, 78.

A person put to superintend an unlicensed house for the reception of lunatics was liable to

the penalties of that statute, though he did not receive any of the profits of the establishment. *Budd* v. *Foulkes*, 3 Camp. 404.

**Deed—Undue Influence of Keeper.**]—A deed was set aside as obtained by fraud and undue influence, by a keeper of a house for lunatics, from a person under his care, as within the general principle arising from the relation of guardian and ward, attorney and client. *Wright* v. *Proud*, 13 Ves. 138.

**8 & 9 Vict. c. 100, s. 45.**]—The prohibition in 8 & 9 Vict. c. 100, s. 45, as to receiving insane persons into licensed houses or hospitals without such medical certificate as the act requires, is not general, but relates only to the keepers of licensed houses; the confinement of lunatics in all other cases being left as it was at common law. *Shuttleworth, In re*, 9 Q. B. 651; 2 New Sess. Cas. 470; 16 L. J., M. C. 18; 11 Jur. 41.

**Surgeon giving Certificate Improperly.**]—An indictment charged that a surgeon, knowingly, and with intention to deceive, signed a certificate required by 9 Geo. 4, c. 41, s. 30, without having visited and personally examined the patient, contrary to the statute; the jury negatived the intention to deceive, and found him guilty:—Held, that in the description of the offence the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law. *Rex* v. *Jones*, 2 B. & Ad. 611.

### *b.* Confinement and Restraint.

#### 1. Where Parties Dangerous.

**Right to Restrain.**]—In an action against two medical men, for having, with other persons, unlawfully entered the house of the plaintiff, and assaulted and imprisoned her therein, they pleading only not guilty, and leave and licence; and the case being that she had called them both in as her medical attendants, and had asked them to send a nurse, and that they, at the desire of her friends, sent not only a female nurse, but also a male attendant, who were both engaged by the plaintiff's friends, but to whom the defendants gave directions, and against whom the plaintiff alleged certain acts of violent restraint and coercion; the defence being that she was suffering under delirium tremens, and that there was no more restraint than necessary as a part of medical treatment:—Held, that if this was so, even assuming that the defendants were responsible for the acts of the attendants, there was a justification in law, had it been so pleaded. *Symm* v. *Fraser*, 3 F. & F. 859.

Any man may justify an assault, when it is to restrain the fury of a lunatic and prevent mischief. *Brookshaw* v. *Hopkins*, Lofft, 243.

At common law a medical man may justify measures necessary to restrain a dangerous lunatic. So also, if he is called in to attend a person suffering under delirium tremens, he may justify such measures as are reasonably necessary, either to cure him or to restrain him from doing mischief, so long as the fit lasts, or it is likely to return. *Scott* v. *Wakem*, 3 F. & F. 328.

**"Charged" with Crime in "Court" in India, but "not tried"—Removal to England.**]—By 14 & 15 Vict. c. 81, s. 1, if any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not be tried for such crime or offence on the ground of his being found to be of unsound mind, he may be removed to England in the manner prescribed by the act. A European British subject in India having been arrested for homicide, a district magistrate was informed of it, and went with witnesses to a private house in the presidency, where the accused was detained. On seeing him, and receiving medical testimony on oath as to his state of mind, the magistrate deemed him insane and unfit to be tried, and so reported to the government of the presidency. The government made an order under 14 & 15 Vict. c. 81, s. 1, for the removal of the prisoner to England. By virtue of the order he was brought in custody to England, and on his arrival a royal warrant was issued, under s. 2, for his reception into a lunatic asylum, where he was accordingly kept:—Held, that the prisoner was charged with a crime in a "court," and "not tried" on the ground of being "found" to be of unsound mind within the meaning of s. 1, and that his detention was lawful. *Maltby, In re*, 50 L. J., Q. B. 413; 7 Q. B. D. 18; 44 L. T. 711; 29 W. R. 678; 14 Cox, C. C. 609; 45 J. P. 681.

#### 2. Under Medical Certificates.

**Duty of Medical Man.**]—A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody, and confine him, unless he is satisfied from those statements that such a step is necessary to prevent some immediate injury from being done by the individual, either to himself or to other persons. *Anderdon* v. *Burrows*, 4 Car. & P. 210. *See* 5 Vict. c. 4, s. 3.

To an action for imprisonment of the plaintiff, a plea that he conducted himself as a person of unsound mind, and incompetent to take care of himself, and proper to be taken charge of and detained under due care and treatment; that two medical certificates had been given by persons authorised, according to the provisions of the 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96, certifying that he was of unsound mind and proper to be taken charge of and detained; that the defendant had notice of the certificates, and had reasonable and probable grounds for believing, and did believe them to be true; and that the plaintiff was of unsound mind; and that the defendant being his uncle, and a proper person to cause him to be taken in charge and detained, did for the causes aforesaid, cause him to be taken charge of and detained as a person of unsound mind, is a bad plea, inasmuch as at common law the defendant would be justified only if the plaintiff was actually insane at the time, which the plea did not allege, and the protection given by 8 & 9 Vict. c. 100, s. 99, to parties duly and bonâ fide acting under certificates and an order for confinement, does not extend to the party making the order. *Fletcher* v. *Fletcher*, 1 El. & El. 420; 28, L. J., Q. B. 134; 5 Jur. (N.S.) 678; 7 W. R. 187.

A medical man, who has merely signed a certificate, and has done nothing more towards causing the confinement of a lunatic, is not liable in trespass. Nor, if he has merely consulted another medical man who has signed the other certificate, and told him his own idea of the case, is he liable for causing the other to sign such certificate. But

if he signs such a certificate without taking due care and making due inquiries, he is liable for the consequences which ensue. And if on his own personal examination he is not satisfied, he is bound to make due inquiries. Nor is he the less liable for the want of such due care and inquiries because he has acted bonâ fide. *Hall* v. *Semple*, 3 F. & F. 337.

**Certificate—Production of.**]—The 8 & 9 Vict. c. 100, requires every person receiving a single lunatic into his or her care to obtain and transmit to the lunacy commissioners certain orders and certificates, which are upon receipt at their office entered and filed. In the books in which the receipt of such orders and certificates was entered no notice was found of any such having been received from the defendant. Notice was given to him to produce any orders or certificates he might have received, entitling him to take charge of the alleged lunatic:—Held, that although, as a general rule, a defendant must have his guilt proved, and not be called upon to establish his innocence, yet seeing that the proof was in the nature of a negative proof, and that, if he had received the documents and not transmitted them they would be in his possession and that after notice to produce them had been given he had not produced them, there was a sufficient case to go to the jury. *Reg.* v. *Harris*, 10 Cox, C. C. 541.

**8 & 9 Vict. c. 100, s. 90—"Lunatic"—Definition.**]—C. was placed in the house of a medical man as an invalid; the house not being licensed or registered for the reception of lunatic patients. C.'s mind was quite imbecile, and he allowed himself to be kept in a state of revolting filthiness; but it did not appear that he laboured under any delusion or mental aberration, nor was he subject to fits of frenzy or violence:—Held, that he was a lunatic within the meaning of 8 & 9 Vict. c. 100, s. 90, and that the medical man was liable to the charge of receiving C. to board and lodge in an unlicensed house. *Reg.* v. *Shaw*, 37 L. J., M. C. 112; 18 L. T. 583; 16 W. R. 913; 11 Cox, C. C. 109.

**Liability of Keeper.**]—Even assuming that a person is of sound mind when conveyed under proper authority to a lunatic asylum, it would not be illegal on the part of the keepers of the asylum to detain him until they had proper authority for his discharge. *Mackintosh* v. *Smith*, 4 Macq. H. L. 913.

### 3. Orders for Confinement.

**Effect of.**]—In justification for the detention or recapture by the proprietor or superintendent of a licensed house or registered hospital, or other authorised person, of a person who has been received into such asylum under an order, and certificates required by 8 & 9 Vict. c. 100, it is not necessary to aver that such person is a lunatic, as s. 99 affords a complete defence for such detention or recapture. *Norris* v. *Seend*, 3 Ex. 782; 18 L. J., Ex. 300; 13 Jur. 830.

Such order and certificates are equally a justification for taking a wife from her husband *Ib.*

A return to a habeas corpus, directing a keeper of a lunatic asylum to bring up the body of R. F., certified that he was, on a certain day, received under 2 & 3 Will. 4, c. 107, and that on the day and year aforesaid, the keeper received an order and medical certificates, in the form directed by that act (setting them out). It then further certified, that, on the 22nd November, 1845, an order and two medical certificates, under 8 & 9 Vict. c. 100 (setting them out), were delivered to the keeper, and concluded, "that R. F. is now detained under our custody, under and by virtue of the last-mentioned act of parliament":—Held, that the return was sufficient under 2 & 3 Will. 4, c. 107, as it sufficiently appeared that the order and certificates returned were received at the same time with the lunatic, and that they were those under which he was received. *Fell, In re*, 3 D. & L. 373; 15 L. J., M. C. 25.

The 8 & 9 Vict. c. 100, s. 1, which repeals the 2 & 3 Will. 4, c. 107, leaves orders made under the latter act so far valid as to amount to a justification of a detainer in an asylum. *Ib.*

**16 & 17 Vict. c. 96, s. 4, is Compulsory.**]—The 16 & 17 Vict. c. 96, s. 4, which enacts that no person (not a pauper) is to be received as a lunatic into any licensed house or hospital without the medical certificate according to the form in schedule A, No. 2, of two persons, being physicians, surgeons or apothecaries, is not merely directory, but compulsory. *Reg.* v. *Pinder*, *Greenwood*, *In re*, 24 L. J., Q. B. 148; 1 Jur. (N.S.) 522.

It appeared upon return to a habeas corpus, that the certificates, under which a person had been received into a private asylum as a lunatic, omitted to state the number of the street and the number of the house where the examination took place, in accordance with the form in schedule A, No. 2; and it further appeared by affidavit that the examination did in fact take place in a house in a street, and that the alleged lunatic was not dangerous either to the public or himself:—Held, that the certificates were defective in a material particular, and the lunatic was ordered to be discharged from custody. *Ib.*

**Order for Reception—Alteration of Order—Order for Discharge.**]—The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind under an order signed by the plaintiff's husband, and containing a statement of questions and answers concerning the plaintiff. To the question "Age?" the answer was "Fifty." To the question, "Whether first attack?" the answer was "For the last twenty years has been subject to what is termed hysteria." To the question, "Age (if known) on first attack?" the answer was "Thirty." To the question, "When and where previously under care and treatment?" the answer was, "During this period of twenty years has been constantly under treatment." A few days after the plaintiff had been received into the asylum the last answer was altered by adding to it the words "For hysteria" by several doctors whose names were given. No copy of the order as so altered was sent to the commissioners, nor did they sanction the alteration. Afterwards the plaintiff's husband wrote a letter to the defendant begging him to discharge the plaintiff "as soon as you may think it advisable." Notwithstanding this letter the defendant detained the plaintiff for a considerable time. The plaintiff having brought an action against the defendant for maliciously and without reasonable and probable cause assaulting and imprisoning her, the defendant relied upon 8 & 9 Vict. c. 100, ss. 99, 105:

—Held, that the answers were a sufficient compliance with the requirements of 16 & 17 Vict. c. 96, s. 4, and schedule A, No. 1; that the alteration not being of a material part of the order did not invalidate the order; that the letter written by the plaintiff's husband to the defendant was not an order of discharge within the meaning of 8 & 9 Vict. c. 100, s. 72; and that there was no evidence for the jury in support of the plaintiff's case. *Lowe* v. *Fox*, 56 L. J., Q. B. 480; 12 App. Cas. 206; 56 L. T. 406; 36 W. R. 25; 51 J. P. 468—H. L. (E.)

**Detention under Reception Order—Application for Order of Discharge—Discretion of Lunacy Commissioners to make Order.**]—Where an application is made to the commissioners in lunacy for an order to discharge a patient detained under a reception order, the commissioners have a discretion under s. 49 of the Lunacy Act, 1890, as to making such order, and are not bound by the certificate of two medical practitioners that in their opinion the patient may, without risk or injury to himself or the public, be discharged; and where they do not agree with the opinion of such medical practitioners, they cannot be compelled by mandamus to issue an order of discharge. *Reg.* v. *Lunacy Commissioners*, 66 L. J., Q. B. 387; [1897] 1 Q. B. 630; 76 L. T. 353; 45 W. R. 505; 61 J. P. 278.

**Clergyman issuing Order.**]—The clergyman of a parish in which a lunatic is living, who has had opportunities of observing his conduct, is competent to issue an order under 8 & 9 Vict. c. 100, s. 45, for his admission into an asylum and detention there. *Shuttleworth, In re*, 2 New Sess. Cas. 470; 9 Q. B. 651; 16 L. J., M. C. 18; 11 Jur. 41.

In such an order, it is not imperative that all the particulars enumerated in the appendix, schedule (B), to the form of the order for receiving a lunatic into an asylum, should be set out, if the act is substantially complied with. *Ib.*

The form of a medical certificate given in schedule (C) is directory only, and an equivalent will suffice. *Ib.*

**On what Grounds given.**]—A general statement in a certificate that a lunatic "labours under delusions of various kinds, and is dirty and indecent in the extreme," is a sufficient statement, within s. 16, of the fact from which a medical man forms his opinion of existing insanity; so also is his statement that he forms his opinions from conversations with the lunatic, without describing their purport. *Ib.*

**Reception of Lunatics in Unlicensed House—Honest Belief Immaterial.**]—The defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above act, or under any previous act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic:—Held, by the court (Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Stephen, JJ.), that such belief was immaterial, and that the conviction was right. *Reg.* v. *Bishop*, 49 L. J., M. C. 45; 5 Q. B. D. 259; 42 L. T. 240; 28 W. R. 475; 14 Cox, C. C. 404; 44 J. P. 330.

#### 4. Release on Habeas Corpus.

A person may be discharged from a madhouse by habeas corpus. *Rex* v. *Turlington*, 2 Burr. 1115.

But where it appeared that a person confined was a lunatic, and not fit to be produced in court, and that the relations were applying for a commission of lunacy, the court enlarged the time for making a return to a habeas corpus, directed to a keeper of a private madhouse. *Rex* v. *Clarke*, 3 Burr. 1362.

If an alleged lunatic is detained under an improper or invalid certificate, he will be discharged on a writ of habeas corpus, on the ground that the detention is illegal unless it is shewn that it would be injurious to himself or others to set him at liberty. *Reg.* v. *Pinder, Greenwood, In re*, 24 L. J., Q. B. 148; 1 Jur. (N.S.) 522.

A rule having been obtained for a habeas corpus to bring up a lunatic confined in an asylum in this country under Irish medical certificates; the court discharged the rule with costs, there being no evidence to shew that the party promoting the application was duly authorised by the lunatic. *Child, Ex parte*, 15 C. B. 238.

A lunatic might be brought up by habeas corpus from St. Luke's Hospital, to be surrendered in discharge of his bail. *Pillop* v. *Sexton*, 3 Bos. & P. 550.

When all reasonable efforts have been made to effect personal service of a writ of summons on a lunatic in confinement in an asylum:—Semble, that unless the lunatic be in such a state that personal service of a writ of summons may injuriously affect his health, the court will grant a writ of habeas corpus to bring up the body of said lunatic. *Ridgway* v. *Cannon*, 2 W. R. 473.

#### 5. Maintenance.

**Paid by Union for long Period—How far an inference that Order had been made by Justices.**]—The keeper of a private asylum received an insane prisoner, by virtue of a warrant of the secretary of state, under 3 & 4 Vict. c. 54, and the guardians of a union, to which the prisoner was chargeable during thirteen years, paid for maintenance a certain weekly sum, which was a reasonable sum in that behalf:—Held, that no inference could be drawn, either that there had been an order of justices under 3 & 4 Vict. c. 54, ss. 2, 3, for payment of that sum, or that an arrangement had been made to pay that sum, or a reasonable sum, so long as the lunatic should be kept. *Pegge* v. *Lampeter Union*, 43 L. J., C. P. 181; L. R. 9 C. P. 373; 31 L. T. 132; 22 W. R. 882—Ex. Ch.

### XIV. PUBLIC ASYLUMS.

#### *a.* GENERALLY.

**Joint Asylum—County and Borough—Agreement by Borough—Transfer of Liability.**]—A borough situated in the county of S. entered into an agreement with the justices to pay an annual rent for the privilege of using an asylum, the property of the county, such agreement providing that on the termination of the arrange-

ment the borough should not be entitled to any right, claim, or interest in the asylum, and should not, whilst the arrangement subsisted, contribute towards the expenses of the asylum. The borough when the Local Government Act, 1888, came into operation had a quarter sessions, with a population of less than 10,000 :—Held, that the liability of the borough under the agreement to provide for the maintenance, management of, and other dealings with the joint asylum, was not extinguished, but was transferred under s. 38, sub-s. 1, of the Local Government Act, 1888, from the borough to the county council of the county of S., subject to the agreement entered into. *Salop County Council, In re*, 65 L. T. 416 ; 56 J. P. 213.

**Chaplain—Right to Dismiss.**]—By 9 Geo. 4, c. 40, ss. 30 and 32, the visiting justices have the power of appointing and dismissing the chaplain of the asylum. *Reg.* v. *Middlesex Lunatic Asylum JJ.*, 2 G. & D. 300 ; 2 Q. B. 433 ; 6 Jur. 682.

**—— Retiring Allowance—Right to.**]—A chaplain of a lunatic asylum, appointed under the Lunatic Asylums Act, 1853, performed the duties of his office in the asylum, but did not reside therein or give his whole time to the duties of his office. He wished to retire on a superannuation allowance, and such allowance was granted by the visitors, but the county council refused to pay the same, on the ground that, as the chaplain did not reside in the asylum or give his whole time to his duties therein, though he might be an officer of the asylum, he was not an officer in the asylum, and therefore not entitled to a pension within the 57th section of the act :—Held, that it was not necessary for the purpose of receiving a superannuation allowance that the chaplain should reside in the asylum, or give his whole time to the duties of his office therein, that there was no distinction between an officer of, and an officer in, the asylum, and that, as the chaplain performed his duty in the asylum, he was an officer in the asylum, and therefore entitled to a superannuation allowance, if the visitors in their discretion granted it. *Reg.* v. *Hereford County Council*, 63 L. T. 245 ; 38 W. R. 775 ; 55 J. P. 72.

**Sale of Land for—Approval of Quarter Sessions.**]—A contract for the sale of land to the committee of visitors of a lunatic asylum may be approved of by the court of quarter sessions before being actually signed by the parties, if it can be identified as the contract which was afterwards entered into. *Devenish* v. *Brown*, 26 L. J., Ch. 23 ; 2 Jur. (N.S.) 1043 ; 4 W. R. 783.

The 16 & 17 Vict. c. 97, s. 36, incorporating the Lands Clauses Act, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, enables parties having limited interests to contract with the committee of visitors for the sale of land although the committee of visitors has no compulsory powers of purchasing. *Ib.*

**Jurisdiction of Justices—Personal Examination by Justices of alleged Lunatic.**]—In order to give two justices jurisdiction to make an order under s. 68 of the Lunatic Asylums Act, 1853, for the reception of a person into a lunatic asylum as a lunatic who is not a pauper, and not wandering at large, but who is not under proper care and control, it is not necessary that they should examine such person in the presence of the medical man whom they have called to their assistance, nor that the examination should be made with the knowledge of the alleged lunatic, so that he should have the opportunity of explaining, if he could, what might otherwise be signs of insanity. Though the examination must not be a sham, yet if it be made by the justices bonâ fide for the purpose of satisfying themselves of the sanity or insanity of the person examined it is sufficient, and their order is not without jurisdiction because the examination lasted only four or five minutes and was made at the door of the carriage in which the alleged lunatic was seated with his attendants preparatory to his being taken to the asylum. *Reg.* v. *Whitfield*, 54 L. J., M. C. 113 ; 15 Q. B. D. 122 ; 53 L. T. 96—C. A. Reversing 49 J. P. 230.

Where the person deemed to be a lunatic is examined by two justices at his place of abode or elsewhere, the 68th section requires that one of such two justices must already have had, as a condition precedent to the vesting of the jurisdiction of the justices, either an information upon oath, or private or personal knowledge of his own as to the insanity of such person. Per Coleridge, C.J. *Ib.*

**Committee of Visitors—Profits arising from Management.**]—The committee of visitors of a lunatic asylum, built and managed under the Lunatic Asylums Act, 1853 (repealed), had in their hands a sum of money, being the excess of receipts over the costs incurred in maintaining lunatics under their care :—Held, that the guardians of the several unions in the county had no claim to these funds, but that the county council were entitled to them under s. 64 of the Local Government Act, 1888. *Proctor* v. *Cheshire County Council*, 56 J. P. 532.

**—— Contract by — Action against Clerk.**]—By 8 & 9 Vict. c. 126, s. 17, a select number of justices for a county or borough, called the "committee of visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c., and by s. 16 they were enabled to sue and be sued in the name of their clerk :—Held, that an action might be maintained against the committee of visitors in the name of their clerk in respect of a contract so entered into by them, although the plaintiff might have no means of enforcing his judgment when obtained. *Kendall* v. *King*, 9 C. B. 483 ; 25 L. J., C. P. 132 ; 4 W. R. 389.

**Expenses of Pauper Lunatics — Parochial Rates on Asylum Buildings.**]—The expression "the expenses of maintenance and other expenses of each pauper lunatic in the asylum," in s. 283 of the Lunacy Act, 1890, includes the payment of parochial and other rates charged upon the buildings of the asylum, and payment of such rates may lawfully be made out of the maintenance fund of the asylum. *Reg.* v. *Dolby*, 61 L. J., Q. B. 809 ; [1892] 2 Q. B. 301 ; 67 L. T. 296 ; 56 J. P. 599.

**Doctor giving Certificate—Duty of Relieving Officer.**]—The effect of s. 20 of the Lunacy Act, 1890, is to vest an absolute discretion in the constable, relieving officer, or overseer, with regard to the duty imposed upon them by that section. Therefore, where the plaintiff was taken by a relieving officer to an infirmary upon

receiving a certificate from a doctor, the doctor was not liable to the plaintiff for negligence in giving the certificate. *Thompson* v. *Schmidt*, 56 J. P. 212—C. A.

**Person Violent and Dangerous—Removal to Workhouse—Right of Guardians to recover.**]—A person suffering from delirium tremens became violent in his own house, used threats and broke the windows and furniture; a relieving officer of the union was sent for who ordered his removal to the workhouse where he was kept for some days. He was then examined by a doctor and brought before the magistrates as a lunatic, but as the magistrates held that he was not a lunatic he was discharged. Certain expenses were incurred by the guardians in respect of these services:—Held, that, apart from the lunacy acts, there was a common law liability upon such person to repay to the guardians the expenses so incurred, and that the guardians therefore could recover such money as necessaries expended by them. *West Ham Union* v. *Pearson*, 62 L. T. 638; 54 J. P. 645.

*b*. As to Rates—*See* Rates and Rating.

XV. PAUPER LUNATICS.

*See* Poor Law (Pauper Lunatics).

W. I. C.

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## MACHINERY.

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**Distraining.**]—*See* Distress.

**Taking in Execution.**]—*See* Execution.

**Destroying.**]—*See* Criminal Law.

**Removing.**]—*See* Fixtures.

**Rateability of.**]—*See* Rates and Rating.

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## MAGISTRATE.

*See* JUSTICE OF THE PEACE.

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## MAINTENANCE.

**Of Suits.**]—*See* Champerty.

**Of Infants.**]—*See* Infant—Trust.

**Of Wife.**]—*See* Husband and Wife.

**Of Lunatic.**]—*See* Lunatic.

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## MALICIOUS PROCEDURE AND FALSE IMPRISONMENT.

A. False Imprisonment.

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### A. FALSE IMPRISONMENT.

#### 1. Imprisonment in General.

**What is**].—The forcibly preventing a party from proceeding in a particular direction, e.g. along a public footway, is not an imprisonment in law. *Bird* v. *Jones*, 7 Q. B. 742; 15 L. J., Q. B. 82; 9 Jur. 870. See *Wright* v. *Wilson*, 1 Ld. Raym. 739.

In an action for false imprisonment proof must be given of circumstances, from which the judge and jury may decide whether there was or was not a restraint or a detention of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew that the defendant, at a police-office, stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart. *Cant* v. *Parsons*, 6 Car. & P. 504.

The merely giving a person in charge to a peace officer, where the officer never takes the person of the defendant into custody, is not an imprisonment which will support an action. *Simpson* v. *Hill*, 1 Esp. 431.

It is an imprisonment where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him. *Grainger* v. *Hill*, 4 Bing. (N.C.) 212; 5 Scott, 561; 7 L. J., C. P. 85. S. P., *Whalley* v.

*Pepper*, 7 Car. & P. 506; *Bristow* v. *Heywood*, 1 Stark. 48; 4 Camp. 213.

If, whilst A. is unlawfully imprisoned by B., C. commits an assault upon him, C. is guilty of the false imprisonment as well as B. *Boyce* v. *Douglas*, 1 Camp. 60.

Voluntarily going with a constable into whose charge a person has been given, is sufficient to support an action for false imprisonment. *Chinn* v. *Morris*, 2 Car. & P. 361. S. P., *Peters* v. *Stanway*, 6 Car. & P. 737.

So also where the constable says, "You must go with me," and the person voluntarily goes. *Pocock* v. *Moore*, 1 Ry. & M. 321.

And where an attorney's clerk accompanied a creditor to his debtor, and pretended he was a bailiff's officer, whereby the debtor went away with them not willingly but supposing they had power to compel him, this was held a sufficient arrest to support an action for false imprisonment. *Wood* v. *Lane*, 6 Car. & P. 774.

Plaintiff appeared before defendant, a magistrate, to answer the complaint of A. for unlawfully killing his dog. Defendant advised a settlement, but as the plaintiff declined to accede to this the defendant threatened to convict him under the Trespass Act. The defendant afterwards called in a constable and said, "Take this man out and see if they settle the matter; if not bring him in again as I must proceed to commit him under the act." The plaintiff went out and settled the matter by paying a sum of money:—Held, that this was an assault and false imprisonment. *Bridgett* v. *Coyney*, 1 M. & Ry. 211; 6 L. J. (o.s.) M. C. 42; 31 R. R. 316.

**Bonâ fide Mistake of Law—Acting in Discharge of Public Duty.**]—An officer in command of military cantonments, having general control of the police in the absence of the cantonment magistrate, believing the appellant to be, or to be likely to become, a dangerous lunatic, directed two medical officers to examine him, and placed a guard over him, until they could decide on the case. The medical officers reported that the appellant was perfectly sane:—Held, that as the conduct of the officer was not authorised by law, the fact that he acted in perfect good faith in the supposed discharge of a public duty, and on a bonâ fide belief that the appellant was dangerous, did not prevent his being liable for damages at the suit of the appellant. *Sinclair* v. *Broughton*, 47 L. T. 170.

**Arresting Witness.**]—No action lies against the sheriff or his officer for arresting a person attending court as a witness, although it is alleged that he knew that he was privileged, and arrested him maliciously. *Magnay* v. *Burt*, D. & M. 652; 5 Q. B. 381; 7 Jur. 1116—Ex. Ch. And see *Stokes* v. *White*, 4 Tyr. 186; 1 C. M. & R. 283; 3 L. J., Ex. 321.

**Detaining Person converting Chattel.**]—The plaintiff, having wrongfully in his possession a chattel of the defendants, and being about to remove it from their premises and convert it to his own use, they demanded it from him, and, on his refusal to give it up, laid hands on him and detained him on their premises, in order to prevent his carrying away and converting the chattel; doing no more, and detaining the plaintiff no longer than was necessary:—Held, that the detention of the plaintiff was illegal. *Harvey* v. *Mayne*, Ir. R. 6 C. L. 417.

**Continuance of False Imprisonment.**] — A plaintiff issued a plaint in a county court for false imprisonment, with a notice appended that he did not claim for malicious prosecution. It was proved at the trial that he lodged at the defendant's; that the defendant had removed the plaintiff's goods on a claim of money owing; that the plaintiff broke open a door of a room in the house to get them, upon the defendant's wife refusing to give them up: that she gave him in charge; that at the police-station the defendant signed the charge-sheet, on the police saying that everything must be on his responsibility; and that the plaintiff was kept in charge, taken before justices, and discharged. The judge nonsuited, on the ground that though there was evidence of false imprisonment till the signing of the charge, the case then became one of malicious prosecution, over which he had no jurisdiction, and the whole evidence was inseparable, and had been heard by the jury:—Held, that the false imprisonment lasted till the plaintiff was before the magistrates, and that the judge should not have nonsuited the plaintiff, but told the jury to exclude from their consideration anything that then occurred. *Austin* v. *Dowling*, 39 L. J., C. P. 260; L. R. 5 C. P. 534; 22 L. T. 721; 18 W. R. 1003.

In an action for false imprisonment, it appeared that the plaintiff was given into custody by the defendant on a charge of stealing, and was taken before a magistrate, who, after hearing the evidence of the plaintiff in support of the charge, remanded him:—Held, that the remand being the act of the magistrate, the defendant was only liable in damages for the trespass and imprisonment in taking the plaintiff before the magistrate. *Lock* v. *Ashton*, 12 Q. B. 871; 18 L. J., Q. B. 76; 13 Jur. 167.

**Direction to Jury.**] — The defendant, the owner of a beerhouse, placed the plaintiff therein to carry on the business as his servant at weekly wages, under an agreement for a month's notice to determine the service. Having given him a week's notice, the defendant made up the account, and required the plaintiff to pay him the balance; and on his refusal to accede to this request, on the ground that he had not received the stipulated month's notice, the defendant brought in a superintendent and a sergeant of police, one of whom, on the plaintiff's attempting to go upstairs, refused to permit him to do so, and ultimately only allowed him to go accompanied by an officer. After some further altercation about the money, and the plaintiff's again refusing to hand it over at the request of the superintendent, the latter asked the defendant if he should take him; it did not appear what answer the defendant made, but the officer took the plaintiff into custody, and entered a charge of embezzlement against him at the station-house, and afterwards carried him before the magistrates, by whom he was discharged. In an action for the false imprisonment, the judge told the jury first that "to constitute an imprisonment it was not necessary that the person should be locked up within four walls, but that if he was restrained in his freedom of action by another, that was an act of imprisonment, and that the way in which the plaintiff had been constrained in his own house, and the restraint put upon his person by refusing him permission to leave the room and go upstairs in his own house, was in itself an imprisonment, independent of his being

conveyed before a magistrate"; secondly, "that if they found the defendant was the moving party in causing the imprisonment, he was responsible for it"; and, thirdly, "that the plaintiff, as tenant or as lawful occupier, under an agreement not then terminated, of the premises, was not legally liable to be ejected by compulsion and without notice, and that if he refused to leave his house, the defendant could only eject him by adopting the proper legal proceedings to obtain possession, and that there was no evidence whatever to support or justify the charge of embezzlement." The jury having found for the plaintiff:—Held, that although the latter part of the summing up (which seemed to assume that there was a tenancy, or quasi tenancy) was somewhat inaccurate, it did not amount to a misdirection in point of law. *Warner* v. *Riddiford*, 4 C. B. (N.S.) 180.

**Prolonging Imprisonment.**]—The plaintiff was in custody under an attachment from the court of chancery, for nonpayment of costs to the plaintiff in a suit in equity, the defendant in this action. After the costs were paid, the solicitor of the plaintiff in equity (the now defendant) refused to give an order to the sheriff to discharge the plaintiff, saying, "Let him go to the court to purge his contempt." The judge in equity discharged him on motion:—Held, that no action was maintainable for refusing to give the order to the sheriff, and thereby prolonging plaintiff's imprisonment, except on proof of express malice. *Moore* v. *Gardner*, 16 M. & W. 595.

**Removing while in Prison.**]—The removal of a person from one part of a prison to another, in which he is not legally confined, is a trespass. *Cobbett* v. *Grey*, 4 Ex. 729; 19 L. J., Ex. 137. See also *Bint* v. *Lavender*, 1 Car. & P. 659.

**Governor of Prison—Protection of Warrant.**]—The governor of a prison is protected in obeying a warrant of commitment valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant. *Henderson* v. *Preston*, 57 L. J., Q. B. 607; 21 Q. B. D. 362; 36 W. R. 834; 52 J. P. 820—C. A. Affirming 59 L. T. 334.

2. Giving in Charge of the Police.

**On Breach of the Peace.**]—The plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; the defendant came into the shop during the affray, which continued for a short time after he came; the defendant then requested the plaintiff to leave the shop quietly; but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house:—Held, that he was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray. *Timothy* v. *Simpson*, 1 C. M. & R. 757; 5 Tyr. 244; 6 Car. & P. 499; 4 L. J., Ex. 81.

A man and his wife refused to go out of the shop of a baker, and continued to abuse him in relation to an alleged overcharge, until a crowd collected round the shop, and obstructed the public passage:—Held, that the baker was justified in giving the man and his wife into custody, and that their conduct amounted to a breach of the peace. *Cohen* v. *Huskisson*, 2 M. & W. 477; M. & H. 150; 6 L. J., M. C. 133.

While a clergyman after performing the communion service was walking from the table to the vestry a person rose in the church and read a notice. A constable at the minister's request took the person out of the church, and detained him until he promised to appear before a magistrate next morning, when he did appear and was discharged:—Held, that the constable was not justified in detaining the person until he was taken before a magistrate. *Williams* v. *Glenister*, 2 B. & C. 699; 4 D. & R. 217; 2 L. J. (o.s.) K. B. 143; 26 R. R. 525.

Proof of annoyance and disturbance by a person present at a meeting, such as crying, "Hear, hear," and putting questions to a speaker, and making observations on his statement, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such course of proceeding, it must be shown, that what was done amounted to a breach of the peace. *Wooding* v. *Oxley*, 9 Car. & P. 1.

If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuses to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and if it is seen by a peace officer, he is justified in taking the person into custody. *Howell* v. *Jackson*, 6 Car. & P. 723.

So, if a person, without committing any assault, makes such noise or disturbance in a public-house as would create alarm, and disquiet the neighbourhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace officer, provided that this had occurred in the presence of the officer. *Ib.*

A plea, justifying an arrest for an affray, without warrant, ought to contain a direct averment that there was an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal. *Price* v. *Seeley*, 10 Cl. & F. 28.

A person is justified in giving in charge, and a constable in arresting, without warrant, a party who has been guilty of a breach of the peace, if there are reasonable grounds for apprehending its continuance or immediate renewal, but not otherwise; and the circumstances from which such an inference is raised are for the jury. *Baynes* v. *Brewster*, 2 Q. B. 375; 1 G. & D. 669; 11 L. J., M. C. 5; 6 Jur. 392. S. P., *Ingle* v. *Bell*, 1 M. & W. 516; 5 L. J., M. C. 85.

To an action for false imprisonment, a plea that the plaintiff came to the door of the defendant's house, and with violence attempted to enter against his will, and wilfully and wantonly rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance of the defendant, and against the peace of the queen, and (after request to cease) continued making such noise, without any lawful excuse; and thereupon the defendant, in order to preserve the peace, and render good order and tranquillity in his house, gave the plaintiff in charge to a

policeman :—Held, bad, as not shewing that, at the time the plaintiff was given in charge, he was committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed. *Grant* v. *Moser*, 5 Man. & G. 123 ; 6 Scott (N.R.) 46 ; 2 D. (N.S.) 923 ; 12 L. J., C. P. 146 ; 7 Jur. 854.

—— **Chairman of Meeting — Direction to remove Persons creating Disturbance.**]—Where at a public meeting in a hall a disturbance was being created in the gallery near which the plaintiff was standing, and the defendant, who was chairman of the meeting, said: "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front," whereupon a man and two policemen seized the plaintiff, who was making no disturbance, and dragged him over some benches, whereby he was injured. There was nothing to shew the position or duty of those who seized the plaintiff, or whether any instructions as to keeping order had been given by the defendant before the act complained of :—Held, that there was no evidence of any liability on the part of the defendants as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff ; but only a particular direction as to a particular matter, and that the words used by the defendant did not authorise the officers to act upon their judgment as to who were the persons making the disturbance. *Lucas* v. *Mason*, 44 L. J., Ex. 145 ; L. R. 10 Ex. 251 ; 33 L. T. 13 ; 23 W. R. 924. See also *Wooding* v. *Oxley*, col. 706.

**Trespasser.**]—A person who is in a house in such circumstances as amount to a continuing civil trespass may be removed, but unless he is actually committing a breach of the peace he cannot lawfully be given into custody ; and if he is given into custody he may maintain an action for false imprisonment. *Jordan* v. *Gibbon*, 8 L. T. 391. S. P., *Rose* v. *Wilson*, 1 Bing. 353 ; 8 Moore, 362 ; 2 L. J. (O.S.) C. P. 14.

An occupier of land found a man (employed by the owner) felling trees into the land in such a way as to damage growing barley ; and after again and again desiring him to desist, gave him into custody for wilfully damaging the barley. In an action of trespass, the man having recovered 20*l.*, and the judge having declined to certify for costs, a suggestion was entered to deprive him of costs, on the ground that the defendant was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 22. The judge on the trial of the suggestion, having left it to the jury to say whether the defendant really and reasonably believed he was acting according to law, and they having found in the affirmative :—Held, that whether the question was for the judge or the jury, the verdict was right. *Norwood* v. *Pitt*, 5 H. & N. 801 ; 29 L. J., Ex. 127 ; 6 Jur. (N.S.) 614.

A party who trespassed upon land, under a fair and reasonable supposition that he has a right to do the act complained of, was not liable to be apprehended under 7 & 8 Geo. 4, c. 30, s. 28, by the owner of the property, although the latter had reason to suppose the party to be within the act. *Parrington* or *Pennington* v. *Moore*, 2 Ex. 223 ; 17 L. J., M. C. 117.

**Liability of Company for Acts of Servants—Scope of Employment.**]—Sect. 52 of the Tramways Act, 1870, which enables any officer or servant of the promoters or lessees of any tramway to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeeer. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money : —Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston* v. *London Tramways Co.*, 36 W. R. 367. Affirmed 32 S. J. 557—C. A.

A passenger on a tramway tendered a half sovereign to the conductor of a car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police :—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong* v. *South London Tramways Co.*, 1 Cab. & E. 316 ; 48 J. P. 329.

### 3. Arresting on Suspicion.

**With Warrant.**]—If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant is not liable for that imprisonment, and that even although the magistrate had no jurisdiction. *Brown* v. *Chapman*, 6 C. B. 365 ; 17 L. J., C. P. 329 ; 12 Jur. 799.

A defendant gave information before a magistrate, upon which the plaintiff was taken up on a warrant, and brought before the magistrate. After the charge was dismissed for the time, and the plaintiff liberated on his promise to appear at a future day, the defendant stated that he had another charge, of forgery, against the plaintiff, who was retiring, but was again put to the bar :—Held, that trespass was not maintainable. *Barber* v. *Rollinson*, 1 C. & M. 330 ; 3 Tyr. 267 ; 2 L. J., Ex. 101.

The defendant having charged the plaintiff with felony, the plaintiff was taken up for it under a justice's warrant. At the hearing before the justice, the plaintiff was discharged on his promise to appear again in a week, upon which the defendant said he had another charge of forgery against him. The plaintiff was stopped by an officer and again put to the bar, but dismissed on a similar promise :—Held, that his remedy against the defendant was in trespass. *Ib.*

Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant on which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case is one in which the magistrate had no authority to act. *West* v. *Smallwood*, 3 M. & W. 418 ; 6 D. P. C. 580 ; 7 L. J., Ex. 144.

—— **Issued in another County.**]—Knowledge by the police that a warrant has been issued for the arrest of a particular person for felony constitutes a sufficient ground of reasonable suspicion that a felony has been committed by such person so as to authorise the police to arrest him ; and if the warrant has been issued at a distance

from the place where such person is to be found, the police are entitled to bring him before a justice having jurisdiction in the place where the arrest is made and obtain a reasonable remand until the warrant shall arrive and be backed by the proper authorities. *Creagh* v. *Gamble*, 24 L. R., Ir. 458.

—— **Against whom.**]—In an action by A. against B. for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue. *Hoye* v. *Bush*, 2 Scott (N.R.) 86; 1 Man. & G. 775; 10 L. J., M. C. 168.

—— **Excess of Violence.**]—Where in an action against the serjeant-at-arms of the house of commons, for forcibly and with the assistance of armed soldiers, breaking into the house of the plaintiff (the outer door being shut and fastened) and arresting him there, being justified under the speaker's warrant to arrest the plaintiff, a member of the house, for a breach of privilege, to which there was a new assignment of excess in using military force:—Held, that evidence of acts of violence of the mob committed in parts adjacent, though out of view and hearing of the plaintiff in his house, if they appeared to be connected with the same purpose as actuated those about the house, might be admitted to show the danger and difficulty of executing the warrant by force against the plaintiff in his own house without the aid and protection of the military. *Burdett* v. *Colman*, 14 East, 163, 183; 12 R. R. 478.

—— **Evidence.**] — In an action for false imprisonment, the onus of justifying rests on the defendant; therefore, in trespass, for causing the plaintiff to be apprehended under a justice's warrant:—Held, that he might maintain the action without producing the warrant. *Holroyd* v. *Doncaster*, 11 Moore, 441; 3 Bing. 492; 4 L. J. (o.s.) C. P. 178; 28 R. R. 672.

**Without Warrant—Felony.**]—A private person cannot apprehend another upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. *Hall* v. *Booth*, 3 N. & M. 316.

If a person be taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself so as to excite suspicion, this only goes in mitigation of damages, if it turn out that no felony was committed. *Cowles* v. *Dunbar*, 2 Car. & P. 565.

In an action for false imprisonment the defendant pleaded that money was stolen from him by some person unknown, and that he gave the plaintiff into custody, suspecting him on reasonable and probable grounds of being the thief, but did not plead that the plaintiff had committed the theft. The plaintiff had been tried on the charge of stealing the money, and was acquitted. At the trial of the civil action, evidence was given on both sides as to the question whether the offence had been committed by the plaintiff. The judge who tried the case being of opinion that there was no evidence of theft by any person other than the plaintiff, and that the plaintiff's acquittal precluded the question of his guilt being tried in the civil action, directed a verdict for the plaintiff notwithstanding the objection of the defendant's counsel, who required the question "whether the defendant's money had been feloniously stolen by any person" to be left to the jury:—Held, a misdirection, and that it was open to the defendant upon the pleadings to show that the plaintiff had stolen the money, and that he was not precluded from doing so by the acquittal of the plaintiff on the criminal charge. *Cahill* v. *Fitzgibbon*, 16 L. R., Ir. 371.

In an action for false imprisonment, the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed which she had occupied and he, suspecting her to be the person that had stolen them, caused her to be apprehended. It appeared that the defendant took a policeman at night to the new lodging of the plaintiff, a few days after she had left his house, and had her apprehended and taken to the station-house, and the next day she was examined before the magistrate and discharged:—Held, that as the defendant had taken the law into his own hands, and not adopted, as a prudent person would under such circumstances, the cautious course of having a previous investigation by a magistrate, and obtaining a warrant from him, it was incumbent on him to make out to the entire satisfaction of the jury, not only that a felony had been committed, but that the circumstances of the case were such that they or any reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it. *Allen* v. *Wright*, 8 Car. & P. 522.

A plea justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him. *Smith* v. *Shirley*, 3 C. B. 142; 15 L. J., C. P. 230.

It is doubtful whether, in an action for false imprisonment, mere personal resemblance between the plaintiff and the person who had committed a felony can afford reasonable ground of suspicion, justifying an arrest on the part of a private person without a warrant. But, at all events, the plea will fail unless either the defendant himself saw the felony committed, or unless the person who saw it, and on whose information he acted, spoke positively to the identity. *Rayner* v. *German*, 1 F. & F. 700.

A declaration charged an assault and battery of the plaintiff, and taking him into custody along certain streets, and imprisoning him on a false charge of an assault with an intent to commit a felony; plea, that the plaintiff having assaulted the defendant, the latter gave the former in charge to a peace officer, who took him before a magistrate; all the allegations in the court being proved:—Held, that the plea was no sufficient answer. *Stammers* v *Yearsley*, 3 M. & Scott, 410; 10 Bing. 35; 2 L. J., C. P. 256.

Whether a person alleged to be found committing an offence punishable by the Larceny Act, 1861, has been "immediately apprehended" or not, within the meaning of s. 103 of that statute, is a question of fact for the determination of the jury. *Griffith* v. *Taylor*, 46 L. J., C. P. 152; 2 C. P. D. 194; 36 L. T. 5; 25 W. R. 196—C. A.

**Detention of Person offering Article to pawn.**]—The plaintiff offered in pawn to the defendant, a pawnbroker, a gold horseshoe pin, set with seven diamonds, and a ring. The defendant having previously received from the police a notice of articles recently stolen, amongst which was "a gold horseshoe pin, set with seven diamonds," and a ring, asked the plaintiff if he was a dealer. He replied that he was not. The defendant also asked the plaintiff where he obtained the articles. The plaintiff said that he got them from a publican, whose name and address he stated. The defendant gave the plaintiff into custody of a constable. It was afterwards proved that the articles in the possession of the plaintiff had not been stolen, and that his statements were true. In an action by him for false imprisonment the judge left the question whether the defendant had a reasonable suspicion to the jury, who found their verdict for the plaintiff:—Held, that the question arising under the Pawnbrokers Act, 1872, whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; that on the facts there was no evidence of absence of reasonable suspicion in the mind of the defendant, and therefore judgment should be entered for him. *Howard* v. *Clarke*, 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310.

#### 4. Other Matters.

**Claims.**]—A count alleging that the defendant caused the plaintiff to be arrested and imprisoned, without reasonable or probable cause, on a false and malicious charge of felony, is a count for an assault and false imprisonment, and not an informal count for a malicious prosecution, and therefore requires no evidence of malice, or want of reasonable and probable cause. *Brandt* v. *Craddock*, 27 L. J., Ex. 314.

Trespass for assault and false imprisonment may be laid diversis diebus et vicibus. *Burgess* v. *Freelove*, 2 Bos. & P. 425. See *English* v. *Purser*, 6 East, 395.

**Justification.**] — A plea which professes to justify several assaults and false imprisonments laid in separate counts, must show distinct occasions upon which the defendant was justified in committing each particular trespass. *M'Curday* v. *Driscoll*, 1 C. & M. 618; 3 Tyr. 571; 2 L. J., Ex. 185.

It is necessary to show, in pleading, the causes of suspicion, with certainty, in order that the court may judge of their reasonableness; and using the term suspicious will not aid what is necessary to be averred. *Mure* v. *Kaye*, 4 Taunt. 34. S. P. *Haynes* v. *Mewis*, 5 L. J. (O.S.) K. B. 47.

A plea justifying an arrest by a private person, on suspicion of felony, must show the circumstances, from which the court may judge whether the suspicion was reasonable. *Ib.*

### B. MALICIOUS PROCEDURE.

#### 1. In General.

##### a. Procuring Warrants and Summonses.

**Liability.**]—Though it may be the subject of a trespass in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it is done maliciously, and without reasonable or probable cause. *Elsee* v. *Smith*, 1 D. & R. 97; 2 Chit. 304; 24 R. R. 639—Ex. Ch.

A bankrupt (who had obtained an order for protection under 12 & 13 Vict. c. 106, s. 112), at the time of his bankruptcy, was in arrear for two poor-rates, and had been assessed to a third rate, which, however, was not allowed or published until after his bankruptcy. The overseers, pending the protection, summoned him for the non-payment of the three rates; he did not attend before the justices, but returned the summons to the assistant overseer, stating in writing on it the fact of his having a protection order, and the assistant overseer saw the messenger of the court of bankruptcy in possession of his goods, which were afterwards sold. The justices, on the application of the overseers, then issued a distress warrant on his goods for the amount of the three rates, which warrant was returned nulla bona, and a warrant of commitment issued, under which he was arrested and imprisoned, until released by an order of a commissioner in bankruptcy. The bankrupt then brought an action against the overseers, for maliciously, and without reasonable or probable cause, procuring and obtaining from the justices, a warrant of commitment against him, and under that arresting and imprisoning him, and also for assaulting him, and giving him into custody:—Held, first, that there was no absence of reasonable or probable cause for assuming the court of bankruptcy not to have the power of protecting the bankrupt from arrest in respect of the rate made before, but not allowed till after the bankruptcy. Secondly, that there was no absence of reasonable or probable cause for supposing that the protection was not good against the warrant of commitment in respect of the aggregate of all the rates. Thirdly, that there was no evidence of malice. Fourthly, that trespass would not lie against the overseers for causing the bankrupt to be arrested under the warrant of commitment. *Philips* v. *Naylor*, 4 H. & N. 565; 28 L. J., Ex. 225; 5 Jur. (N.S.) 996; 7 W. R. 504—Ex. Ch.

**Misdescription of Offence.**]—Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstances of the loss, and the magistrate grants his warrant to apprehend A. on a charge of having "feloniously stolen, taken and carried away," the bill of exchange (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turns out to be no felony:—Held, that an action would not lie for maliciously procuring the magistrate to grant his warrant; to sustain the averment of malice, the charge must be wilfully false. *Cohen* v. *Morgan*, 6 D. & R. 8; 28 R. R. 533. S. P., *Carratt* v. *Morley*, 1 G. & D. 275; 1 Q. B. 18; 10 L. J., Q. B. 259.

**Search Warrant.**]—An action lies for maliciously obtaining or executing a warrant to search a house for smuggled goods, though none are found. *Boot* v. *Cooper*, 1 Term Rep. 535; 3 Esp. 135.

A declaration stated that the defendant went before a magistrate, and falsely, maliciously and without probable cause, charged that certain goods of his had been feloniously stolen, and that he suspected that the goods were concealed in the plaintiff's dwelling-house; and the defendant procured the magistrate to grant a warrant,

authorising a constable, with necessary assistance, to enter the plaintiff's house to search for the goods; and the defendant, with other persons, caused the dwelling-house to be searched and rummaged for the goods by such persons, and the door of such house, and a pantry there to be broken to pieces, and the plaintiff and his family to be disturbed in the possession, and his goods to be carried away:—Held, that the acts of violence alleged to have been committed in the house appeared sufficiently by the declaration to have been acts done in pursuance of the warrant, and in consequence of the charge made by the defendant. *Henswortb* v. *Fowkes*, 4 B. & Ad. 449.

—— **And subsequent Arrest.**]—The defendant, a miller, saw a number of sacks, which he identified as his property, lying on a quay alongside a vessel. Being informed that the sacks were about to be shipped by the plaintiff, he laid an information before a magistrate that he had reason to suspect, and did suspect, that some sacks, his property, had been stolen, and were then in possession of the plaintiff. Thereupon the magistrate issued a warrant to search for the goods, and if they should be found, to bring them and the plaintiff before him, to be dealt with according to law. The plaintiff was accordingly apprehended, and taken before the magistrate, who dismissed the charge. In an action for maliciously causing the search warrant to be issued, and the plaintiff apprehended:—Held, first, that the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest. Secondly, that there was no absence of reasonable and probable cause for the information, and consequently the defendant was not liable either in respect of the search warrant or arrest. *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J., Ex. 193; 1 L. T. 517; 8 W. R. 307.

Under s. 10 of the Criminal Law Amendment Act, 1885, the justice has a judicial duty to perform, and his decision that there is reasonable cause for such suspicion is a protection to a person who bonâ fide applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue. *Hope* v. *Evered*, 55 L. J., M. C. 146; 17 Q. B. D. 338; 55 L. T. 320; 34 W. R. 742; 16 Cox, C. C. 112. S. P., *Lea* v. *Charrington*, 58 L. J., Q. B. 461; 23 Q. B. D. 45; 61 L. T. 222; 37 W. R. 736; 16 Cox, C. C. 704; 53 J. P. 614. Affirmed on other grounds, 23 Q. B. D. 272; 61 L. T. 450; 16 Cox, C. C. 704; 54 J. P. 19—C. A.

In an action for malicious prosecution, it is no evidence of malice on the part of the defendant that in applying for a search warrant to issue against the plaintiff, the defendant asked that a warrant at the same time might issue against another person for the same offence. *Utting* v. *Bernay*, 52 J. P. 806.

**Summons against Passenger for knowingly and wilfully refusing to pay the Fare.**]—Proceedings by a tramway company under ss. 51 and 52 of the Tramways Act, 1870 (which relate to nonpayment of fares), are of a criminal character, and therefore the company are liable in an action for malicious prosecution brought by the person against whom a summons in respect of such an offence has been dismissed. *Rayson* v. *South London Tramways Co.*, 62 L. J., Q. B. 593; [1893] 2 Q. B. 204; 4 R. 522; 69 L. T. 491; 42 W. R. 21; 17 Cox, C. C. 691; 58 J. P. 20—C. A.

**Evidence.**]—In a declaration for a malicious prosecution, it is not necessary to state that there was an information. It is sufficient to state that the defendant procured a warrant to be issued; but if the declaration states that the defendant made information on oath, and that upon that information the magistrate granted the warrant, the information must be proved, and a recital of it in the warrant is not sufficient. *Gregory* v. *Derby*, 8 Car. & P. 749. S. P., *Stevens* v. *Clark*, Car. & M. 509.

In an action for a malicious prosecution, in which the plaintiff charges the defendant with having imposed on him the crime of felony, by reason of which he was imprisoned; and on production of the information before the justice there is no charge of felony, though the warrant was to arrest the plaintiff for felony; the evidence does not support the declaration. *Leigh* v. *Webb*, 3 Esp. 165.

### b. Malicious Convictions.

**Proof of.**]—In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent of the offence of which he was convicted; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley* v. *Bethune*, 1 Marsh. 220; 5 Taunt. 580.

A count alleged that the defendant, a justice of the peace, unlawfully and maliciously, and without reasonable or probable cause, took the information of A. against the plaintiff, and wrongfully, wilfully, maliciously, and without reasonable or probable cause, convicted the plaintiff, who was thereby compelled to pay a sum of money, and that upon appeal to the quarter sessions the conviction was afterwards quashed. A verdict having been found for the plaintiff, the court refused to arrest the judgment. *Gelen* v. *Hall*, 2 H. & N. 379; 27 L. J., M. C. 78; 5 W. R. 757.

### 2. In Bankruptcy and Winding-up.

**Presenting Petition in Bankruptcy.**]—S., an attorney, having been instructed by H. to make J. bankrupt, obtained a debtor's summons, and served it on him, who thereupon applied to the registrar of the county court to dismiss the summons. Having heard both parties, the registrar made an order on the 12th of April that J. should, within seven days, enter into a bond, with two such sufficient sureties as the court should approve, to pay such sum as should be recovered by H. in respect of the debt due to him from the debtor, together with costs; and that all proceedings on the summons should be stayed until the court in which such proceedings should be taken had come to a decision thereon. S. drew up the order, which was the first of the kind made by the county court in pursuance of the statute. During the seven days a correspondence took place as to the proposed sureties, who were objected to by S. on behalf of H., and no bond having been executed in consequence, a petition in bankruptcy was, by the express order of H., presented by S. on the 21st of April, and on the same day a receiver was appointed, the act of bankruptcy alleged being that the petitioning creditor had served on J. a debtor's summons, and that he being a trader had for seven days

neglected to pay the debt alleged to be due, or to secure or compound for the same. J. objected to the petition; and after several hearings the county court judge on the 8th of May adjudged him to be bankrupt. This decision was affirmed by the chief judge in bankruptcy, but was afterwards reversed by the lord justice of appeal, who annulled the proceedings on the ground that the order of the 12th of April was a stay of proceedings at the time of the petition and adjudication:—Held (per Kelly, C.B., and Cleasby, B.), that upon these facts an action was maintainable by J. against S. for maliciously and without reasonable and probable cause presenting the petition and causing him to be adjudicated a bankrupt. Held, contrà (per Martin, B., and Bramwell, B.), that such an action was not maintainable by J. against S. *Johnson* v. *Emerson*, 40 L. J., Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.

A declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, filed a bankruptcy petition against the plaintiff, and falsely and maliciously, and without reasonable or probable cause, caused and procured him to be declared a bankrupt:—Held, that this charge was established by proof that the defendant petitioned for the adjudication, and, by depositions false in fact, and maliciously made, induced the commissioner to adjudicate the bankruptcy, although it appeared that, even if the depositions had been true, the adjudication could not have been supported in law. *Farley* v. *Danks*, 4 El. & Bl. 493; 24 L. J., Q. B. 244; 1 Jur. (N.S.) 331; 3 W. R. 173.

An action lay for maliciously suing out a commission of bankruptcy, notwithstanding the specific remedy given by 5 Geo. 2, c. 30, s. 23. *Brown* v. *Chapman*, 3 Burr. 1418; 1 W. Bl. 427.

Although the commission was afterwards superseded. *Chapman* v. *Pickersgill*, 2 Wils. K. B. 145.

**Serving Notice requiring Debtor to make an Assignment for his Creditors.**]—A notice served upon a debtor in accordance with s. 14 of the Statutes of Canada (32 & 33 Vict. c. 16), requiring him to make an assignment of his estate and effects for the benefit of his creditors, being a legal proceeding is primâ facie privileged, and no action will lie for the delivery of it to a third person for service upon the plaintiff unless upon proof of express malice. *Bank of British North America* v. *Strong*, 1 App. Cas. 307; 34 L. T. 627—P. C.

**Onus.**]—Evidence of facts upon which the act of bankruptcy was probably proved, but which facts do not amount to an act of bankruptcy, is sufficient to call upon the defendant to prove the affirmative of probable cause. *Cotton* v. *James*, 1 B. & Ad. 128.

The adjudication of the commissioners does not in itself negative the want of probable cause. *Ib.*

**Whether Adjudication set aside.**]—A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy, and such an action may be summarily dismissed upon summons as frivolous and vexatious. *Metropolitan Bank* v. *Pooley*, 54 L. J., Q. B. 449; 10 App. Cas. 210; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756—H. L. (E.)

It must be averred and proved, if traversed, that the commission was superseded before the commencement of the action; and if this fact is not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so. *Whitworth* v. *Hall*, 2 B. & Ad. 695; 9 L. J. (O.S.) K. B. 297.

It is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay* v. *Weakley*, 5 Car. & P. 361.

**Presentation of Petition to wind up Company.**]—An action will lie for falsely and maliciously, and without reasonable or probable cause, presenting a petition under the Companies Acts, 1862, 1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company. The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount, and its debts were trifling. The defendant was not then, in fact, a shareholder; his shares had been sold, and the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously, and without reasonable or probable cause, presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition; and, upon this ground, the company was nonsuited at the close of its case:—Held, that although the liability to pay "extra costs" was not a ground of legal damage, nevertheless the nonsuit was wrong, and a new trial must be had, because an action would lie for falsely and maliciously, and without reasonable or probable cause, presenting the petition to wind up, which was necessarily injurious to the credit of the company. *Quartz Hill Gold Mining Co.* v. *Eyre*, 52 L. J., Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668—C. A.

Held, further, that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shown, there was a want of reasonable and probable cause for presenting the petition, and the opinion of the jury ought to have been taken whether the defendant had been actuated by malice. *Ib.*

Held, further, that if the defendant as a matter of business ought, in the opinion of the jury, to have inferred from the failure of the brokers to return the transfer, that the shares had been sold, the defendant would have had no reasonable or probable cause to suppose that he was still a shareholder. *Johnson* v. *Emerson*, col. 715, commented upon. *Ib.*

On the second trial the judge asked the jury whether the defendant at the time he presented

the petition honestly believed that he was a shareholder; but they were not asked whether the defendant had taken reasonable care to inform himself of the fact:—Held, that the latter question should have been left to the jury, and that there must be a new trial. *Quartz Hill Gold Mining Co.* v. *Eyre*, 50 L. T. 274.

### 3. Arrest for Debt.

#### a. When Wrongful.

*Abolished save in certain cases by the Debtors Act*, 1869 (32 & 33 *Vict. c.* 62).

**Process and Arrest.**]—If in a declaration for a malicious arrest it is averred that the plaintiff was arrested, that allegation is satisfied by proof of a detainer. *Whalley* v. *Pepper*, 7 Car. & P. 506.

An officer, who had a writ against a man, sent to him to say so, and asked him to appoint a time to come to his office and execute a bail-bond, which he did:—Held, not to constitute an arrest, so as to support an action for a malicious arrest, although the original plaintiff had no cause of action. *Berry* v. *Adamson*, 6 B. & C. 528; 9 D. & R. 558; 2 Car. & P. 503; 5 L. J. (o.s.) K. B. 215.

An allegation that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison, until, in order to procure his release, he was forced to procure bail, is not a divisible allegation; and if there was a giving of bail proved, but no evidence of any arrest, it is not sufficient. *Ib.*

But an averment in an action for a malicious arrest, that the defendant detained the plaintiff until he found bail, if some detention is proved, is sufficient to support the action, although no bail was put in. *Bristow* v. *Heywood*, 1 Stark. 48; 4 Camp. 213.

In an action for malicious arrest, it should be averred that the arrest was "malicious." *Saxon* v. *Castle*, 1 N. & P. 661; 6 A. & E. 652; W. W. & D. 305; 6 L. J., K. B. 177.

And without reasonable or probable cause. *Rout* or *Rovet* v. *Lewis*, 5 D. & L. 371; 17 L. J., Ex. 99.

A declaration alleged that the defendant arrested the plaintiff, and that the plaintiff had been detained in custody until he was discharged by reason of the defendant's not having declared against him; that the defendant might have procured judgment in that suit if he had thought fit, but that he afterwards, without any reasonable or probable cause, maliciously arrested him a second time for the same cause of action, without the leave of any judge of the court:—Held, that the declaration was good, as it must be taken that the second arrest was maliciously made by the defendant without the contemplation of any benefit to himself. *Heywood* v. *Collinge*, 1 P. & D. 202; 9 A. & E. 268; 1 W. W. & H. 702; 8 L. J., Q. B. 6; 2 Jur. 1038.

**Amount due.**]—If a plaintiff maliciously takes a defendant in execution for a debt, in respect of which he has been discharged under the Irish Insolvent Act, he is liable to an action on the case. *Ewart* v. *Jones*, 3 D. & L. 252; 14 M. & W. 774; 15 L. J., Ex. 18.

But trespass will not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a defendant who has obtained an order for protection from process under 5 & 6 Vict. c. 116. *Yearsley* v. *Heane*, 3 D. & L. 265; 14 M. & W. 322.

Where a cause (in which the defendant has been arrested) is referred to arbitration, and the award is given in favour of the defendant, he cannot on that ground maintain an action against the plaintiff for a malicious arrest. *Habershon* v. *Troby*, Peake, Ad. C. 181; 3 Esp. 33.

No action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice and want of probable cause are alleged in the declaration, and proved. *De Medina* v. *Grove*, 10 Q. B. 152; 15 L. J., Q. B. 284; 10 Jur. 426. *S. C.* affirmed, 10 Q. B. 152; 17 L. J., Q. B. 321; 11 Jur. 145—Ex. Ch.

But an action lies at the suit of a debtor taken in execution under a ca. sa. upon a judgment against an execution creditor who maliciously and without any reasonable or probable cause, causes and procures a warrant to be issued upon such writ, indorsed to levy a larger sum than remains due upon the judgment, and the debtor to be taken to satisfy such sum, there being no difference between an arrest on mesne process and an arrest under a ca. sa. on a judgment. *Churchill* v. *Siggers*, 3 El. & Bl. 929; 2 C. L. R. 1509; 23 L. J., Q. B. 308; 18 Jur. 773; 2 W. R. 551.

A. having issued a writ of summons against B., specially indorsed for 28*l.*, B., without appearing to the writ, paid 10*l.* to A. on account of the debt. A. afterwards signed judgment, for default of appearance, for the full amount of 28*l.* and costs, and issued a ca. sa. indorsed for that amount, under which B. was arrested, and paid the sum demanded. B. having brought an action against A. for maliciously, and without probable cause, signing judgment and issuing execution:—Held, that whilst the judgment stood for the whole amount, it estopped the plaintiff from denying the correctness of the judgment or of the execution. *Huffer* v. *Allen*, 4 H. & C. 634; 36 L. J., Ex. 17; L. R. 2 Ex. 15; 12 Jur. (N.S.) 930; 15 L. T. 225; 15 W. R. 281.

A declaration stated that the defendants (the one, A., acting as attorney for B., the other) recovered a judgment against the plaintiff for 30*l.* 7*s.* 4*d.*, that the plaintiff paid and satisfied to B. the debt recovered by such judgment, except 15*s.* 8*d.*, and that they sued out a ca. sa. upon the judgment, and wrongfully and maliciously, and without any reasonable or probable cause, indorsed the writ with directions to levy 5*l.* 14*s.* 8*d.*, and interest, and 1*l.* 7*s.* for the costs of execution; that the plaintiff tendered and offered to pay to the defendants 3*l.* 8*s.*, which was sufficient to pay and discharge all that was recoverable against the plaintiff upon the judgment and writ, together with the costs of the writ of execution, and all other legal and incidental expenses; and that they wrongfully and maliciously, and without any reasonable or probable cause, procured the sheriff to arrest the plaintiff, and detain him until he paid 7*l.* 6*s.* 9*d.*, whereas the sum of 3*l.* 8*s.* and no more was due and owing from and recoverable against the plaintiff upon the judgment:—Held, that the declaration disclosed a good cause of action, and that it was not necessary to allege that the plaintiff had obtained his discharge by order of the court, or a judge, so as to show that the proceedings had terminated in his favour. *Gilding* v. *Eyre*, 10 C. B. (N.S.) 592; 31 L. J., C. P. 174; 5 L. T. 136; 9 W. R. 946.

A declaration, in an action by an execution debtor against his creditor for maliciously and without reasonable or probable cause arresting the plaintiff for more than was due on the judgment, alleged as damage that the plaintiff was always, during his detention, able and willing, and offered to pay, and was finally discharged from imprisonment by paying the smaller sum; and that he was put to costs and expenses in and about his maintenance during his detention, and in and about obtaining his discharge:—Held, that the declaration sufficiently showed special damage resulting to the plaintiff from the arrest, inasmuch as to entitle him to a verdict he must show, not merely that he was arrested and detained for a greater amount than was due, however properly indorsed, but also that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased. *Jenings* v. *Florence*, 2 C. B. (N.S.) 467; 26 L. J., C. P. 277; 3 Jur. (N.S.) 774.

By a cognovit A. confessed the action, and that B. had sustained damage to the amount of 3,000*l.*, and agreed, that, in case A. should make default in payment of 259*l.* on the 7th of May, B. should be at liberty to enter up judgment for 3,000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1,650*l.* due to B. A. not having paid the 259*l.* on the 7th of May, B. entered up judgment, and sued out execution for 3,011*l.*, indorsed with a direction to the sheriff, requiring him to levy 1,967*l.*, and A. was arrested and detained in prison for that sum:—Held, that A. might maintain an action against B. for having caused him to be arrested for a larger sum than he ought. *Wentworth* v. *Bullen*, 9 B. & C. 840; 9 L. J. (O.S.) K. B. 33.

**In Inferior Courts.**]—An action was held to lie for holding to bail in an inferior court, when no more than 30*s.* was due. *Smith* v. *Cattel*, 2 Wils. K. B. 376.

So, when an inferior court had no jurisdiction over the cause. *Goslin* v. *Wilcock*, 2 Wils. K. B. 302.

**Under Irregular Process.**]—An action of trespass is not maintainable where the process is irregular merely, and not void. *Reddell* v. *Pakeman*, 2 C. M. & R. 30; 1 Gale, 104; 5 Tyr. 721; 3 D. P. C. 714; 4 L. J., Ex. 130. S. P., *Kilshaw* v. *Crowther*, 3 L. J. (O.S.) Ch. 101.

A., being in the custody of the marshal of the king's bench prison, was brought up to that court upon an order of court, and charged with an attachment for contempt, upon which attachment he was afterwards detained in custody:—Held, that trespass was maintainable against the party who caused the order to be served on the marshal. *Bryant* v. *Clutton*, 1 M. & W. 408; 5 D. P. C. 66; 2 Gale, 50; 1 Tyr. & G. 843; 5 L. J., Ex. 182.

An action for false imprisonment could be maintained against a sheriff for arresting a person who was wrongly named in the process, although he was the person against whom it was issued. *Carridge* v. *Lautour*, 7 L. J. (O.S.) K. B. 33.

Trespass would not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a party who had obtained an order for protection from process, under 5 & 6 Vict. c. 116. *Yearsley* v. *Heane*, 3 D. & L. 265; 14 M. & W. 322.

If an attorney issues a ca. sa., which is afterwards set aside on the ground that the sum of 20*l.* was not due, the client is liable to an action for false imprisonment at the suit of the party arrested. *Collett* v. *Foster*, 2 H. & N. 356; 26 L. J., Ex. 412; 5 W. R. 790.

And the defendant who is taken under a ca. sa., issued on a judgment for less than 20*l.*, may maintain trespass against the creditor and his attorney, although the writ has not been set aside. *Brooks* v. *Hodgkinson*, 4 H. & N. 712; 29 L. J., Ex. 93; 7 W. R. 735.

**Evidence of Bona Fides.**]—To an action for false imprisonment of the plaintiff, the defendant pleaded, that a judgment was recovered against the plaintiff, and that a ca. sa. issued thereon, under which he was arrested. Replication, that the judgment was signed upon a warrant of attorney, and that the judgment and ca. sa. were set aside by a judge's order, which was afterwards made a rule of court, on the ground that the warrant of attorney was never delivered as a complete authority to do or suffer any of the acts therein specified, but as an escrow to take effect in an event which had never happened, and was to be kept by the plaintiff, in his own possession, till such event should happen; and that the defendant, by an improper contrivance, obtained and kept possession of it, without the plaintiff's consent; that judgment was signed under colour of that document, and the ca. sa. issued upon the judgment:—Held, that the replication was good, as it sufficiently appeared that the ca. sa. was set aside, not on the ground of its being erroneous, but on the ground of irregularity, or want of good faith. *Brown* v. *Jones*, 15 M. & W. 191; 3 D. & L. 678; 15 L. J., Ex. 210.

The defendant having issued a writ of summons against the plaintiff specially indorsed for 34*l.*, signed judgment in default of appearance for the full amount and costs, and issued a ca. sa. indorsed for that amount, under which he was arrested, and paid the sum demanded. The plaintiff then applied to set aside the judgment on the ground that the sum of 16*l.* only was due to the defendant, and the master set aside the judgment on payment of costs by the plaintiff; the plaintiff then brought an action against the defendant for false imprisonment:—Held, that as the judgment was regular, and as it must be taken that it was set aside as a favour to the plaintiff, and not for irregularity or any bad faith on the defendant's part, the action could not be maintained. *Smith* v. *Sydney*, 39 L. J., Q. B. 144; L. R. 5 Q. B. 203; 22 L. T. 16; 18 W. R. 628.

It will be evidence of malice in an arrest on mesne process that the plaintiff has taken a bill for the debt, and it will also negative reasonable and probable cause. And though the party has been discharged on the condition of bringing no action for trespass, that does not preclude an action on the case. *Macfarlane* v. *Ellis*, 1 F. & F. 288.

### b. Under Judge's Order.

**False Statement to Judge.**]—An action for maliciously arresting on a capias issued by a judge lies only where the party obtaining the order for the capias has imposed on the judge by some false statement or suggestio falsi, and thereby satisfied him of the existence of the debt to the requisite amount, and that there was reasonable ground for supposing that the debtor was about to quit the country. *Daniels* v.

*Fielding*, 16 M. & W. 200; 4 D. & L. 329; 16 L. J., Ex. 153; 10 Jur. 1061.

Such an action cannot be supported on the mere fact, that the defendant, when he procured the order and arrest, had no reasonable or probable cause for believing that the plaintiff was going abroad. *Ib.*

A creditor receiving information from one person that his debtor is going abroad, and obtaining an order to arrest him on an affidavit, which is afterwards held to be insufficient and to some extent untrue, is not therefore liable to an action for maliciously obtaining the arrest without reasonable cause, there being enough to justify the belief that the debtor was going abroad, and the payment into court of a sum over 20*l.* is a sufficient admission of a debt to justify the application. *Nerill* v. *Loadman*, 2 F. & F. 313.

A declaration stated that the defendant, not having any reasonable or probable case of action against the plaintiff, to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously, and unjustly procured from a judge an order for a capias, by falsely and maliciously representing to the judge that the plaintiff was justly and truly indebted to the defendant in a certain sum, by means of a false affidavit shown and uttered by the defendant before the judge, and thereupon maliciously caused a capias to be issued, and without any reasonable or probable cause of action, caused the plaintiff to be arrested:—Held, that the declaration was sufficient, and that it need not more particularly set out the false statement, by which the judge was induced to make the order, nor show that the facts were false within the defendant's knowledge, or that he had not reasonable or probable cause for believing them to be true. *Ross* v. *Norman*, 1 L. M. & P. 409; 5 Ex. 359; 19 L. J., Ex. 329.

The plaintiff alleged that the defendants maliciously and without reasonable or probable cause, obtained a writ of capias against him in an action on certain promissory notes of which he was the maker and the defendants were the indorsees for value, by falsely and maliciously representing by a false affidavit that he was about to leave the province, and alleging his arrest thereunder and his subsequent discharge by an order of court on its appearing that he was not about to leave the province. Plea, that having been informed and believing that the plaintiff was about to leave the province the defendants caused proceedings to be taken to recover their debt, which was of long standing. The judge directed the jury that if the defendants did not at the time of the arrest believe that their debt would be otherwise lost, and acted with a view to protect the interests of the indorsers of the notes rather than their own, that would be evidence of want of reasonable and probable cause for arresting, and entitle the plaintiff to damages:—Held, that there was misdirection, which justified a new trial. There was reasonable and probable cause for the arrest if the defendants believed that the plaintiff was about to leave the province, and that their remedy against him would be lost if he were not arrested; notwithstanding they might have believed that they could recover the debt from the indorsers, and were endeavouring to protect the interests of the indorsers. *Bank of British North America* v. *Strong*, 1 App. Cas. 307; 34 L. T. 627—P. C.

In an action for maliciously and without reasonable or probable cause obtaining a judge's order to hold the plaintiff to bail, and without reasonable or probable cause for believing and not believing, that the plaintiff was about to quit England, suing out a capias, and wrongfully and maliciously causing the plaintiff to be arrested under such writ, and to be thereupon imprisoned, the evidence was, that the defendants obtained the order, and caused a capias to be issued thereupon; that the plaintiff was afterwards found in the custody of the sheriff; that one of the defendants being informed (in the presence of the other) that the plaintiff was in custody at their suit, observed that they had got him fast and meant to keep him; that an application by the plaintiff to the judge for his discharge from custody was opposed by the defendants; and that, on the order for his discharge as to that writ being left with the officer in whose custody he was, he was released:—Held, that this was sufficient to sustain the action without proof of any warrant. *Petrie* v. *Lamont*, 4 Scott (N.R.) 335; 3 Man. & G. 702; 11 L. J., C. P. 63.

In an action against a builder, his attorney, and the attorney's clerk, for maliciously and without reasonable or probable cause procuring an order for the arrest of the plaintiff in an action of debt, it appeared that he, being a Roman Catholic priest, had entered into a contract with the builder for the erection of a church, the contract containing a condition for payment only on an architect's certificates; and all the money originally due upon it having been paid, and a further claim made by the builder for extras, which the architect refused to allow, thereupon the builder consulted his attorney, who sent his clerk to serve the plaintiff, and see what he would say; and on the clerk's statement as to what he said (viz. that the plaintiff had said he was going abroad at some time, the precise words being in dispute), the attorney caused his clerk to make an affidavit thereof, and his client to make an affidavit of debt, and of belief that the plaintiff was going abroad, upon which a judge made the order, the affidavit not making mention of the contract and its condition, or of the architect's refusal to certify, or of the plaintiff's permanent office:—Held, first, that there was no reasonable or probable cause for the proceeding, as there was no reason to suppose that the plaintiff was going abroad for any lengthened time, or to avoid the action; secondly, that if the proceeding was for any improper purpose, as to coerce the plaintiff into more speedy payment, it would be malicious; and thirdly, that in such case the attorney would be liable, but that its merely being an improper proceeding, and without reasonable cause, was not per se evidence of malice, assuming bonâ fides. *Melia* v. *Neate*, 3 F. & F. 757.

G., who had advertised his farming stock and effects for sale, was arrested at the suit of B., on a judge's order to hold to bail, made upon an affidavit of C. that G. had stated his intention to go to Jersey to avoid his creditors, but he was at once discharged upon paying the amount to the officer. On the following day he was arrested at the suit of the defendants, upon a like order made upon the affidavit of their London agent, that he had read and believed the statement in the affidavit of C. to be true. It eventually appeared that C.'s statement was untrue, and G. was discharged by a judge's order. At the trial of the action against the defendants for arrestin

him maliciously, and without reasonable and probable cause, the agent was called on their part, and he swore that he believed, without further inquiry, the statement in C.'s affidavit to be true at the time that he applied for and obtained the order to hold to bail, and thereupon the judge directed the verdict to be entered for the defendants on the ground that there was reasonable and probable cause for the arrest, and that the action could only be maintained on proof, first, of malice on the part of the defendants, and secondly, of want of reasonable and probable cause:—Held, that there was reasonable and probable cause for the arrest, and that there was no duty on the defendants or their agent to make inquiry into the truth of the facts stated in C.'s affidavit before making an application based thereon for an order to hold the plaintiff to bail. *Gibson* v. *Veasey*, 15 L. T. 586.

4. Other Malicious Proceedings.

**In Court-martial.**]—An action will not lie for a malicious prosecution of a court-martial by a captain in the navy against his commander-in-chief. *Sutton* v. *Johnstone*, 1 Bro. P. C. 76; 1 Term Rep. 493, 784.

An inferior officer cannot maintain an action against his superior officer in respect of any matter done by such superior officer in the discharge of his duty, but he must pursue the mode of redress prescribed by the articles of war. *Dawkins* v. *Paulet* (*Lord*), 9 B. & S. 768; 39 L. J., Q. B. 53; L. R. 5 Q. B. 94; 21 L. T. 584; 18 W. R. 336.

**Abuse of the Process of Court.**]—In an action for abusing the process of the court, in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or proper cause. *Granger* v. *Hill*, 3 Scott, 561; 4 Bing. (N.C.) 212; 1 Arn. 42; 7 L. J., C. P. 85; 2 Jur. 235

**Procuring Sureties to Keep the Peace.**]—In an action for maliciously, and without reasonable or probable cause, going before a magistrate, and procuring the plaintiff to be held to bail to keep the peace, it is not necessary, as in an action for a malicious prosecution, to aver that the proceeding before the magistrate was determined in favour of the plaintiff, such a proceeding being ex parte, and the truth of the statement made by the applicant to the magistrate not being controvertible. *Steward* v. *Gromett*, 7 C. B. (N.S.) 191; 29 L. J., C. P. 170; 6 Jur. (N.S.) 776.

In an action for laying a complaint before a magistrate of threatening language, in consequence of which the plaintiff was taken into custody and imprisoned till he found bail; if it appears that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before a magistrate, the question for the jury will be, whether the defendant acted bonâ fide upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes. *Venafra* v. *Johnson*, 3 M. & Scott, 847; 10 Bing. 301; 6 Car. & P. 50; 3 L. J., C. P. 51.

**Filing Judges' Orders.**]—A trader gave B. a judge's order for payment of debt and costs to be taxed: the costs were duly taxed, and the amount of debt and costs paid; and afterwards, and within twenty-one days from the order, B. caused it to be filed:—Held, that, whether the 12 & 13 Vict. c. 106, s. 137, made the filing of the order, under the circumstances, imperative or not, no action would lie against B. for filing it, inasmuch as it could not be said to have been done without reasonable or probable cause. *Dimmock* v. *Bowley*, 2 C. B. (N.S.) 542; 26 L. J., C. P. 231; 3 Jur. (N.S.) 1059.

**Registering Charges.**]—Where, in a suit in equity, an order was made that G. should pay into the name of the accountant-general, in trust in the cause, a certain sum admitted by his answer to have been the amount of the sale of a trust fund; and the solicitor for the plaintiff in the suit registered it under 1 & 2 Vict. c. 110, s. 19, and G. was in consequence prevented from disposing of his lands:—Held, that the registering of the order was not of itself a wrongful act, and that no action could be maintained for it without proof of malice. *Gibbs* v. *Pike*, 9 M. & W. 351; 1 D. (N.S.) 409; 12 L. J., Ex. 257; 6 Jur. 465.

**Wrongful Registration of Bill of Sale.**]—No action will lie for the wrongful registration of a document erroneously supposed to be a bill of sale unless the plaintiff proves malice and want of reasonable and probable cause. *Horsley* v. *Style*, 4 R. 574; 69 L. T. 222; 58 J. P. 38—C. A.

**Distraining.**]—A count for distraining for more rent than is due is bad, although it alleges it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable, because it is done with a bad intent. *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J., C. P. 110; 17 Jur. 600—Ex. Ch.

In an action for a malicious distress, the plaintiff cannot recover his extra costs as between attorney and client, incurred in an action of replevin which the plaintiff had brought to recover the goods distrained. *Grace* v. *Morgan*, 1 Hodges, 398.

**Outlawry.**]—The debtor's going abroad was held reasonable cause for the creditor's proceeding to outlawry, notwithstanding the creditor might know that the debtor had an agent in England. *Drummond* v. *Pigou*, 2 Bing. (N.C.) 114; 1 Hodges, 190; 2 Scott, 228; 4 L. J., C. P. 294.

**Conspiracy.**]—A declaration, stating that the plaintiff being possessed of premises, the defendant and S. maliciously conspired to get possession of a portion of the premises, and to set up illicit stills there; and thereupon, in pursuance of the conspiracy, they, by falsely, and fraudulently representing to the plaintiff that S. required such portion of the premises for the purpose of making ink, induced the plaintiff to permit S. to enter thereon; and thereupon the defendant and S., in further pursuance of the conspiracy, entered thereupon, and set up illicit stills; and in further pursuance of the conspiracy, maliciously represented, and made it appear and be believed, that it was the plaintiff who had so set up the stills; and also, that, in further pursuance of the conspiracy, the defendant and

S. manufactured in that portion of the premises exciseable articles contrary to the statute; and then maliciously represented, and made it appear and be believed it was the plaintiff who manufactured such articles, and that he was knowingly aiding and concurring in the manufacturing of such articles, by means whereof an officer of the excise found in the said portion of the premises manufacturing, and in the course of manufacturing, divers goods, and did at the same time discover in and about such place the plaintiff, who, by reason of the premises, appeared to be assisting in the manufacture, &c., whereupon the officer arrested the plaintiff, and he was convicted by a magistrate in the penalty of 30*l.*:—Held, bad, as neither stating a good cause of action in the nature of conspiracy, nor of an action for a malicious prosecution. *Barber* v. *Lesiter*, 7 C. B. (N.S.) 175; 29 L. J., C. P. 161; 6 Jur. (N.S.) 654.

—— **To issue Commission of Lunacy.**]—An action lies for a conspiracy in issuing a commission in lunacy. *Turner* v. *Turner*, Gow, 50.

To support such an action, malice and a want of probable cause must be proved; but on proof of a total want of probable cause, malice may be implied; and although express malice is proved, some slight evidence of a want of probable cause must be given. *Ib.*

**Procuring Breach of Contract.**]—An action lies for maliciously inducing a person to break his contract with the plaintiff. Whether the contract is between a master and servant or not is immaterial. *Bowen* v. *Hall* (6 Q. B. D. 333) followed. *Temperton* v. *Russell*, 62 L. J., Q. B. 412; [1893] 1 Q. B. 715; 4 R. 376; 69 L. T. 78; 41 W. R. 565; 57 J. P. 676—C. A.

—— **Intention to injure Plaintiff—"Malice."**]—If the persuasion is used for the purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, the act becomes malicious. *Ib.*

—— **Special Damage.**]—The plaintiffs, under an agreement with the committee of the Stock Exchange, were allowed to collect information as to the prices of stocks and shares. The plaintiffs entered into contracts with their own subscribers which contained a stipulation that the information supplied to them by the plaintiffs should not be sold or communicated to non-subscribers:—Held, that in order to support an action against the defendant for inducing one of the plaintiffs' subscribers to break his contract by communicating the information to him, it was not necessary to prove specific damage, but that it was enough to show that the act complained of was of such a nature that damage to the plaintiffs ought to be inferred. *Exchange Telegraph Co.* v. *Gregory*, 65 L. J., Q. B. 262; [1896] 1 Q. B. 147; 74 L. T. 83; 60 J. P. 52—C. A. See also *Exchange Telegraph Co.* v. *Central News*, 66 L. J., Ch. 672; [1897] 2 Ch. 48; 76 L. T. 591; 45 W. R. 595.

**Inducing Person not to Enter into Contract.**]—It is not actionable maliciously to induce a person not to enter into a contract. *Allen* v. *Flood*, 67 L. J., Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258—H. L. (E.) S. P., *Huttly* v. *Simmons*, 67 L. J., Q. B. 213; [1898] 1 Q. B. 181.

**Rejecting Elector's Votes.**]—Action for maliciously rejecting the plaintiff's vote at an election of vestrymen and auditors under 18 & 19 Vict. c. 120. Plea, that the plaintiff was rated to a church rate more than six months before the election, and at the time of the election the rate was due and unpaid. Replication, that the rate was void in this, that it was made for defraying expenses for which a rate could not be made. Rejoinder, that the rate was good on the face of it, and had never been quashed:—Held, that the plaintiff having no means of questioning the rate, the rejoinder was not good. But that the replication was good, as it shewed that the rate was not due, therefore that the plaintiff was entitled to vote; and that the action lay, malice being admitted on these pleadings. *Tozer* v. *Child*, 6 El. & Bl. 289; 25 L. J., Q. B. 337; 2 Jur. (N.S.) 928; 4 W. R. 513.

In an action against a returning officer for refusing a vote, the malice of the defendant is an essential ingredient to support the action. *Tozer* v. *Child*, 7 El. & Bl. 377; 26 L. J., Q. B. 151; 3 Jur. (N.S.) 409; 5 W. R. 287—Ex. Ch.

**Vexatious Ejectment.**]—An action on the case to recover damages against the lessor of the plaintiff, in a vexatious ejectment, is not maintainable. *Purton* v. *Honnor*, 1 Bos. & P. 205.

**Annoyance by Musical and other Sounds.**]—Where a tenant of a house makes musical and other sounds for the purpose of vexing and annoying his next door neighbour, this is in point of law done maliciously, and is an unreasonable user of the house that may be restrained by injunction. *Christie* v. *Davey*, 62 L. J., Ch. 439; [1893] 1 Ch. 316; 3 R. 210.

**Prosecuting Civil Action.**]—If A., in the name of B., prosecutes an action against C. maliciously, and without reasonable and probable cause, C. has no action against A. unless he has thereby sustained legal damage. *Cotterell* v. *Jones*, 11 C. B. 713; 21 L. J., C. P. 2; 16 Jur. 88.

If C. has thereby sustained legal damage, an action lies. *Ib.*

Semble, no action will lie against a party for inciting a third person to bring a civil action against a plaintiff without reasonable or probable cause. *Fixaz* or *Finan* v. *Nicholls*, 2 C. B. 501; 15 L. J., C. P. 125; 10 Jur. 50.

—— **Party interested in Suit.**]—An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause. *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Cas. 186—P. C.

**Defending without Authority.**]—A declaration stated that the defendant was an attorney, that a writ of summons had been issued against the plaintiff at the suit of A., but no further proceedings had been had, nor would the plaintiff have defended the same, nor had the defendant been retained by the plaintiff to defend the action, or take any step therein or in relation thereto, yet the defendant wrongfully, and without the consent of the plaintiff, entered an appearance for the plaintiff in the action, and defended the same, and such proceedings were had thereupon that A. recovered judgment against the plaintiff for 83*l.* 9*s.*, and thereupon execution issued against him, and he was forced to pay the sum recovered, and 9*l.* 8*s.* 6*d.* for costs of the execution:—Held, bad, in arrest of judgment.

*Westaway* v. *Frost*, 17 L. J., Q. B. 286; 12 Jur. 698.

**Opposing Grant of Letters Patent.**]—A count alleged that the plaintiff was the first and true inventor of certain improvements in the manufacture of fire-arms, and had petitioned for a patent; that his petition had been referred to the solicitor-general, who had allowed the title of his invention to be amended in certain particulars, and given a certificate of allowance; yet the defendant falsely, fraudulently, maliciously and wrongfully, and without any reasonable or probable cause, represented to the solicitor-general that he had an interest in opposing a grant of letters patent to the plaintiff, and gave notice that he had applied for a patent, and obtained provisional protection for a certain invention, and that in consequence of the alteration in the title of the plaintiff's patent, he had reason to apprehend that such alteration in the title might admit of his invention being embraced in the plaintiff's patent, whereby the solicitor-general refused to allow the plaintiff's application for letters patent to proceed, and he was put to expense in opposing a grant of letters patent to the defendant:—Held, that the special damage alleged did not naturally flow from the grievances charged, and that, without it, the count disclosed no cause of action. *Haddan* v. *Lott*, 15 C. B. 411; 3 C. L. R. 144; 24 L. J., C. P. 49.

**Setting up Wrongful Claim.**] — If special damage results from a claim made to goods, an action against the claimant may be maintained if he makes the claim maliciously and without any reasonable or probable cause. *Green* v. *Button*, 1 Gale, 349; 2 C. M. & R. 707; 1 Tyr. & G. 118; 5 L. J., Ex. 81.

It is a sufficient special damage that the party with whom a contract has been made for the sale of the goods refuses to deliver them in consequence of the claim, he not being under a perfect obligation to deliver the goods. *Ib.*

**Issuing Extents.**]—A declaration stated that the defendant maliciously, and without reasonable or probable cause, caused to be issued out of the court of exchequer a writ, on which an inquisition was held, and the debt deposed to by the defendant was found to be due from the plaintiff to the crown; that afterwards the defendant, maliciously, and without reasonable or probable cause, caused to be sued out a writ of extent against the plaintiff, directed to the sheriff, who levied thereupon and held the goods until the writ of extent was superseded by the court. Plea, that the writ of supersedeas was issued as matter of grace and favour of the crown:—Held, first, that the causing the writ of extent to be sued out was the gist of the action, and that the declaration was sufficient, inasmuch as it showed the discharge of that writ; and, secondly, that the plea was bad. *Craig* v. *Hasel*, 3 G. & D. 299; 4 Q. B. 481; 12 L. J., Q. B. 181; 7 Jur. 368.

**Issuing Foreign Attachment.**]—A declaration that the defendant maliciously and without reasonable and probable cause procured an attachment to be issued out of the mayor's court, to attach a debt due to the plaintiff, is bad, for not showing that the proceedings in the suit in the mayor's court had been terminated. *Parton* v. *Hill*, 10 L. T. 414; 12 W. R. 753.

**Rendering in Discharge of Bail.**] — In an action for maliciously and without the authority of the bail causing the defendant to be rendered in discharge of his bail, it is necessary to prove express malice as well as want of authority. *Porter* v. *Weston*, 5 Bing. (N.C.) 715; 8 Scott, 25; 8 L. J., C. P. 349; 3 Jur. 507.

## C. WHAT MUST BE PROVED IN SUCH ACTIONS.

### 1. Proceedings before a Judicial Officer.

**Defamation and Malicious Prosecution.**] — A claim alleged that the defendant wrote and sent to the police letters charging the plaintiff with a murder, and required his arrest, and that a superintendent, in consequence, endeavoured to arrest the plaintiff on several occasions, but was unable to meet with him; that the defendant had no reasonable or probable cause for making the charge, that the same was false, and made maliciously and with intent to injure the plaintiff, whose credit and reputation were thereby injured. On demurrer:—Held, that the claim was bad; because, if it was for libel or slander, the defamatory words were not set out; if for malicious prosecution, none had been instituted before a judicial officer. *Harris* v. *Warre*, 48 L. J., C. P. 310; 4 C. P. D. 125; 40 L. T. 429; 27 W. R. 461.

### 2. Termination of Proceedings favourably to Plaintiff.

**Plaintiff must Show that he Succeeded.**]—A plaintiff, to recover in an action for the malicious issue of process, must have had judgment in his favour in that process. *Taylor* v. *Ford*, 29 L. T. 392; 22 W. R. 47.

A declaration for maliciously setting in motion a court of competent jurisdiction is not bad, because it does not aver that the proceedings terminated in favour of the plaintiff. *Reduay* v. *McAndrew*, L. R. 9 Q. B. 74; 29 L. T. 421; 22 W. R. 60.

Therefore a declaration for maliciously and without reasonable or probable cause procuring the arrest and detention of a vessel in a county court suit for necessaries, "until the proceedings in the court in the matter of the arrest and detention were determined and the ship released," is good, without an express averment that the proceedings were determined in favour of the plaintiff. *Ib.*

An action for malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration. *Fisher* v. *Bristow*, 1 Dougl. 215.

A declaration in an action for a malicious prosecution for felony must state that the prosecution is at an end; and alleging that the plaintiff was discharged from his imprisonment is not sufficient. *Morgan* v. *Hughes*, 2 Term Rep. 225.

If it alleges that he was discharged by the grand jury not finding the bill, it will show a legal end to the prosecution. *Ib.*

It is necessary to state in a declaration every allegation proper to support the action; namely, that the defendant falsely, maliciously, and without any reasonable or probable cause, caused the plaintiff to be indicted, and to state the trial and acquittal. *Carman* v. *Truman*, 1 Bro. P. C. 101.

—— **Proceedings Abroad.**]—The principle that in an action for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, it is essential to show that the proceeding alleged to be instituted maliciously, and without reasonable and probable cause, has terminated in favour of the plaintiff, if from its nature it is capable of such a termination, applies where an action is brought for falsely and fraudulently causing a proceeding to be taken in a foreign court to the damage of the plaintiff. *Castrique* v. *Behrens*, 3 El. & El. 709; 30 L. J., Q. B. 163; 7 Jur. (N.S.) 1028; 4 L. T. 52.

—— **Ex Parte.**]—The rule, that in an action for a malicious prosecution the plaintiff is bound to shew a termination of the proceedings in his favour, does not apply where the proceedings, in respect of which the action is brought, are ex parte, and must of necessity terminate unfavourably to the plaintiff; as where the defendant maliciously exhibits articles or demands sureties of the peace against the plaintiff, in which cases the latter has no opportunity of controverting the oath of the defendant. *Stewart* v. *Gromett*, 7 C. B. (N.S.) 191; 29 L. J., C. P. 170; 6 Jur. (N.S.) 776.

**Nature of Termination of Proceedings.**]—An action lies for a malicious prosecution, though the plaintiff is acquitted on a defect in the indictment. *Wicks* v. *Fentham*, 4 Term Rep. 247; 2 R. R. 374.

So, for the malicious prosecution of a bad indictment for perjury. *Pippet* v. *Hearn*, 1 D. & R. 266; 5 B. & Ald. 634.

If a party is indicted for a felony, though he is acquitted without calling witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, and the evidence was sufficient to cause the jury to pause. *Smith* v. *Macdonald*, 3 Esp. 7.

An action for a malicious arrest cannot be maintained where the former cause was terminated by a stet processus, by the consent of the parties. *Wilkinson* v. *Howel*, M. & M. 495.

An action may be brought to recover damages for a malicious arrest, where the suit is terminated by a rule of court, and that rule is evidence of the termination of the suit. *Brook* v. *Carpenter*, 3 Bing. 297; 11 Moore, 59; 4 L. J. (O.S.) C. P. 70.

The acceptance of the debt and costs, in satisfaction of the action, under a judge's order or rule of reference, is a sufficient determination of the suit. *Combe* v. *Capron*, 1 M. & Rob. 398.

An averment that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid. *Bristow* v. *Heywood*, 1 Stark. 48; 4 Camp. 213.

In an action for a malicious arrest, the plaintiff proved the averment in the declaration that the defendant's action had been discontinued by production of a rule to discontinue on payment of costs, and subsequent payment of them by the defendant:—Held, sufficient. *Watkins* v. *Lee*, 5 M. & W. 270; 7 D. P. C. 498; 8 L. J., Ex. 266; 3 Jur. 484. See also *Pierce* v. *Street*, 3 B. & Ad. 397; 1 L. J., K. B. 147; and *Norrish* v. *Richards*, 5 N. & M. 269; 1 H. & W. 437; 3 A. & E. 733; 4 L. J., K. B. 254.

**When Proceedings not Quashed.**]—An action for a malicious prosecution will not lie if the proceeding complained of terminated in the conviction of the plaintiff, which has not been quashed; and it makes no difference that there is no appeal from such conviction. *Basébé* v. *Matthews*, 36 L. J., M. C. 93; L. R. 2 C. P. 684; 16 L. T. 417; 15 W. R. 839.

Quære, whether an action is maintainable against a justice of the peace for wilfully and maliciously, and without reasonable and probable cause, convicting a person in a penalty in a matter in which the justice has jurisdiction, and which penalty is paid, but the conviction has been subsequently quashed. *Gelen* v. *Hall*, 2 H. & N. 379; 27 L. J., M. C. 78; 5 W. R. 757.

A person convicted of a trespass under the Game Act. 1 & 2 Will. 4. c. 32, underwent the sentence of imprisonment under that conviction, and did not appeal against it:—Held, that that conviction was an answer to an action against the informer for a malicious prosecution. *Mellor* v. *Baddeley*, 2 C. & M. 675; 4 Tyr. 962; 6 Car. & P. 374; 3 L. J., Ex. 217.

A declaration stated that A. issued against B. a writ of summons, specially indorsed, for 28*l.*; that B. paid A. 10*l.* on account; that A. afterwards, maliciously, and without reasonable or probable cause, signed judgment for default of appearance for 28*l.*, and arrested B. under a ca. sa. for that amount, and compelled him, in order to obtain his discharge, to pay 30*l.*:—Held, that the action was not maintainable, inasmuch as the judgment operated as an estoppel, and precluded the plaintiff from averring that the sum of 28*l.* was not due. *Huffer* v. *Allen*, 4 H. & C. 634; 36 L. J., Ex. 17; L. R. 2 Ex. 15; 12 Jur. (N. S.) 930; 15 L. T. 225; 15 W. R. 281.

The proper course would have been to apply to the court or a judge to reduce the judgment to the amount actually due. *Ib.*

### 3. Malice, and Absence of Reasonable and Probable Cause.

**Malice.**]—An act which is lawful in itself does not become unlawful because it is done with malicious intent. *Bradford Corporation* v. *Pickles*, 64 L. J., Ch. 759; [1895] A. C. 587; 11 R. 286; 73 L. T. 353; 44 W. R. 190; 60 J. P. 3—H. L. (E.) S. P. (per Lord Watson), in *Allen* v. *Flood*, 67 L. J., Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258.

Malice must be proved in an action for a malicious arrest. *George* v. *Radford*, 3 Car. & P. 464.

An action will not lie against a party suing out a writ if he neglects to countermand it after payment of the debt, at least, unless malice is averred. *Scheibel* v. *Fairbain*, 1 Bos. & P. 388.

And if the costs are paid as well as the debt. *Page* v. *Wiple*, 3 East, 314; 7 R. R. 470.

In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. But this is an inference not of law but of fact, which the jury is not bound to draw. *Mitchell* v. *Jenkins*, 2 N. & M. 301; 5 B. & Ad. 588; 3 L. J., K. B. 35.

Presenting to the jury the absence of such cause as conclusive evidence of legal malice is a misdirection. *Ib.*

In an action against an attorney for a malicious arrest, the jury must be satisfied of the absence of any just demand on the part of his client, and also, that the attorney knew that there was not any such demand; and, applying the law for some purpose of his own, or for some other ill

purpose, which the law calls malicious, committed the injury complained of by the plaintiff. In such a case it is not necessary to prove malice in the ordinary sense of the word; any improper or sinister motive will be sufficient. *Stokley* v. *Harnidge*, 8 Car. & P. 11.

A. having by his laches lost all right of action on a note indorsed by B., arrested B., and afterwards discontinued the action; these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice. *Bristow* v. *Heywood*, 1 Stark. 48; 4 Camp. 213.

The first action being non-prossed, is not of itself evidence of malice. *Sinclair* v. *Eldred*, 4 Taunt. 7.

An action lies for maliciously and without reasonable or probable cause arresting the plaintiff, and detaining him until discharged by a judge's order, pending a former suit by the defendant for the same cause of action, in which the plaintiff had been arrested and discharged out of custody by reason of the defendant's delay in declaring. *Heywood* v. *Collinge*, 9 A. & E. 268; 1 P. & D. 202; 1 W. W. & H. 702; 8 L. J., Q. B. 6; 2 Jur. 1038.

To such action it is no defence that the second suit is still pending. *Ib.*

E. having obtained a judgment against F. and T., he, by H., his attorney, sued out concurrent writs of ca. sa. into London and Surrey. F. was taken on the former writ, and on giving to H. a promissory note jointly with B., as his surety, was discharged. No notice of this was given to the sheriff of Surrey, and he took T. on the other writ of ca. sa. In an action against H. for maliciously omitting to give notice to the sheriff of Surrey, that the judgment had been satisfied by the arrangement with F.:—Held, that, to support this action, the jury must be satisfied that there was malice; but that to constitute malice, it was not necessary that H. should have acted from any spite or ill-will, or the like; but that if he acted as he did from any indirect motive, such as to get the debt for his client from T., or get more costs for himself, that would be malice for this purpose. *Tebbutt* v. *Holt*, 1 Car. & K. 280.

The mere fact of H. not giving notice to the sheriff of Surrey, that the judgment had been satisfied, was one from which alone the jury might infer malice; but that, if they thought H. had been defrauded when he received the promissory note, or had taken it on a representation that the parties were solvent when they were not so, this would go to negative the malice. *Ib.*

A plaintiff gave the defendants a warrant of attorney to enter up judgment, if certain costs should be unpaid within four days after the master should have taxed the same; the defendants procured a taxation ex parte, and by an incorrect representation to the master, obtained from him an allocatur for more costs than they were entitled to. By order of a judge, a new taxation was directed, pending which the defendants arrested the plaintiff; afterwards the new taxation was had, and the costs were reduced. The plaintiff declared for a wrongful arrest, and the defendants pleaded that the costs had been taxed, and a sum found due, for which they arrested:—Held, first, that the plaintiff might properly sue for a malicious arrest, and was not bound to declare for a deceitful representation to the master; secondly, that the plea was not supported, there having been, in effect, no taxation when the defendants arrested. *Saxon* v. *Castle*, 6 A. & E. 652; 1 N. & P. 661; 6 L. J., K. B. 177.

—— **Where Privilege.**]—No action lies against a sheriff or his officer for arresting a person attending court as a witness, although alleged that the defendant knew that he was privileged, and arrested him maliciously. *Magnay* v. *Burt*, D. & M. 652; 5 Q. B. 381; 12 L. J., Q. B. 225—Ex. Ch.

In an action against a party for causing the arrest of a person privileged from arrest (e.g. a witness attending on his subpœna, or a practising attorney), thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognised the circumstances accompanying it, and also knew that the party arrested was privileged at that time. *Stokes* v. *White*, 4 Tyr. 786; 1 C. M. & R. 223; 3 L. J., Ex. 321.

**Intention.**]—Prosecuting a person with any other motive than that of bringing a guilty party to justice is a malicious prosecution in law; as, for instance, where a prosecution is instituted against a person with a view of terrifying parties from the commission of some prevalent offence—Per Alderson and Martin, BB. *Stevens* v. *Midland Counties Ry.*, 2 C. L. R. 1300; 10 Ex. 352; 23 L. J., Ex. 328; 18 Jur. 932.

To show that the prosecutor was in the wrong is not enough to make him liable in an action for malicious prosecution; it must appear that he was maliciously so, that is, obstinately and improperly in the wrong, through anger, ill-feeling, or any bad motive or feeling, differing from a sincere, honest desire to put the law in force. *Darling* v. *Cooper*, 11 Cox, C. C. 533.

An action lies for maliciously inducing a person to break his contract with the plaintiff. If the persuasion is used for the purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, the act becomes malicious. *Bowen* v. *Hall* (6 Q. B. D. 333) followed. *Temperton* v. *Russell*, 62 L. J., Q. B. 412; [1893] 1 Q. B. 715; 4 R. 376; 69 L. T. 78; 41 W. R. 565; 57 J. P. 676—C. A.

**Evidence of Malice.**]—A forged cheque had been presented at the defendants' bank, and the plaintiff, because he was supposed to be one C. who was suspected, was arrested by the police on the charge of uttering it, and was then positively identified by the bank cashier as the man to whom the money was paid. In an action for malicious prosecution:—Held, that there was no evidence of the absence of reasonable and probable cause; that though, when the plaintiff set up an alibi and denied that he was C., the defendants found that evidence would be forthcoming which, if true, would establish these facts, it was no evidence of malice on the part of the defendants that they did not withdraw from the prosecution till the plaintiff had been thrice remanded; that it not being the duty of the defendants to bring this evidence, which they doubted, before the magistrates, their not doing so was no evidence of malice. Held, further, that the question whether the plaintiff was in fact C., or whether he was in fact the guilty person, was not a question relevant to the issue; and it was no evidence of malice on the part of the defendants that they put witnesses into the box, who, as the defendants well

knew, would assert their belief that the plaintiff was guilty. *Harrison* v. *National Provincial Bank*, 49 J. P. 390.

The defendant having been robbed in a crowd, gave a description of the offender, of whom he caught a glimpse, to a police constable, by whom the plaintiff, upon the strength of that description, was apprehended on suspicion. The defendant met the constable while taking the plaintiff before the magistrate, and said, "This is the man," and accompanied them to the magistrate. The plaintiff was twice remanded, being let out on bail, and having surrendered and the defendant not appearing, the plaintiff was discharged. The defendant was afterwards informed that the plaintiff was not the thief, but subsequently he took out a fresh warrant against the plaintiff:—Held, in an action for false imprisonment and malicious prosecution, that the defendant was not responsible for the remands, but that the failure to appear before the magistrate at the hearing, coupled with the procuring of a fresh warrant, was evidence of want of probable cause and also of malice to support the count for malicious prosecution. *Shufflebottom* v. *Allday*, 5 W. R. 315.

—— **Against whom.**]—There is a material distinction, as to the liability for a malicious prosecution, between the institution of the prosecution and its continuance after it has been already instituted without authority by an agent. And the absence of reasonable and probable cause, which might be evidence of malice in the one case, will not be so in the other. *Weston* v. *Beeman*, 27 L. J., Ex. 57.

Where the party put in possession under a bill of sale issued a summons against the assignor for feloniously stealing some of the chattels assigned, and the assignees attended the hearing, and allowed the case to be opened on their behalf as prosecutors:—Held, that the absence of reasonable and probable cause would not be evidence of malice as against them. *Ib.*

**Onus of Proof.**]—In an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon the plaintiff. *Abrath* v. *North Eastern Ry.*, 55 L. J., Q. B. 457; 11 App. Cas. 247; 55 L. T. 63; 50 J. P. 659—H. L. (E.)

It lies on the plaintiff to give evidence of malice in the defendant, either express, or to be collected from circumstances, showing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell* v. *Macnamara*, 9 East, 361; 1 Camp. 199; 9 R. R. 578.

**Difference between Malicious Prosecution and False Imprisonment.**]—In false imprisonment, the onus lies on the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. *Hicks* v. *Faulkner*, 51 L. J., Q. B. 268; 8 Q. B. D. 167; 30 W. R. 545. Affirmed, 46 L. T. 127; 46 J. P. 420—C. A.

**Proof generally.**]—Where the bill has not been found, an action cannot be supported without evidence of express malice, as well as the want of probable cause. *Byne* v. *Moore*, 1 Marshall, 12; 5 Taunt. 187.

Malice and the want of probable cause must both concur. *Farmer* v. *Darling*, 4 Burr. 1971.

**Reasonable and Probable Cause.**]—An action for a malicious prosecution cannot be maintained, though the accusation turns out to be unfounded, if the prosecutor can show probable cause for the prosecution. *Arbuckle* v. *Taylor*, 3 Dow, 160.

Although want of reasonable and probable cause cannot be inferred from proof of malice, yet where a person acting upon the information of another makes a highly improbable charge before a magistrate, the jury may infer from the proof of malice that he did not believe the statement to be true. *Wright* v. *Greenwood*, 1 W. R. 393.

—— **Definition of.**]—Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be (1) an honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly-mentioned belief must be based upon reasonable grounds; (4) the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused. *Hicks* v. *Faulkner*, 46 L. T. 127; 46 J. P. 420—C. A. Affirming, 51 L. J., Q. B. 268; 8 Q. B. D. 167; 30 W. R. 545.

**Question for Decision of Judge.**]—Where the judge to enable himself to determine the issue of reasonable and probable cause leaves subsidiary questions of fact to the jury, the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause, rests upon the plaintiff. The plaintiff, a surgeon, had attended M. for injuries alleged to have been sustained in a collision upon the defendant's railway. M. brought an action against the defendants, which was compromised by the defendants paying large sums for costs and damages. Subsequently the directors of the defendant company caused certain investigations to be made which went to show that M.'s alleged injuries were not caused by the accident, but were fraudulently produced by the plaintiff with the consent of M. with the intention of defrauding the defendants. Counsel advised, on these statements being laid before him, that there was good ground for prosecuting the plaintiff and M. for conspiracy. The plaintiff was accordingly prosecuted and acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury having answered these questions in the affirmative, the judge entered judgment for the defendants:—Held, that the direction to the jury was correct, that upon the facts and findings of the jury, the defendants had reasonable and probable cause for prosecuting the plaintiff, and that judgment had been rightly entered for the defendants. *Abrath* v. *North-Eastern Ry.*, 55 L. J., Q. B. 457; 11

App. Cas. 247; 55 L. T. 63; 50 J. P. 659—H. L. (E.)

At the hearing of a plaint in a county court, to recover rent, the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. The landlord denied this, and subsequently prosecuted the witness for perjury. He was acquitted, and brought an action against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key, and the judge directed the jury alternatively, that if they could not arrive at a conclusion as to which of the parties was speaking the truth, the plaintiff had not made out his case, and the defendant was entitled to a verdict; and that if they thought the plaintiff did give up the key, but the defendant, owing to a defective memory, had forgotten the occurrence, and went on with the prosecution, honestly believing that the plaintiff had sworn falsely and corruptly, then the jury would not be justified in saying that the defendant maliciously and without reasonable and probable cause prosecuted the plaintiff, and the defendant would be entitled to their verdict:—Held, that the direction was right. *Hicks* v. *Faulkner*, 46 L. T. 127; 46 J. P. 420—C. A. Affirming, 51 L. J., Q. B. 268; 8 Q. B. D. 167; 30 W. R. 545.

It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the judge's judgment. *Lister* v. *Perryman*, 39 L. J., Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.

In an action for false imprisonment, the question of reasonable and probable cause is one of law for the judge to decide, and not for the jury. *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J., Ex. 389; 7 Jur. (N.S.) 851; 4 L. T. 805; 9 W. R. 808. S. P., *West* v. *Baxendale*, 9 C. B. 141; 19 L. J., C. P. 149.

The existence of reasonable or probable cause is to be decided by the judge, and is a question for him and not for the jury. *Busst* v. *Gibbons*, 30 L. J., Ex. 75. S. P., *Watson* v. *Whitmore*, 14 L. J., Ex. 41; 8 Jur. 964.

In an action for a malicious prosecution, the question, whether there is or is not reasonable or probable cause, may be entirely for the judge or for the jury, according to the evidence in each particular case. *James* v. *Phelps*, 11 A. & E. 483; 3 P. & D. 231; 9 L. J., Q. B. 106.

If the facts are undisputed, the judge may decide the question of reasonable and probable cause without taking the finding of the jury upon them. *Wilkinson* v. *Foote*, 5 W. R. 22.

—— **Where no Question for Jury.**]—In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the attorney, by direction of his clients, wrote a letter to the defendants, demanding payment of them for the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; and that he had instructions to adopt proceedings, if the matter was not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate to answer a charge of obtaining goods under false pretences. The attorney served the summons, and attended for his clients, and the complaint was dismissed. The defendants afterwards indicted the attorney for sending a threatening letter, contrary to 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On a trial in this action, the judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:—Held, that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants bonâ fide believed that they had a reasonable cause for indicting; but a pure question of law for the judge, whether the defendants had such reasonable cause. *Blachford* v. *Dod*, 2 B. & Ad. 179; 9 L. J. (O.S.) K. B. 196.

**Questions on Inference from Facts.**]—In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends not upon few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. *Panton* v. *Williams*, 1 G. & D. 504; 2 Q. B. 169; 10 L. J., Ex. 545—Ex. Ch.

Though the question of reasonable and probable cause is to be determined on facts, the existence of which, in cases of doubt, can only be properly decided by the jury, yet it is not necessary for the judge, where there is a variety of facts, to leave each fact specifically to the jury, but to decide, on a general view of the circumstances, whether there is or is not reasonable and probable cause for the prosecution. *Rowlands* v. *Samuel*, 11 Q. B. 39; 17 L. J., Q. B. 65.

The facts material to the question of probable cause must be found by the jury, and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or want of it. *Turner* v. *Ambler*, 10 Q. B. 252; 16 L. J., Q. B. 158; 6 Jur. 346. S. P., *Chapman* v. *Heslop* (*in error*), 2 C. L. R. 139; 23 L. J., Q. B. 49; 18 Jur. 348; 2 W. R. 74—Ex. Ch.

Among these facts are the defendant's knowledge of the alleged ground of accusation at the time when he prosecuted, and his belief at the time that the conduct forming such ground of accusation amounted to the offence charged. *Turner* v. *Ambler*, supra.

If the defendant did not so believe, the want of reasonable and probable cause is established, though the imputed offence appear primâ facie to have been committed by the plaintiff, and the fact to have been known to the defendant before the charge was made. *Ib.*

The absence of belief must be proved by the plaintiff; and if it be not proved, the defect is not supplied (for the purpose of shewing probable cause) by evidence that the defendant made use of the charge as a means of obtaining an unfair advantage over the plaintiff. *Ib.*

Upon the trial of an action for maliciously indicting the plaintiff, he proved a case, which in the opinion of the judge shewed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and that being proved, the judge was of opinion that there was:—Held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanour of the witness who proved it to impeach his credit, the judge was not bound to leave to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. *Davis* v. *Hardy*, 6 B. & C. 225; 9 D. & R. 380; 5 L. J. (O.S.) K. B. 91; 30 R. R. 306.

The defendant had indicted the plaintiff for maliciously obstructing the air-way of a mine, but which it appeared the plaintiff did bonâ fide under a claim of right. In an action by the plaintiff for a malicious prosecution:—Held, that it ought to have been left to the jury to say, whether the defendant knew that the obstruction had been done under a claim of right; for that, if so, there was no probable cause for the indictment. *James* v. *Phelps*, 3 P. & D. 231; 11 A. & E. 483; 9 L. J., Q. B. 106.

Where the question of malice was never in terms left to the jury, the court made a rule absolute for a new trial. *Payne* v. *Revans*, 9 W. R. 693. See *S. C.* at nisi prius, 2 F. & F. 367.

Action for maliciously, and without probable cause, indicting the plaintiff for perjury; averment, that he was tried and acquitted, and judgment given that he should depart without day, as by the record appeared. The evidence on which perjury was assigned was given against the defendant in an action in which he was the defendant, and in which the evidence for him contradicted that of the then plaintiff. The defendant, on being told of the now plaintiff's evidence, said he would indict him for perjury. The defendant's informant said, he thought there was no ground for such indictment, but the defendant replied that he should move for a new trial (in the then action), and the indictment would stop the mouths of the now plaintiff and the opposite party for a time:—Held, first, that the jury were properly asked whether the defendant believed there was reasonable and probable cause for the prosecution, and they having found that he did not, that the judge was right in ruling that there was no such cause. *Haddrick* v. *Heslop*, 12 Q. B. 267; 17 L. J., Q. B. 313; 12 Jur. 600.

The jury was rightly told that, if upon the above evidence they believed that the defendant acted from an improper motive, they might infer malice. *Ib.*

In an action against a defendant for taking the plaintiff to a police-office, and causing him to be imprisoned without reasonable or probable cause, on the charge that he uttered menaces against the defendant's life:—Held, that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge decided whether or not there was reasonable and probable cause for the charge. *Venafra* v. *Johnson*, 3 M. & Scott, 847; 10 Bing. 301; 6 Car. & P. 50; 3 L. J., C. P. 51.

In an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested on a capias, the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract for the alleged breach of which the defendant was suing, the judge having stated that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause, told the jury that, to entitle the plaintiff to a verdict, they must be satisfied that there was a total want of reasonable and probable cause, and that the defendant had acted with malice:—Held, a misdirection. *Gibbon* v. *Allison*, 3 C. B. 181.

The question of probable cause is a mixed proposition of law and fact; whether the circumstances alleged are true or not, is a question of fact for the jury; whether they amount to probable cause, is a question of law. *Johnstone* v. *Sutton*, 1 Term Rep. 545; 1 Bro. P. C. 76; 1 R. R. 269. And see *Candell* v. *London*, 1 Term Rep. 520, n.

If A. strikes B., and B. returns the blow, on which A. indicts B. for an assault, the bare fact of A. having struck the first blow is not sufficient to support an action for a malicious prosecution. *Fish* v. *Scott*, Peake, 135.

**How Question to be left by Judge to the Jury.**]—Where A. arrested B. upon the advice of his special pleader that he had a good cause of action, but afterwards upon being ruled to declare, discontinued proceedings, and B. brought an action for a malicious arrest, without any reasonable or probable cause:—Held, that the reasonableness or probability of the cause was a mixed question of law and fact for the jury to decide; and that they were rightly told by the judge, that if they believed the defendant to have acted bonâ fide upon the advice he had received, he was entitled to a verdict; but if otherwise, they ought to find for the plaintiff. *Ravenga* v. *Macintosh*, 4 D. & R. 107; 2 B. & C. 693; 1 Car. & P. 204.

**Question when left to the Jury.**]—In an action for malicious prosecution though reasonable or probable cause, or the want of it, is a question of law for the opinion of the judge; yet when such question is combined with, and depending upon, a long chain of facts, as given in evidence, the whole may be left to the jury for their decision; and the judge, by leaving the matter thus, does not surrender the authority with which he is vested. *M'Donald* or *M'Donnell* v. *Rooke* or *Brooke*, 2 Bing. (N.C.) 217; 2 Scott, 359; 1 Hodges, 314; 5 L. J., C. P. 9. And see *Shrosbery* v. *Osmaston*, 37 L. T. 792.

**Honest Belief in Charge.**]—In an action for a malicious prosecution, although the question of reasonable and probable cause is an inference to be drawn by the judge from facts undisputed or found, yet the test is, not what impression the circumstance would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in instituting and following up the proceedings. *Kelly* v. *Midland Great Western Ry.*, Ir. R. 7 C. L. 8.

The evidence in support of the plaintiff's case was, that he had been a foreman porter in the employment of a railway company, his duty being to charge for extra luggage, and to give

receipts for the sums received by him on that account; that he was informed by the manager of the company, in the presence of the chairman, one of the directors, and the solicitor, that a passenger had accused him of having charged and received double the amount for which he had given a receipt, and was coming up from the country to swear information against him; that he was subsequently arrested on informations sworn against him by the passenger; that he was afterwards tried, and the passenger and his wife swore to the truth of their accusation; notwithstanding which, the jury acquitted him:—Held, that the plaintiff failed to shew want of reasonable and probable cause, and that the judge ought to have nonsuited him, or directed a verdict against him. *Ib.*

The railway company produced their solicitor, who deposed that the passenger wrote a letter to the manager making the accusation; that the matter was put into his (the solicitor's) hands; that he had the passenger brought up from the country, took down his statement in writing and closely sifted him as to the truth of it; that his answers were satisfactory; that he (the solicitor) believed the statement, and then directed informations to be prepared, and the criminal prosecution to be proceeded with. This evidence having been in no wise impeached:—Held, that the judge ought to have inferred from it reasonable and probable cause, and directed a verdict for the company. *Ib.*

Where in an action for a malicious prosecution for sheep-stealing, the sheep which the plaintiff was charged with having stolen was not the defendant's, but the jury found that the defendant believed it was his, and that he had reasonable ground for so believing, and the judge ruled that there was reasonable and probable cause:—Held (Erle, J., dissenting) that the ruling was right. *Douglas* v. *Corbett*, 6 El. & Bl. 511; 2 Jur. (N.S.) 1247.

In an action for malicious prosecution the jury found that the defendant did not take reasonable care to inform himself of the true facts of the case, that he honestly believed in the charge made by him, but that he was actuated by malice and indirect motives. There was no direct evidence of malice and indirect motives, the only evidence relied upon by the plaintiff as proving malice being that the defendant acted in haste, anger, and without adequate inquiry:—Held, that although the absence of reasonable and probable cause is sometimes evidence of malice, yet it is not evidence of malice when the prosecutor honestly believes in the charge; that there was, therefore, no evidence of malice to be left to the jury, and that judgment must be entered for the defendant. *Brown* v. *Hawkes*, 61 L. J., Q. B. 151; [1891] 2 Q. B. 718; 65 L. T. 108; 55 J. P. 823—C. A.

—— **Honest though Unreasonable.**]—The defendant having received a threatening letter, transmitted it to the executive government with a statement that he believed it was written by the now plaintiff, whereupon an official prosecution was instituted at petty sessions, and the plaintiff was examined as a witness in support of it; but the court dismissed the case. An action was then brought for that prosecution, and the judge left to the jury the first issue, scilicet, Whether the defendant did the acts complained of? He also left to them the question, Whether the defendant honestly and reasonably believed that the letter was in the plaintiff's handwriting? But he did not explain to them how their finding upon the first issue should be regulated by their answer to the question. The jury having found the issue in the affirmative, and answered the question in the negative:—Held, that there was misdirection, inasmuch as the defendant's belief might have been honest, though not reasonable, and that, if it was honest, the finding upon the first issue could not be sustained. *Lowe* v. *Collum*, 2 L. R. Ir. 15; 13 Cox C. C. 641.

Though if the jury find that the defendant acted bonâ fide, the question of reasonable and probable cause is for the judge, yet, where the defendant is found by them not to have believed in circumstances justifying his action, the question of reasonable and probable cause cannot be ruled in his favour. Reasonable and probable cause in the mind of the judge is not sufficient; there must have been reasonable and probable cause moving the defendant. *Shrosbery* v. *Osmaston*, 37 L. T. 792.

**Evidence of Disbelief in Charge.**]—The plaintiff is to give primâ facie evidence of want of probable cause, which the defendant may rebut, if he can, by shewing the existence of probable cause. The defendant presented two bills for perjury against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored. He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till the plaintiff taking the record down to trial, the defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted:—Held, sufficient primâ facie evidence of want of probable cause. *Taylor* v. *Willans*, 2 B. & Ad. 845; 1 L. J., K. B. 17—Ex. Ch. Affirming *S. C.*, nom. *Willans* v. *Taylor*, 6 Bing. 183; 3 M. & P. 350; 7 L. J. (O.S.) C. P. 250; 31 R. R. 379.

The disbelief of the party making a charge before a magistrate is some evidence of want of probable cause, notwithstanding other evidence may have shewn that there was primâ facie probable cause for making the charge. *Broad* v. *Ham* or *How*, 5 Bing. (N.C.) 722; 8 Scott, 40; 8 L. J., C. P. 357.

In an action for maliciously indicting the plaintiff for an assault on the defendant, it was proved the defendant came to the plaintiff's house, which was let out as chambers, to inquire for a Mr. S., and on being informed that no such person lived there, uttered abusive language, and, on the plaintiff requesting him to go away, laid hands on him, whereupon he forced him out. There was conflicting testimony as to the degree of violence used by plaintiff. The plaintiff was indicted by the defendant for the assault, and acquitted. The judge directed the jury, that, if the defendant preferred the indictment with a consciousness that he was in the wrong, there was no reasonable or probable cause for the indictment:—Held, that the mere fact of the plaintiff having assaulted the defendant did not of itself constitute reasonable and probable cause without reference to the other circumstances of the case, and that the direction of the judge was substantially correct. *Hinton* v. *Heather*, 14 M. & W. 131; 15 L. J., Ex. 39.

A defendant, having reasonable and probable cause for suspecting that A. had made an assault upon him with intent to rob, gave him in charge to a constable. The constable stated that A.

was a very respectable man, and not likely to have committed the offence. The defendant, however, persisted in his charge, and he was taken before a magistrate. In an action for a malicious arrest:—Held that it was a misdirection to tell the jury, that if the defendant believed the good character given by the constable, and persisted in his charge merely from obstinacy, it put an end to the reasonable or probable cause for taking A. into custody. *Musgrave* v. *Newall*, 1 M. & W. 582; 2 Gale, 91; 1 Tyr. & G. 957; 5 L. J., Ex. 227.

If C. is intrusted to receive money for A., with a written direction for its application, and C. writes a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C. under the 7 & 8 Geo. 4, c. 29, s. 49, not malicious. *Eagar* v. *Dyott*, 5 Car. & P. 4.

In an action for malicious prosecution, the charge having been for stealing a horse left with a servant to shew with a view to a sale, and the horse having been bought honestly and openly:—Held, that there was no reasonable cause. Held, also, that the facts, not having been fully and fairly stated, and there being apparently some anger on the part of the prosecutor, there was evidence of malice. *Stewart* v. *Beaumont*, 4 F. & F. 1034.

**Claim of Right.**]—In an action for maliciously causing the plaintiff to be arrested, it appeared that he was employed to work up some timber into spars, under a contract with H., by which he was to be paid 48*l*., by weekly instalments, during the progress of the work, and the balance on the completion of it. Before the work was completed H. assigned all his goods to the defendant and others, for the benefit of his creditors generally. At this time about 19*l*. remained due to the plaintiff, as the value of the work done up to that time. The plaintiff went to the defendant's yard, where the spars were, and asked for them, and on the defendant's foreman refusing to give them up, he took them the next morning, at four o'clock a.m. His attorney then wrote to the defendant's attorney to say that he claimed a lien on the spars. The defendant demanded them back, but the plaintiff refused to give them up. The plaintiff was then taken into custody for stealing the spars, on the information and complaint of the defendant. He asked the defendant why he gave him into custody; to which the defendant replied, "You had no right to take the spars away; I think you merely fetched them away to get what was your due":—Held, that there was evidence of the absence of reasonable and probable cause for the charge. *Huntley* v. *Simson*, 2 H. & N. 600; 27 L. J., Ex. 134; 6 W. R. 106.

The plaintiff having become tenant to the defendant, who resided in Wiltshire, of a house and lands in Carmarthenshire, together with the exclusive right of sporting over lands adjacent, belonging to the defendant, fished one of the ponds by cutting down the dam, and but few fish having been caught, D., who was the defendant's local agent, suggested to the plaintiff that he might fish a certain pond on the estate by cutting down a bank and placing a net to catch the fish, which the plaintiff accordingly afterwards did during the tenancy, and a few fish were taken. Disputes having afterwards arisen between the plaintiff and defendant, D. laid an information before magistrates against the plaintiff for unlawfully and maliciously breaking down the dam and destroying the fish, under 7 & 8 Geo. 4, c. 30, s. 15; and D. having been examined, the magistrates required the plaintiff to find bail to appear to an indictment for that offence at the assizes, where a bill was preferred but ignored. The defendant was not present at the hearing of the information, nor was there any evidence to shew that he knew that D. had given the plaintiff permission. At the trial, the judge asked the jury whether, in their opinion, D. had given permission, and they found that he had; they also found that D. acted under the defendant's authority in instituting the proceedings, and the judge having expressed his opinion that there was absence of reasonable and probable cause:—Held, that he was correct in so deciding, and that, independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings. *Mitchell* v. *Williams*, 11 M. & W. 205; 12 L. J., Ex. 193.

—— **Forcible Entry.**]—L., being entitled to the possession of premises, entered upon them, but was afterwards ejected by T. and W. He then indicted them for a forcible entry, but they were acquitted. They then brought an action against him for malicious prosecution:—Held, that the action could not be maintained, as the facts shewed that L. had a right to the possession, and there was therefore reasonable and probable cause for the indictment. *Lows* v. *Telford*, 45 L. J., Ex. 613; 1 App. Cas. 414; 35 L. T. 69—H. L. (E.)

**Knowledge of what Evidence was Given.**]—In actions against a railway company for malicious prosecution, it appeared that there had been a disturbance and struggle at one of the company's stations between their servants and some passengers, and that after the struggle was over, and W., who had been one of such passengers, had left the station and was walking away, A., one of the company's servants, who had been engaged in such struggle, and who was a sworn constable, took W. into custody on the charge, first, of being drunk, and on the sergeant of the police station refusing to take that charge, then for assaulting A. in the discharge of his duty. During the struggle and before it was over, the plaintiff S., another of such passengers who had taken part in the struggle, was given into custody by A., and removed to the police-station and there charged, in the first instance, with being drunk and refusing to quit the company's premises, and afterwards with assaulting the company's officers in the execution of their duty. The instructions issued by the company to their servants, who were sworn constables, were that they might, when on duty, take into custody any one whom they might see commit an assault at any of the stations, "and for the purpose of putting an end to any fight or affray," but that such power was to be used with extreme caution, and not if the fight or affray was at an end before they interfered. The attorney for the company appeared before the magistrates to prosecute, and both plaintiffs were committed for trial, and afterwards prosecuted by the company at the sessions and acquitted. In order to shew the absence of reasonable and probable cause, the depositions of the servants of the company before the magistrate were put in evidence, but they contained evidence of assaults upon such servants, and particularly of an assault

on A. in the execution of his duty as a constable:—Held, that inasmuch as, if the facts stated in the depositions of the company's servants had been communicated to the company's attorney before appearing to prosecute, and there was no evidence that they had not been, he might reasonably have considered there was a probable cause for the prosecution; there was no evidence of the absence of probable cause, and the onus being with the plaintiffs to shew such absence, it was not for the company to shew that they undertook the prosecution with a knowledge of the testimony their servants were prepared to give. *Walker* v. *S. E. Ry.*, 39 L. J., C. P. 346; L. R. 5 C. P. 640; 23 L. T. 14; 18 W. R. 1032.

**Nature of Evidence.**]—A trustworthy servant informed his master, whose gun had been stolen, that a credible person (one Robinson) had told him that he had seen the gun with a young man in the village; and went on to inform the master, as the fact was, that he had brought Robinson and the accused together, and had heard the accusation repeated in the presence of the accused; that they had then, at the proposal of the accused, gone together to the place where Robinson stated he had seen the gun, namely, a barn of the father of the accused; and that they there had found a gun which Robinson said was not the gun he had seen there on a former occasion. The master thereupon gave the accused into custody, and the latter having been tried and acquitted, brought an action for false imprisonment. The judge directed the jury that if the master had acted on the information of his servant without making inquiry of Robinson he must be taken to have acted on hearsay evidence, and without reasonable and probable cause. The jury found for the plaintiff:—Held, that the latter part of the information given by the servant was an original account and not merely a confirmation of the hearsay evidence contained in the first part of his information, and that it was a misdirection by the judge to direct the jury that there was no reasonable and probable cause for the arrest of the suspected person, on the assumption that the information on which the arrest had been ordered was derived from hearsay evidence only. *Lister* v. *Perryman*, 39 L. J., Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.

The porter of a silk mercer, whose duty it was to sleep in the warehouse at night, pointed out to his master that some silk had been stolen by cutting the same out of larger pieces and then sewing on the ends of same. As the duties of the porter gave him no opportunity of becoming acquainted with the state of the silk, suspicion against him was excited, and a search being made, a chain and seal were found in a box of which the porter kept the key and of which he had the use, and which were identified by his master as belonging to him, and the porter was given into custody upon a charge of stealing the silk and the chain and seal. It turned out that the silk was stolen, but not by the porter, and that the chain and seal had been given to him, which at the time the charge was made his master had forgotten. In an action for malicious prosecution:—Held, first, that there was sufficient evidence of reasonable and probable cause for giving the plaintiff into custody irrespective of anything connected with the chain and seal; secondly, that the circumstances of suspicion at the time connected with the finding of the chain and seal were some evidence of reasonable and probable cause for suspecting that the plaintiff had stolen the silk. *Wilkinson* v. *Foote*, 5 W. R. 22.

A defendant in an action for maliciously and without reasonable or probable cause procuring the plaintiff to be apprehended on a charge of felony, cannot rely on circumstances of mere suspicion as evidence of reasonable or probable cause for a defence to the action. *Busst* v. *Gibbons*, 30 L. J., Ex. 75.

A robbery had been committed by A., who immediately absconded. The plaintiff, who had been a fellow-workman with A., had been heard to say that he (the plaintiff) had heard, a few hours after the robbery, that A. had absconded, and that A. had previously told him (the plaintiff) that he intended to go to Australia. A. had also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant, the plaintiff's master, having been informed of these circumstances, caused the plaintiff to be apprehended and charged before magistrates with the robbery:—Held, no evidence of reasonable or probable cause, justifying the plaintiff in making the charge. *Ib.*

The defendant, who was robbed in a crowd, gave a description of the offender to the police, who on this arrested the plaintiff. The plaintiff was charged and remanded on bail. Having surrendered and the defendant not appearing, he was discharged. The defendant was subsequently informed that the plaintiff was not the thief, but notwithstanding he took out a fresh warrant:—Held, that the defendant's failure to appear before the magistrate, coupled with the procuring of a fresh warrant, was evidence of want of probable cause and also of malice. *Shuttlebottom* v. *Allday*, 5 W. R. 315.

A farmer having lost two trusses of straw and finding the plaintiffs soon afterwards at a place some two or three miles distant with some loose straw in a cart, gave them into custody with some expression of irritation and prosecuted them for stealing it:—Held, that if the straw was of the same kind as that lost, and in particular if it was clean and new, there was probable cause for suspicion; but if otherwise, there was not probable cause; and if the jury thought that the defendant had acted under irritation, rashly, and rather through the influence of angry feeling than with reasonable care or due inquiry, there was evidence of malice on a count for malicious prosecution. *Darling* v. *Cooper*, 11 Cox, C. C. 533.

Reasonable and probable cause may be shewn by evidence which would make a primâ facie case such as would justify a criminal charge, although it might be insufficient to convict, and although it might require confirmation by further evidence not disclosed or discovered by the prosecutor until after he had given the plaintiff into custody. *Dawson* v. *Vansandau*, 11 W. R. 516.

Evidence of an accomplice, that he had been tampered with by the attorney for the defence, coupled with a letter found on the person of the attorney, after his arrest on the criminal charge, is evidence of reasonable cause for its prosecution. *Ib.*

Similarity of handwriting is not, per se, and without other circumstances, probable cause for preferring a charge of perjury against a person whose handwriting is like that of a forged instrument. *Clements* v. *Ohrly*, 2 Car. & K. 686.

Information received from persons apparently respectable, and believed to be credible, is sufficient evidence of reasonable and probable cause for a prosecution. *Chatfield* v. *Comeford*, 4 F. & F. 1008.

In justifying giving a person into custody on a charge of felony, it is sufficient to prove such facts as constitute a reasonable and probable cause for the charge, although the defendant may have acted not merely on those facts which are proved, but also on others, the truth of which, although alleged in the plea, are either not proved, or are disproved. *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J., Ex. 389; 7 Jur. (N.S.) 851; 4 L. T. 805; 9 W. R. 808.

A female who occupied a house belonging to the defendant, saw a man, on a Sunday, throw a stone at the windows of the house. She immediately pointed out to the defendant two men running away, saying, "It was one of them, the one with the stick," and telling him to arrest them. He did so; and one of them, the plaintiff, was proved to be the one who had thrown the stone:—Held, that there was reasonable ground for giving him into custody. *Jones* v. *Howell*, 29 L. J., Ex. 19; 1 L. T. 330; 8 W. R. 151.

—— **Intent.**]—The mere fact that a report and balance-sheet prepared and published by the secretary of a public company, contain errors or misstatements, does not afford reasonable and probable cause for charging him criminally under the Larceny Act, 1861, s. 84, and will be no defence to an action for malicious prosecution brought by him if he has been so charged, unless some proof be given that he made and circulated the report and balance-sheet as a wilful falsehood and with a fraudulent intent. *Ayres* v. *Elborough*, 22 L. T. 106.

—— **Inference from subsequent Acts.**]—In an action for malicious prosecution the conduct of the defendant subsequent to the making of the charge may be looked at with a view to shew malice. Where, therefore, the defendant had, without reasonable or probable cause, charged the plaintiff with leaving his wife and family chargeable to the parish, and after the plaintiff had been arrested, and before he had been brought before a magistrate, colluded with a parish officer to get the plaintiff's wife into the workhouse:—Held, that the jury might infer malice from such conduct. *Heath* v. *Heape*, 1 H. & N. 478; 26 L. J., M. C. 49; 5 W. R. 23.

**Some Charges preferred maliciously and without Cause.**]—If a plaintiff declares in an action that the defendant maliciously and without probable cause preferred an indictment, setting it forth, the averment is proved, if some charges in the indictment were maliciously and without probable cause preferred, although there was good ground for others of the charges preferred. *Reed* v. *Taylor*, 4 Taunt. 616; 13 R. R. 701. And see *Ellis* v. *Abrahams*, 8 Q. B. 709; 15 L. J., Q. B. 221.

The plaintiff was indicted under s. 4 of the Newspaper Libel Act, though only committed for trial under s. 5. In an action for malicious prosecution:—Held, that he had been put on his trial wantonly and that there was an absence of reasonable and probable cause; he was therefore entitled to maintain an action for malicious prosecution under s. 4 of the act. *Boaler* v. *Holder*, 51 J. P. 277.

**Undisclosed Facts sufficient to support Charge.**]—In an action for malicious prosecution, it appeared that the defendant's traveller applied to P. for payment, that P. shewed him a receipt of the plaintiff (who had formerly been the defendant's traveller) for 20*l*., which he never accounted for; that the defendant on learning this communicated with P. who sent the receipt and reaffirmed the payment, that the defendant then consulted his attorney, and charged the plaintiff with embezzlement before a magistrate, who dismissed the charge; it also appeared that there were other cases which, if known to the defendant, would clearly have justified him in making the charge, but it was not shewn whether he knew of them when he made it:—Held, that the plaintiff had failed to shew the absence of reasonable and probable cause, because (per Bovill, C.J.) the facts of P.'s case shewed reasonable and probable cause, or because at all events (per Byles, J. and Brett, J.), as the plaintiff did not shew the contrary, the defendant was to be assumed to have known of the other matters. *Brooks* v. *Blain*, 39 L. J., C. P. 1.

**Interference of Judge—Evidence of Counsel.**]—In an action for false imprisonment and malicious prosecution, to which the defence was a justification on the ground of embezzlement, it appeared that the plaintiff had been servant to the defendant, and was by him given into custody on a charge of embezzlement, and taken before magistrates, when a day-book kept by him was produced by the prosecution, and no entry found of the sum in question. The plaintiff was remanded, but bailed, and on a further hearing the book was again produced, and found to contain the entry, whereupon the charge was dismissed. At the trial of the action the defendant's counsel charged the plaintiff with having when on bail surreptitiously made that entry in the book. The judge, observing in court a barrister who had been counsel for the plaintiff on both occasions when he was before the magistrates, said he ought to be examined as to whether the entry was in the book at the first examination. He was accordingly examined by the defendant's counsel, and deposed that in his belief it was not. The judge told the jury that if the plaintiff made that entry surreptitiously it was the strongest evidence of his guilt; adding, that he was ashamed to put it as matter of doubt, because they had the evidence of the counsel whose duty it was to make the investigation. The jury having found for the defendant:—Held, first, that the evidence was rightly received, as the fact deposed to by the counsel was not a privileged communication; secondly, that the judge had not improperly interfered with the conduct of the cause by calling him as a witness; and thirdly, that the observations of the judge to the jury on his evidence were not a misdirection, or a ground for a new trial. *Brown* v. *Foster*, 1 H. & N. 736; 26 L. J., Ex. 249; 3 Jur. (N.S.) 245; 5 W. R. 292. And see *Shrewsbery* v. *Osmaston*, 37 L. T. 792.

**Opinion of Counsel.**]—In an action for a malicious prosecution, it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect, or the opinion ill founded. *Hewlett* v. *Cruchley*, 5 Taunt. 277. And see *Abrath* v. *North-Eastern Ry.*, ante, col. 734.

## D. PRACTICE.

### 1. PARTIES.

**Action against Corporation.**]—An action for a malicious prosecution will lie against a company. *Stevens* v. *Midland Ry.*, infra, not followed. *Edwards* v. *Midland Ry.*, 50 L. J., Q. B. 281; 6 Q. B. D. 287; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374.

An action for malicious prosecution will lie against a corporation or a limited company. *Kent* v. *Courage & Co.*, 55 J. P. 264.

Per Lord Bramwell: An action for malicious prosecution will not lie against a corporation aggregate. *Abrath* v. *North-Eastern Ry.*, 55 L. J., Q. B. 457; 11 App. Cas. 247; 55 L. T. 63; 50 J. P. 659—H. L. (E.)

A man was arrested on a warrant issued on the sworn information of an officer employed by a railway company on a charge of theft; he was taken before a magistrate and remanded for a week at the request of an attorney employed by the company, and was ultimately discharged. At the trial of an action for malicious prosecution against the railway company, he denied that he was guilty of the theft, and the judge nonsuited:—Held (per Kelly, C.B., and Cleasby, B.), that the nonsuit was wrong; but per Bramwell, B., that the nonsuit was right; and that no action for malicious prosecution will lie against a railway company, for a corporation aggregate is in law incapable of acting maliciously. *Henderson* v. *Midland Ry.*, 24 L. T. 881; 20 W. R. 23.

A railway company, though a corporation, is liable to an action for false imprisonment, if that imprisonment is committed by its authority, and such authority need not be under seal, but it lies upon the party to give evidence justifying the jury in finding that the persons actually imprisoning him or some of them had authority from the company to do so. *Goff* v. *G. N. Ry.*, 3 El. & El. 672; 30 L. J., Q. B. 148; 7 Jur. (N.S.) 286; 3 L. T. 850.

An incorporated railway company is not liable for a malicious prosecution, in respect of a criminal proceeding instituted by their servant without their knowledge or direction. *Stevens* v. *Midland Counties Ry.*, 2 C. L. R. 1300; 10 Ex. 352; 23 L. J., Ex. 328; 18 Jur. 932.

If a servant of a corporation commits an assault by the authority of the corporation, an action for assault and battery is maintainable against the corporation. *Eastern Counties Ry.* v. *Broom*, 6 Ex. 314; 6 Railw. Cas. 743; 20 L. J., Ex. 196; 15 Jur. 297—Ex. Ch.

If an assault is committed on behalf and for the benefit of a corporation, the corporation may ratify the act of the agent, and if they do so they render themselves liable to an action for the assault. *Ib.*

If a servant of a railway company, acting on behalf of the company, assaults and imprisons a passenger, to compel him to pay his fare for riding in a carriage of the company, the act of the servant is one which may be for the benefit of the company and may be ratified by the company. *Ib.*

**Trustee in Bankruptcy.**]—A trustee in bankruptcy may be liable to be proceeded against for malicious prosecution of the bankrupt, even when the prosecution has been directed by order of the court. *Mittens* v. *Foreman*, 58 L. J., Q. B. 40.

**Authority of Servants to Prosecute on Behalf of Master.**]—In an action for malicious prosecution against an incorporated banking company, the jury found that the same had been authorised on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution. A rule nisi to enter a nonsuit or for new trial was discharged:—Held, on appeal, that assuming the prosecution to have been authorised by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect. *Bank of New South Wales* v. *Owston*, 48 L. J., P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox, C. C. 267—P. C.

The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorised to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present. *Ib.*

**Police.**]—Where a party charges another with felony, a police officer ought to take him into custody, unless there are circumstances shewing that the charge is an unreasonable one. If he takes the party into custody where there are such circumstances, he is liable to an action for false imprisonment. *Hogg* v. *Ward*, 3 H. & N. 417; 27 L. J., Ex. 443; 4 Jur. (N.S.) 885; 6 W. R. 595.

A police constable having imprisoned the plaintiff in a cell, on a charge of aiding another person in assaulting him in the execution of his duty, some hours afterwards the defendant (the chief constable) arrived at the station, and, on the report of another constable, without inquiring into the facts, handcuffed the plaintiff and took him before the magistrate, who dismissed the charge:—Held, that the defendant, in order to justify himself, was bound to shew that the charge was well founded; and that, having failed to do so, he and all other persons concerned in the imprisonment of the plaintiff were liable in trespass. *Griffin* v. *Colman*, 4 H. & N. 265; 28 L. J., Ex. 134.

—— **Persons giving Information to.**]—A party is not liable to an action for false imprisonment who, seeing a man in custody of a constable for a supposed offence, points out another as the real criminal, and does not direct the constable to take that party into custody. *Gosden* v. *Elfick*, 4 Ex. 445; 19 L. J., Ex. 9; 13 Jur. 989.

The defendant, having missed two pairs of horse clippers from his stables, sent for a police constable and said, "I have had two pairs of

clippers stolen from me, and they were last seen in the possession of Danby." Thereupon the constable, having made inquiry, and without communicating with the defendant, arrested the plaintiff, who was taken before the magistrate and committed for trial:—Held, that there was no evidence that the defendant was actively instrumental in putting the criminal law in force, and therefore he was not the prosecutor, and not liable in an action for false imprisonment and malicious prosecution. *Danby* v. *Beardsley*, 43 L. T. 603. See also, *Browne* v. *Stradling*, 5 L. J., C. P. 295.

—— **Giving in Charge of.**]—The fact that the defendant signed the charge-sheet, and appeared before the magistrate against the plaintiff, is strong, though not conclusive, evidence that he authorised the arrest. *Harris* v. *Dignum*, 29 L. J., Ex. 23; 1 L. T. 169.

A felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on inquiries made by himself, arrested the plaintiff. The defendant accompanied the policeman to the station, and signed the charge-sheet:—Held, that he was not liable in trespass. *Grinham* v. *Willey*, 4 H. & N. 496; 28 L. J., Ex. 242; 5 Jur. (N.S.) 444; 7 W. R. 463.

The person giving another in charge for felony, and assisting a constable in the arrest, is not entitled to an acquittal on the general issue in trespass brought against him, together with the constable. *Hough* v. *Marchant*, M. & M. 510.

If A., having been robbed, suspects B. to be guilty, and takes him and delivers him into the charge of a constable present, B. (if innocent) may maintain trespass against A. *Stonehouse* v. *Elliott*, 6 Term Rep. 315; 1 Esp. 272; 3 R. R. 183.

A. telling a policeman to take charge of B. is the same as his telling the policeman to take him into custody, and is sufficient to support an action for false imprisonment by B. against A. *Wheeler* v. *Whiting*, 9 Car. & P. 262.

—— **Authority of Agent.**]—The plaintiff, a workman employed in the defendants' factory, was discharged with others in consequence of slackness of work. He carried away with his own tools one belonging to the defendants, which, when he found inquiry was made for it he returned to the foreman of the factory. When he afterwards called about it at the factory, a detective was present who asked the foreman if he gave the plaintiff in charge for stealing the tool, to which the foreman replied he must see the defendants' managing director first. The plaintiff and the detective went together to the police-station, and the foreman afterwards appeared and charged the plaintiff, and signed the charge-sheet. The next morning, the plaintiff having been locked up all night, the defendants' managing director gave evidence against the plaintiff, but the charge was dismissed. Upon that, the managing director made a remark impugning the magistrate's decision, for which he was called to order. The plaintiff brought an action in a county court for false imprisonment; at the end of the plaintiff's case the judge refused to nonsuit; and the jury found a verdict of 50*l.* for the plaintiff:—Held, that these facts afforded no evidence that the managing director ratified the foreman's action in the matter; and that a nonsuit must be entered. Held, also, that, under the circumstances, the managing director had no power to render the defendants liable in the action. *Rowe* v. *London Pianoforte Co.*, 34 L. T. 450; 13 Cox, C. C. 211.

A servant has an implied authority to give a person into custody only when it is necessary to take such a step to protect his master's property. If a servant gives a person into custody, when no such danger exists, the master will not be liable. *Stevens* v. *Hinshelwood*, 55 J. P. 341—C. A. *Abrahams* v. *Deakin*, 60 L. J., Q. B. 238; S. P., [1891] 1 Q. B. 516; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212—C. A.

**Whether Agent's Act authorised or ratified.**]—The defendant's son, a youth about seventeen or eighteen, in his employ, caused a servant whom he suspected of obtaining money from him by false pretences, to be apprehended and taken before a magistrate, who remanded, but ultimately discharged him. After the remand, the son told his father what he had done; the latter did not prohibit his son from proceeding in the matter, but said that as he (the son) had begun it he would not interfere:—Held, no evidence for a jury of either previous authority or subsequent ratification by the father. *Moore* v. *Towers*, 8 C. B. (N.S.) 611.

**Person inciting Third Person to sue Plaintiff.**]—Semble, no action will lie against a party for inciting a third person to bring a civil action against a plaintiff without reasonable or probable cause. *Fivaz* or *Finan* v. *Nicholls*, 2 C. B. 501; 15 L. J., C. P. 125; 10 Jur. 50.

**Maliciously causing Plaintiff to be indicted.**]—A declaration for maliciously indicting the plaintiff is sustained, although it appears that the defendant preferred the indictment unwillingly, and solely because he was bound over to do so, if it appears that he was himself the cause of his being bound over by originally making a malicious charge before the magistrate. *Dubois* v. *Keates*, 3 P. & D. 306; 11 A. & E. 329; 9 L. J., Q. B. 66; 4 Jur. 148.

In an action for malicious prosecution against A. and B., if it appears that both A. and B. entered into a joint recognizance to prosecute and give evidence; but that A. only employed the attorney, and that B. attended before the magistrate and the grand jury at the request of the attorney, the judge will direct the acquittal of B. *Eagar* v. *Dyott*, 5 Car. & P. 4.

In an action A., by means of perjured evidence, led the judge to believe that B., also a witness, had committed perjury; whereupon the judge directed that B. should be indicted, and bound over A. to prosecute him at the assizes, where B. was acquitted:—Held, that an action for malicious prosecution lay against A., at the suit of B. *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505; 30 L. J., C. P. 257; 7 Jur. (N.S.) 1283; 4 L. T. 149; 9 W. R. 477—Ex. Ch.

**Evidence of Person being Prosecutor.**]—In an action for malicious prosecution, a person is liable who gives evidence in support of the charge, and who represents himself as preferring it, although it is preferred at some other persons expense, and such other persons have told him that he shall be a witness only, and they employ the counsel and solicitor; and if it is shewn that,

during the examination on the charge, such person is, in his hearing, repeatedly alluded to as prosecutor, and does not deny that character, that is evidence from which a jury may infer that he represented himself as the person preferring the charge. *Clements* v. *Ohrly*, 2 Car. & K. 686.

To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew that the charge was taken down in writing and acted upon by the magistrate; but it is necessary that the jury should be satisfied that it was made to the magistrate with a view to induce him to entertain it as a charge of felony. *Clarke* v. *Postan*, 6 Car. & P. 423.

Where a person who was robbed while in a state of intoxication was compelled to go before a magistrate next day and bound over to prosecute, but who made no charge, merely saying he had lost his watch, and the suspected party was committed on the evidence of another person, it was held that an action for malicious prosecution was not maintainable against him as no malice was proved, and it did not appear that he put the law in motion. *Browne* v. *Stradling*, 5 L. J., C. P. 295.

**Before Foreign Authorities.**]—The captain of a merchant ship is liable in trespass, for procuring a mutinous seaman to be flogged and imprisoned in a foreign port by the local authorities, if he took an active part in the proceedings, and did not merely leave the local authorities to act as they thought fit. *Aitken* v. *Bedwell*, M. & M. 68; 31 R. R. 712.

Trespass lies for procuring by awe, fear and influence, and contrary to his own inclination, a sovereign, independent, absolute prince to imprison the plaintiff. *Rafael* v. *Verelst*, 2 W. Bl. 983, 1055.

**Convicting Magistrate.**]—In an action against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it is not necessary that the convicting magistrate should be made a defendant. *Simpkin* v. *French*, 12 Price, 394.

**Where Rule for Criminal Information.**]—A rule for a criminal information obtained by the plaintiff in an action for the malicious prosecution of an indictment, and made absolute, is no bar to such action, although the indictment was against the plaintiff and another person. *Caddy* v. *Barlow*, 1 M. & R. 275; 6 L. J. (o.s.) M. C. 19; 31 R. R. 325.

**Persons Jointly Liable.**] — If, while A. is unlawfully imprisoned by B., C. commits an assault upon him, C. is guilty of the false imprisonment as well as B. *Boyce* v. *Bayliffe*, 1 Camp. 60. See *Day* v. *Porter*, 2 M. & Rob. 151.

**Liability of Person to Separate Actions for False Imprisonment and Malicious Prosecution—Same Facts.**]—False imprisonment and malicious prosecution give rise to distinct causes of action, and therefore a person may be liable to separate actions arising out of the same facts. *Guest* v. *Warren*, 9 Ex. 379; 2 C. L. R. 979; 23 L. J., Ex. 121; 18 Jur. 133; 2 W. R. 159.

**Joint Action for.**]—It was doubtful before the Judicature Act and rules made thereunder whether two persons could bring a joint action for malicious prosecution. *Lowe* v. *Telford*, 45 L. J., Ex. 613; 1 App. Cas. 414; 35 L. T. 69—H. L. (E.)

2. EVIDENCE.

**Consequential Injury.**] — A count for maliciously indicting the plaintiff for an assault, cannot be supported without proof of some consequential injury sustained by him. *Freeman* v. *Arkell*, 3 D. & R. 669; 1 Car. & P. 137.

**Grand Juryman.**]—In such an action the plaintiff may call one of the grand jury to prove that the defendant was the prosecutor of the indictment. *Ib.*

**Counsel.**]—Counsel for an employer in proceedings for embezzlement examined as to the condition of the employer's books at former trial. *Brown* v. *Foster*, 1 H. & N. 736; 26 L. J., Ex. 249; 3 Jur. (N.S.) 245; 5 W. R. 292.

**Solicitor.**] — In an action against A. for maliciously causing an indictment for a riot to be preferred against B., it was proved on the part of A., by a solicitor, that he preferred the indictment by order of a city alderman:—Held, that A.'s counsel might ask the solicitor whether A. had desired him not to prosecute on his behalf, but could not ask him generally what A. had said to him on the subject of the prosecution. *Osterman* v. *Bateman*, 2 Car. & K. 728.

**Opinion of Magistrate or Judge.**]—On the trial of an action for malicious prosecution for perjury in making a charge against the defendant before a magistrate, evidence of what the magistrate said in his hearing on disposing of the charge is admissible for the purpose of shewing the existence of reasonable and probable cause. *Edden* v. *Thorniloe*, 6 Jur. 265.

In an action for maliciously indicting the plaintiff, the observations made by the judge on the trial of the indictment are not evidence for him. *Barker* v. *Angell*, 2 M. & Rob. 371. *See* contra *Warne* v. *Terry*, Rosc. Nisi Prius Evid. 886, 16th edit.

The plaintiff cannot give in evidence what the magistrate said on his discharge, as, if unfavourable to the plaintiff, he had no power of replying to it. *Wetzlar* v. *Zachariah*, 16 L. T. 432.

On the trial of an action for false imprisonment on a charge of felony, if the plaintiff's counsel asks his witness what was said by the defendant when the parties were before the magistrate, the defendant's counsel may ask, on cross-examination, what was said by the magistrate. *Richards* v. *Turner*, Car. & M. 414.

—— **Of Jury.**]—The opinion of the jury on a former trial is not material. *Hibberd* v. *Charles*, 2 F. & F. 126.

**Evidence of Accomplice.**] — Where a plea justifying the trespasses, in such cases, states that the plaintiff committed a felony, the jury must try that question in the same way as if sitting in a criminal court trying the plaintiff for the offence itself; and, if a witness, who admits that he stole similar property at the same time, is called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it

seems that his testimony ought to receive some confirmation. *Richards* v. *Turner*, Car. & M. 414.

**Depositions.**]—Where, in an action for a malicious charge of felony, the plaintiff put in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrate, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent. *Jackson* v. *Bull*, 2 M. & Rob. 176.

**As to Character.**]—In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to shew that the plaintiff's character was suspicious, and that his house had been searched on former occasions. *Newsam* v. *Carr*, 2 Stark. 69; 19 R. R. 675.

In an action by A. for the malicious prosecution by C. of an indictment against A. and B., evidence of the misconduct of C. towards B., after his apprehension tending to shew the bad motives of C. is admissible. *Caddy* v. *Barlow*, 1 M. & R. 275; 6 L. J. (o.s.) M. C. 19; 31 R. R. 325.

Where the defendant gives evidence of probable cause, a witness may be asked whether the plaintiff was not a man of notoriously bad character. *Rodriguez* v. *Tadmire*, 2 Esp. 721.

In an action for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him. *Downing* v. *Butcher*, 2 M. & Rob. 374.

**Of Proceedings.**]—In an action for malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates. *Biggs* v. *Clay*, 3 N. & M. 464; 3 L. J., K. B. 124.

A declaration which alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. *Davis* v. *Noake*, 6 M. & S. 29; 1 Stark. 377; 18 R. R. 290.

A., the servant of B., stated before a magistrate that C. came into the yard of his employer, and took from a stable there two geldings, the property of B., and rode them away, though he was told that he must not:—Held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen and ridden away with two geldings. *Milton* v. *Elmore*, 4 Car. & P. 456.

A declaration, alleging that the defendant maliciously and without probable cause preferred an indictment against the plaintiff for perjury, is supported by proof that some of the assignments of perjury in the indictment, which was set out at length in the declaration, were preferred without probable cause. *Ellis* v. *Abrahams*, 8 Q. B. 709; 15 L. J., Q. B. 221; 10 Jur. 593.

The plaintiff's counsel stated that he should offer no evidence as to the transactions to which the other assignments of perjury related:—Held, that the defendant was not at liberty to give evidence to shew that there was probable cause for those other assignments of perjury. *Ib.*

To a declaration containing one count only for assault and false imprisonment, the plea justified the apprehending the plaintiff on a charge of felony, and proceeded to aver that the plaintiff resisted, whereupon he beat him. At the trial, the justification as to the apprehension for felony was proved; but the defendant did not prove the resistance of the plaintiff. The jury having found for the defendant:—Held, that the verdict was right, the defendant having proved so much of his plea as was necessary to cover the declaration, and it not being necessary for him to prove what was unnecessarily alleged. *Atkinson* v. *Warne*, 1 C. M. & R. 827; 5 Tyr. 481; 3 D. P. C. 483; 6 Car. & P. 687.

**Charge Sheet.**]—A charge sheet is sufficient proof of the signatures which it contains. *Ross* v. *Lascelles*, 15 L. T. 293.

**Returns on Writs.**]—In an action against a judgment creditor for maliciously suing out an alias fi. fa., after a sufficient execution levied upon the plaintiff's goods under the first fi. fa.:—Held, that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case), wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford* v. *Woodgate*, 11 East, 297; 2 Camp. 117.

**Subsequent Acts.**]—The plaintiff, the secretary of a joint-stock bank in London, with a branch at D., went with the cashier to the latter place, with a paper purporting to be an order upon the party having charge of the branch bank, to deliver up to them the books and moneys in his custody. The defendant, one of the directors of the bank, seeing a light in the banking-house at an unusual hour, went there, and not being satisfied of their authority to act as they were doing, placed the plaintiff and the cashier in the custody of a policeman, who handcuffed them, and put them in the cage for the night. In an action for false imprisonment, evidence, that the defendant had, on the following morning, gone to the banking-house in London, broken open the desks of the secretary and cashier, and abstracted papers, for the purpose (as was suggested) of depriving them of means of justifying their conduct, was properly received. *Edgell* v. *Francis*, 1 Scott (N.R.) 118; 1 Man. & G. 222; 9 L. J., C. P. 233; 4 Jur. 366. And see *Brooks* v. *Blain*, 39 L. J., C. P. 1.

**Of Authority.**]—The defendant was lieutenant-governor of the fortress of Gibraltar, and wishing to obtain possession of General Torrijos, a Spanish refugee, whom he thought was harboured in the house of the plaintiff, an English merchant residing at Gibraltar, he placed a part of the military force of the garrison under the command of his military secretary, who ordered it to surround the plaintiff's house, and, in the course of their duty, one of the soldiers prevented the plaintiff's egress. This was the assault and false imprisonment complained of:—Held, that there was sufficient evidence that the various proceedings were under the direction, and carried on by the authority, of the commandant of the garrison.

*Glynn* v. *Houstoun*, 2 Scott (N.R.) 548; 2 M. & G. 337; 5 Jur. 125.

Held, also, that the soldiers being directed to search for Torrijos, whose person they did not know, the governor's military secretary in command of them was only carrying out his orders in directing them to prevent all persons from leaving the house; and that the governor's general orders made him liable for this particular act. *Ib.*

If a party is taken into custody by a constable on a warrant, the signature of which is proved to be of the handwriting of the defendant, a magistrate, this is primâ facie evidence against the defendant in an action for false imprisonment, without further proof that the warrant was issued by him. *Mason* v. *Barker*, 1 Car. & K. 100.

**Joint Acts.**]—If A. imprisons B., and in continuation of that imprisonment delivers him into the charge of C. who keeps him in custody, the acts and declarations of C. are evidence against A. *Powell* v. *Hodgetts*, 2 Car. & P. 432.

In an action against three defendants jointly, the declarations of one tending to shew malice made some weeks after the imprisonment though in the absence of his co-defendants, are admissible. *Wright* v. *Court*, 2 Car. & P. 232.

A. directed a police-officer to take B. into custody, on a charge of embezzlement, and the officer having done so, the officer and A. went together to a box of B., and the officer, in the presence of A., searched the box, and took from it a sovereign:—Held, that in an action by B. against A. for the trespass in opening of the box and taking the sovereign, proof of these facts was evidence of A.'s participation in the trespass. *Jones* v. *Morrell*, 1 Car. & K. 266.

**Prior Conviction.**]—In an action against the defendant for giving the plaintiff into custody on a charge of stealing oysters from an oyster-bed:—Held, that he could not, for the purpose of proving bona fides on his part, give evidence of a prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to his knowledge at the time of his giving the plaintiff into custody. *Thomas* v. *Russell*, 9 Ex. 764; 2 C. L. R. 542; 23 L. J., Ex. 233; 2 W. R. 418.

**What may be Considered.**]—When in an action for maliciously giving the plaintiff into custody and for slander, the defendant pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, and at the trial the plaintiff failed to prove the slander:—Held, that the jury ought to disregard this plea in considering the former cause of action. *Brooke* v. *Avrillon*, 42 L. J., C. P. 126; 21 W. R. 594.

### 3. Damages.

**Malicious Prosecution—Costs.**]—Semble, that if one of two parties indicted, having a defence common to both, retains an attorney to defend them, and pays him the whole costs of defence, and they are acquitted, such party, in an action for malicious prosecution, may demand the costs so paid as part of his damages:—Held, that at all events he may so recover, if the costs of defence, being divisible, it has been expressly left to the jury to deduct any part of such costs which they thought not fairly incurred by the plaintiff, and they have found for him as to the whole. *Rowlands* v. *Samuel*, 11 Q. B. 39; 17 L. J., Q. B. 65.

In the calculation of damages, in an action for maliciously holding to bail, the plaintiff is entitled to recover not merely the taxed costs, but the costs as between attorney and client. *Sandback* v. *Thomas*, 1 Stark. 306; 18 R. R. 771.

In an action for a malicious arrest the plaintiff is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit. *Gould* v. *Barratt*, 2 M. & Rob. 171.

The plaintiff can recover no damages for extra costs, nor any damages, unless malice is proved. *Sinclair* v. *Eldred*, 4 Taunt. 7. S. P., *Webber* v. *Nicholas*, R. & M. 419; 4 Bing. 16; 12 Moore, 87.

**Aggravation.**]—To an action for false imprisonment, the defendant pleaded a justification that the plaintiff had committed a felony. At the trial his counsel abandoned the plea, and exonerated the plaintiff from the charge:—Held, that it was not a misdirection on the part of the judge to tell the jury that putting such a plea on the record was a persisting in the charge contained in it, and was to be taken into account in estimating the damages. *Warwick* v. *Foulkes*, 12 M. & W. 507; 1 D. & L. 638; 13 L. J., Ex. 109; 8 Jur. 85.

If there is an abuse of an authority, by which the party becomes a trespasser ab initio, the plaintiff is entitled to recover damages, as well for the part of the injury which would have been justified if there had been no abuse, as for that part which is directly caused by the abuse. *Kerbey* v. *Denby*, 2 Gale, 31; 1 M. & W. 336; 1 Tyr. & G. 688; 5 L. J., Ex. 162.

A defendant is answerable for all the ordinary acts of precaution on the part of the policeman to whom he has given the plaintiff into custody, on a charge of felony, though more severity may have been used than the occasion required. *Edgell* v. *Francis*, 1 Scott (N.R.) 118; 1 Man. & G. 222; 9 L. J., C. P. 233; 4 Jur. 365.

**Mitigation.**]—In an action for false imprisonment, by giving the plaintiff in charge to a police officer, the defendant may, in mitigation of damages, give evidence to shew that the plaintiff had, for several days, been in the habit of going after him and annoying him. *Thomas* v. *Powell*, 7 Car. & P. 807.

In an action against an individual for giving the plaintiff into custody on a charge of felony, reasonable and probable cause of suspicion is good evidence in mitigation of damages. *Perkins* v. *Vaughan*, 4 Man. & G. 989; 5 Scott (N.R.) 881; 12 L. J., C. P. 38; 6 Jur. 1114. S. P., *Chinn* v. *Morris*, 2 Car. & P. 361; Ry. & M. 424; *Tulley* v. *Corrie*, 10 Cox, C. C. 584; *Cowles* v. *Dunbar*, 2 Car. & P. 565.

In an action for assaulting the plaintiff, and giving him into custody of a policeman, it appeared that the charge upon which the defendant arrested the plaintiff was for fraudulently heaping up mounds of earth, to make it appear that he was entitled to receive from the defendant a large sum for work contracted to be done:—Held, that as the charge could not be pleaded as a justification, evidence of the truth of it was admissible in mitigation of damages. *Linford* v. *Lake*, 3 H. & N. 276; 27 L. J., Ex. 334; 6 W. R. 515.

In an action for false imprisonment on a

charge of stealing money, where there is no plea of justification, the defendant cannot, in mitigation of damages, give evidence of recent apparent losses of money on his part, though offered for the purpose of explaining the circumstances which induced in his mind a belief in the plaintiff's guilt. *Yardley* v. *Hine*, 17 L. T. 264.

**Expenses Incurred.**]—The defendant by a warrant of commitment on a coroner's inquisition, without jurisdiction, caused the plaintiff to be imprisoned. The plaintiff was bailed, and afterwards, while on bail, procured the inquisition to be quashed:—Held, that the plaintiff was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expenses of quashing the inquisition. *Foxall* v. *Barnett*, 2 El. & Bl. 928; 2 C. L. R. 273; 23 L. J., Q. B. 7; 18 Jur. 41; 2 W. R. 61.

**Remoteness.**] — A plaintiff cannot recover damages in respect of having been detained beyond a certain hour, whereby he missed an opportunity of being taken into an employment in a shop or factory, the damages being too remote. *Hoey* v. *Felton*, 11 C. B. (N.S.) 142; 31 L. J., C. P. 105; 8 Jur. (N.S.) 764; 5 L. T. 354; 10 W. R. 78.

**Several Defendants.**]—In trespass and assault against two, damages cannot be severed, though the assault is proved to have been committed by one with more violence and more circumstances of aggravation than by the other. *Brown* v. *Allen*, 4 Esp. 158.

In an action against several where all are implicated in one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable. *Eliot* v. *Allen*, 1 C. B. 18.

Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass. *Clark* v. *Newsam*, 1 Ex. 131; 16 L. J., Ex. 296.

J. S. H.

## MALICIOUS INJURY.

*See* CRIMINAL LAW.

## MALTA.

*See* COLONY.

## MANDAMUS.

*See* CROWN OFFICE—PRACTICE.

## MANOR.

*See* COMMON—COPYHOLD.

## MANSLAUGHTER.

*See* CRIMINAL LAW.

## MAPS.

*See* DEED AND BOND—EVIDENCE.

## MARGARINE.

*See* LOCAL GOVERNMENT (FOOD).

## MARINE INSURANCE.

*See* SHIPPING (INSURANCE).

## MARINER.

*See* SHIPPING.

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## MARKETS AND FAIRS.

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## A. GENERALLY.

**"Fair"—Meaning of—Shows and Contrivances for Amusements—Buying and Selling.**]—The appellant brought upon his land swing-boats, roundabouts, shows, and other contrivances for amusements, and allowed certain other persons to bring upon his land similar contrivances without any payment. There was no buying or selling, and no exposure of goods for sale. The appellant having been convicted of having permitted a "fair" to be held without obtaining a licence so to do:—Held, by Bruce, J., that there was no evidence to justify the conviction, as there was no buying and selling of goods, which is a necessary element in a "fair." Held, by Lawrance, J., that the amusements in question constituted a "fair," and that the appellant was properly convicted. *Collins* v. *Cooper*, 5 R. 256; 68 L. T. 450; 17 Cox, C. C. 647; 57 J. P. 248.

—— **Restraining Holding of.**]—Where land was directed by a local act to be put and kept in proper condition for purposes of recreation, the court restrained a corporation from holding thereon a fair at which cattle were sold. *Att.-Gen.* v. *Southampton Corporation*, 1 Giff. 363; 29 L. J., Ch. 282; 6 Jur. (N.S.) 36; 1 L. T. 155.

**Accommodation in Market.**]—A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods. *Townend* v. *Woodruff*, 5 Ex. 506; 19 L. J., Ex. 315.

If a person is refused, at a fair or market, the accommodation to which he is entitled, a court of equity cannot interfere by injunction, semble. *Weale* v. *West Middlesex Waterworks*, 1 Jac. & Walk. 373; 21 R. R. 183.

Failure on the part of the lord of a market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale, although it is a defence to an action against a dealer who cannot find room in the market. *G. E. Ry.* v. *Goldsmid*, 54 L. J., Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.)

A custom for all persons exercising a particular trade to enter on the soil where a fair was to be held a reasonable time before it took place, and erect stalls and booths thereon for the more convenient carrying on of the trade and to keep them there until a reasonable time after the fair, paying 2*d.* to the lord of the fair, is valid. *Tyson* v. *Smith*, 6 A. & E. 745; 1 N. & P. 784; 6 L. J., K. B. 189.

**Interference with Market—Power of District Board to erect Posts.**]—A district board of works, under the statutory powers conferred by 57 Geo. 3, c. 29, s. 58, and 18 & 19 Vict. c. 120, s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of Spitalfields Market, in order to preserve the rights of the public and to insure the safety of foot-passengers. It was proved that this would seriously interfere with the access to the market, which had been recently enlarged by throwing into it the site of houses which had been pulled down belonging to the plaintiff:—Held, that such an exercise of the board's powers would be an interference with the "rights and privileges vested in the plaintiff in reference to a market" within the exception contained in 18 & 19 Vict. c. 120, s. 91, and an injunction was granted restraining the proposed action of the board. *Horner* v. *Whitechapel Board of Works*, 55 L. J., Ch. 289; 53 L. T. 842—C. A.

**Erection of Weighing-house and Weighing-machine—Interference with Public Highway.**]—In Dec., 1887, the plaintiffs, as the market authority under the Markets and Fairs (Weighing of Cattle) Act, 1887, took steps to provide under that act a weighing-machine for cattle upon a site in their market-place which, according to the plaintiffs' contention, consisted of two long and narrow strips in the market town separated by the highway. The defendants interfered, their contention being that the market-place was not distinct from the highway; but that the entire space upon which the markets were held was a public highway dedicated to the use of the public, subject only to the right of the owner of the soil for the time being or his lessees to hold markets thereon: and that the market-place, as a highway, was vested in them, the defendants, as an urban authority under the Public Health Act, 1875, and that the proposed weighing-machine would be a public nuisance, and interfere with their rights in such highway and with the public right of passage thereon:—Held, that s. 4 of the Markets and Fairs (Weighing of Cattle) Act, 1887, was an imperative section, and that the market authority was not only at liberty, but was bound to provide a proper weighing-machine for their market, which, according to the act, must be a permanent structure and not a movable machine, and that the defendants were wrong in their contention. *McIntosh* v. *Romford Local Board*, 61 L. T. 185.

**Power to let Covered Portion of Market for other Purposes.**]—By 37 & 38 Vict. c. lxxxv., s. 8, the corporation of Edinburgh (who were grantees of a market in Edinburgh) "may cover in a suitable and convenient manner the fruit

and vegetable market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, &c. Provided always that the ground floor only of such market-place shall be used for such fruit and vegetable market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place may be let or used by the corporation for such purposes and for such rents or sales as to them shall seem proper" :—Held, that the corporation were not entitled to exclude members of the public from the covered portion of the market during market hours and devote the building to other purposes. *Edinburgh Magistrates* v. *Blackie*, 11 App. Cas. 665—H. L. (Sc.)

## B. RIGHT, HOW ACQUIRED.

**Prescription.**]—Such a right may be gained by immemorial enjoyment or prescription. *Penryn Corporation* v. *Best*, 48 L. J., Ex. 103; 3 Ex. D. 292; 38 L. T. 805; 27 W. R. 126—C. A.

Where a place had been used as a fair or a market, to which persons resorted to expose articles to sale :—Held, to be a sufficient answer to an indictment for a nuisance, that the same had been enjoyed more than twenty years without interruption. *Rex* v. *Smith*, 4 Esp. 111; 6 R. R. 842.

If the grantee of a market suffers another to erect a market in his neighbourhood, and he uses it for twenty-four years without interruption, the grantee is by such use barred of his action for disturbance. *Holcroft* v. *Heel*, 1 Bos. & P. 400.

**Crown Grant.**]—The crown has a right to grant a market franchise to one person over the land of another, though it cannot be exercised against the will of the person to whom the land belongs. *Att.-Gen.* v. *Horner*, 54 L. J., Q. B. 227; 14 Q. B. D. 245; 33 W. R. 93; 49 J. P. 326—C. A. Affirmed infra.

There is no public right of holding fairs or markets. The right to set up a market or fair is a prerogative right, which can only be granted by the crown after a preliminary inquiry under a writ of ad quod damnum. *Downshire* (*Marquis*) v. *O'Brien*, 19 L. R., Ir. 380.

**Limits of—"In or Near."**]—A grant of a right to hold a market "in or near" a certain place is not a grant by metes and bounds. *Att.-Gen.* v. *Horner*, in C. A., supra—per Lord Esher, M.R.

Such a market may extend as far as reasonable convenience from time to time requires, if the market overflows honestly. *Ib.*

—— **Dedication of Street subject to Market Rights.**]—By letters patent in 34 Charles 2, the king granted market rights "in sive juxta" a certain place called "Spittle square" to one who was lessee of the square, and had acquired the greater part of the reversionary interest in it. The grantee or his successors in title laid out the square as a market-place with four internal streets. The land immediately surrounding the square was afterwards laid out in four external streets, but it did not appear to whom the property in this surrounding land at any time belonged. There was evidence of usage from the time of living memory to grant licences and take tolls for the sale of marketable articles over parts of the external streets as well as over the market-place and the internal streets :—Held, that under the grant "in sive juxta" the market-rights extended into the four external streets as well as over the market-place and the four internal streets; and that the inference from the documents and evidence was that the streets were dedicated to the public, subject to the exercise of the market-rights. *Att.-Gen.* v. *Horner*, 55 L. J., Q. B. 193; 11 App. Cas. 66; 54 L. T. 281; 34 W. R. 641; 50 J. P. 564—H. L. (E.)

—— **"In or at."**]—Under a grant of the right of holding markets and fairs "in or at" a town, the limits of the franchise include all the town, and the grantee has the right, in the absence of anything in the grant to the contrary, to appoint the place in which the market is to be held. *Downshire* (*Marquis*) v. *O'Brien*, 19 L. R., Ir. 380.

**On what Days.**]—Where by the term of a grant a market is to be held on specified days, no length of user will entitle the grantee to hold markets on other days. *Att.-Gen.* v. *Horner*, in C. A., supra.

**Discontinuance—Abandonment.**]—Disuser of the fair ground, in consequence of the illegal holding of rival fairs, does not constitute a discontinuance amounting to an abandonment of the patentee's right. *Downshire* (*Marquis*) v. *O'Brien*, 19 L. R., Ir. 380.

**Forfeiture of Grant—Waiver.**]—The principle laid down in the *Islington Market Case* (3 Cl. & Fin. 513), that whilst the grant of a fair or market remains unrepealed, the default of finding proper accommodation for the public cannot operate in point of law as a ground of granting a new charter to another to hold a market within the common law distance, applies equally to other breaches of duty involving forfeiture of grant, such as holding a fair or market on days other than those appointed by the charter. The crown only can take advantage of such a forfeiture. A forfeiture may be waived by the crown as well as by private individuals, and such waiver may be proved by similar evidence, e.g. by the continued acceptance of the crown rent. *Midleton* (*Lord*) v. *Power*, 19 L. R., Ir. 1.

**Waiver of Statutory Rights.**]—A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *G. E. Ry.* v. *Goldsmid*, 54 L. J., Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.)

**Grant of New Market—Extinguishment of Old Franchise.**]—Under the powers of an act of 1844, the Corporation of Manchester purchased the manorial rights of the manor of Manchester, which was co-extensive with one of the six townships included in the borough. Among these rights was an ancient franchise to hold a market, which appeared to have been a Saturday market. After this, by the Manchester Market Act, 1846, the corporation were empowered to hold markets on such days as

they should think fit at any places within the borough which they should appropriate as market-places, and to charge any tolls not exceeding those mentioned in the schedule to the act (which were higher than the old accustomed tolls), and to make certain charges for weighing which could not have been made under the old franchise :—Held, that there being under the act a change of time, a change of place, an alteration of the old charges, an imposition of new charges, and an extension of the market from the township to the borough, the effect of the act was to give the corporation new rights of holding markets in substitution for the old franchise, and that the old franchise was extinguished. *Manchester Corporation* v. *Lyons*, 22 Ch. D. 287 ; 47 L. T. 677—C. A.

—— **When Old Grant Insufficient.**]—If, by the terms of the grant, the market was to be held in a fixed place, defined and known by metes and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more. *Islington Market Bill, In re*, 3 Cl. & F. 513 ; 12 M. & W. 20, n.

**Charter—How Repealable.**]—And where the first charter purported to be granted "de assensu prælatorum, comitum, &c., in instanti parliamento convocato," a new charter granted to hold the market within the prescribed distance would be void, and would be repealable by scire facias. The words stated would have the effect of giving the first charter the authority of an act of parliament. *Ib.*

Such a charter could only be repealed by act of parliament. If the market created by the first charter had not sufficient space for the accommodation of the public, and also if part of the space originally allotted to it was employed, or suffered by the grantee to be employed for other purposes, without his providing a convenient place for the public to buy and sell in elsewhere, within the limits of his grant, such circumstances would form a good defence to an action brought by him against any person for selling out of the market. They might also furnish ground for a scire facias to repeal the patent. *Ib.*

Quære, whether such circumstances would not render the grantee liable to an indictment for a misdemeanour. If they would, an action would lie also against him for his default ; but while such grant remains unrepealed, no other market could be granted within the limited distance. *Ib.*

**Effect of Charter on Prescriptive Right.**]—Where a corporation held a market by prescription, and the crown afterwards granted to the corporation a charter with these words : "quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur" :—Held, that such prohibition, if it could be considered to extend beyond that which is attached by the common law to the grant of a market, was void. *Islington Market Bill, In re*, 3 Cl. & F. 513 ; 12 M. & W. 20, n.

**Right to Prevent Sale of Marketable Articles in Shops.**]—The right of the owner of a market to prevent tradesmen from selling marketable articles in their shops within the limits of the franchise without paying the market dues in respect of such sales, is not unreasonable and may be gained by immemorial custom or prescription. The grant of a market "with all liberties and free customs to such a market belonging" does not imply such a right. *Penryn Corporation* v. *Best*, 48 L. J., Ex. 103 ; 3 Ex. D. 292 ; 38 L. T. 805 ; 27 W. R. 126—C. A.

The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days. *Macclesfield Corporation* v. *Chapman*, 12 M. & W. 18 ; 13 L. J., Ex. 32 ; 7 Jur. 1041.

A right by custom to exclude persons from selling marketable articles in their shops on market days without the limits of the market, is valid. *Macclesfield Corporation* v. *Pedley*, 1 N. & M. 708 ; 4 B. & Ad. 397.

—— **Evidence for.**]—Where a market for meat, &c., was proved to have been in existence in the reign of James 1, proof that the grantees of the market had for the last hundred years appointed market brokers, that no butchers' shops had existed out of the market place until 1810, and that the shops then set up were objected to by the grantees :—Held, to be sufficient evidence of such immemorial right. *Ib.*

A corporation claimed to be entitled by prescription to a meat market within the borough, and as incident thereto they claimed the right to prevent butchers from selling meat in their own shops on market days within the limits of the franchise. The evidence was that from the time of living memory down to 1862 butchers who had shops in the borough closed them on market days, and resorted to the market and sold there, paying stallage ; that in 1862 two butchers refused to do this, but on actions being brought submitted, and thenceforth paid toll for keeping their shops open on market days, and that the defendant had paid a similar toll for some years before 1875, when he declined to continue the payment :—Held, that the evidence was sufficient to support the claim to prevent the owners of shops from selling in them on market days. *Penryn Corporation* v. *Best*, supra.

**Locality of Market.**]—In an action by a lord of a manor, for disturbance of a market, if the lord proves a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced) that the market was granted to be holden in those places only ; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor. *De Rutzen* v. *Lloyd*, 5 A. & E. 456 ; 6 N. & M. 776 ; 5 L. J., K. B. 202.

—— **Under Parliamentary Powers.**]—A market company obtained an act, the preamble of which recited that a convenient site might be obtained between certain streets on the east and certain other streets on the west, and which enacted that the Market and Fairs Clauses Act, 1847, was incorporated therewith. The special act authorised the erection of a market-house on land described in the deposited plans, and the company was enabled to alter and widen streets in the way pointed out on the deposited plans, and to buy additional lands, not exceeding two acres. A. was owner of land on the west side

of one of the streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets. The company proceeded to take the whole land of A. compulsorily, and to build upon it a covered building, in addition to the market-house, authorised by the act, whereupon A. filed a bill for an injunction:—Held, that as the land of A. was described in the plan, and as therefore it might be wanted, the company was authorised to take it; and as by the general act "the singular may mean the plural," the company was not restricted by the word "market-house"; that the enactments of the special act did not require a reference to the preamble to explain them, and the injunction must be refused, the company being the proper judges of what lands were necessary for the works. *Richards* v. *Scarborough Public Market Co.*, 23 L. J., Ch. 110—L.JJ.

## C. DISTURBANCE OF MARKET.

### 1. ACTIONS FOR.

**No Toll taken.**]—An action will lie for erecting a market near the plaintiff's ancient market, though the defendant only took money in the nature of rent for his stalls, which is a lawful act; but took no toll, and had no pretence to a pie-poudre court, or any thing that amounted to a usurpation of a franchise of the crown. *Mosley* v. *Chadwick*, 7 Bos. & C. 47, n.; 31 R. R. 150, n.; 3 Doug. 117.

**Effect of Waiver.**]—If the grantee of a market under letters patent from the crown suffers another to erect a market in his neighbourhood, and uses it for the space of twenty-four years without interruption, he is by such use barred of his action for disturbance of his market. *Holcroft* v. *Heel*, 1 Bos. & P. 400. See *G. E. Ry.* v. *Goldsmid*, infra.

**Interference without Sale.**]—To support an action for the disturbance of a market, it is not necessary that the defendant should have actually sold; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient. *Dorchester Corporation* v. *Ensor*, 39 L. J., Ex. 11; L. R. 4 Ex. 335.

**Where Space Deficient—Sale by Individual.**]—Where part of the space granted for a market was used for other purposes than those specified in the grant, and the remaining part became insufficient for the public accommodation:—Held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighbourhood of his market, and thereby depriving him of toll, even at a time when there was room in the market, without shewing that on the day when the sale took place, he gave notice to the seller that there was room within the market. *Prince* v. *Lewis*, 5 B. & C. 363; 3 D. & R. 121; 2 Car. & P. 66; 4 L. J. (o.s.) K. B. 188; 29 R. R. 265. And see *G. E. Ry.* v. *Goldsmid*, infra, *Moseley* v. *Walker*, 7 B. & C. 40; 9 D. & R. 863; 5 L. J. (o.s.) K. B. 358; 31 R. R. 146.

—— **Competing Market.**]—It is essential to the complaint of an old market against a new one set up near it, that the old one was competent to the accommodation of the public. *O'Reilly, Ex parte*, 1 Ves. J. 114; 1 R. R. 89.

Failure on the part of the lord of a market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale, although it is a defence to an action against a dealer who cannot find room in the market. In order to make a defendant liable to an action for disturbance of a market, it is not necessary to prove that he acted with the intention of defrauding the plaintiffs of their tolls by taking advantage of the concourse at their market. *G. E. Ry.* v *Goldsmid*, 54 L. J., Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260—H. L. (E.)

A charter was granted by Edw. 3, with the advice of his parliament, to the city of London, conferring certain privileges on the citizens, and granting that no market should be held within seven miles of the city. A charter was granted by Car. 2, in 1662, to the plaintiff's predecessors in title, giving them the right to hold a market "in or next to S. Square," which was within seven miles of the city. User of the market was proved from 1723. The plaintiffs built houses at S. Square, and let many of them for purposes unconnected with the market, and there was evidence that the market was very crowded, that it was difficult for dealers to get stalls there, and that substantially the whole market area was let by the year, month, or week, leaving no space for the general public. The defendants, who were a railway company, established a depôt or row of shops at their terminus, which was within 300 yards of S. Square, and let them to dealers for the purpose of selling vegetables brought up by the railway; the company also circulated their tenants' advertisements inviting consignments of produce; no persons were allowed to sell except the tenants of the shops. The plaintiffs brought an action to restrain the defendants from interfering with their market rights:—Held, that although the charter of Edw. 3 had the force of an act of parliament, the corporation of London might waive their rights as to establishment of markets, and that the court would presume that they consented to the charter of 1662. Held, also, that the depôt of the defendants, although not technically a market, was a disturbance of the plaintiffs' rights, and made them liable to an injunction; and that even if the plaintiffs' mode of conducting their market would preclude them from maintaining an action against a tenant of the defendants, yet it did not preclude them from bringing an action against the defendants to restrain them from establishing a rival place of sale in the neighbourhood. *Islington Market Case* (12 M. & W. 20, n.; 3 Cl. & F. 513), and *Prince* v. *Lewis* (5 B. & C. 363; 4 L. J. (o.s.) K. B. 188; 29 R. R. 265), considered. *Ib.*

**Illegal Tolls no Excuse.**]—Although the taking of tolls on an animal not sold may be illegal, unless such tolls are demanded as stallage, still the levying of them cannot form a justification for setting up a rival market. *Midleton (Lord)* v. *Power*, 19 L. R., Ir. 1.

**Prescribed Limits—Different days—Liability of Persons taking part in Disturbing.**]—Where there is a franchise right of holding fairs and markets, and of taking tolls in respect thereof, and an unauthorised fair or market is held within

a reasonable distance of the prescribed place, and within the ambit of the grant, and such fair or market is held on the same day as is prescribed by the grant for holding a fair or market, there is an actual intendment of law that there has been a disturbance. If, however, the injury arises from acts done outside the prescribed limit, or done on different days from those specified, a question of fact arises, and proof must be adduced of actual disturbance by the persons sought to be made liable, and of injury to the rights of the patentee. Every person who takes part in an illegal combination to disturb a franchise right of holding fairs, or who knowingly takes advantage of it, is guilty of disturbance. *Downshire* (*Marquis*) v. *O'Brien*, 19 L. R., Ir. 380.

**Injunction—Damages—Costs.**]—In an action for disturbance of the plaintiff's fairs and markets, it appeared that a combination had been formed to set up rival fairs within the ambit of the plaintiff's grant, and in such a way as to disturb their franchise rights; that the defendants were not parties to such combination, but that they sold at one of the rival fairs with a knowledge that they were infringing the plaintiff's rights. The defendants, by their pleading and evidence in the action, denied the plaintiff's rights as claimed, and attempted to justify the holding of such rival fairs and the conduct of the originators of the combination:—Held, that they had contributed to the disturbance; that they should be restrained by injunction; that they should not be held liable in damages; but that, having regard to the case made by them, they should pay the costs of the action. Semble, if the defendants had by their pleading admitted the plaintiff's rights, and shewn that they were mere casual vendors, and that the part they took in the rival fairs was due to inadvertence, they would not have been condemned in costs. *Ib.*

**Interlocutory Injunction.**] — The plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursday. The defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The plaintiffs brought their action to restrain the defendants from holding their proposed sales, as being an interference with the plaintiffs' market:—Held, by the Master of the Rolls, that, having regard to modern facilities for traffic, a market on Monday was primâ facie an injury to a market on Thursday, that what the defendants were doing was in fact the establishment of a rival market, and that an interlocutory injunction ought to be granted. But held, on appeal, that the defendants undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted and it turned out that the defendants were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, and the plaintiffs succeeded at the trial, there would be no difficulty in giving them compensation, and their market would suffer no permanent injury from the sales by the defendants in the meantime. *Elwes* v. *Payne*, 48 L. J., Ch. 831; 12 Ch. D. 468; 41 L. T. 118; 28 W. R. 234—C. A.

2. DISTURBANCE, WHAT IS.

**Sale by Sample.**]—A sale by sample, on a market day, near to but without the limits of the market, is not a disturbance of the market, unless done designedly and with the intention to evade payment of toll. *Brecon Corporation* v. *Edwards*, 1 H. & C. 51; 31 L. J., Ex. 368; 8 Jur. (N.S.) 461; 6 L. T. 293.

**Sale out of Market—Customers from the Market.**]—A person brought sheep to a public-house forty yards out of the limits of a market, left them there, went into the market in search of customers, whom he brought back to the public-house, and there sold the sheep to them:—Held, that this was a fraud upon the market, for which the seller was liable to an action by the lessee of the market. *Bridgland* v. *Shapter*, 5 M. & W. 375; 8 L. J., Ex. 246.

**Alteration by Statute—Modern Market—Sale Yard.**]—The commissioners of a town were by their act incorporating the Markets and Fairs Clauses Act, 1847, empowered to set up a market and take tolls for articles sold therein. Sect. 47 of the local act imposed tolls on all persons selling except on premises in their own occupation. Sect. 13 of the Consolidation Act imposes penalties on all persons selling except in their own dwellings or shops:—Held, that an auctioneer holding sales on a field in his own occupation could not be sued for disturbance of the market, though apart from the special act that mode of sale would have been a disturbance of an ancient market. *Abergavenny Improvement Commissioners* v. *Straker*, 58 L. J., Ch. 717; 42 Ch. D. 83; 60 L. T. 756; 38 W. R. 158.

The provisions in the local act were not intended to increase the liability of a person infringing the Consolidation Act, but to increase the area of exemption, and that a person protected by the local act in respect of tolls was also exempt from the penalty under the Consolidation Act. *Rutherford* v. *Straker*, 58 L. J., Ch. 718, n.; 42 Ch. D. 85, n.; 60 L. T. 756, n.

A corporation granted leases, with covenants for quiet enjoyment, of land within the limits of their borough, to the appellant, who occupied it as a sale-yard, and held periodical sales of cattle upon it. Subsequently the corporation, by their urban sanitary authority, opened a public market in the borough and established tolls. The appellant was convicted in a penalty provided by s. 13 of the Markets and Fairs Act, 1847, for selling bullocks in his sale-yard without payment of toll:—Held, that the exemption in s. 166 of the Public Health Act, 1875, referred to a franchise, and did not apply to the case of the appellant, as he had not by his leases acquired such a right to sell cattle in his sale-yard that the corporation could not interfere with it by the establishment of a new market. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157; 17 Cox, C. C. 372; 56 J. P. 132.

By virtue of a consolidating statute of 1883, the corporation of Birmingham had the sole right to establish, and had, in fact, a market for pigs. Under s. 90 of this act penalties were imposed upon any person selling, or exposing for sale within the borough, any animals or articles (in respect of which tolls were authorised to be taken) "except in some market or fair lawfully authorised, or in his own dwelling-place, shop, or

place of business, . . . or on any farm or land in his occupation." The defendants were an association of six individuals who had set up within the borough a sale-yard, or private market for pigs, to which the public had access during market hours, and at which the pigs of any one might be sold. In this sale-yard there were common ways, and a common room provided for the frequenters of the market. All the sales of pigs were, however, effected through the individual members of the association, to whom alone the various stalls were let as yearly tenants; and a charge of 2*d.* had to be paid by them to the association for every pig sold, whether on the premises or not. There was evidence that sales took place on portions of the yard not let to the individual defendants:—Held, that what the defendants were doing as an association and as individuals was not within the exceptions of the act of 1853, but amounted to a disturbance of the market rights of the plaintiffs, which much be restrained by an injunction. *Birmingham Corporation* v. *Foster*, 70 L. T. 371.

**Selling Cattle in Lairs on Transfer of Market.**]—The plaintiffs were, down to 1855, seised in fee of an ancient market for the sale of cattle, known as Smithfield Market, and were entitled to certain tolls in respect of cattle exposed for sale in the market. In 1855 the Smithfield Market was, under the authority of an act of parliament, removed to Islington; but all privileges were expressly preserved to the plaintiffs, and it was enacted that no new market for the sale of cattle should be opened within a distance of seven miles from St. Paul's Cathedral, in the city of London. For more than fifty years before the closing of Smithfield Market, the defendants, or one of them, had been in possession of a private lair near to that market, and in 1854 the business that had there been carried on was transferred to certain premises about six hundred yards distant from the Islington Market and within the distance of seven miles from St. Paul's Cathedral; lairs and receptacles for cattle were there provided, containing accommodation for about four hundred head. Some of the cattle were from time to time sold by the defendants upon the premises between the market days, which were held on Mondays and Thursdays. Beyond a uniform charge of lairage there was nothing in the nature of a toll upon sales effected by other persons than the defendants; but where the defendants themselves acted as salesmen, they charged the same commission as if the cattle had been sold in the plaintiffs' market. The cattle thus sold in the interval between the two markets, would if there had been no opportunity for sale between the two markets, have found their way to and have been sold in the market of the plaintiffs. From time immemorial cattle had been sold in certain lairs near Smithfield Market, of which that possessed by the defendants was one. The defendants now claimed to have a right either from lost grant, prescription, or otherwise, to sell cattle in the manner described:—Held, that an action was maintainable against the defendants for a disturbance of the plaintiffs' market. *London Corporation* v. *Low*, 49 L. J., Q. B. 144; 42 L. T. 16; 28 W. R. 250; 44 J. P. 169.

Held, also, that if the defendants had had any prescriptive right to carry on such sales in the neighbourhood of Smithfield Market (which the court were clearly of opinion they had not), such right had in no way been transferred to lairs in the neighbourhood of Islington Market. *Ib.*

**Another Market on same Day.**]—A market held in the same town with an old market, if held upon the same day, is a disturbance by intendment of law; but if it is held on a different day it is only evidence of a disturbance. *Dorchester Corporation* v. *Ensor*, 39 L. J., Ex. 11; L. R. 4 Ex. 335.

The establishment of a new market, to be holden within the same times, within the common law distance of the old market, was primâ facie injurious to the latter, and therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market. *Islington Market Bill, In re*, 3 Cl. & F. 513.

**Holding Markets on different Days.**]—The plaintiffs were owners of the tolls of an ancient cattle market held weekly on Thursdays. The defendants, who were auctioneers, fitted up with stalls and pens a neighbouring piece of ground, and issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. The plaintiffs brought their action to restrain the defendants from holding their proposed sales, as being an interference with the plaintiffs' market:—Held, that, having regard to modern facilities for traffic, a market on Monday was primâ facie an injury to a market on Thursday, that what the defendants were doing was in fact the establishment of a rival market—per M.R. *Elwes* v. *Payne*, 48 L. J., Ch. 831; 12 Ch. D. 468; 41 L. T. 118; 28 W. R. 234.

**Shop opposite Market.**]—A corporation brought an action to restrain the defendants from selling eggs and dried fish on market days in their shop. The shop was situate in a street which adjoined one side of the plaintiff's market, and was on the opposite side of the street from, but not opposite to, the entrance from that street to the market. The defendants only sold their own goods in their shop in the ordinary course of business:—Held, that this was no disturbance of the statutory right of market. *Manchester Corporation* v. *Lyons*, 22 Ch. D. 287; 47 L. T. 677—C. A. *See cases* ante, col. 764.

**Pleading.**]—To account for disturbance of a fair and market place, a plea that the market was held by the plaintiff, without any lawful warrant or authority, is not embarrassing. *Fitzgerald* v. *Connors*, Ir. R. 5 C. L. 191.

Where, by law, markets are forbidden to be held on particular feast days, it is unnecessary, in pleading the right to hold a market on certain days of the week, to state the exceptions of the feast days. *Mosley* v. *Walker*, 7 B. & C. 40; 9 D. & R. 863; 5 L. J. (o.s.) K. B. 358; 31 R. R. 146.

## D. RIGHT OF REMOVAL.

**Transfer within Township—Right to Ancient Site.**]—The lord of a manor to whom a grant of a market is made infra villam de W., may hold it anywhere infra villam de W.; and whether villa extends to the town of W., or the township or parish of W., the lord has a right to remove the market place from one situation to another within the precinct of his grant; and though he should have holden it above twenty years within the township of W. when the grant only gave

it him within the town properly so called at the time, yet if he afterwards gives notice of the removal to another place in the township, the public has no right to go upon his soil and freehold in the old market place; and any person going there is liable to an action of trespass by the lord. *Curwen* v. *Salkeld*, 3 East, 538; 7 R. R. 510.

A person indicted for a nuisance in erecting a stall in the old market place, after a wrongful removal of the market, may set up the wrongfulness of the removal as a defence, and need not proceed by scire facias to repeal the grant of the market. *Rex* v. *Starkey*, 7 A. & E. 95; W. W. & D. 502; 6 L. J., K. B. 202.

**Incident to grant of Market.**]—Charles the Second, by a charter, granted to a corporation two fairs to be holden annually within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor. A market had been holden immemorially in the High street until a very late period, when the corporation, finding it inconvenient, removed it out of the High street to another and more convenient place within the borough; the corporation exercised acts of ownership in pulling down an old market-house and erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. The defendant having been indicted for a nuisance in erecting stalls in the High street, after the removal of the market, the judge left it to the jury to say, whether the corporation was owner of this market; adding, that if so, the right of removal was incident to the grant. The jury, having found in the affirmative, the court refused to grant a new trial. *Rex* v. *Cotterill*, 1 B. & Ald. 67; 2 Chit. 487.

A municipal corporation was entitled to hold a market at any place within the limits of its municipal borough. The 2 & 3 Will. 4, c. 64, enlarged the boundaries of the borough for parliamentary purposes. The 5 & 6 Will. 4, c. 76, subsequently extended the boundaries of the municipal borough to those of the parliamentary borough for certain purposes. The corporation thereupon removed its market to a place without the boundaries of the old municipal borough, but within those of the parliamentary borough:—Held, that the corporation did not forfeit its ancient right to hold the market by the change which it had made in the place for holding it. *Dorchester Corporation* v. *Ensor*, 39 L. J., Ex. 11; L. R. 4 Ex. 335.

Under a grant of a market to be holden within certain limits, the grantees may hold the market in any convenient place within the limits, and may from time to time remove such market, or any part thereof, to any other convenient place within the limits. *Wortley* v. *Nottingham Local Board*, 21 L. T. 582.

When a grant of market is not confined to any particular locality, the grantee may from time to time change the site in order to suit his own convenience; but it is an implied condition of the exclusive privilege that he shall provide a market place, and that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, and the extent of the accommodation which must be afforded in each case must vary with the circumstances—per Lord Watson. *Edinburgh Magistrates* v. *Blackie*, 11 App. Cas. 665—H. L. (Sc.)

The patentees of fairs are justified in removing them to any place within the precinct of their grant; and if the accommodation provided by them is inadequate, or the change so injurious as to amount to an abuse of the franchise, the remedy of those injured is not the setting up of a rival affair. If such a change is productive of public injury, the remedy must be with the crown, who can proceed by indictment or scire facias to repeal the patent; if productive of private injury, the party injured must resort to his action. *Midleton* (*Lord*) v. *Power*, 19 L. R., Ir. 1.

Semble, that a transfer of the market from the old market house and open street to a new building at the end of the same, and partly in another street, is establishing a new market within s. 50 of the 21 & 22 Vict. c. 98. *Ellis* v. *Bridgnorth Corporation*, 2 Johns. & H. 67; 4 L. T. 112; 9 W. R. 331.

**How Exerciseable—No Change of Privileges.**]—B. being entitled to a market in the manor of K., which was held in the public street on B.'s soil, removed it to another site in K., which site he had demised, without demising the franchise, for a term of years:—Held, that the removal was bad, unless the public had the same privilege in the new market as in the old. *Rex* v. *Starkey*, 7 A. & E. 95; W. W. & D. 502; 2 N. & P. 169; 6 L. J., K. B. 202.

—— **Interference with Existing Rights.**]—A corporation was owner of an ancient market, and also lord of the manor in which the borough was situate. The market had from time immemorial been held in and near the High street. A party had a house in that street, and he and the previous owners and occupiers of the houses in which he lived, as well as several other occupiers of houses in the street, had from time immemorial erected, on market days, stalls opposite their houses, and either used the stalls themselves, or let them to others. No tolls were ever taken in respect of the goods sold at these stalls, though they were formerly taken for similar produce exposed in the market elsewhere. In an action against the corporation for removing the market to another place, within the borough:—Held, that the right to the stalls was a right which might reasonably be supposed to have been granted by the owners of the market to the owners and occupiers of the houses, and that it was sufficiently connected with the enjoyment of the houses to be claimed as appurtenant thereto. *Ellis* v. *Bridgnorth Corporation*, 15 C. B. (N.S.) 52; 32 L. J., C. P. 273; 9 Jur. (N.S.) 1078; 8 L. T. 668; 12 W. R. 56.

Held, also, that if the original grant was presumably to hold the market at any place within the borough, still the corporation could not remove it, as to do so would be in derogation of their own grant of the right claimed. *Ib.*

—— **Corporation acting as Local Board.**]—Although there is a clear right at common law for a corporation to change the site of a market held in a borough, yet if the members of the corporation avail themselves of the 21 & 22 Vict. c. 98, and, as a local board rather than in their corporate capacity, propose to transfer and regulate the market, they will be held to the provisions of the Local Government Act, and their powers will be limited to that extent.

*Ellis* v. *Bridgnorth Corporation*, 2 Johns. & H. 67; 4 L. T. 112; 9 W. R. 331.

**Under Authority to Extend and Improve.**]—In the Cambridge Market Act, 1850, power was given to the mayor, aldermen, and burgesses in council, to enlarge as well as to improve the market of that borough:—Held, that the meaning of the word was not restricted to merely extending the market to streets theretofore forming parts of its sides, but authorised them to extend the market to other streets in its immediate neighbourhood, even though such streets were not mentioned in the act. *Att.-Gen.* v. *Cambridge Corporation*, L. R. 6 H. L. 303; 22 W. R. 37.

The general object of the act being to enlarge and improve the market of the borough, the mayor and aldermen, who had the right to hold markets in the borough, though by the act not authorised to enlarge an existing corn exchange, were authorised to erect a new corn exchange, and to make it adjoin the borough market, such being, in their opinion, a matter of public convenience, and an enlargement and an improvement of the market. *Ib.*

## E. TOLLS.

### 1. ORIGIN OF RIGHT.

**Incident to Grant.**]—The grant of a fair, "cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam pertinentibus," does not give a right to take tolls. *Egremont (Earl)* v. *Saul*, 6 A. & E. 924; 6 L. J., K. B. 205.

If a grantee of a royal franchise, as toll, grants an immunity thereout, and the franchise of toll afterwards becomes extinct by unity of possession in the crown, the immunity does not thereby cease; and if the crown re-grants the toll, the grantee must take it still subject to the immunity. *Tewkesbury (Bailiff)* v. *Bricknell*, 2 Taunt. 120; 11 R. R. 537.

**Immemorial User.**]—In a high street in a town and manor there was a market-house belonging to the lord. This manor, together with the market belonged to the crown in the reign of Henry 3. As far back as living memory extended, various tolls had been paid for the use of the market, for articles hawked about the town, and for stalls and standings for the sale of articles erected in the street. One of these tolls was a shilling for every cart-load of fish, fruit, and vegetables hawked about the town for which no toll had before been paid in the market:—Held, first, that there was evidence that the toll had been paid from time immemorial, so that a legal origin of the claim would, if possible, be presumed. *Lawrence* v. *Hitch*, 37 L. J., Q. B. 209; L. R. 3 Q. B. 521; 9 B. & S. 467; 18 L. T. 483; 16 W. R. 813—Ex. Ch.

**Presumed Dedication.**]—Held, also, that the claim might be sustained as to a toll granted or reserved within time of memory, by presuming a dedication by the crown of the street to the public since the time of Henry 3, which would be a good consideration for a grant or a reservation of the toll claimed, as it was not toll-thorough, or a toll for the mere use of the way, but imported a licence to rest and stay upon the land for the purpose of selling marketable commodities. *Ib.*

**Transferred by Lease.**]—By a private act, passed in 1835, the market of Devonport, belonging to A., was enlarged into a market for cattle, sheep, &c., and A. was empowered to let the erections, buildings, &c., on the ground whereon the market should be held; and to demand and take certain tolls of and from any person or persons bringing any goods or articles to the market. There was also a clause providing, that if the owner should demise or lease the market, or the site, and all or any of the erections or buildings thereon, the lessee should, subject to such exceptions or restrictions as might be expressly contained in the lease, take and enjoy the rents and tolls authorised to be taken by the act, as the owner would have been entitled to do if the lease had not been made:—Held, that a lessee of the market, under a parol demise, was entitled to demand and receive the tolls. *Brigland* v. *Shapter*, 5 M. & W. 375; 8 L. J., Ex. 246.

**By Statute—Conflict with other Rights.**]—The Brecon Markets Act, 1862, vested in the Brecon Markets Company certain tolls, which, under the name of "drift tolls," had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through or from the borough. A railway company, under the sanction of an act passed in the same session, acquired land, not being a highway, on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the Brecon Markets Company were expressly reserved by the Railway Act, but there was no provision either in that or in the Markets Act expressly enabling the Brecon Markets Company to levy tolls on the railway:—Held, that the Brecon Markets Company was not entitled to toll in respect of cattle, goods, or carriages passing along the railway. *Brecon Markets Co.* v. *Neath and Brecon Ry.*, 42 L. J., C. P. 63; L. R. 8 C. P. 157—Ex. Ch.

### 2. AMOUNT OF.

**Reasonable.**]—A grant of a fair or a market, with an express grant of toll, passes reasonable toll, though no amount of toll is specified. *Stamford Corporation* v. *Pawlett*, 1 C. & J. 57, 400; 1 Tyr. 291.

If any objection is made to the antiquity of a toll on the score of rankness, it might still be supported as a reasonable toll, the amount varying from time to time according to the varying value of money. *Lawrence* v. *Hitch*, 9 B. & S. 467; 37 L. J., Q. B. 209; L. R. 3 Q. B. 521; 18 L. T. 483; 16 W. R. 813—Ex. Ch.

A toll of one penny for every pig brought into a market is not necessarily unreasonable. *Wright* v. *Bruister*, 4 B. & Ad. 116; 2 L. J., K. B. 6.

**Usual.**]—An act for the better regulating a market, enacted, that it should be lawful for the owner thereof to take all such tolls as were usually collected or taken, or which were payable within the market:—Held, that such owner, although not entitled at common law to any toll, might, under that act, recover such tolls as, at the time of passing thereof, were usually paid in any part of the market; although the tolls then usually paid in respect of the same articles were

different in other parts of the market. *Bedford (Duke)* v. *Emmett*, 3 B. & Ald. 366.

Where a corporation was entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city, on horses, or in carts or waggons (that is, at the rate of 1*d.* for every horse load, and 2*d.* for every cart load drawn by one horse, and 2*d.* more for each additional horse):—Held, that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches, instead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses was estimated by the weight of passengers rather than of goods. *Carlisle Corporation* v. *Wilson*, 5 East, 2; 1 Smith, 297.

**Misconduct of Toll Collector.**]—Where a toll of corn has been customarily taken by dipping into the sack, so as to bring out a certain quantity, and the collector varied from the proper mode (by sweeping instead of lifting the toll), so as to take more:—Held, that trover lay against him for the excess. *Norman* v. *Bell*, 2 B. & Ad. 190.

### 3. For What Allowed.

**Sales by Sample.**]—A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported. *Hill* v. *Smith*, 4 Taunt. 520. But see *S. C.*, 10 East, 476; 10 R. R. 357.

A seller of corn by sample in a market is benefited by the market as well as the seller of corn which is pitched there in bulk and sold; and if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action lies against him for the injury done to the market in selling by sample. *Tewkesbury (Bailiff)* v. *Bricknell*, 2 Taunt. 120; 11 R. R. 537.

**Milk—Sale from Door to Door.**]—By a local act, 15 Vict. c. civ., for the establishment and regulation of markets in the borough of L., it was provided that, after the opening of the market places, every person (with certain specified exceptions) who should sell within the limits of the act, other than in some one of the market places, private legal markets, or in his own dwelling-house, shop, warehouse, yard, or store, anything whatever in respect of which tolls were by the act authorised to be taken, should be subject to a penalty. Milk was not one of the articles specified in the act as subject to tolls; but by a subsequent amending act, 25 Vict. c. 23, the bailiffs and servants of the trustees of the markets were authorised to remove to the markets any articles, and, inter alia, milk, illegally exposed for sale in any street or public thoroughfare within the limits of the former act, and by a further amending act (35 & 36 Vict. c. 96) it was provided that it should be lawful for the trustees, if they should think fit, to demand and receive in respect of certain enumerated articles, and, inter alia, milk, exposed or offered for sale in any of the market places provided by the trustees, certain tolls specified in the schedule to the act. In 1882, the trustees issued a public notice that, for the future, tolls should be paid on all cans, tankards, or other vessels of milk, whether sold from door to door, or otherwise, and whether taken to the market or not. The market trustees contended that they were entitled to toll upon milk within the market limits, and summoned the appellant for so selling milk without payment of toll; the appellant was convicted:—Held, that, under the acts regulating the markets, the trustees were not entitled to levy toll on milk not sold in one of the market places, but sold, as by the appellant, at the dwellings of customers; and that a person delivering milk to customers at their doors, was not liable to a penalty. *Quilligan* v. *Limerick Market Trustees*, 14 L. R. Ir. 265.

**Evidence of Right.**]—A claim of toll to be taken in specie for goods sold in a market, is supported by evidence of a right to toll for goods brought into the market, and there sold, without shewing any right to toll for goods sold in the market without being brought there. *Mosley* v. *Pierson*, 4 Term Rep. 104.

**Goods brought into a Town.**]—A prescription for toll of corn brought into a town to be there sold on a market-day, any part of which is pitched within the market for sale, and which shall be there sold, is bad, as there cannot be any toll in respect of goods not actually brought into the market. *Wells* v. *Miles*, 4 B. & Ald. 559; 23 R. R. 393.

**Toll-traverse.**]—To support a claim of toll-traverse, a special consideration need not be shewn. *Richards* v. *Bennett*, 2 D. & R. 389; 1 B. & C. 223; 1 L. J. (O.S.) K. B. 97; 25 R. R. 372.

In an action for toll-traverse evidence that a party on a market-day sold forty-one quarters of corn by two sacks pitched in the market, is not sufficient to authorise a verdict against him. *Vines* v. *Reading Corporation*, 4 Bing. 8; 12 Moore, 201; 1 Y. & J. 4; 29 R. R. 490.

**Toll-thorough.**]—A claim of toll-thorough cannot be supported, without shewing a beneficial consideration moving to the person from whom it is claimed. *Yarmouth Corporation* v. *Eaton*, 3 Burr. 1402.

**Hat-guards.**]—The respondent sold hat-guards in a street of a borough which was under a local improvement act. The act required a licence from the corporation to sell in a place other than the market any article for which a toll was leviable. The schedule of tolls mentioned only sheds or stalls for flesh, cheese, butter, "or other thing whatsoever":—Held, that the respondent did not require a licence, as hat-guards were not within the list of tollable things. *Loftos* v. *Gleave*, 55 J. P. 149.

**Sale of Fish—Amending Act—Repeal.**]—The respondent sold fish from a cart in a borough governed by a local improvement act which required a licence from the corporation to sell any goods for which a toll was leviable. A prior act contained an exemption from toll for fish sold in places other than the market. There was no express repeal of the former act and parts of it were recited in the later act:—Held, that the exemption in the former act continued and that no licence was required for selling fish in the streets. *Loftos* v. *Kiggins*, 55 J. P. 151.

### 4. Penalties for Nonpayment.

**"Shop"—Vessel Moored to a Wharf.**]—By a market act, every person who shall sell or expose for sale at any place within the limits of the act

(other than in any existing market-place, or the market-house and market-places to be established under the act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by the act authorised to be taken, other than eggs, butter and fruit, shall forfeit 40*s.* :— Held, that a vessel moored to a wharf on the old canal, within the limits, was not a shop within the exemption. *Wiltshire* v. *Baker*, 11 C. B. (N.S.) 237 ; 31 L. J., M. C. 10, n. ; 5 L. T. 355 ; 10 W. R. 89.

—— **Skittle Ground.**]—The Exmouth Market Act, 1867, which incorporated the Markets and Fairs Clauses Act, 1847, by s. 20, enacts that no unlicensed person shall sell in any open place within the limits of the market, not being the new market-place or his own dwelling-house or shop, any articles, &c. A person sold articles of the description mentioned in the act in a skittle-ground let to him for two days. The place where the sale took place was covered with a roof and inclosed, but had a door leading into the street :—Held, that the place of sale was not his shop within the exception in the act. *Hooper* v. *Kenshole*, 46 L. J., M. C. 160 ; 2 Q. B. D. 127 ; 36 L. T. 111 ; 25 W. R. 368.

—— **Shed affixed to House.**]—A. was tenant of a dwelling-house and shop and a piece of ground in front of the shop ; a wooden shed affixed to the house and supported on wooden posts had been erected and continued over the piece of ground for eighteen years, and previously to the erection of the shed there had been stone flags built into and forming part of the house which projected three feet from the house, and the flags helped to support the shed. In 1864 a market was established for the town. A. was convicted under s. 13 of the Markets and Fairs Clauses Act, 1847, for selling goods in the shed, and the justices stated a case describing the shed and giving their construction of the statute :— Held, that the justices put too narrow a construction on the section, and that the shed was accessory to part of the shop, and therefore within the exception. *Ashworth* v. *Heyworth*, 10 B. & S. 309 ; 38 L. J., M. C. 91 ; L. R. 4 Q. B. 316 ; 20 L. T. 439 ; 17 W. R. 668.

**Dwelling-house or Shop.**]—Where an act enacted that every person who shall sell or expose for sale at any place within the limits of the act (other than his own dwelling-house, or in any shop attached to and being part of any dwelling house) any article in respect of which tolls are by the act authorised to be taken, shall incur a penalty of 40*s.* :—Held, that to bring it within the exemption the shop need not be attached to any part of the dwelling-house of the party himself. *Wiltshire* v. *Willett*, 11 C. B. (N.S.) 240 ; 31 L. J., M. C. 8 ; 5 L. T. 355 ; 10 W. R. 44.

Held, also, that a sale by auction in a shop attached to and being part of any dwelling-house was privileged. *Ib.*

A local board, acting under the powers of the Local Government Act, 1858, and the Markets and Fairs Clauses Act, 1847, made by-laws, directing that cattle markets and an annual show of horses should be held in prescribed places and appointing a toll for cattle, horses, &c., exposed for sale in such markets. An auctioneer, at the time when these markets were established, was possessed of a building called the Agricultural Hall, which was erected some years before the passing of the by-laws, regulating the market. It was a large building, containing a ring or an area in which was accommodation for about 100 head of cattle. Adjoining to and communicating with it was a yard with pens capable of holding 1,400 sheep. His dwelling-house was separated from the Agricultural Hall by his harness-room and stable. He advertised and held sales by auction in the agricultural hall on market days, the average sale on these days amounting to 100 cattle and 1,000 sheep, and exceeding the sales in the regular market. The cattle and sheep so sold were the property of farmers and others, the auctioneer charging them with a commission : — Held, without expressing any opinion as to whether an auctioneer would have been at liberty to sell horses by auction on his premises, notwithstanding the market, it was evident, having regard to the nature and extent of his premises, that they were not part of his dwelling-place or shop within the meaning of s. 13 of the Markets and Fairs Clauses Act, 1847, and that the business carried on by him was not a right, power, or privilege which he enjoyed when the market was established, within the meeting of the Local Government Act, s. 50. *Fearon* v. *Mitchell*, 41 L. J., M. C. 170 ; L. R. 7 Q. B. 690 ; 27 L. T. 33.

A local act regulating a market prohibited under a penalty, in terms identical with those in the Markets and Fairs Clauses Act, 1847, s. 13, any person from selling or exposing for sale within the limits of the market, "except in his own dwelling-place or shop," any articles in respect of which tolls were by that act authorised to be taken. A salesman resided within the limits, and occupied a large yard adjoining his residence, in which were sheds for the sale of cattle and sheep. The yard extended back about 160 feet, and the only entrance to it was through double doors from the street, and by passing underneath the small house, which consisted only of upper rooms supported on pillars over the entrance. Stairs led up from this covered entrance, which was thirty feet by twenty, to the house. He was summoned for exposing for sale 200 sheep in this yard, and convicted in a penalty :—Held, that the conviction was right, as the yard did not come within the exception, so as to be either his dwelling-place or his shop. *M'Hole* v. *Davies*, 45 L. J., M. C. 30 ; 1 Q. B. D. 59 ; 33 L. T. 502 ; 24 W. R. 343.

A sale by auction of horses by A., a licensed auctioneer, in a yard attached to the dwelling-house of B., within the district, is an offence. *Llandaff and Canton Market Co.* v. *Lyndon*, infra.

**How Determined.**]—By s. 13 of the Markets and Fairs Clauses Act, 1847, after a market-place is open for public use, every person other than a licensed hawker who shall sell or expose for sale, in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorised to be taken in the market, shall for every such offence be liable to a penalty ; and in order to exempt from penalty under this section, a party must be shewn to have sold the marketable articles in what is really his own private shop, and not in any such way as to constitute a different market from the legal one ; and in order to determine this question, all the

elements of the case must be taken into consideration, although not one of them alone might be conclusive upon it. *Pope* v. *Whalley*, 6 B. & S. 303; 34 L. J., M. C. 76; 11 Jur. (N.S.) 444; 11 L. T. 769; 13 W. R. 402.

**Bulk of Goods Outside.**]—Upon the construction of a local act establishing a market for corn, &c., in the city of Cork, and its suburbs:—Held, that the market toll was not leviable upon a sale, made in the vendor's own house or premises situate within the city, of corn then being outside the city and its suburbs. *Webber* v. *Adams*, Ir. R. 5 C. L. 146—Ex. Ch.

Held, also, that market toll was not leviable upon such a sale, though the corn sold was then actually within the city or its suburbs. *Ib.*

A sale of goods on a market day, "within the prescribed limits" of a town, is not within s. 13 of the Markets and Fairs Clauses Act, 1847, unless the bulk of the goods sold is, at the time of such sale, substantially "within the prescribed limits." *Newtownards Town Commissioners* v. *Woods*, Ir. R. 11 C. L. 506.

**Sale by Sample.**] — A person, not being a licensed hawker, was committed and fined under the Markets and Fairs Clauses Act, 1847, s. 13, for having sold corn by sample in a place, other than his own dwelling-place or shop, within the municipal boundary of the city of Londonderry, the bulk of the corn being at the time of sale within the municipal boundary:—Held, that the conviction was right. *Londonderry Corporation* v. *McElhinney*, Ir. R. 9 C. L. 71.

**Sale from Door to Door.**]—By s. 13 of the Markets and Fairs Clauses Act, 1847, after the market-place is open for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorised to be taken in the market, shall forfeit 40*s*. An improvement act, subsequently passed, enacted that the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground space in any market-place for the time being under the management of the local board and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule A. annexed; and the schedule in terms imposed the toll on the occupier of every shop, stall, or ground-space in the market, and not upon the commodities sold or exposed for sale there:—Held, that a person who sold fruit and fish, which are marketable articles, from door to door within the prescribed limits, did not thereby become liable to the penalty imposed by 10 & 11 Vict. c. 14, s. 13. *Caswell* v. *Cook*, 11 C. B. (N.S.) 637; 31 L. J., M. C. 185.

**"Provisions" — Potatoes.**] — The Taunton Market Act prohibited the selling within certain limits of the market, corn, grain, fish, meat, poultry, or other provisions, or any bulls, sheep, swine or other live cattle, which are usually sold in public markets:—Held, that a shopkeeper selling potatoes came within the statute, these being "provisions," and also "usually sold within markets." *Shepherd* v. *Folland*, 49 J. P. 165.

**"Article" includes Horses.**]—A market act enacted that every person who shall sell or expose for sale at any place within the limits of the act (other than in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this act authorised to be taken, shall forfeit and pay any sum not exceeding 40*s*. By a schedule a toll was imposed upon horses:—Held, that a horse was an article within this section. *Llandaff and Canton Market Co.* v. *Lyndon*, 8 C. B. (N.S.) 515; 30 L. J., M. C. 105; 6 Jur. (N.S.) 1344; 2 L. T. 771; 8 W. R. 693.

**Fulfilment of Previous Contract.**]—H. was charged before the magistrates of a city for having infringed a private market act (6 & 7 Vict. c. cxxii. s. 3), which imposed a fine on any person selling, offering or exposing for sale any carcases or meat within the limits of the city and county, except within the market. It was proved on the 12th January, 1877, H. delivered certain carcases at a door within the limits, and that the carcases were then weighed and paid for, but it was alleged that they were delivered in pursuance of a previous contract, entered into between the same parties at the same place on the 5th of the same month. The summons was taken out for the 12th January, and the magistrates found that there had been a previous sale and purchase on the 5th:—Held, that they should have convicted on the above facts, and that if they had thought it necessary they should have amended the summons by altering the date on which the offence was alleged to have been committed from the 12th to the 5th of the month. *Exeter Corporation* v. *Heaman*, 37 L. T. 534.

A greengrocer, within the limits of the T. market, used to order vegetables from B., a farmer, outside the limits, and paid monthly. B. was charged with selling marketable goods without paying toll:—Held, that B. was liable to pay the tolls. *Torquay Market Co.* v. *Burridge*, 48 J. P. 71.

**Exposure for Sale.**]—A baker living outside the limits of a borough, who, in a mutual course of dealing, delivers bread to his customers within the borough from a cart three days in the week, is not guilty of the offence of exposing for sale an article in respect of which tolls are authorised to be taken within prescribed limits. *White* v. *Yeovil Corporation*, 61 L. J., M. C. 213.

**Toll paid—Re-sale.**]—A market for a town was established under a local act. A section, for preventing any encroachment on it, enacted that any person who should sell, or offer or expose to sale (among other things) any roots, fruit, or garden stuff in any other place within the town should be liable to a penalty; with a proviso excepting the sale by inhabitants in their houses, shops or premises. A party bought vegetables from a wholesale dealer in the market who had previously on the same day paid the toll for them; he then offered them for sale in the streets:—Held, an offence within the section. *Black* v. *Sackett*, 10 B. & S. 639.

**Payment does not Condone.**]—The respondent, at nine o'clock in the morning, sold certain marketable vegetables, he not having a licence, nor having previously paid the market tolls, and upon being required to pay the same, he refused. At seven o'clock in the evening of the same day

he paid the toll, and was afterwards summoned for the offence of selling these goods without having a licence or having paid the toll; and at the hearing, the justices being of opinion that by the subsequent payment of the toll the offence was condoned, they dismissed the information :—Held, that the justices were wrong, and that the offence was one which could not be condoned. *Carter* v. *Parkhouse*, 22 L. T. 788.

**"Within a Town."**]—By an act passed in 1822 (3 Geo. 4, c. 58), s. 42, any person who sells fish within the town of Rochdale, except in the market-place (unless such sale takes place from a shop or dwelling-house), is liable to a penalty not exceeding 5*l*. N. sold four herrings in an open street, not in the market-place. The street was a main thoroughfare with houses on both sides, in a populous part of the ancient municipal borough of Rochdale, and there was a continuous line of buildings from the market-place to the street where the sale took place. When the act was passed the street in question was not made, and the site of it was in fact green fields. There was no definition in the act of the meaning of the expression "town of Rochdale." The justices refused to convict, being of opinion that the words "town of Rochdale" were limited to the town as it then existed :—Held, that the justices were wrong in refusing to convict, inasmuch as the section was intended to apply to all parts of what might be fairly termed the town of Rochdale, whether in existence at the time of the passing of the act or not. *Collier* v. *Worth*, 1 Ex. D. 464; 35 L. T. 345.

The act of 1822 must have contemplated a growing town, and the expression "town of Rochdale" in s. 42 was intended to include not merely the then existing but the increasing town of coming years; and that, under the Rochdale Improvement Act of 1872, the provisions of the act of 1822 apply to and are in force within the extended boundaries so as to make the "town of Rochdale" mentioned in the earlier act comprise, for all the purposes of that act, the whole of the municipal borough as constituted by the later act of 1872. *Killmister* v. *Fitton*, 53 L. T. 959.

**"Prescribed Limits"—What are.**]—By s. 13 of the Markets and Fairs Clauses Act, 1847, after the market-place is open for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorised to be taken in the market, shall forfeit 40*s*. An improvement act, subsequently passed, enacted that the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench or ground space in any market-place for the time being under the management of the local board, and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule A. annexed: and the schedule in terms imposed the toll on the occupier of every shop, stall, or ground space in the market and not upon the commodities sold or exposed for sale there :—Held, that the "prescribed limits" meant the limits to which the local act applied, viz., the boundaries of the borough. *Caswell* v. *Cook*, 11 C. B. (N.S.) 637; 31 L. J., M. C. 185.

A corporation granted leases, with covenants for quiet enjoyment, of land within the limits of their borough, to the appellant, who occupied it as a sale-yard, and held periodical sales of cattle upon it. Subsequently the corporation, by their urban sanitary authority, opened a public market in the borough and established tolls. The appellant was convicted in a penalty provided by s. 13 of the Markets and Fairs Act, 1847, for selling bullocks in his sale-yard without payment of toll :—Held, that the words "within their district" in s. 166 of the Public Health Act, constituted the district of the urban sanitary authority "the prescribed limits" within s. 13 of the Markets and Fairs Act, 1847. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157; 17 Cox, C. C. 372; 56 J. P. 132.

### 5. Fraud upon the Toll.

**What Amounts to.**]—A person brought sheep to a public-house forty yards out of the limits of a market, left them there, went into the market in search of customers, whom he brought back to the public-house, and there sold the sheep to them :—Held, that this was a fraud upon the market, for which the seller was liable to an action on the case by the lessee of the market. *Bridgland* v. *Shapter*, 5 M. & W. 375; 8 L. J., Ex. 246.

An action by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold, alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the owners were prevented from taking their toll, is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the owners' claim to toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to the defendant in the same borough, but out of the market. *Tewkesbury (Bailiff)* v. *Diston*, 6 East, 438; 2 Smith, 508.

**Proceedings in Respect of.**]—A distress cannot be made for the toll of goods fraudulently sold out of a market to avoid the toll, but the party injured must bring a special action on the case. *Blakey* v. *Dinsdale*, Cowp. 661.

### 6. Liability of Market-owners to Payers of Toll.

**Injury to Cattle.**]—Defendants, owners of a market for the sale of cattle, had, some three years before action, erected some railings round a statue in the street of the town where the market was held, and near to the site which plaintiff, who was in the habit of bringing cattle to the market, occupied and paid a toll for. A cow of plaintiff's was killed in trying to jump the railings, and in an action brought against defendants to recover damages for her loss, the jury found that the railings were of insufficient height :—Held, that the defendants having received toll from the plaintiffs, and invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by

the plaintiffs. *Lax* v. *Darlington Corporation*, 49 L. J., Ex. 105 ; 5 Ex. D. 28 ; 41 L. T. 489 ; 28 W. R. 221 ; 44 J. P. 312—C. A.

## F. STALLAGE.

### 1. NATURE OF.

**Grant of.**]—The word toll in a grant may include stallage. If the crown grants to H. and his heirs that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant. *Lockwood* v. *Wood*, 6 Q. B. 36 ; 15 L. J., Q. B. 365 ; 10 Jur. 158.

The granting of stallage and piccage by a corporation does not authorise the lessee to occupy the market-place at times when no market is being held. *Coleman* v. *Howard*, 2 L. T. 463.

**What is.**]—Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. *Yarmouth Corporation* v. *Groom*, 1 H. & C. 102 ; 32 L. J., Ex. 74 ; 8 Jur. (N.S.) 677 ; 7 L. T. 161.

Therefore, where a person used a market with a chair and a ped, that is, a wooden or a wicker basket, four feet long, two feet and a half wide, and two feet high, with a lid, which, being turned back and supported by pieces of wood not fixed in the soil, formed a table on which he exposed his provisions for sale :—Held, that he was liable for stallage. *Ib.*

The question what constitutes a stall, is a question of fact for a jury. *Ib.*

**Licence for.**]—Whoever will have a stall in a market must have a licence for that purpose from the owner of the soil. *Northampton Corporation* v. *Ward*, 1 Wils. 107 ; 2 Str. 1238.

Trespass lies for setting tables in a market-place for the sale of goods thereon, without leave of the owner of the soil. *Norwich Corporation* v. *Swan*, 2 W. Bl. 1116.

Ejectment cannot be maintained against a person for having a stall in a street : the proper remedy is an action of trespass by the owner of the soil on which the stall was erected. *Doe* d. *St. Julian, Shrewsbury* v. *Cowley*, 1 Car. & P. 123.

### 2. RIGHT TO RECOVER.

**Payment for Sale—Not Stallage.**]—Charles 1 granted by letters-patent to the lord of the manor of Swindon, his heirs and assigns, full and absolute licence and authority to hold a market within the town of Swindon, with all liberties and free customs, tolls, stallage, piccage, fines, and all other profits, commodities and emoluments, whatsoever to such market appertaining. In 1866, the lord of the manor of Swindon, being seised of and entitled to the rights granted by Charles 1, demised to a company for twenty-one years all the tolls, rates, dues and duties arising and to be collected and received at the Swindon market. The market was held in the public street, and no stalls or pens had ever been erected for the standing or separation of the cattle. Up to the time that the company acquired their rights in 1866, no payment was ever demanded except upon the sale of cattle, when a small sum was paid per head, either by the buyer or seller. The company made a charge upon the vendors for stallage upon all cattle brought to the market in lieu of the tolls charged on the sale :—Held, in an action against a vendor of cattle to recover this stallage, that the company had no right to make such charge. *Swindon Central Market Co.* v. *Panting*, 27 L. T. 578.

**Exemption—Evidence for.**] — Charles 1. by letters patent, in 1639, granted to H. and his heirs a weekly market at E., with all tolls and profits. By deed in 1646, between H. of the first part, and certain persons on behalf of the inhabitants of E. of the second part, the inhabitants "having considered the great charge H. had been at in procuring the market," and for other considerations did grant unto him the court-house and the waste ground adjoining the market-place, together with the market-place ; and H. covenanted that the inhabitants should have a market toll free :—Held, that in the absence of any evidence of an ancient market, or of any reference to a custom or an exemption from stallage in the charter of 1639, there was no origin to which such exemption could be referred but the deed of 1646. *Lockwood* v. *Wood*, 6 Q. B. 31 ; 13 L. J., Q. B. 365 ; 10 Jur. 158.

A modern grant by H., a subject holding under the crown as before mentioned, to which certain persons, styled inhabitants of E., are parties, granting that the inhabitants of E., their heirs and assigns for ever, shall enjoy the market as freely as H. held it of the crown, and containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant. *Ib.*

Such an exemption for the inhabitants of a town can be only by way of custom, not of grant or prescription. *Ib.*

**Not necessary to shew Contract.**]—An action may be maintained by the owner of a market for stallage, and that without shewing any contract in fact between him and the occupier of the stall. *Newport Corporation* v. *Saunders*, 3 B. & Ad. 411 ; 1 L. J., K. B. 147.

## G. BY-LAWS.

**Validity.**]—A by-law for regulating a market must not be so restrictive as to prevent, without leave, a frequenter of it from resorting to it. *Wortley* v. *Nottingham Local Board*, 21 L. T. 582.

A by-law for the regulation of a market, setting apart different places for the carrying on of wholesale and retail trade, is not unreasonable as being in restraint of trade. *Strike* v. *Collins*, 55 L. T. 182 ; 34 W. R. 459 ; 50 J. P. 741.

**Exposure contrary to Regulations.**]—A local improvement act imposed a penalty for exposing for sale in any of the streets of the town any meat so as to project over or upon any foot- or carriage-way. The act provided that no person should be subject to any penalty for placing any stall, or exposing provisions for sale, so as such stalls be placed in such part of the streets as should be appointed by the commissioners, and that no person should be subject to any penalty for placing any stall, or exposing provisions for sale in such parts of the streets as should have been theretofore used for that purpose at the times of the usual fairs and markets within the

town. In 1853 a local board of health was constituted in the township under 16 & 17 Vict. c. 24, who, by by-laws duly allowed and published, appointed certain places for markets for certain descriptions of goods on market days, and imposed penalties for the breach thereof:—Held, that the provisions of the local act did not exempt from such penalties one who violated these by-laws by exposing for sale meat, at a place other than that so appointed by the local board of health, notwithstanding the spot where such meat was so exposed for sale was a place where such articles had for a long series of years been sold by him and others. *Savage* v. *Brook*, 15 C. B. (N.S.) 264; 33 L. J., M. C. 42; 10 Jur. (N.S.) 587; 9 L. T. 334; 12 W. R. 81.

## H. SALE OF DISEASED ANIMALS.

**Action for.**]—The Contagious Diseases (Animals) Act, 1869, s. 57, does not render the sending of diseased animals to a public market an actionable wrong, in the absence of any warranty of soundness or of any evidence of fraud or misrepresentation. *Ward* v. *Hobbs*, 48 L. J., C. P. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114—H. L. (E.)

A number of pigs were sold by auction in a public market, subject to conditions of sale which provided that no warranty would be given, and that the animals should be removed "with all faults." Shortly after the sale it was found that the pigs were infected with typhoid fever, from which the greater part of them died:—Held, that the seller of the pigs had not been guilty of misrepresentation by conduct, and was not liable in an action for misrepresentation at the suit of the purchaser. *Ib.*

## I. SLAUGHTER OF BEASTS.

**For Sale—Meaning of.**]—By a local act it is enacted, in language similar to s. 19 of the Markets and Fairs Clauses Act, 1847, that "no person shall slaughter any cattle, or dress any carcase, for sale as human food or food of man, in any places within the limits, other than" such slaughter-house as there described; and that every person who "shall offend by slaughtering any cattle, or dressing for sale any carcase within the limits in any place other than one of such slaughter-houses," shall be liable to a penalty:—Held, that this enactment applies only to the slaughtering of beasts intended by the person slaughtering for sale as human food. *Elias* v. *Nightingale*, 8 El. & Bl. 698; 27 L. J., M. C. 151; 4 Jur. (N.S.) 166; 6 W. R. 291.

**Slaughter-houses — Consent of Corporation.**]—By a local act of 1862 a company was empowered to erect a cattle market at Brecon, and by s. 65 the company from time to time, if and when they should think fit, and with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town-clerk, might provide and maintain slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they should think expedient. In 1863 the corporation consented to the provision and maintenance by the company of slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, in pursuance of, and in accordance with, the above-mentioned s. 65; the company built slaughter-houses accordingly, but absolutely abandoned the use of them in 1864. The company subsequently built other slaughter-houses a quarter of a mile off; but the corporation had always refused to give any further consent. Justices refused to convict under s. 19 of the Markets and Fairs Clauses Act, 1847, for slaughtering cattle on premises in the borough other than those leased by the appellant:—Held, that the slaughter-houses occupied by the appellant had not received the consent of the corporation under s. 65 of the local act of 1862, and that the justices were right. *Hughes* v. *Trew*, 36 L. T. 585.

—— **When Corporation Local Board.**]—The Towns Improvement Clauses Act (10 & 11 Vict. c. 34), s. 126, prohibits the use of a slaughter-house without the licence of the commissioners; that is, in certain boroughs, the corporation acting as the local board under 21 & 22 Vict. c. 98. The corporation was the local board in Brecon. The Brecon Markets Act, 1862, which incorporated the Brecon Markets Company, empowered the company, with the consent of the corporation to erect slaughter-houses;—Held, that the consent of the corporation under the latter act operated as the licence of the local board under the former act. *Anthony* v. *Brecon Markets Co.*, 41 L. J., Ex. 201; L. R. 7 Ex. 399; 26 L. T. 979; 21 W. R. 27—Ex. Ch.

*See also* LOCAL GOVERNMENT.

## J. MARKET OVERT.

### 1. PRIVILEGE OF.

**Nature of.**]—The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title. *Cundy* v. *Lindsay*, 47 L. J., Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406; 14 Cox, C.C. 93—H. L. (E.).

By a purchase in market overt the title obtained is good against all the world. *Ib.*

If not so purchased, though purchased bonâ fide, the title obtained may not be good against the real owner. *Ib.*

Possession is the criterion of title to a personal chattel; the property therefore changed by sale in market overt. *Hiern* v. *Mill*, 13 Ves. 122.

**Extent of.**]—The protection attendant upon a sale in market overt is not confined to ancient markets created by charter or by prescription, but extends to modern markets established under powers conferred by act of parliament. *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33.

—— **Pawning.**]—A market overt cannot be for pawning. *Hartop* v. *Hoare*, 1 Wils. 8; 2 Stra. 1187.

—— **Sale by Sample.**]—A sale by sample is not entitled to the privileges of a sale in market overt. *Crane* v. *London Dock Co.*, 5 B. & S. 313; 33 L. J., Q. B. 224; 10 Jur. (N.S.) 984; 10 L. T. 372; 12 W. R. 745.

—— **Ships.**]—There is no market overt for ships. *Hooper* v. *Gumm*, 36 L. J., Ch. 605; L. R. 2 Ch. 282; 16 L. T. 107; 15 W. R. 464.

2. SALES IN MARKET OVERT—WHAT ARE.

*See* Sale of Goods Act, 1893, s. 22.

**In the Market.**] — To constitute a sale in market overt, the goods sold must be present in the market during the whole of the transaction, from the making of the contract to the delivery. *Crane* v. *London Dock Co.*, supra.

**At Wholesale Warehouse.**] — A wholesale warehouse in London, used as a shop, and having glazed windows in which articles are exhibited for sale towards the street, is a market overt by the custom of London for goods commonly sold there. The custom is not confined to shops which are literally open to the street. *Lyons* v. *Depass*, 3 P. & D. 177; 11 A. & E. 326; 9 Car. & P. 68; 9 L. J., Q. B. 51; 4 Jur. 505.

**At Horse Repository.**]—A sale by public auction at a horse repository out of the city of London, is not a sale in market overt. *Lee* v. *Bayes* or *Robinson*, 18 C. B. 599; 25 L. J., C. P. 249; 2 Jur. (N.S.) 1093.

**Of Horse—Effect of.**]—The provisions of 31 Eliz. c. 12, extend to the sale as well of horses which are not stolen as of those which are stolen; and the sale of a horse in market overt without complying with the requirements of this statute has merely the effect of a sale out of market overt. *Moran* v. *Pitt*, 42 L. J., Q. B. 47; 28 L. T. 554; 21 W. R. 525.

**Sale in Showroom above Shop—Sale by Customer to Shopkeeper.**]—Jewellery, stolen from the plaintiff, was sold to the defendants, jewellers in the city of London. The sale took place in a showroom above the defendants' shop to which access could only be obtained by their special permission:—Held, that the sale was not a sale in market overt, and that the plaintiff was therefore entitled to recover back the jewellery from the defendants. Semble, that the doctrine as to sales in market overt in the city of London does not apply to a sale by a customer to a shopkeeper. *Hargreave* v. *Spink*, 61 L. J., Q. B. 318; [1892] 1 Q. B. 25; 65 L. T. 650; 40 W. R. 254.

**Liability of Salemaster.**]—A salemaster, who in market overt publicly sells and afterwards delivers a stolen beast, although he does so innocently and in the ordinary course of his business, is responsible, in trover, to the true owner for the value of the beast. *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33.

The defendants were public sales-masters, and transacted their business in a legally established cattle market, where a market overt for the sale of cattle and sheep was held once a week. A number of sheep, which had been stolen from the plaintiff, were brought on a market day to the stand of the defendants by the thief, who employed the defendants to sell the sheep for him. The defendants, in ignorance of the theft, placed the sheep in their stand, and sold and delivered them to a purchaser, by whom they were removed:—Held, that the defendants were liable to the plaintiff in an action of trover for the value of the sheep. *Delaney* v. *Wallis*, 13 L. R., Ir. 31; 15 Cox, C. C. 525—C. A.

**Authority of Servant.**]—An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere. *Metcalfe* v. *Lumsden*, 1 Car. & K. 309.

3. STOLEN GOODS—RIGHT OF OWNER TO RECOVER.

*See* Sale of Goods Act, 1893, s. 24.

**Contract induced by Fraud — Conviction of Fraudulent Buyer—Revesting of Property.**]—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner, convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—Held, that under 24 & 25 Vict. c. 96, s. 100, the property in the goods revested in the original owner upon conviction, and that he was entitled to recover them from the innocent purchaser. *Moyce* v. *Newington* (4 Q. B. D. 32) overruled. *Bentley* v. *Vilmont*, 57 L. J., Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68—H. L. (E.)

**Owner not confined to Special Remedy.**]—Where goods were stolen, and sold in market overt, and the thief was prosecuted to conviction, and the goods were, after a demand made for them by the original owner, converted by the defendant:—Held, that by virtue of 7 & 8 Geo. 4, c. 29, s. 57 [repealed by 24 & 25 Vict. c. 95, but similar provision re-enacted by 24 & 25 Vict. c. 96, s. 100], the owner might recover them in trover, and was not bound to obtain them only by the means pointed out in that statute, of a writ of restitution, or an order of the judge who tried the thief. *Scattergood* v. *Sylvester*, 15 Q. B. 506; 19 L. J., Q. B. 447; 14 Jur. 977.

The effect of 7 & 8 Geo. 4, c. 29, s. 57, is, upon conviction of the thief, besides giving to the original owner the summary methods pointed out by the statute, to restore to him the goods which were stolen, the right of property in them, and all the legal remedies incident to that right. *Ib.*

**Of Horses—Evidence.**]—The defendant's mare, which he had turned out in a public park, was found out of the park, and was sold at a public auction by the pinner. After an intermediate sale she was sold in market overt to the plaintiff, and was subsequently taken possession of by the defendant. There was no proof that the formalities which the 13 Eliz. c. 12, requires upon the sale of horses at fairs and markets had been observed:—Held, that in the absence of such proof the court would not infer that such formalities had been observed, and that the plaintiff could not maintain an action for the mare against the defendant, the true owner. *Moran* v. *Pitt*, 42 L. J., Q. B. 47; 28 L. T. 524; 21 W. R. 554.

**Claim by Purchaser against Owner for Cost of keeping Beasts.**]—The bonâ fide purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counterclaim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property re-vested in the original owner. *Walker* v. *Matthews*, 51 L. J., Q. B. 243; 8 Q. B. D. 109; 46 L. T. 915; 30 W. R. 338.

## K. ENGROSSING, REGRATING AND OTHER OFFENCES.

**Offence of.**] — The common law offence of engrossing or regrating applies only with respect to the necessaries of life. *Pettamberdass* v. *Thackoorseydass*, 7 Moore, P. C. 239; 5 Moore, Ind. App. 109; 15 Jur. 257.

**Spreading Rumours to Enhance Price.**] — Spreading rumours with intent to enhance the price of hops, in the hearing of hop planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, with intent to induce them not to bring their hops to market for a long time, and thereby greatly to enhance the price, is an offence at common law, notwithstanding the repeal of the 5 & 6 Edw. 6, c. 14, by 12 Geo. 3, c. 71. *Rex* v. *Waddington*, 1 East, 143, 166; 6 R. R. 238.

## L. HAWKER AND PEDLAR.

### 1. LICENCE.

**Effect of.**]—A hawker's licence does not give the privilege of selling goods in a borough, where, by a by-law made pursuant to a charter and ancient custom, strangers are not permitted to trade. *Simson* v. *Moss*, 2 B. & Ad. 543; 9 L. J. (O.S.) M. C. 120.

**Use by Servant.**]—A licensed hawker, who gave his licence to be used by his servant employed to sell goods on his account, was not liable on 29 Geo. 3, c. 26, as for letting to hire or lending the licence. *Hodgson* v. *Flower*, 2 Camp. 288.

**Trading without.**]—A conviction for having traded as a hawker, pedlar, and petty chapman, without having a licence, was held good. *Rex* v. *Smith*, 3 Burr. 1475.

A person exposing to sale and selling tea as a hawker, without a licence, is liable to the penalty imposed by 50 Geo. 3, c. 41, s. 17, upon hawkers trading without a licence, although, even with a licence, he would be liable to a penalty for selling tea in an unentered place. *Rex* v. *M'Gill*, 2 B. & C. 142; 3 D. & R. 377.

**Auction no offence against.**]—Where a person duly licensed as a hawker and pedlar, and also as an auctioneer, sells by auction in a public market, and during market hours:—Held, that such sale by auction is not an offence against the tenor of his licence. *Reg.* v. *Henry*, 3 W. R. 103.

A licensed hawker opening a room in a place, he not being a householder there, and that not being the usual place of his abode, and selling there by retail, does not thereby commit an offence within 50 Geo. 3, c. 41, s. 7. To constitute such an offence, the selling must be by outcry, &c., or some mode of sale at auction. *Allen* v. *Sparkall*, 1 B. & Ald. 100.

**When required—Trading from Town to Town.**] —A cabinet maker, residing at Leicester, and having a shop there, sending goods to Ashby-de-la-Zouch in a cart, which he accompanied on foot part of the way, and then going to Ashby-de-la-Zouch by the mail, where he employed an auctioneer and sold the goods by auction, is a person travelling from town to town within 50 Geo. 3, c. 41, s. 7. It is not necessary in an information for penalties under 50 Geo. 3, c. 41, s. 7, to state that the defendant sold by auction, by opening a room or a shop, and exposing to sale his goods by retail. *Att.-Gen.* v. *Woolhouse*, 1 Y. & J. 463; 12 Price, 65.

A person travelling from town to town, and having packages of books sent after him by public conveyance, and taking rooms at each town, and there selling such books by retail by auction, is a trading person within the meaning of the statute. *Dean* v. *King*, 4 B. & Ald. 517. S. P., *Rex* v. *Pease*, 8 L. J. (O.S.) M. C. 87.

A licensed auctioneer, conveying goods by public stage-waggon from place to place, and selling the same on commission, by retail or auction, at different towns, is a pedlar, or trading person, within 50 Geo. 3, c. 41, s. 6. *Rex* v. *Turner*, 4 B. & Ald. 510.

An information charging the defendant under 50 Geo. 3, c. 41, as a trading person, going from town to town, &c., but selling at S. (by sale at auction) goods, &c., is supported by evidence that he lived at B., and was a trader there—that he went to S., and took up a temporary abode at an inn there, and that he employed an auctioneer living at S. to sell for him there goods from B. (part of which was proved to be of his own manufacture), who sold them by the defendant's order, and under his directions and authority, the defendant remaining in S. during the sale—against the objection that the evidence did not establish a going from town to town, so as to bring the defendant within the statute. *Att.-Gen.* v. *Tongue*, 12 Price, 51.

A person who goes from a town in which he resides and takes a room at another town, and there sells goods which are brought direct from the town of his residence, is liable to a penalty under 50 Geo. 3, c. 41, s. 17, as a trading person going from town to town trading without a hawker's licence. *Manson* v. *Hope*, 2 B. & S. 498; 31 L. J., M. C. 191; 8 Jur. (N.S.) 971; 6 L. T. 326; 10 W. R. 664.

—— **What Goods.**]—The sale of goods whether in a raw or manufactured state, is a sale of goods within the meaning of the 50 Geo. 3, c. 41. *Rex* v. *Pease*, 8 L. J. (O.S.) M. C. 87.

—— **Barter.**]—A person who goes about the country and barters needles, threads and tapes, for bones, rags and other similar articles, is a hawker and pedlar, and requires a licence under 50 Geo. 3, c. 41, s. 6. *Druce* v. *Gabb*, 6 W. R. 497.

—— **Single Act.**]—A single act of selling does not make a man a hawker, so that he ought to take out a licence before he trades as such. *Rex* v. *Little*, 1 Burr. 609; 2 Ld. Ken. 317.

—— **Householder.**]—A person who may not be a bonâ fide householder, but who has taken a house merely to avoid taking out a licence, is a householder within 50 Geo. 3, c. 41, s. 7. *Houpe* v. *Smith*, 8 Cox, C. C. 203.

—— **Asking for Orders.**]—A servant of a licensed tea-dealer was sent by his master round the neighbourhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders: Held, that this was not a carrying to sell within the meaning of the 50 Geo. 3, c. 41, so as to

subject the servant to a penalty for trading as a hawker without a licence. *Rex* v. *M'Knight*, 10 B. & C. 734; 8 L. J. (O.S.) M. C. 86.

**——Selling from Missionary Basket.**]—Twelve ladies, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a "missionary basket," from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes:—Held, that none of these ladies came within the definition of a pedlar in the Pedlars Act, 1871, s. 3, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate. *Gregg* v. *Smith*, 42 L. J., M. C. 121; L. R. 8 Q. B. 302; 28 L. T. 555; 21 W. R. 737.

2. EXEMPTIONS.

**Servant Living Apart.**]—The 50 Geo. 3, c. 41, s. 23, does not extend to an agent or a servant residing in a separate dwelling-house, though solely employed by such worker or maker. *Rex* v. *Mainwaring*, 5 M. & Ry. 57; 10 B. & C. 66; 8 L. J. (O.S.) M. C. 36.

**Non-resident Makers.**]—Manufacturers on a large scale, employing workmen on premises where they do not reside, and doing no manual labour themselves, are makers within the exemption. *Rex* v. *Faraday*, 1 B. & Ad. 275; 9 L. J. (O.S.) M. C. 35.

The servant of such manufacturers, not residing with them, travelled with goods of the manufactory to a town, where he sold in a public room, having advertised the goods as those of his employers, to be disposed of by him according to their instructions: one of the proprietors was present, and noted the purchases and received the money, but nobody was informed who he was:—Held, that the seller, though not licensed, was exempt from penalty, the sale being substantially a sale by the master. *Ib.*

**Hawking in different Places.**]—The manufacturer of goods cannot without obtaining a hawker's licence, vend them in any other places than those enumerated in 50 Geo. 3, c. 41, s. 23; and a manufacturer who hawks his goods in a different place, without a licence so to do, can be convicted in a penalty of 10*l.* only, under s. 17, although s. 20 imposes a penalty of 40*l.* for an offence apparently of the same description. *Rex* v. *Websdell*, 3 D. & R. 360; 2 B. & C. 136.

**Victuals.**]—Barm or yeast is victuals within the exempting clause of 50 Geo. 3, c. 41, s. 23, and therefore a person purchasing that article of brewers, and selling the same, is not liable to the penalty imposed by that statute upon hawkers trading without a licence. *Rex* v. *Hodgkinson*, 10 B. & C. 74; 5 M. & Ry. 162; 8 L. J. (O.S.) M. C. 47.

**Made Goods.**]—A person buying books in sheets and making them up, and then going from London into the country, and selling them there, is within 50 Geo. 3, c. 41, and is not exempted from penalties as the maker of the goods. *Moore* v. *Edwards*, 2 Chit. 213.

**Markets—Before 50 Geo. 3, c. 41.**]—Before the Hawkers and Pedlars Act, 50 Geo. 3, c. 41, no hawker could expose goods to sale in any part of a market-town but the public market-place, by 29 Geo. 3, c. 26, ss. 16, 17. *Rex* v. *Redfearne*, 4 Term Rep. 273.

**Nature of Market.**]—To entitle a party to exemption from penalties for an offence against 50 Geo. 3, c. 41, on the ground that the place where he exposed his wares for sale was a public market, it must be shewn that it was a legally-established market, by grant from the crown, and not merely a market de facto. *Benjamin* v. *Andrews*, 5 C. B. (N.S.) 299; 27 L. J., M. C. 310; 4 Jur. (N.S.) 41; 6 W. R. 692.

**Selling tollable Articles within Limits of Market.**]—A pedlar holding a pedlar's certificate, which under the Pedlars Act, 1881, authorised him to act as a pedlar within any part of the United Kingdom, employed a horse and cart, and sold tollable articles within the limits of a market prescribed by a special act:—Held, that as he was not then acting as a pedlar according to the definition in s. 3 of the Pedlars Act, 1871, his certificate, notwithstanding s. 6 of that act making a pedlar's certificate to have the same effect as a hawker's licence within the district for which it is granted, did not exempt him from the penalty prescribed by s. 13 of the Markets and Fairs Clauses Act, 1847, for selling tollable articles within the limits of such a market without a hawker's licence. *Howard* v. *Lupton* (L. R. 10 Q. B. 598) not followed. *Woolwich Local Board* v. *Gardiner*, 64 L. J., M. C. 248; [1895] 2 Q. B. 497; 15 R. 590; 73 L. T. 218; 44 W. R. 46; 18 Cox, C. C. 173; 59 J. P. 597.

By the Markets and Fairs Clauses Act, 1847, s. 13, after a market place is opened for public use, every person other than a licensed hawker, selling in a place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorised to be taken in the market, is liable to a penalty. By the Pedlars Act, 1871, s. 6, a certificate under that act is to have the same effect as a hawker's licence for the purpose of the Markets and Fairs Clauses Act, 1847, and the term "licensed hawker" in such act shall be construed to include a pedlar holding such a certificate. A person holding a pedlar's certificate both sold on foot and with a horse and four-wheeled waggon within the limits of a district formed by the adoption of the Local Government Act, 1858, under which act the local board had provided a market-place for potatoes and other vegetables liable to toll in the market:—Held, that he was exempted by the pedlar's certificate from the penalty imposed by the Markets and Fairs Clauses Act, 1847, s. 13, though not acting strictly as a pedlar, but rather as a hawker. *Howard* v. *Lupton*, 44 L. J., M. C. 150; L. R. 10 Q. B. 598.

**Penalty for selling without Licence under Local Act—Exemption—Hawkers Act, 1888.**]—It is provided by the Bolton Improvement Act, 1865 (28 Vict. c. xii.), s. 21, that every person (other than a licensed hawker or auctioneer) who shall sell or expose for sale, in any place in the borough, except in his own dwelling-house or shop or in the public-market, any marketable

commodity, shall, for every such offence, be liable to a penalty not exceeding 40*s*. The Bolton Improvement Act, 1882, enacts that the corporation may grant licences to any person to sell in a place in the borough other than his own dwelling-house or shop, or other than in the public market, any marketable commodity in respect of the sale whereof a penalty is recoverable under s. 21 of the act of 1865, and that if any person does anything in contravention of that section without having obtained such a licence, he shall be liable to a penalty not exceeding 40*s*. The Hawkers Act, 1888, provides that it shall not be necessary for a licence to be taken out under this act by any person selling fish, fruit, victuals, or coal. The respondent, who had not obtained a licence from the corporation of Bolton, hawked fish, within that borough, and, when summoned for so doing, contended that he was exempt from all licences by the above section of the Hawkers Act, 1888. The justices discharged the respondent:—Held, that the respondent was only exempt under the Hawkers Act, 1888, from having to take out an excise licence, and that he was liable to the penalty provided under the Bolton Improvement Acts for hawking fish without having first obtained a licence from the corporation, and should have been convicted. *Openshaw* v. *Oakeley*, 60 L. T. 929; 53 J. P. 740; 16 Cox, C. C. 671.

J. M.

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## MARRIAGE.

*See* HUSBAND AND WIFE—INTERNATIONAL LAW—CONDITION.

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## MARRIAGE ARTICLES OR SETTLEMENT.

*See* SETTLEMENT—INTERNATIONAL LAW.

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## MARSHALLING.

**For Charities.**]—*See* CHARITY.

**In Administration.**] — *See* EXECUTOR AND ADMINISTRATOR.

**In Case of Mortgages.**]—*See* MORTGAGE.

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## MARTIAL LAW.

*See* ARMY AND NAVY.

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## MASTER.

**Of the Superior Courts.**] — *See* APPEAL—PRACTICE.

**Taxing.**]—*See* COSTS—SOLICITOR.

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## MASTER AND SERVANT.

[BY J. RITCHIE.]

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## I. RIGHTS AND LIABILITIES OF MASTER AND SERVANT.

### A. CONTRACT OF HIRING.

#### 1. Nature and Validity of Contract—Generally.

**Whether a Partnership.**]—C., having contracted with the government for the conveyance of mails by sea, agreed with H. to employ him during the existence of the contract at a fixed yearly salary, payable quarterly, and in addition thereto a sum equivalent to 10 per cent. on the profits:—Held, that the sum was a contract of hiring and service, and not a partnership. *Harrington* v. *Churchward*, 29 L. J., Ch. 521; 6 Jur. (N.S.) 576; 2 L. T. 114; 8 W. R. 302. See also *Reg.* v. *Wortley*, 2 Den. C. C. 333; T. & M. 636; 21 L. J., M. C. 44; 15 Jur. 1137; 5 Cox C. C. 382.

P., who was engaged as an underwriter at Lloyd's, entered into an agreement, before the passing of 28 & 29 Vict. c 86, with R., who was not a member, that the underwriting account, which commenced on a specified day, should be carried on for three years from that date in the name of P., and that the policies, losses, and averages should be signed and settled by P. or by R. as his agent; that a salary of 150*l.* per annum should be paid to R. by P.; that four-fifths of the net profits of the business should be paid to P., and the remaining one-fifth to R., R. to be exempted from bearing any loss, with a provision for the refunding by R. of all or any part of what he might receive by way of profit in any one year, if it should appear on the taking of the accounts as therein provided that there had been no profit in the business in that year:—Held, that the agreement was not a partnership contract, but a contract for hiring and service. *Ross* v. *Parkyns*, 44 L. J., Ch. 610; L. R. 20 Eq. 331; 30 L. T. 331; 24 W. R. 5.

**Whether unilateral.**]—The plaintiff in May, 1889, entered into agreements with five girls whereby they agreed to perform in the ballet for the plaintiff during the following pantomime season at certain salaries:—Held, that the contract was not unilateral, and could be enforced by the plaintiff. *De Francesco* v. *Barnum*, 63 L. T. 514.

**Condition Implied from Course of Conduct.**]—A written agreement between A. and his traveller provided for the payment of the travelling expenses of the latter, but did not lay down any mode in which they should be ascertained and stated. Before the agreement the traveller had been in the habit of stating after each journey those expenses as a gross sum, omitting all details, and this practice continued for some years after it:—Held, that a contract so to state and accept the amount of those expenses was to be implied from this course of conduct, and that the employer had no power to determine it during the stipulated term. *Hunter* v. *Belcher*, 10 L. T. 548—L.JJ.

**Implied Covenant—Continuance of Employment.**]—A declaration stated that by a deed between the defendant, of the first part; D., of the second part; and the plaintiff, of the third part, the plaintiff covenanted with the defendant that D. should, during the term of five years from the date of the deed, serve, abide, and continue with the defendant as his assistant in the art of a surgeon-dentist, and perform such service as the defendant should order to be done, in the way of his art, with stipulations for working nine hours per day; and that the defendant, in consideration of the services to be performed by D., covenanted with the plaintiff that he, the defendant, during the term of five years (in case D. performed his part of the agreement, and particularly the work of nine hours per day), would pay to D. 35*s.* weekly for the first year of the term; 2*l.* weekly during the second and third years; 2*l.* 2*s.* weekly during the fourth

and fifth years of the term, for wages and compensation for the services. The declaration alleged as a breach that the defendant would not permit D. to remain in his service, but dismissed him:—Held, in arrest of judgment, that the breach was ill-assigned, as there was no implied covenant on the part of the defendant to retain D. in his service during the five years. *Dunn* v. *Sayles*, D. & M. 579; 5 Q. B. 685; 13 L. J., Q. B. 159; 8 Jur. 358.

By an agreement between A. and B., it was agreed that A. should manufacture cement for the use of B., of a specified quality; that B. should pay A. a weekly sum for two years from the agreement, and another weekly sum for one year after; and should receive A. into partnership in the business of manufacturing cement at the end of three years; and that A. should instruct B. in the art of manufacturing cement:—Held, in an action brought by A., assigning, as a breach of this agreement, that B. wrongfully discharged him (the plaintiff) from his service, and from manufacturing cement for the use of the defendant, and from any longer instructing the plaintiff in the art of manufacturing cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable. *Aspdin* v. *Austin*, D. & M. 515; 5 Q. B. 671; 13 L. J., Q. B. 155; 8 Jur. 355.

S., the agent of an insurance company, being indebted to the company and being pressed for payment, it was arranged that the plaintiff should pay the money to the company, and that the company should appoint him and S. as joint agents, with the same rates of payment and remuneration as before. A deed was executed containing a covenant that in case the company should at any time thereafter displace S. from his appointment as agent, then that they should and would forthwith repay to the plaintiff the money so paid by him. Subsequently the company transferred the whole of their business and liabilities to another company, and refused to pay the plaintiff the money so advanced by him:—Held, in an action to recover the amount, that there was an implied covenant on the part of the company that they would not do anything of their own voluntary act by which it should be impossible for them to keep S. in their employ any longer, and therefore they were liable in the action by the plaintiff. *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L. J., Q. B. 1; 11 L. T. 337; 13 W. R. 76.

On a contract to employ the plaintiff on board a particular ship on certain specified voyages, it is a breach to sell the ship before those voyages are completed without procuring him similar employment on board that particular vessel; and the mere acceptance of money on account of wages on board another ship, which was to sail for a different voyage, and on board which the plaintiff did not enter, is not conclusive evidence either of accord and satisfaction, or of a substituted contract. *Driscoll* v. *Australian Royal Mail Steam Navigation Co.*, 1 F. & F. 458.

The plaintiff, a surgeon, engaged the defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the defendant, previously to going up to pass his examination, executed at the request of the plaintiff a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the plaintiff to continue the defendant's employment. The defendant continued in the employment for about three months afterwards and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from doing so:—Held, that an agreement by the plaintiff to continue the defendant's employment could be inferred and that there was consideration to support the bond. *Gravely* v. *Barnard*, 43 L. J., Ch. 659; L. R. 18 Eq. 518; 30 L. T. 863; 22 W. R. 891.

—— **Finding Employment.**] — A workman entered into an agreement with a coal company to serve them as a collier, in consideration of wages to be paid to him fortnightly; and the company, in consideration of such service, agreed that he should not be discharged without twenty-eight days' notice in writing, unless in the case of misconduct:—Held, that this contract necessarily implied an obligation on the part of the master to find work for the servant, and to pay him wages every fortnight; and, consequently, was not bad for want of mutuality. *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L. J., M. C. 81; 8 Jur. (N.S.) 382; 5 L. T. 639.

By an agreement called a pit-bond, the owners of a coal-pit retained and hired the plaintiff for a year, the plaintiff, "during all the times the pit shall be laid off work, to continue the servant of the owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit," and at certain wages:—Held, that the pit-owners were not bound to employ the plaintiff for a reasonable number of working days during the year. *Williamson* v. *Taylor*, D. & M. 389; 5 Q. B. 175; 13 L. J., Q. B. 81.

**Exclusive Service — Consideration.**] — The plaintiffs agreed in writing with L. that he should serve them for seven years as a crown-glass maker; that he should not during that term work for any other person without their licence; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him so long as he should be employed and work as a crown-glass maker certain wages by the piece, and 8*l.* a year in lieu of house-rent and firing, and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—Held, that this agreement bound the plaintiffs to employ L. during the seven years, subject to the power of dismissal; that there was therefore a good consideration for L.'s contract to serve for the seven years, and the agreement was not in unlawful restraint of trade. *Pilkington* v. *Scott*, 15 M. & W. 657; 15 L. J., Ex. 329.

Where A. contracts to furnish B. with a reasonable quantity of work at a fixed rate of wages, and B. is bound not to work for any other person or persons for a period of seven years:—Held, that there is a mutuality of contract implied, and that A. would be bound to furnish work for the

whole period of seven years. *Hartley* v. *Cummings*, 2 Car. & K. 433 ; 5 C. B. 247 ; 17 L. J., C. P. 84 ; 12 Jur. 57.

W. agreed in writing with G., that in consideration of 3*l.* lent to him by G., and of the wages to be paid by G., he would work for and serve G. as a tin-plate worker, and would not work for or serve anyone else without his leave for twelve months, and also until the expiration of three months' notice given by him to G. ; and G., in consideration of the services of W., agreed to pay him on the Saturday night of every week, during the term, all such wages as the articles made by him should amount to, at their usual workmen's prices for similar articles ; provided that after the expiration of twelve months either party might determine the service by three months' notice, and G. was authorised to deduct 10*s.* per week until the loan of 3*l.* was paid :—Held, that the agreement bound G. to employ W. during the period mentioned in it ; that there was, therefore, a good consideration for W. to serve G. ; and the agreement was valid. *Reg.* v. *Welch*, 2 El. & Bl. 357 ; 22 L. J., M. C. 145 ; 17 Jur. 1007.

In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service by a notice to expire on the 25th March, 1850. On the 7th January, 1850, the defendant wrote to the plaintiff asking to be paid his salary to Lady-day, and to be at once discharged, in order that he might go to London, and remain there until he could meet with another engagement. To this letter the plaintiff replied, assenting to the defendant's proposal, saying, "of course I should have expected your services if you were in Amersham, but as you request me at once to pay your salary to Lady-day, in order that you may go to town until you meet with another engagement, I consent to your request ;" and on the following day the plaintiff asked the defendant whether, if he paid him up to the 25th March, he intended going to town and remaining there till he got another engagement, to which the defendant answered that he did ; whereupon the plaintiff said, "on these conditions I am prepared to pay your salary at once up to Lady-day ; but if you remain in Amersham, I shall expect your services," and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained giving professional advice :—Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels* v. *Charsley*, 11 C. B. 739.

**Restraint of Trade.**]—A. agreed to take B. as his servant "at such wages as might from time to time be agreed on," and B., on his part, agreed to serve A., and not to set up trade for himself within certain limits. B. accordingly entered into and continued in A.'s service at the wages agreed on :—Held, that there was a good and valuable consideration to support the agreement as against B., and a court of equity enforced it. *Benwell* v. *Inns*, 24 Beav. 307 ; 26 L. J., Ch. 663.

A legal consideration of any value is sufficient to support a contract in partial restraint of trade and the court will not inquire as to its adequacy. *Gravely* v. *Barnard*, 43 L. J., Ch. 659 ; L. R. 18 Eq. 518 ; 30 L. T. 863 ; 22 W. R. 891.

A. agreed by articles under seal to enter the service of B., as assistant to him in his business of a surgeon-dentist, for a period of four years, and the agreement contained a covenant, that after the expiration of that term A. would not, without the consent in writing of the other, carry on the business of a surgeon-dentist in London or any of the towns or places in England or Scotland where B., or A. on his account, might have been practising before the expiration of the above service :—Held, first, that this covenant, so far as it related to London, was not, but as to its other provisions it was, void as imposing an unreasonable restraint of trade ; and secondly, that the covenant was divisible so that the illegality of the second branch did not vitiate the whole. *Mallan* v. *May*, 11 M. & W. 853 ; 12 L. J., Ex. 376 ; 7 Jur. 536.

Semble, that in estimating the reasonableness of a contract not to exercise a trade or profession within a particular district, the populousness of the district is not to be taken into account. *Ib.*

—— **Reasonableness — Assignment.**] — W. entered the service of C. as a shopman at weekly wages, and covenanted not to carry on business within one mile of the shop at any time thereafter. The business was afterwards moved to another shop close by, and sold by C. to J., together with the goodwill and beneficial interest thereof. W. then left the shop, and set up business within a mile of the old shop :—Held, that the covenant was not unreasonable, and endured for the life of W., though the original covenantee should cease to carry on business altogether, and that the covenant was not affected by the removal of the business to another shop near at hand, though it might have been otherwise, if the business had been removed to quite a different neighbourhood :—Held, also, that such a covenant added to the value of the goodwill, and, therefore, was part of the goodwill and assignable with it, and did, in fact, pass by the sale of the goodwill and beneficial interest to J., so as to give him a right of action. *Jacoby* v. *Whitmore*, 49 L. T. 335 ; 32 W. R. 18—C. A.

—— **In the Case of Commercial Travellers.**]—The plaintiffs, lace merchants, employed travellers to visit certain parts of England, and where they had a business connection, and to each traveller they assigned a separate journey. A vacancy having occurred on the Midland journey, the plaintiffs told the defendant of it, he being at the time in their service in another capacity, and he verbally agreed with them to fill the vacancy, it being understood at the time that the agreement between them should be reduced into writing. The defendant accordingly entered their employ as traveller on the Midland journey ; and after he had been travelling for them about a month, a list of places and of the customers whom he was to visit was sent down to him, and a written contract, which was as follows :—"In consideration of my entering upon your employ at a salary, &c., I herewith agree to do so, with the understanding that, in the event of my wishing to travel and doing so for any other house in the trade, on any part of the same ground, to pay you 50*l.*" This contract the defendant

signed, and after having travelled for the plaintiffs about a year, he left them and travelled for a rival house in the same trade over the Midland journey. The plaintiffs having sued him for the 50*l.* penalty under the contract:—Held, first, that a good consideration for the defendant to the agreement appeared, on the face of the contract. *Mumford* v. *Gething*, 7 C. B. (N.S.) 305; 29 L. J., C. P. 105; 6 Jur. (N.S.) 428; 1 L. T. 64; 8 W. R. 187.

Held, secondly, that the circumstances under which the defendant entered the plaintiffs' employ as traveller showed a good consideration for his part of the agreement, and that the written contract, therefore, which was drawn up in pursuance of the original understanding, was made on a good consideration. *Ib.*

Held, thirdly, that the contract was for the entire services of the defendant while in the plaintiffs' employ, and that the parties meant, therefore, that the penalty should attach if he travelled for another house, after he left their employ. *Ib.*

Held, fourthly, that the subject-matter of the contract being identified by the extrinsic evidence, the contract was not unlimited in point of space, and so void, as being in restraint of trade, inasmuch as the evidence showed that the restriction as to the same ground was limited to the ground, i.e. the Midland journey, over which the defendant travelled. *Ib.*

Held, fifthly, that the written contract, even without the extrinsic evidence limiting the restriction to the Midland journey, was not void, as being in restraint of trade. *Ib.*

A proviso that a traveller should not solicit orders for Burton ale for two years after the termination of his agreement with his employers, is void on the ground that the proviso is in restraint of trade, and should be limited as to area. *Allsopp* v. *Wheatcroft*, 42 L. J., Ch. 12; L. R. 15 Eq. 59; 27 L. T. 372; 21 W. R. 102.

In consideration of the plaintiff employing the defendant as his servant to sell oil in the streets of London, at a weekly salary of 21*s.*, the latter agreed that he would not, for one year from the determination of such agreement, sell oil within a radius of eight miles from the General Post-office. The agreement was determinable on a week's notice on either side. The defendant, having determined the agreement, continued to sell oil in the same way on his own account within the prohibited area. An interim injunction had been granted, but the defendant continued to violate it. On a motion for an order to commit the defendant for breach of the injunction, Malins, V.-C., dissolved the injunction, on the ground that the agreement was a hard and improper bargain:—Held, that the agreement was for valuable consideration, was fairly entered into, and, upon the balance of convenience and inconvenience, ought to be enforced. *Middleton* v. *Brown*, 47 L. J., Ch. 411; 38 L. T. 334—C. A.

—— **Infant.**]—See *Evans* v. *Ware*, infra.

*See further*, CONTRACT.

### 2. PARTIES.

**Infants.**]—A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, and to retain the wages during stoppage, is wholly void as not being beneficial to the infant. *Reg.* v. *Lord*, 12 Q. B. 757; 3 New Sess. Cas. 246; 17 L. J., M. C. 181; 12 Jur. 1001.

An infant signed an agreement with plaintiffs, that in consideration of their taking him into their service he would not, after leaving, compete in business within a radius of five miles for two years. He left a few weeks after attaining twenty-one:—Held, that the contract was for the benefit of the infant, and an injunction must be granted. *Evans* v. *Ware*, [1892] 3 Ch. 502; 67 L. T. 285.

**Public Commissioners.**]—Commissioners appointed under an act of parliament to pave and light a parish, were empowered to appoint officers at such salaries as they should think reasonable, and to remove such officers and appoint others. In some sections of the act the officers were spoken of as employed by the commissioners. The commissioners were empowered to make rates, which were vested in them, and they were directed to apply the moneys which should come to their hands under the act in paving and lighting the parish, and carrying the several purposes of the act into execution:—Held, that an action did not lie against them by one of their officers for arrears of salary. *Bogg* v. *Pearse*, 2 L. M. & P. 21; 10 C. B. 534; 20 L. J., C. P. 99.

**Agents.**]—Action upon an agreement in writing between the plaintiff and the defendants, as foreign agents resident in London, on behalf of and representing P., resident at Havana, in the island of Cuba, by which the plaintiff agreed to proceed, as fireman or stoker, on board a steamer, about to leave London for Havana, to be placed in the service of P., and to discharge the duty and do the work of fireman or stoker on board, and to obey the orders and follow the directions of the engineers; that he should receive wages monthly, and during the outward voyage rations to be served out to him on account of P.; the contract to be in force for one year from its date, and should he be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms heretofore stated, or to discharge him, and find his passage back to England:—Held, that the defendants were personally liable for a breach of the agreement, before the ship reached Havana. *Wilson* v. *Zulueta*, 14 Q. B. 405; 19 L. J., Q. B. 49; 14 Jur. 366.

**Stewards of Public Meetings.**]—The relation existing between the chairman and stewards or managers of a public meeting is not that of master and servant, or principal and general agent, and though it is the duty of the chairman to do his best to preserve order, and the duty of those who are acting as stewards or managers to assist him in so doing, yet the nature and extent of this duty on both sides must arise out of, and in character and extent depend upon, the emergencies which may from time to time arise, and there is no ground for extending by implication an express authority given by the chairman and limited in its term. *Lucas* v. *Mason*, 44 L. J., Ex. 145; L. R. 10 Ex. 251; 33 L. T. 13; 23 W. R. 924.

**District Delegate of Trade Union.**]—A district delegate appointed by the members of a trade union to confer with and advise them in disputes

is not the servant or the agent of the officers or of the members of the union. *Flood* v. *Jackson*, 64 L. J., Q. B. 665 ; [1895] 2 Q. B. 21 ; 14 R. 397 ; 73 L. T. 161 ; 43 W. R. 453 ; 59 J. P. 388—C. A.

**Apprentices.**]—*See* APPRENTICE.

3. REQUISITES OF.

a. Writing.

**Under Statute of Frauds—Contract not to be Performed within a Year.**]—A contract for a year's service, to commence at a subsequent day, is a contract not to be performed within the year, and must be in writing ; therefore an action cannot be maintained for the breach of a verbal contract made on the 27th of May, for a year's service to commence on the 30th of June following. *Bracegirdle* v. *Heald*, 1 B. & Ald. 722 ; 19 R. R. 442.

A contract made on one day to serve for a year from the following day is not within the Statute of Frauds. *Banks* v. *Crossland*, 44 L. J., M. C. 8 ; L. R. 10 Q. B. 97 ; 32 L. T. 226 ; 23 W. R. 414.

A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year. B. took the proposals and went away, and entered into the service on the 24th of July :—Held, that this was a contract on the 20th, not to be performed within the space of one year from the making thereof. *Snelling* v. *Huntingfield* (*Lord*), 1 C. M. & R. 20 ; 4 Tyr. 606 ; 3 L. J., Ex. 232.

The plaintiff agreed on a Sunday to serve the defendant for a year, the service to commence on the Monday. On the Monday, the plaintiff, with the knowledge and consent of the defendant, commenced the service, and received 20*l.* on account :—Held, in an action for a wrongful dismissal within the year, in which an objection was taken that this was a contract for a year's service to commence on a future day, that the jury might infer a new implied contract on the Monday for a year's service from that day. *Cawthorn* v. *Cordrey*, 13 C. B. (N.S.) 406 ; 32 L. J., C. P. 152.

The plaintiff having been in the defendant's employment as a traveller, entered in October, 1854, into a fresh verbal agreement with the defendant, whereby either party was to be at liberty to determine the agreement by giving to the other three months' notice before the 1st of September. 1855, otherwise the parties were to go on for another twelvemonth from that time :—Held, that this was a contract not to be performed within a year, and therefore was required to be in writing under the Statute of Frauds. *Dobson* v. *Collis*, 1 H. & N. 81 ; 25 L. J., Ex. 267 ; 4 W. R. 512.

The statement of claim alleged that in 1866 the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of anyone carrying on, or himself carry on, the business of a tailor within five miles of D. ; and that on the expiration of the three years he continued in the plaintiff's employment on the like terms (except as to the period of employment) till 1877. Breach, that in 1877 the defendant left the plaintiff, and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing as required by the Statute of Frauds :—Held, on demurrer, by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff ; and was, therefore, primâ facie not to be performed within a year, and therefore fell within s. 4 of the Statute of Frauds. *Davey* v. *Shannon*, 48 L. J., Ex. 459 ; 4 Ex. D. 81 ; 40 L. T. 628 ; 27 W. R. 599.

—— **Parol Evidence to Explain.**]—A. entered the service of B. under a written agreement, as follows : "I agree to receive you as clerk in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, namely, for the first year 70*l.*, for the second 90*l.*, for the third 110*l.*, for the fourth 140*l.*, and 150*l.* for the fifth and following years that you may remain in my employment" :—Held, that the agreement was one that by the Statute of Frauds was required to be in writing ; that there being a precise stipulation for yearly payments, evidence was not admissible to show, that, at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly ; and that the fact of the payments having usually been made quarterly, did not vary the rights of the parties under the agreement. *Giraud* v. *Richmond*, 2 C. B. 835 ; 15 L. J., C. P. 180 ; 10 Jur. 360.

**Part Performance.**]—The equitable doctrine of part performance taking contracts out of the operation of s. 4 of the Statute of Frauds cannot be extended by the high court of justice, under s. 24, sub-s. 7, of the Judicature Act, 1873, beyond the limits to which it was confined by the courts of equity. It is, therefore, applicable only to contracts for the sale and purchase of lands, and not to a contract of service. *Britain* v. *Rossiter*, 48 L. J., Ex. 362 ; 11 Q. B. D. 123 ; 40 L. T. 240 ; 27 W. R. 482—C. A.

b. Stamps.

**Exemption—Labourers and Artificers.**]—A. entered into the following agreement with B. : "A. engages to take charge of the glebe lands of B., his wife undertaking the dairy and poultry, at 15*s.* a week till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit, after all expenses of rent and rates, labour, and interest on capital, are paid, on a fair valuation made from Michaelmas to Michaelmas ; three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by A., who occupies it as bailiff, in addition to his salary" :—Held, that this agreement constituted the relation of master and servant between B. and A., and not that of partners ; that A. was not a menial servant, but a labourer ; and that the agreement was admissible, though unstamped, as it fell within the exemption in 55 Geo. 3, c. 184, as an agreement for the hire of a labourer. *Reg.* v. *Wortley*, 2 Den. C. C. 333 ; T. & M. 636 ; 21 L. J., M. C. 44 ; 15 Jur. 1137 ; 5 Cox, C. C. 382.

The plaintiff and the defendant being resident in England, and P. at Havana, and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant, on behalf and representation of P. of Havana, that the plaintiff would proceed as fireman and

stoker on board a steamer, about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., and would faithfully do the work of fireman or stoker on board the steamer, and obey the orders of the engineers. In consideration of the service the plaintiff was to receive wages at 5*l.* per month, payable monthly, and 2*l.* per month for providing himself in provisions. During the outward passage, rations were to be served out to the plaintiff on account of P. The contract to be understood to be in force for one year certain from the date; and should the plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge the plaintiff and to find him his passage back to England; the wages to be payable up to the day of the plaintiff's arrival in England, unless he should be discharged for misconduct; one month's pay to be advanced for the plaintiff's outfit for the voyage:—Held, that the agreement did not require a stamp, being within the exemption, of a memorandum or agreement for the hire of any labourer, in 55 Geo. 3, c. 184. *Wilson* v. *Zulueta*, 14 Q. B. 405; 19 L. J., Q. B. 49; 14 Jur. 366.

An overseer in a printing office is an artificer, within the exemption in the stamp acts. *Bishop* v. *Letts*, 1 F. & F. 401.

### 4. Proof of.

#### a. Generally.

**Work done after Agreement Rescinded.**]—A. engaged B., under an agreement, dated 25th of September, 1865, as a file-forger, for two years, after the rate of the Sheffield list of prices for the time being. On the 24th of February, 1866, the master refused to give him work. On the 16th of March, 1866, B. entered a plaint in a county court against A. his master; and in his particulars alleged that A. "neglected and refused to perform, and had not performed, his agreement, whereby he had sustained damages to the amount of 7*l.* 14*s.*, being four weeks' average wages in lieu of notice." A. paid 7*l.* 14*s.* and the costs into court on the 19th of April, 1866. On the next day, the 20th of April, B. again went to work for A., but was dismissed on the 21st of April. On the 4th of July, 1866, B. entered another plaint against A., and in his particulars alleged that A. "refused to employ him, and illegally discharged him from his service," and claimed 48*l.* 12*s.* At the trial, the jury found a verdict for B. for 33*l.* 12*s.* It was admitted that the agreement sued on in the first plaint was the same agreement as was sued on in the second plaint:—Held, that there was no evidence to go to the jury of such agreement, and that the judge ought to have directed a nonsuit. *Barnsley* v. *Taylor*, 37 L. J., Q. B. 39.

The plaintiff was engaged as a clerk by the defendant, a shipbroker, at a yearly salary of 150*l.*, and was paid his wages weekly, and on leaving the service at the defendant's instance, accepted a month's salary instead of notice. He subsequently re-entered the defendant's service at a yearly salary of 250*l.*, nothing being expressly said as to notice, and no time fixed for the duration of the service, but the plaintiff was paid weekly a sum equal to a week's salary. The plaintiff having been dismissed with a month's notice:—Held, that it was properly left to the jury to say whether the last hiring was on the same terms as the first, and whether the terms of the previous hiring were determined by the acceptance of a month's wages instead of notice. *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J., Ex. 459.

**Reference in Documents.**]—A. being in want of workmen, applied to the Free Labour Registration Society, and filled up and signed a form sent by them to him, containing the particulars of the employment and terms offered by him, and his address at S. This form was read over to B. by the secretary of the society, and B. then signed an agreement headed "Free Labour Society," by which he stated that he had accepted employment at S., and agreed that one half-day's wages, "being the fee to the society for obtaining him the employment," should be deducted from his wages, and that he would not quit the service of his employer without just cause:—Held, that the documents sufficiently referred to one another, and constituted a contract in writing signed by both parties. *Crane* v. *Powell*, 38 L. J., M. C. 43; L. R. 4 C. P. 123; 20 L. T. 703; 17 W. R. 161.

The plaintiff proposed to enter the defendant's service as a salesman, and stated in a letter his willingness to come for a year on trial, and his terms. The defendant, in reply, assented generally, but in the course of his letter said that if some of the terms were defined more clearly it might prevent mistakes, and spoke of a list of customers which he would consider with the plaintiff. He, however, named a day for the plaintiff to enter on his duties, and said he should expect him then:—Held, that this was not an unqualified acceptance of the plaintiff's proposal, and that the two letters were not a complete and binding contract in writing. *Johnson* v. *Appleby*, 43 L. J., C. P. 146; L. R. 9 C. P. 158; 30 L. T. 261; 22 W. R. 515.

An agreement to employ the plaintiff in a particular situation cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter relating to the quantum of salary only. *Chiodi* v. *Waters*, 1 Stark. 335.

**Appointment by Resolution of Directors.**]—In 1859 R. was owner of a mine which he proposed to sell to a projected company. On the 12th February, 1859, there was a meeting of the promoters, at which it was resolved that the plaintiff should be appointed captain of the mine at a salary, "such salary to commence at the completion of the contract with R.," who was one of the promoters. The resolution was communicated to the plaintiff. On the 9th March the agreement for the sale of the mine to R. was executed. On the 25th March there was a meeting of the promoters, at which the memorandum and articles of association were executed, and a prospectus was approved of, which described the plaintiff as captain and local manager of the mine. On the 28th March the company was registered. On the 31st March there was a meeting of the company, at which the prospectus was submitted and approved. The plaintiff acted as manager, and in an action by him for his salary, the jury found that he acted for the company and not for R. There was no conveyance of the mine to the company:—Held, that there was evidence of the appointment of

the plaintiff, by the company, as manager, and that he was entitled to recover. *Browning* v. *Great Mining Central Co.*, 5 H. & N. 856; 29 L. J., Ex. 399.

### b. Parol Evidence to Explain.

**By Parol Evidence.**]—An agreement for the hiring of a servant may be proved by parol, although the terms of the agreement are, by the direction of the parties, written down by a third person; such writing, though read over to the parties, not being signed by them. *Rex* v. *Wrangle*, 4 N. & M. 375; 2 A. & E. 314; 1 H. & W. 41; 4 L. J., M. C. 43.

**Verbal Stipulations.**]—A. entered the service of B. under a written agreement as follows: "I agree to receive you as clerk in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, namely, for the first year 70*l.*, for the second 90*l.*, for the third 110*l.*, for the fourth 140*l.*, and 150*l.* for the fifth and following years that you may remain in my employment": —Held, that the agreement was one that, by the Statute of Frauds, was required to be in writing; that there being a precise stipulation for yearly payments, evidence was not admissible to shew that at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly, and that the fact of the payments having usually been made quarterly did not vary the rights of the agreement. *Giraud* v. *Richmond*, 2 C. B. 335; 15 L. J., C. P. 180; 10 Jur. 360. S. P., *Evans* v. *Roe*, L. R. 7 C. P. 138; 26 L. T. 70.

P., who was known to be acting in the capacity of a lace buyer, was engaged by M., a lace dealer, under the following memorandum: "M. agrees to engage P. for the term of three years from Monday, the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly, P. to give the whole of his services, and to be advised and guided by M. if necessary." In an action by P. against M. for wrongful dismissal pending the term, on the alleged ground of disobedience of lawful orders:—Held, that evidence was admissible to shew the capacity in which P. was engaged, viz., as lace buyer; and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in his position was bound to obey. *Price* v. *Mouat*, 11 C. B. (N.S.) 508.

The plaintiff proposed to enter the defendant's service as salesman, and stated in a letter his willingness to come for a year on trial, and his terms. The defendant, in reply, assented generally, but in the course of his letter said that if some of the terms were defined more clearly it might prevent mistakes, and spoke of a list of customers which he would consider with the plaintiff. He, however, named a day for the plaintiff to enter on his duties, and said he should expect him then:—Held, that parol evidence of supplementary terms agreed to at a meeting of the parties subsequent to the letters, but prior to the plaintiff entering on the service, was admissible. *Johnson* v. *Appleby*, 43 L. J., C. P. 146; L. R. 9 C. P. 158; 30 L. T. 261; 22 W. R. 515.

The plaintiffs, lace merchants, employed travellers to visit certain parts of England and where they had a business connection, and to each traveller they assigned a separate journey. A vacancy having occurred on the Midland journey, the plaintiffs told the defendant of it, he being at the time in their service in another capacity, and he verbally agreed with them to fill the vacancy, it being understood at the time that the agreement between them should be reduced to writing. The defendant accordingly entered their employ as traveller on the Midland journey, and after he had been travelling for them about a month, a list of places and of the customers whom he was to visit was sent down to him, and a written contract which was as follows: "In consideration of my entering upon your employ at a salary, &c., I herewith agree to do so with the understanding that, in the event of my wishing to travel, and doing so for any other in the trade on any part of the same ground, to pay you 50*l.*" This contract the defendant signed, and after having travelled for the plaintiffs for about a year, he left them and travelled for a rival house in the same trade over the Midland journey. The plaintiffs having sued him for the 50*l.* penalty under the contract:—Held, that extrinsic evidence was admissible to identify the particular employment to which the agreement referred, viz., that of traveller, and also to identify the ground over which the defendant agreed to travel, viz., the Midland journey. *Mumford* v. *Gething*, 7 C. B. (N.S.) 305; 29 L. J., C. P. 105; 6 Jur. (N.S.) 428; 1 L. T. 64; 8 W. R. 187.

**Custom.**]—When a workman is hired for a year to work at a particular trade, under a written agreement, which says nothing as to any periods of absence allowed to the workmen, parol evidence may be given that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work without the permission of their masters. *Reg.* v. *Stoke-upon-Trent*, 5 Q. B. 303; 13 L. J., M. C. 41; 8 Jur. 34.

The rule that an indefinite hiring is a hiring for a year, is not an inflexible rule of law; it must be considered in connection with the circumstances of the particular case. *Baxter* v. *Nurse*, 6 Man. & G. 935; 7 Scott (N.R.) 801; 1 Car. & K. 10; 13 L. J., C. P. 82; 8 Jur. 273. S. P., *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J., Ex. 459.

A. was engaged as editor of a new periodical publication by B., at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B. for dismissing him before the termination of a year, a usage was proved that such a hiring was annual with regard to established periodicals:—Held, that the jury was properly directed to consider whether such usage was applicable to a newly-started publication. *Ib.*

In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged:—Held, that he might go into evidence to shew a custom for editors of newspapers to be engaged for a year, unless there was an express stipulation to the contrary. *Holcroft* v. *Barber*, 1 Car. & K. 4.

An agreement in writing, by which the plaintiff agreed to serve the defendant as agent, at a yearly salary, contained a proviso that the defendant would, at the end of the year, if he found the plaintiff had done sufficient business, give him 30*l.* more:—Held, that there was nothing

in this agreement inconsistent with a custom in the trade to terminate the service by either party giving to the other a month's notice. *Parker* v. *Ibbetson*, 4 C. B. (N.S.) 346; 27 L. J., C. P. 236; 4 Jur. (N.S.) 536; 6 W. R. 519.

To an action for wrongfully dismissing the plaintiff from the defendant's service under the above agreement, the defendant pleaded that he determined the service by a month's notice, according to the custom. The judge left it to the jury to say whether, looking at the proviso in the contract, they inferred that the parties meant to exclude the custom: Held, a misdirection. *Ib.*

When the hiring is expressly for a term certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters* v. *Staveley*, 15 L. T. 275.

In an action for the breach of a contract of hiring, if either party relies upon the existence of a custom authorising him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, and it is not enough to aver simply that a reasonable notice was given. *Williams* v. *Byrne*, 2 N. & P. 139; 7 A. & E. 177; W. W. & D. 535; 6 L. J., K. B. 239; 1 Jur. 578.

The custom must be general, of reasonable antiquity and uniformity, and sufficiently notorious that people would make their contracts on the supposition that it exists. *Foxall* v. *International Land Credit Co.*, 16 L. T. 637.

### 5. In Special Cases.

#### a. Yearly.

**Evidence of—Generally.**]—A hiring at so much per month is a hiring for a year. *Fawcett* v. *Cash*, 3 N. & M. 177; 5 B. & Ad. 904; 3 L. J., K. B. 113.

A general hiring, in the absence of any custom to rebut the presumption, is to be presumed to have been a hiring for a year. *Ib.*

A clerk hired at 12*l.* 10*s.* per month for the first year, to advance 10*l.* per annum until the salary is 180*l.*, is hired for at least one year. *Ib.*

A general hiring for a year, and so on, particularly of clerks and of respectable servants, can only be put an end to at the end of the current year, where no misconduct is imputed. *Beeston* v. *Collyer*, 4 Bing. 309; 12 Moore, 552; 2 Car. & P. 607; 5 L. J. (O.S.) C. P. 180; 29 R. R. 576.

Such a hiring is a hiring for a year, and so on from year to year for so long time as the parties should respectively please, and may be so described in pleadings; and such an implied yearly hiring is not destroyed by the salary being paid monthly; nor is it within the Statute of Frauds. *Ib.*

A clerk's salary paid for some years in quarterly, but afterwards in monthly payments, is evidence of a hiring from year to year. *Ib.*

A count stated, that in consideration that the plaintiff would enter into the defendant's employ, and serve him as servant in husbandry for a certain time, to wit, from a day named till the service should be determined by reasonable notice on either side, at 10*l.* 10*s.* per annum, the defendant promised to retain the plaintiff and pay him the wages, and continue him in the service till such determination; that the plaintiff entered the service, and was always ready to serve, but the defendant discharged him without reasonable cause, and refused longer to retain him:—Held, that proof that the plaintiff was hired generally as a labourer in husbandry did not support this count, such hiring being in law a hiring from year to year. *Lilley* v. *Elwin*, 11 Q. B. 742; 17 L. J., Q. B. 132; 12 Jur. 623.

There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring for a year. *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J., Ex. 459.

On a contract to pay a traveller by commission, no implication arises of a yearly hiring, nor without an express and a clear stipulation is there any obligation to pay the commission on orders from customers originally obtained by the agent, but sent after he has ceased to be so. *Nayler* v. *Yearsley*, 2 F. & F. 41.

—— **Agreements for a Year certain.**]—It was agreed between A. & B. that A. should enter into the service of B. as a traveller, and it was stipulated that the agreement should be binding between them for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given by either party to determine the same:—Held, that this was a contract for a year certain only, and that B. was at liberty to put an end to it at the expiration of the year by giving A. three months' previous notice. *Brown* v. *Symons*, 8 C. B. (N.S.) 208; 29 L. J., C. P. 251; 6 Jur. (N.S.) 1079; 8 W. R. 460.

By an agreement between brewers and their traveller, the latter was engaged at a salary of 200*l.* a year, payable fortnightly, and it was stipulated "that the agreement between the parties shall be for twelve months certain, after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing." But if the employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired, they may do so on payment of 50*l.*":—Held, per Bramwell, B., and Pigott, B. (Kelly, C. B., dissentiente), that the agreement ceased at the end of the first twelve months, unless the parties allowed the engagement to continue beyond that time, in which event only did notice, or payment in lieu thereof, become necessary to determine it. *Langton* v. *Carleton*, 43 L. J., Ex. 54; L. R. 9 Ex. 57; 29 L. T. 650.

A contract to serve, as a reporter to a newspaper, one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties shall respectively please, is a yearly service so long as it lasts, and cannot be terminated except at the end of any current year. *Williams* v. *Byrne*, 2 N. & P. 139; 7 A. & E. 177; W. W. & D. 535; 6 L. J., K. B. 239; 1 Jur. 578.

Where a servant was hired for a year in the capacity of a clerk, and dismissed without notice:—Held, that he was entitled to recover compensation for the year, and that the fact of his wages being payable monthly was not inconsistent with a hiring for a year, short periodical payments being necessary to persons in that position of life. *Davis* v. *Marshall*, 4 L. T. 216; 9 W. R. 520.

—— **Annual Salary.**]—A hiring at a salary of 500*l.* a year is primâ facie, and in the absence of any custom to the contrary, a hiring for a year certain. The plaintiff was employed as engineer to the defendants at a salary of 500*l.* a year, and

was dismissed at a three-months' notice:—Held, that the plaintiff was entitled to recover salary for the unexpired portion of the year. *Buckingham* v. *Surrey and Hants Canal Co.*, 46 L. T. 885; 46 J. P. 774.

When a clerk is hired at a certain sum per annum simply, the hiring is a hiring for a year, and in the absence of a custom to the contrary, he cannot be discharged before the end of the year. *Foxall* v. *International Land Credit Co.*, 16 L. T. 637.

An appointment of clerk to a public company was by a resolution which stated the salary to be 200*l.* per annum, but said nothing as to the period of payment; the clerk acted as such, and was paid several sums of 50*l.* each at periods just after the usual quarter days of the year:—Held, that proof of these facts warranted a declaration in an action for salary, which alleged the contract to be at a salary of 200*l.* per annum payable quarterly on the usual quarter days. *Ridgway* v. *Hungerford Market Co.*, 4 N. & M. 797; 3 A. & E. 171; 1 H. & W. 244; 4 L. J., K. B. 157.

—— **Service for Half a Year.**]—In an action by an assistant-surgeon for wages it was proved that he had served the defendant for nearly half a year, and that payments were made, during that time, on account of wages, but not according to any yearly amount or at any definite period of the year. The plaintiff afterwards fell ill and was taken to a hospital, and after his recovery did not return to his employment, nor did the defendant require him to do so:—Held, that there was no evidence of any hiring for a year and that the plaintiff was entitled to recover wages on a quantum meruit for the time he served. *Bailey* v. *Rimmell*, 1 M. & W. 506; 2 Gale, 60; 5 L. J., Ex. 192.

### b. Weekly.

**What is.**]—A hiring at two guineas a week for one year, is a hiring by the week and not by the year. *Robertson* v. *Jenner*, 15 L. T. 514.

A. entered the service of Messrs. Roe under a written memorandum, as follows: "April 13th, 1871. I agree to accept the situation as foreman of the works of Messrs. Roe, flock and shoddy manufacturers, and to do all that lays in my power to serve them faithfully, and promote the welfare of the firm, on my receiving a salary of 2*l.* per week and house to live in from the 19th of April, 1871":—Held, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract shewing that a hiring for a year was intended, was not admissible. *Evans* v. *Roe*, L. R. 7 C. P. 138; 26 L. T. 70.

### c. Domestic or Menial Servants.

**Contract Generally.**]—The contract between a master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. *Turner* v. *Mason*, 14 M. & W. 112; 14 L. J., Ex. 311.

**Who are.**]—A governess engaged at a yearly salary is not within the rule relating to domestic or menial servants, by which the contract of service may be dissolved upon a month's warning or a month's wages. *Todd* v. *Kerrich*, 8 Ex. 151; 22 L. J., Ex. 1; 17 Jur. 119.

A head gardener was engaged on an agreement that he should have yearly wages, and a house to live in rent-free. Several inferior gardeners were subject to his directions, and the house he lived in was not under the roof or a part of the master's dwelling-house. The jury having found that he was a menial servant:—Held, that the verdict was right, and that he was consequently liable to be discharged on a month's notice. *Nowlan* v. *Ablett*, 2 C. M. & R. 54; 1 Gale, 72; 5 Tyr. 709; 4 L. J., Ex. 155.

So a huntsman is a menial servant, and therefore the hiring of a huntsman, though in terms for a year, and upon conditions which can only be fully carried out by a service enduring for the full period of a year, is subject to the ordinary condition that it may be determined by either party at a month's notice. *Nicoll* v. *Greaves*, 17 C. B. (N.S.) 27; 33 L. J., C. P. 259; 10 Jur. (N.S.) 919; 10 L. T. 531; 12 W. R. 961.

The housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of an express agreement. *Lawler* v. *Linden*, Ir. R. 10 C. L. 188.

By a written memorandum of agreement, the plaintiff was "to have 6*s.* a week, three bowls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, to keep the gardens and pleasure grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful. To enter 12th May, 1838." The defendant dismissed the plaintiff upon a month's warning. In an action by the plaintiff to recover a quarter's wages, as being a yearly servant:—Held, that he was a menial servant, and was therefore, by the general rule of law, entitled to a month's notice only; and that the memorandum of agreement contained nothing which showed an intention in the parties to exclude that rule. *Johnson* v. *Blenkensopp*, 5 Jur. 870.

—— **Effect of subsequent Contract.**]—A contract, by which a servant hires himself to a master as a footman and a groom, is not dissolved by a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages and in a foreign country, although the servant accompanies his master into such foreign country; the service performed abroad being the same as that originally contracted for. *Rex* v. *Buckingham*, 3 N. & M. 72; 5 B. & Ad. 953; 3 L. J., M. C. 64.

—— **Bequests to Servants.**]—*See* WILL.

## 6. Wages and Remuneration.

### a. Right to.

**After Termination of a Quarter.**]—Where a servant was engaged at a yearly salary, payable quarterly, a month after the termination of one of the years of the service, he tendered his resignation; after another month the resignation was accepted, nothing being said about remuneration for the time elapsed since the termination of the last year's service. The law implies no engagement to pay for the services performed since the last quarter. *Lamburn* v. *Cruden*, 2 Man. & G. 253; 2 Scott (N.R.) 533; 10 L. J., C. P. 121.

Held, however, under the circumstances, that it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for. *Ib.*

**Payment in Goods.**]—Where by terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare for the value of the service, but must sue on the special contract. *Keys* v. *Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

But if B. by his own act renders the delivery of the goods impossible, A. may sue for the value of the service. So, if B. allows the goods to be sold under an execution against him. *Ib.*

**Promise of Present.**]—An agreement by which a master promised his servant, in addition to his ordinary wages, a present of 20*l.*, the services to be at all events till the end of one year, was renewed in all its parts from year to year, by the servant having continued several years, and nothing being said to the contrary by either party:—Held, that the 20*l.* was due for every year of service. *Mansfield* (*Earl*) v. *Scott*, 1 Cl. & F. 319.

**Share in Profits—Regulation of.**]—The defendant, in 1858, agreed that the plaintiff should act as manager of his works, and should receive in each year 7½ per cent. of the profits of the business, to be made up to 500*l.* in any year in which the share of the profits should be less than that sum. In the same year a valuation of the buildings, stock, plant and goodwill was made. In 1864 the defendant sold the buildings, stock and business at an increase over the valuation of 47,916*l.* In taking the accounts under this agreement:—Held, that the defendant was not entitled to charge the profit and loss account in every year with interest on his capital, nor with interest on old debts, nor with 500*l.* in respect of the plaintiff's salary. *Rishton* v. *Grissell*, L. R. 5 Eq. 326.

Held, also, that the defendant was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease, and the waste of plant and machinery. *Ib.*

Held, also, that the plaintiff was not entitled to treat as profit of the year in which the property was sold, the excess of the amount realised by the sale over the estimated value; but that the estimated value of stock first set down must run through the whole account; the annual depreciations being calculated on that constant quantity. *Ib.*

**Nett Profits, what are.**]—The manager of a company was to receive as remuneration for his services a fixed salary and a moiety of the nett profits on all sums realised on certain contracts:—Held, that he was entitled to a moiety of the profits on such contract, deducting only the expenses necessary on account of each contract, but not deducting any of the expenses incidental to the management of the company. *British Columbia and Vancouver Island Spar Lumber and Saw Mill Co., In re, Stamp's Claim*, 25 L. T. 653.

**Contract for—Construction.**]—The defendant wrote to the plaintiff, offering to engage him for the command of a steamer destined for an exploring and a trading voyage up the river Niger, paying him at the rate of 50*l.* a month commencing from the 1st December, 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied, that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the nett proceeds of the trade." The plaintiff received 50*l.* a month for seven months, and afterwards proceeded on the voyage in command of the vessel, but before the expiration of the ninth month wrongfully abandoned the vessel:—Held, that the contract, whether taken as constituted by the plaintiff's letter, or by the defendant's letter as explained by the plaintiff's, gave a cause of action at the expiration of each month, and that the plaintiff was entitled to recover the 50*l.* for the eighth month on an indebitatus count. *Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J., Ex. 329.

The plaintiff wrote to the defendant as follows: "I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company, upon the following terms, viz.: first, a salary of 300*l.* per annum, commencing at the present date, if the company be completely registered, and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of, and your means can afford." The defendant wrote in answer accepting the terms, and adding, "It is distinctly agreed and understood, that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right, as compensation for labour done, in the event of the company not being carried out." The plaintiff rendered some service, but the company was never formed:—Held, that there was no contract upon which the plaintiff could recover any part of the salary. *Roberts* v. *Smith*, 4 H. & N. 315; 28 L. J., Ex. 164.

**Alteration of Contract—Notice of Change.**]—M., a coal miner, was employed by W. to work on terms of fourteen days' notice to leave, and instant dismissal for breach of rules. On engagement, M. was ordered to work on a shift requiring M. to descend shaft at 11 a.m. W. afterwards gave five days' notice that the shift would be altered to 11.30 a.m., and because M. refused to go down at that hour he lost a day's wages, for which he applied under 38 & 39 Vict. c. 90, s. 9:—Held, the justices were right in treating the alteration of contract as material, and that W. was not justified in altering hours without a new contract. *Whitehaven Colliery Co.* v. *M'Court*, 57 J. P. 422.

—— **Increase of Risk—Refusal to continue Voyage.**]—Shipbuilders in this country agreed with a foreign government to build a warship and deliver it at a port in the foreign country for a lump sum. To carry out that agreement they contracted in writing with the defendant to enter their service as captain of the ship at a fixed rate of pay, and, as such captain, to take the ship from this country to the foreign port. The defendant engaged the plaintiff to serve as one of his crew, agreeing to pay him a lump sum for the voyage. During the voyage the foreign government declared war with another foreign government. After the declaration of war, and before the conclusion of the voyage, the plaintiff left the ship, and afterwards sued

the defendant for the whole of the agreed sum :—Held, that the plaintiff was entitled to the whole sum, the defendant having so acted (e.g., by sailing under the foreign flag, and offering to re-engage the men after the declaration of war) as to afford evidence that he was, notwithstanding that his written agreement was with the shipbuilders alone, a captain in the service of the foreign government, and his principals having by their declaration of war altered the risks of the voyage for which the plaintiff had engaged to serve. *O'Neil* v. *Armstrong*, 65 L. J., Q. B. 7 ; [1895] 2 Q. B. 418 ; 14 R. 703 ; 73 L. T. 178 ; 8 Asp. M. C. 63—C. A.

**When no Amount Fixed.**]—If A. agrees to serve B. as an apothecary's assistant at such salary as C. should think reasonable, and it appears that no application has been made to C. to fix any salary, A. cannot recover anything for his services. *Owen* v. *Bowen*, 4 Car. & P. 93.

A party entered into the service of another under the following contract : "I hereby agree to enter into your service as a weekly manager, to commence from next Monday. The amount of payment I am to receive I leave entirely to you" :—Held, per Alderson and Maule, dissentiente Parke, that he was entitled to recover a reasonable remuneration for the services performed by him. *Bryant* v. *Flight*, 5 M. & W. 114 ; 2 H. & H. 84 ; 8 L. J., Ex. 189 ; 3 Jur. 681.

Service, however long continued, creates no claim for remuneration without a bargain for it, either express or implied, from circumstances showing an understanding on both sides that there should be payment. *Reeve* v. *Reeve*, 1 F. & F. 280.

So when services have been rendered without any express contract for wages, but with board and lodging, or other benefits for the party serving, a contract to pay for such services is not to be implied. *Foord* v. *Morley*, 1 F. & F. 496.

A servant who comes over from the West Indies, where he has been a slave, and who continues in the service of his master in England without any agreement for wages, is not entitled to any, unless there has been an express promise. *Alfred* v. *Fitzjames* (*Marquis*) 3 Esp. 3.

**Gratuitous Service.**]—A. having performed gratuitously services for B., received from him a promissory note, with an understanding that he would accept it not only as a gift for what was past, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued B.'s executors upon the note :—Held, that as there was no contract binding A. to perform future services, there was no consideration. *Hulse* v. *Hulse*, 17 C. B. 711 ; 25 L. J., C. P. 177 ; 4 W. R. 239.

**Claims for—Delay.**]—If a servant has left his service for a considerable time, the presumption is that all his wages have been paid. *Sellen* v. *Norman*, 4 Car. & P. 80.

—— **Statute of Limitations.**] — Where it appeared that the course of dealing between master and steward had been to allow the steward to retain his salary from time to time out of money in his hands, the steward was allowed, after the master's death, to claim in account his salary for twenty years, the Statute of Limitations being held not to apply to such a claim. *Hawkins, In re, Hawkins* v. *Hawkins*, 28 W. R. 240.

**Defences — Validity.**] — A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her :—Held, that these advances formed no defence to an action for her wages. *Hedgeley* v. *Holt*, 4 Car. & P. 104.

Money paid by a master for coach-fares, for the mother of his servant, who was under age, cannot be deducted from the wages of the servant. *Ib.*

In an action for wages as a female servant, the defendant pleaded non assumpsit, and the plaintiff gave evidence of acts of service. The defendant proposed to go into evidence to show that the plaintiff had cohabited with him :—Held, that he might do so, as this went to show that there was no contract between the parties, and not to invalidate any contract on the ground of illegality. *Bradshaw* v. *Hayward*, Car. & M. 591.

—— **Certificate of Company's Manager as to amount due.**]—The plaintiff became a conductor of the defendant company under a written agreement on the terms, amongst others, that, for a breach by him of the rules of the company, the company's manager might decide that wages owing to him might be retained by the company as liquidated damages for the breach, and that the manager's certificate in writing to that effect should be binding and conclusive evidence between the company and the conductor in all courts of justice. The plaintiff, having been dismissed by the manager for a breach of the rules, brought an action to recover the wages due to him. After the action was brought the manager, without hearing anything that the plaintiff might wish to say, signed a certificate which declared the wages then due to the plaintiff to be forfeited to the company :—Held, that the certificate was no defence to the action, as the manager had not given the plaintiff an opportunity of being heard on the question of forfeiture. *Armstrong* v. *South London Tramways Co.*, 64 L. T. 96 ; 55 J. P. 340—C. A.

**Engagement without Work.**]—An action for work and labour will lie if a servant is engaged for a fixed period, and the master, without dismissing him, refuses to supply him with work. *Cook* v. *Sherwood*, 11 W. R. 595. And see *Bunning* v. *Lyric Theatre*, 71 L. T. 396.

**Leaving without Notice.**] — A weaver was employed as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of their workmen were ascertained and fixed at noon on Thursday in each week, but were not paid till the next Saturday. By rules embodied in the contract of hiring, the workmen were required to give, before leaving, fourteen days' notice at the time of booking up on Thursday. "Persons leaving without notice will forfeit all wages due." On a Thursday, the sum earned by the weaver in the preceding week, was ascertained and fixed at 15*s.* He commenced another week on the afternoon of the same day, and worked during the morning of Friday, and earned 7*s.* He left during the forenoon of

Friday without having given any notice :—Held, that he had forfeited, by leaving before the Saturday, the wages due on the Thursday, but not payable till the Saturday, as well as the wages earned between noon of Thursday and Friday morning. *Walsh* v. *Walley*, 43 L. J., Q. B. 102 ; L. R. 9 Q. B. 367 ; 22 W. R. 571.

A painter was hired by the week, his wages to be 7*d*. per hour, payable every Saturday at noon. The full week consisted of fifty-four and a half hours. Overtime was paid for at the same rate. A week's notice from either party was required. He left the service at noon on Friday, before the week was up, and without giving any notice, having worked, including overtime since the previous Friday, fifty-seven hours :—Held, that he was not entitled to recover his wages for the current week of his leaving service. *Saunders* v. *Whittle*, 33 L. T. 816 ; 24 W. R. 406.

If a clerk be engaged at a salary of 100*l*. a year and having received his wages up to a certain time serve for some time longer, and then leave the service before the year expires, without due cause and without any notice : whether he is entitled to recover wages up to the time of his quitting, quære. *Huttman* v. *Boulnois*, 2 Car. & P. 510.

**Servant absenting Himself.**]—T. was employed by A., a cotton-spinner, at a weekly wage of 15*s*., ending on Wednesdays ; the rules stated that a workman absenting himself would forfeit his wages. On Tuesday morning at 6 a.m., T. was late, and being refused entrance said he would leave for the day, and went away. After breakfast he came again and went in unobserved, till, being noticed by the overlooker, he was told his work had been distributed, and T. went away again. On suing for the week's wages :—Held, that the county court judge was wrong in finding that T. had not absented himself on those facts, and therefore T. could not recover his wages. *Tomlinson* v. *Ashworth*, 50 J. P. 164.

**Right to, during Illness.**]—A clerk was engaged at 120*l*. per annum, and was to have one month's notice of dismissal. He began his duties on the 2nd July, and served till the 1st August. He was then obliged by illness to be absent till the 2nd September, when he tendered his services, which were refused. He had in the meantime received on the 20th August a letter from his master terminating the engagement. In an action by him for wages from the 1st August to the 20th September :—Held, that he was entitled to wages for that period, and that it was no answer to his claim that the illness was caused by an act of misconduct on his part, which occurred before the contract, and which he did not know, at the time of the contract, would lead to his illness and render him incapable of performing his work. *K*—— v. *Raschen*, 38 L. T. 38.

By one of the rules of a cotton-mill, any person absenting himself on account of sickness or any other cause was immediately to give notice to the overlooker ; in default thereof all wages then earned were to be forfeited. A weaver in the mill, in the middle of the day, asked the overlooker for leave of absence for half a day, promising to return to work the next morning at six. The weaver did not return the next day till half-past one in the afternoon :—Held, that the weaver did not forfeit her wages under this rule, as she could not be said to be absent without notice merely by continuing her absence longer than the period which she had mentioned. *Taylor* v. *Carr*, 30 L. J., M. C. 201 ; 4 L. T. 414 ; 9 W. R. 699.

**In Mines.**]—*See* MINES AND MINERALS.

### b. Payment Contrary to the Truck Acts.

**Statute.**]—59 & 60 Vict. c. 44, *amends the Truck Acts*.

**Applicable to what Persons.**]—The 1 & 2 Will. 4, c. 37, is applicable only to those persons who contract as labourers, viz., such as contract to use their personal services, and to receive payment for such services in wages. *Riley* v. *Warden*, 2 Ex. 59 ; 18 L. J., Ex. 120.

One who contracts to do work upon a large scale, employing labourers under him, is not an artificer, workman, or labourer within the act, though he superintends the work, and from time to time labours personally therein. *Sharman* v. *Sanders*, 13 C. B. 166 ; 3 Car. & K. 298 ; 22 L. J., C. P. 86 ; 17 Jur. (N.S.) 765 ; 1 W. R. 152.

The provisions of the 1 & 2 Will. 4, c. 37, apply only to agreements for personal service, and not to agreements for the performance of a certain quantity of work, which the contractor cannot perform except by making use of the labour of others. *Weaver* v. *Floyd*, 21 L. J., Q. B. 151 ; 16 Jur. 289.

The mode of paying the wages, as specified in the agreement, will not prevent a case from coming within the act. *Ib.*

By an agreement with a mine owner, two persons were engaged as butty colliers. These colliers get the produce of the mine at so much a yard ; they employ others under them, to increase the quantity ; but they must work personally, and are treated as workmen :—Held, that these colliers were artificers within the act ; the distinction between contractors and artificers depending on the fact whether, by the engagement, they were labourers. *Bowers* v. *Loveluin*, 6 El. & Bl. 584 ; 25 L. J., Q. B. 371 ; 2 Jur. (N.S.) 1187 ; 4 W. R. 600.

A butty collier, who undertakes for the performance of a piece of work by the day, or ton, or yard, and employs others to assist him to whom he pays wages, is not an artificer. *Sleeman* v. *Barrett*, 2 H. & C. 934 ; 33 L. J., Ex. 153 ; 10 Jur. (N.S.) 476 ; 9 L. T. 834 ; 12 W. R. 411.

A workman who works for a coal and iron company, and whose personal skill and labour are of the essence of the contract between him and them, is an artificer within the Truck Act, 1 & 2 Will. 4, c. 37, although part of his work for the company was piece work, which he could do at home, and, in fact, get others to do for him, and although he worked sometimes for other people. *Pillar* v. *Llynvi Coal and Iron Co.*, 38 L. J., C. P. 294 ; L. R. 4. C. P. 752 ; 20 L. T. 923 ; 17 W. R. 1123.

The plaintiff, an illiterate labouring man, attached his mark to a written contract with the defendant, by which he engaged to make as many bricks as the defendant required, in his brickfield, finding all labour, the defendant finding the materials. Payment to be 10*s*. 6*d*. per thousand for the bricks, when complete. The plaintiff, assisted by others, made bricks, having worked at them personally. In payment, he accepted tickets for goods. Afterwards he sued for the full price, contending that he was an

artificer, and that, consequently, the payment by ticket was void:—Held, that the plaintiff, not being bound by his contract to do any part of the work personally, was not an artificer under the Truck Act. *Ingram* v. *Barnes*, 7 El. & Bl. 132; 26 L. J., Q. B. 319; 3 Jur. (N.S.) 861; 5 W. R. 726—Ex. Ch.

A framework knitter is an artificer. *Moorhouse* v. *Lee*, 4 F. & F. 355.

A person employed in loading boats with iron at a private canal, close to ironworks, is an artificer in making iron within the Truck Act, 1 & 2 Will. 4, c. 37. *Millard* v. *Kelly*, 7 W. R. 12.

The plaintiff was employed as a guard to conduct goods trains on the defendants' railway, and during such employment, from time to time assisted in loading and unloading and coupling and uncoupling trucks:—Held, that the plaintiff was not a workman or person "engaged in manual labour" within the meaning of s. 10 of the Employers and Workmen Act, 1875, and, therefore, not entitled to the benefits of the Truck Acts, 1831 and 1887. *Hunt* v. *G. N. Ry.*, 60 L. J., Q. B. 216; [1891]1 Q. B. 601; 64 L. T. 418; 55 J. P. 470.

**Mode of Calculating.**]—The plaintiff was employed by the defendant as a frame-work knitter, or weaver of gloves in frames provided by the defendant, and paid according to the quantity of work he performed, at an agreed price per dozen pairs, subject to certain charges and deductions according to the usage of the trade, which was known to the plaintiff. Those deductions were, charge for frames and standing room, for a boy winding, and a small percentage when the weekly wages of the plaintiff exceeded a certain sum:—Held, first, that they were not within the prohibition in s. 8 of 1 & 2 Will. 4, c. 37, being the mode of calculating the amount of wages. *Chawner* v. *Cummings*, 8 Q. B. 311; 15 L. J., Q. B. 161; 10 Jur. 454.

Held, secondly, that, if they had been within that prohibition, they would, by virtue of s. 4, be recoverable under a count for work and labour, and, by s. 5, would not be available for the defendant in the shape of a set-off. *Ib.*

**Offence within the Act—Payment with Goods.**]—The wife of an artificer received, as his agent, from the master, in payment of wages due to her husband, a written order, which, by the master's direction, she took to his office and exchanged for another, given her by the clerk there; this she presented at a shop close by, named to her by the clerk, and received goods only. The master was convicted for paying wages otherwise than in current coin. The place where the first order was given to her was within the jurisdiction of the justices; but the office where the second order was given, and the shop, were not:—Held, that the conviction was right, and that the offence was complete at the time of the delivery of the first order. *Athersmith* v. *Drury*, 1 El. & El. 46; 28 L. J., M. C. 5; 5 Jur. (N.S.) 433; 7 W. R. 14.

W. was a cotton manufacturer, and S. a power-loom weaver in his employ. A complaint was made by W.'s manager to S. of a defect in a piece of cloth woven by him, and he was cautioned; but at the end of the week received his full wages without abatement. In the following week a similar defect was discovered in another piece of cloth woven by S.; and S. was told by W.'s book-keeper, first, that something would have to be deducted from his wages for the defective pieces of cloth, or that he would have to take the pieces of cloth home; and, on a second occasion, that he would have to take one of the pieces of cloth home, and that there were no wages for him. S. ultimately took away one of the damaged pieces of cloth, the value of which in a perfect condition was 1*l.* 1*s.* 3*d.*, and left W.'s employ at the end of the week following that in which the dispute had arisen. The full wages earned by him during that time were 2*s.* 1*s.* 3*d.*, of which amount 1*l.* 2*s.* 6½*d.* was earned during the week in which the last damaged piece was delivered, and 18*s.* 8½*d.* during the last week. On applying for his wages he received 1*l.* in cash and retained the damaged piece of cloth:—Held that the facts disclosed amounted to a payment of wages in goods, and that the Truck Act (1 & 2 Will. 4, c. 37, s. 9) had been infringed. *Smith* v. *Walton*, 47 L. J., M. C. 45; 3 C. P. D. 109; 37 L. T. 437.

To constitute an offence against the 1 & 2 Will. 4, c. 37, it is not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman; the mere payment is enough. *Wilson* v. *Cookson*, 13 C. B. (N.S.) 496; 32 L. J., M. C. 177; 9 Jur. (N.S.) 177; 8 L. T. 53; 11 W. R. 426.

The offence is not purged by a subsequent payment in money, whether made voluntarily or compulsorily under an order of justices. *Ib.*

**Deductions—Fines.**]—The deduction from their wages of fines incurred by artificers is not a "payment otherwise than in the current coin of the realm," so as to make the employer guilty of an offence under s. 9 of the Truck Act. *Redgrave* v. *Kelly*, 37 W. R. 543; 54 J. P. 70.

—— **Liquidated Damages.**]—A rule of a factory provided that any overlooker engaging a child before having the child's name entered in a register should forfeit 20*s.*:—Held, that there was nothing in the Truck Act to prevent a deduction of this sum from an overlooker's wages, as the forfeiture was not a penalty but liquidated damages. *Beetham* v. *Crewdson*, 55 J. P. 55.

—— **Supply of Intoxicants.**]—The respondent, who carried on the business of a licensed victualler and also of a brickmaker, supplied workmen employed at his brickfield with intoxicating liquors to the amount of 3*s.* 10*d.* on credit, entries being made in the respondent's books as the liquors were supplied. In the evening of the same day, when the workmen were in his public-house, the employer handed across the bar to one of them, on behalf of the others, 4*s.*, which was immediately given back, 2*d.* being returned by the employer as change, and the entries were then crossed off. On the next day the wages then due to the workmen were paid by the employer in coin, the 4*s.* above mentioned being deducted from the sum so paid:—Held, that the employer had committed an offence against the Truck Acts, 1831 and 1887. *Gould* v. *Haynes*, 59 L. J., M. C. 9; 61 L. T. 732; 16 Cox, C. C. 732; 54 J. P. 405.

—— **Supply of Medicine and Medical Attendance.**]—The 1 & 2 Will. 4, c. 37, s. 23, permits an employer of an artificer to contract to supply the artificer with medicine, medical attendance

and materials to be employed in his occupation, if a miner, and to demise to the artificer a tenement at any rent reserved; and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing, and signed by the artificer:—Held, that the amount to be deducted in respect of each head of deduction need not be specified in the written contract. *Cutts* v. *Ward*, 36 L. J., Q. B. 161; L. R. 2 Q. B. 357; 15 L. T. 614; 15 W. R. 445.

Under a contract in writing, allowing a stoppage to be made for medicine and medical attendance, the employer may deduct 6*d.* a week, which by the practice of the trade was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance to such miners, as required by them. *Ib.*

The contract as to the supply of materials, in order to be within s. 23, must be shown to be an absolute contract of sale and not a mere contract of hiring by the artificer. *Ib.*

An employer stopped part of the wages of an artificer as a contribution to funds established by him to provide medicine and medical attendance for the artificers employed by him, and schools for their children, without any written agreement with the artificer:—Held, that the artificer was entitled to recover the whole of the deductions under 1 & 2 Will. 4, c. 37, s. 24. *Pillar* v. *Llynri Coal and Iron Co.*, 38 L. J., C. P. 294; L. R. 4 C. P. 752; 20 L. T. 923; 17 W. R. 1123.

By an arrangement between employers and their workmen, certain deductions were made from the workmen's wages (which were paid monthly) for a doctor's fund, which was established for the purpose of paying doctors, who attended the workmen and their families, and supplied them with medicines in case of illness. The sums thus deducted were handed over by the employers to the doctor from time to time. There was no contract in writing between the employers and workmen, authorising the employers to make the deductions, nor was there any evidence that the doctor had accepted the liability of the employers. The employers filed a liquidation petition, and at this time there stood to the credit of the "doctor's fund," in their books, a sum of 149*l.*, which had arisen from deductions thus made from the workmen's wages, and had not yet been paid over to the doctor:—Held, that there had been no valid payment within the Truck Act, of the 149*l.* to the workmen, and that they were entitled to be paid the 149*l.* in full out of the employers' estate as wages. *Cooper, Ex parte, Morris, In re*, 26 Ch. D. 693; 51 L. T. 374—C. A.

Quære, whether, if the 149*l.* had been, in pursuance of the agreement, actually paid over by the employers to the doctor, in discharge of a debt for which the workmen were liable, or if the doctor had accepted the liability of the employers, the Truck Act would have applied notwithstanding the absence of a contract in writing, signed by the workmen. *Ib.*

The plaintiff, upon entering the defendants' service, signed a document containing the conditions of his service. Among these was a condition that the defendants should deduct a certain sum per week from the plaintiff's wages as his contribution to a sick and funeral allowance fund, established for the benefit of the defendants' servants, and administered under certain rules. The specified sums were deducted from the plaintiff's wages during the whole period of his service, and the defendants expended the total amount so deducted upon medicine and medical attendance for the plaintiff and his wife in accordance with the rules. Upon leaving the defendants' service the plaintiff claimed to recover from them the amount deducted by them since the passing of the Truck Act Amendment Act, 1887, as being a deduction in contravention of that Act:—Held, that inasmuch as the Truck Act is incorporated with the Truck Act Amendment Act, 1887, s. 23 of the former act applies to cases under the latter act, and that the sum having been deducted in respect of medicine and medical attendance, in pursuance of a contract in writing, and having been so expended by the defendants, the plaintiff could not recover it back. *Lamb* v. *G. N. Ry.*, 60 L. J., Q. B. 489; [1891] 2 Q. B. 281; 65 L. T. 225; 39 W. R. 475; 56 J. P. 22.

If s. 2 of the Truck Act, 1831, applies at all to a contract between an employer and employee by which the employee agrees to become a member of a sick and accident club, and impliedly authorises the employer to make a weekly deduction from her wages, and to pay the sum deducted to the treasurer of the fund, semble, its only effect is to render the contract unenforceable by the employer. *Hewlett* v. *Allen*, 63 L. J., Q. B. 608; [1894] A. C. 383; 6 R. 175; 71 L. T. 94; 42 W. R. 670; 58 J. P. 700—H. L. (E.)

—— **Recovery of Payments.**]—A payment in current coin by an employer at the instance or with the authority of his employee to a third person on behalf of the employee is as much a payment to the employee as if current coin had been placed in his or her hands, and money so paid is not recoverable by the employee by virtue of ss. 3 and 4 of the Truck Act of 1831. *Cooper, Ex parte, Morris, In re* (26 Ch. D. 693) (supra), discussed. *Ib.*

### c. Other Statutes Affecting.

**Jurisdiction and Powers of Justices.**]—In order to give justices jurisdiction to hear a complaint as to the nonpayment of wages, under 20 Geo. 2, c. 19, s. 1, it is only necessary that the relation of master and servant should exist between the parties, and the contract of service need not be for any specific time. *Taylor* v. *Carr*, 2 B. & S. 335; 31 L. J., M. C. 111.

Under 4 Geo. 4, c. 34, s. 3, a justice may by his conviction order wages already due and unpaid to be abated. *Reg.* v. *Biggins*, 5 L. T. 605.

The provisions of 5 Geo. 4, c. 18, applied only to cases of penalties and forfeitures, and therefore magistrates had no power, under that statute, to commit a party to prison for the nonpayment of a sum of money adjudged by them, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11; and 4 Geo. 4, c. 34, to be due as wages. *Wiles* v. *Cooper*, 6 N. & M. 276; 3 A. & E. 524; 1 H. & W. 560.

In an information before magistrates, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11; and 4 Geo. 4, c. 34, for nonpayment of wages, it should appear that the relation of master and servant existed in one of the occupations therein specified, between the debtor and the informant. *Ib.*

—— **Appeals.**]—There is no appeal to the sessions against an order made under 4 Geo. 4, c. 34, s. 5, for payment of wages, the sum to be levied by distress in case of nonpayment for nineteen days, although the justices, on making the order, may have acted without jurisdiction. *Reg.* v. *Bedwell*, 4 El. & Bl. 213; 3 C. L. R. 88; 24 L. J., M. C. 17; 1 Jur. (N.S.) 306.

The 42 Geo. 3, c. 90, s. 61, enabled a magistrate to make an order for payment of servants' wages in certain cases, and directed "that in case of refusal or nonpayment of any sum so ordered for twenty-one days after such determination, he may issue his warrant of distress;" but he gave an appeal to the sessions:—Held, that twenty-one days having elapsed between the making of such order before the appeal, and also twenty-one days after such appeal dismissed, before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal. *Wootton* v. *Harvey*, 6 East, 75. *S. C.*, nom. *Wood* v. *Harvey*, 2 Smith, 238.

**Rights of Master—Deductions.**]—A master summoned by a servant, an artificer, under 20 Geo. 2, c. 19, s. 1, for wages, is entitled to a deduction in respect of bad workmanship; and the justices, upon satisfactory evidence, should order the payment of so much as shall seem just and reasonable. *Sharp* v. *Hainsworth*, 3 B. & S. 139; 32 L. J., M. C. 33; 9 Jur. (N.S.) 353; 7 L. T. 320; 11 W. R. 36.

Deductions or stoppages made from the wages of an artificer in the hosiery trade in respect of frame rent, machine rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in the waiting room, amounting to about 3*s.* 9*d.* per week, fixed charges, are not illegal. *Archer* v. *James*, 2 B. & S. 61; 31 L. J., Q. B. 153; 8 Jur. (N.S.) 166; 6 L. T. 167; 10 W. R. 489—Ex. Ch.

—— **Under 37 & 38 Vict. c. 48.**]—The Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 3, enacts, "If any employer shall bargain to deduct or shall deduct, directly or indirectly, from the wages of an artificer in his employ any part of such wages for frame-rent or standing or other charges, or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm, he shall forfeit a sum of five pounds for every offence, to be recovered by the artificer, or any other person suing for the same, in the county court in the district where the offence is committed, with full costs of suit. A hand-frame worker was in the employment of hosiery manufacturers. By the regulations of the factory he was liable to a fine of 8*d.* a day for staying away from work without permission. Having been fined for such absence and the amount having been deducted from his wages, he brought an action to recover from his employers the penalty mentioned in s. 3:—Held, that the employers were prohibited from deducting from the wages of the artificer frame-rent and standing or other charges ejusdem generis with rent and standing, but that fines were not charges within the meaning of s. 3, and therefore they had not incurred the penalty under that section. *Wallis* v. *Thorp*, 44 L. J., Q. B. 137; L. R. 10 Q. B. 383; 33 L. T. 11; 23 W. R. 730.

**Forfeiture of Wages—Women.**]—A weaver, a woman, subject to the provisions of the Factory Acts, was employed at a mill in which amongst the rules was rule 15, that no person shall leave his or her work without giving fourteen days' previous notice, such notice to be given on a Saturday, and rule 16, that any person, leaving without giving such notice "shall forfeit all wages then due, or earned or unpaid." She was paid by the piece, and all work done was booked up at three o'clock on the Wednesday afternoon in each week, and paid for on the following Saturday; all work booked after three o'clock on the Wednesday afternoon being carried forward to the following week. She left the mill before three o'clock on a Wednesday afternoon, without giving the required notice, having previously carried in and had booked certain work which she had completed. On the following Saturday she applied for the wages due at the time she left, and when she had completed her work, but payment was refused, on the ground that the same were forfeited by rules 15 and 16. No claim was, however, made for damage sustained by the employer. The 11th section of the Employers and Workmen Act, 1875, enacts, that "in the case of a child, young person or woman, subject to the provisions of the Factory Acts, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage, if any, which the employer may may sustained by reason of such absence or leaving work:—Held, that the above facts did not shew a weekly hiring at weekly wages, but shewed that the price for the work done and booked when the weaver left on the Wednesday was then earned and due, though not then payable, and that the same would have been forfeited by rr. 15 and 16, but as there was no damage, and the weaver was a woman subject to the Factory Acts she was protected by the said 11th section, and could not be deprived of what she had so earned. *Warburton* v. *Heywood* or *Heyworth*, 50 L. J., Q. B. 137; 6 Q. B. D. 1; 43 L. T. 461; 29 W. R. 91; 45 J. P. 38—C. A.

—— **Leaving without Notice.**]—A factory winder was paid every Saturday for the number of sets she had wound off during the week ending on the preceding Wednesday. One of the rules of the factory in which she worked was that fourteen days' notice in writing was required previously to leaving the employment, such notice to be given on a Thursday; and all persons leaving without notice would forfeit the whole of the wages to which they would otherwise have been entitled, and also render themselves liable to be proceeded against according to law. She earned 3*s.* 7*d.* on the first two days of one week of her employment, was absent with leave on the Saturday, did not return, and wholly left the service, without leave or notice on Monday. In an action by her for 3*s.* 7*d.* earned, the county court judge held that hers was a weekly hiring, and that although her master's damage by reason of her absence was only 3*s.*, she could not recover anything under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 11:—Held, that, notwithstanding the fortnight's notice required, the facts justified the finding that the service was weekly; that she had no claim for wages or other sum due for work done; and that

the county court judge was right. *Gregson* v. *Watson*, 34 L. T. 143.

**Wages Attachment Abolition Act, 1870.**]—The salary of a secretary to a company amounting to 200*l.* a year is not "wages" of a "servant" within the Wages Attachment Abolition Act (33 & 34 Vict. c. 30), and is therefore not exempted from attachment by that act. *Gordon* v. *Jennings*, 51 L. J., Q. B. 417; 9 Q. B. D. 45; 46 L. T. 534; 30 W. R. 704; 46 J. P. 519.

7. Medical Attendance on Servant.

Although a master is not bound to provide a menial servant with medical attendance and medicine during sickness, if a servant falls ill, and a master calls in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there is a special contract between master and servant that he should do so. *Sellen* v. *Norman* 4 Car. & P. 80. But see *Rex* v. *Wintersett*, Cald. 298.

A master is not liable upon an implied assumpsit to pay for medical attendance on a servant who has met with an accident in his service. *Wennall* v. *Adney*, 3 Bos. & P. 247; 6 R. R. 780. S. P., *Atkins* v. *Banwell*, 2 East, 505. And see *Scarman* v. *Castell*, 1 Esp. 270.

A servant whose limb is fractured by a fall, when sitting on the shafts of his master's waggon, is a casual pauper in the parish in which he falls, and must be supported and cured at their expense, and not at that of his master. *Newby* v. *Wiltshire*, Cald. 527; 2 Esp. 739; 4 Dougl. 284; 3 Bos. & P. 247; 5 R. R. 772.

If a servant becomes ill in consequence of a service away from her master's family, and calls in a surgeon, and after this the master sends his own surgeon, and his wife knows of the first surgeon's attendance, and expresses no disapprobation, the master is liable to pay him for his attendance. *Cooper* v. *Phillips*, 4 Car. & P. 581.

But where a servant, who hurt her foot in getting over a gate, called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress:—Held, that the master was not liable to pay the surgeon's bill. *Ib.*

A master is not by the general law bound to provide medical advice for his servant; but the case is different with respect to an apprentice; and a master is bound, during the illness of his apprentice, to provide him with proper medicines. *Reg. v. Smith*, 8 Car. & P. 153.

8. Other Rights under the Contract.

**Soliciting Custom.**]—A servant while in his master's service may solicit business from his customers for himself when his service is at an end, and he sets up on his own account. *Nichol* v. *Martyn*, 2 Esp. 732; 5 R. R. 770.

**Copying List of Master's Customers, with Intention of using after leaving.**]—In a contract of service involving confidential relations, there is, in the absence of an express stipulation to the contrary, an implied promise of fidelity and good faith on the part of the servant, which is broken when the latter surreptitiously copies from his master's order book a list of his master's customers, for his own use after he shall have left and shall set up a rival business. The servant who so makes and uses the copy is guilty both of a breach of contract and of a breach of trust, and the master is entitled to (i) damages (ii) delivery up to him of all copies and contracts made from his list by the servant; (iii) an injunction restraining the servant from making use of the information thus improperly obtained. *Robb* v. *Green*, 64 L. J., Q. B. 593; [1895] 2 Q. B. 315; 14 R. 580; 73 L. T. 15; 44 W. R. 25; 59 J. P. 695—C. A.

**Information or Materials Acquired in Course of Employment.**]—The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; and the court will grant an injunction to restrain such use, in addition to awarding damages. *Louis* v. *Smellie*, 73 L. T. 226—C. A.

A draughtsman in the employ of a firm of manufacturers of fire-engines, a few days before leaving his employer's service, prepared a table of the several dimensions of various types of fire-engines made by the firm, which he took away with him. Upon motion, on behalf of the firm, for an interim injunction to restrain the publication or use of this table:—Held, that a confidence that the servant would use the opportunities of gaining information which his service gave him for the purpose of that service alone rose out of the mere fact of the employment; and that abuse of this confidence was shewn by the preparation of the table at a time when, by the termination of the employment, it could be of no advantage to the employer. Injunction granted. *Merryweather* v. *Moore*, 61 L. J., Ch. 505; [1892] 2 Ch. 518; 66 L. T. 719; 40 W. R. 540.

Agents are not entitled to use the materials gained or collected by them in the course of their employment to the detriment of their principal. *Reuter's Telegram Co.* v. *Byron* (43 L. J., Ch. 661) doubted. *Lamb* v. *Evans* 62 L. J., Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405—C. A.

**Inventions.**]—If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master. *Bloxham* v. *Elsee*, 1 Car. & P. 558; R. & M. 187; 6 B. & C. 169; 9 D. & R. 215; 5 L. J. (O.S.) K. B. 104; 30 R. R. 275.

**Occupation of Premises.**]—A servant occupying a house cannot be said to hold it as servant, if it is not the master's house. *Reg.* v. *Lynn*, 8 A. & E. 379; 3 N. & P. 411.

A servant, who is allowed the use of premises belonging to his master, in order to enable him more effectually to perform the duties of his place, has thereby conferred on him no estate in the premises, and may be turned out at the pleasure of his master. *White* v. *Bayley*, 10 C. B. (N.S.) 227; 30 L. J., C. P. 253; 7 Jur. (N.S.) 948.

Agreement, by which, after reciting that the defendant was in possession of a messuage and premises whereon the sale of beer had been for some time past carried on by U. for and on the

defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, it was agreed that the plaintiff should from the date thereof enter upon the premises, and carry on thereon such trade or business for the defendant, in the place and stead, in the same manner, and with and upon the same privileges and terms as U. had theretofore done, until the agreement should be determined by the notice thereinafter mentioned; that all the beer to be sold and consumed on the premises should be had and taken by the plaintiff from the defendant, and that the plaintiff should not part with the trade or the occupation of the premises without the licence of the defendant; and that whenever either party should be desirous of determining the agreement, the plaintiff should on receiving a month's notice in writing, without being paid any sum of money or consideration, quit and deliver up the trade and possession of the premises; and that the plaintiff should be at liberty to leave the trade and quit the occupation of the premises on giving one month's notice in writing:—Held, that the agreement did not create any tenancy between the plaintiff and defendant, but the occupation of the plaintiff was as servant to the defendant. *Mayhew* v. *Suttle*, 4 El. & Bl. 347; 3 C. L. R. 59; 24 L. J., Q. B. 54; 1 Jur. (N.S.) 303; 3 W. R. 108—Ex. Ch.

**Action for Money had and received.**]—Where a servant was in the habit of receiving debts for his master, and paying the same over without any written vouchers, the master must prove that the servant has not paid the money over, as well as that he has received it, in an action against him for money had and received. *Evans* v. *Birch*, 3 Camp. 10.

**Duty of Servant to Account.**]—The managing director was before the formation of the plaintiff company a shareholder in two other companies, and in consequence of employing them to supply ice to the plaintiff company's ships, and to take away the fish from them, he received from those companies certain bonuses paid out of surplus profits after payment of dividends at a fixed rate. Under an agreement with the company he was allowed to engage in any other business or venture not prejudicial to the interests of the company, and the articles provided that the directors might enter into contracts, and do business with the company:—Held, that he must account to the plaintiff company for the bonuses, though the plaintiff company could not have obtained them from the other companies. *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339; 59 L. T. 345.

**Account.**]—Where A., the deceased, was clerk and manager in the sheriff's office in the colony of M., and in that capacity received moneys and made payments on the sheriff's account in the course of the business of the office:—Held, that an action against the representatives of A. would not lie, the parties not standing in the relation of principal and agent, but of master and servant, the latter acting under the immediate eye of the former, and subject to his chief control. *Ermatinger* v. *Gugy*, 5 Moore, P. C. 1.

A man swears he received money as a menial servant, and paid it over to his master. He shall not account for it again. *Anon.*, 1 Vern. 136. S. P. *Potts* v. *Potts*, *id.* 207. But see *id.* 95. Master has a right to earnings of his apprentice who quits him. *Meriton* v. *Hornsby*, 1 Ves. 48. And equity will give no relief. *Hill* v. *Allen*, *id.* 83.

If a merchant employs his apprentice as a factor beyond sea, and he dies, his administrator shall account. *Lee* v. *Bowler*, Rep. t. Finch, 125.

Servant taking by collusion more than belongs to his office must account; so must a stranger upon a bargain with a servant, which is a fraud on the master. *East India Co.* v. *Henchman*, 1 Ves. J. 289.

### 9. Termination of.

#### a. By Notice—Mode and Time of.

**Agreement for Three Years—"At my Option."**]—The defendant having established smelting works at Carthagena, in Spain, offered to employ the plaintiff as foreman, by letter, containing these passages: "I should require you to enter into an engagement to remain with me for at least three years, at my option; salary 250*l.* per annum. I should require you to visit some of the best smelting works in England before you come out." The plaintiff accepted the employment, and on the 1st of February, 1850, proceeded to visit smelting works, and was so occupied until the 15th, when he departed for Carthagena, and arrived there on the 6th of March. He continued in the service of the defendant until the 15th of February, 1851, when he was discharged. He had been paid his first year's salary, as commencing on the 1st of February, 1850. In an action to recover the second year's salary:—Held, first, that the term "at my option" did not enable the defendant to put an end to the service at his will, but that it was a yearly hiring, with an option for the defendant to require the plaintiff's service for three years, or to put an end to it at the expiration of the first, second or third year; and, secondly, that the service and salary commenced when the plaintiff first proceeded to visit the smelting works in England. *Down* v. *Pinto*, 2 C. L. R. 547; 9 Ex. 327; 23 L. J., Ex. 103; 2 W. R. 202.

**Yearly Service — Custom.**] — A declaration stated that in consideration that the plaintiff would enter the service of the defendant as a commercial traveller for one year, the defendant agreed to employ him in that capacity at a yearly salary, and to continue him in such service for one year. Breach, that the defendant wrongfully dismissed the plaintiff before the expiration of the year. At the trial it appeared that by the usage of trade such yearly hiring might be put an end to by either party giving three months' notice:—Held, that the contract was incorrectly described, and that the objection was properly raised by non assumpsit. *Metzner* v. *Bolton*, 9 Ex. 518; 2 C. L. R. 685; 23 L. J., Ex. 130; 2 W. R. 302. See also *Wheeler* v. *Bavidge*, 9 Ex. 668; 2 C. L. R. 1077; 23 L. J., Ex. 221.

An agreement was entered into in the following terms: "A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum, also provided at the end of the year B. finds A. has done sufficient business to justify him in recompensing, by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*" It being proved at the trial, that, by a general custom of the trade, a yearly hiring is determinable by a month's

notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case. *Parker* v. *Ibbetson*, 4 C. B. (N.S.) 346; 27 L. J., C. P. 236; 4 Jur. (N.S.) 536; 6 W. R. 519.

In an action for the breach of a contract of hiring, if either party relies upon the existence of a custom authorising him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, and it is not enough to aver simply that a reasonable notice was given. *Williams* v. *Byrne*, 2 N. & P. 139; 7 A. & E. 177; W. W. & D. 535; 6 L. J., K. B. 239; 1 Jur. 578.

The custom must be general, of reasonable antiquity and uniformity, and sufficiently notorious that people would make their contracts on the supposition that it exists. *Foxall* v. *International Land Credit Co.*, 16 L. T. 637.

A. was engaged as editor of a new periodical publication by B., at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B. for dismissing him before the termination of a year, a usage was proved that such a hiring was annual with regard to established periodicals:—Held, that the jury was properly directed to consider whether such usage was applicable to a newly-started publication. *Baxter* v. *Nurse*, 6 Man. & G. 935; 7 Scott. (N.R.) 801; 1 Car. & K. 10; 13 L. J., C. P. 82; 8 Jur. 273.

In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which he was engaged:—Held, that he might go into evidence to show a custom for editors of newspapers to be engaged for a year, unless there was an express stipulation to the contrary. *Holcroft* v. *Barber*, 1 Car. & K. 4.

When the hiring is expressly for a term certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters* v. *Staveley*, 15 L. T. 275.

—— **Telegraph Clerk.**]—A stationery clerk in a telegraph office, at a salary of 135*l.* per annum, is entitled to a month's notice. *Vibert* v. *Eastern Telegraph Co.*, 1 Cab. & E. 17.

**Agreement for a Year certain.**]—The defendant agreed with the plaintiff that he should serve him, as his commercial traveller, by a contract which contained these words: "This agreement to be binding between the parties for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given to either party to determine the same":—Held, that the employment might be determined by either party by a three months' notice ending with the first twelve months. *Brown* v. *Symons*, 8 C. B. (N.S.) 208; 29 L. J., C. P. 251; 6 Jur. (N.S.) 1079; 8 W. R. 460.

P., in 1674, devised estates for support of a school for parish children, and directed that the trustees, with consent of the parishioners, should provide and keep an honest schoolmaster; and if at any time the schoolmaster should be idle, negligent, or abuseful of his scholars, the trustees and parishioners should have power to dismiss him. On a vacancy occurring, the trustees resolved that they would give 60*l.* a year to a master, or 55*l.*, he finding certain things; that the appointment was to be for one year, commencing on the 25th of March next, and liable to be terminated by either party giving three months' notice; and that they would recommend the plaintiff for the post. At a vestry meeting of the parishioners, the latter adopted the recommendation, and appointed the plaintiff schoolmaster, subject to the regulations of the trustees. On the 17th of April the trustees wrote to the plaintiff, that they would pay him at the rate of 55*l.* per annum, so long as, by mutual consent, he should retain the office of master; the appointment to be subject to termination by three months' notice from either party. The plaintiff wrote back, assenting to hold on the terms mentioned. The plaintiff had entered into the office in March previously, and performed the duties. On the 1st of March, 1854, at a meeting of the trustees, a resolution was adopted, by a majority, that a notice should be given to the plaintiff to quit his office at the end of three months from the 25th of March, 1854, and a notice to that effect signed by a majority of the trustees, was forthwith served on him. Notwithstanding the notice, he continued to act as schoolmaster until the 25th of March, 1855, and sued a trustee for the three quarters' salary ending at that date:—Held, that the trustees, without the assent of the parishioners, had power to give the notice to determine the appointment, as the plaintiff's contract was with them alone; that the notice need not be one that required the plaintiff to quit at the end of a current year, but that his holding might be terminated by a three months' notice to quit at any period of the year; consequently, that the plaintiff was not entitled to recover the three quarters' salary which he claimed. *Ryan* v. *Jenkinson*, 25 L. J., Q. B. 11.

**When Time uncertain.**]—A master mariner accepted the command of a ship under a written agreement, as follows:—"I hereby accept the command of the ship 'City Camp' on the following terms: salary to be at and after the rate of 180*l.* sterling per annum. Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. Wages to begin when captain joins the ship":—Held, that the mariner could not (except under unusual circumstances) be dismissed without a reasonable notice. *Green* v. *Wright*, 1 C. P. D. 591; 35 L. T. 339.

—— **Manager allowed to reside on Employer's Premises.**]—A. was appointed manager of a voluntary society for the purpose of selling religious books on the society's premises, with a right to reside in part of the premises and to carry on the trade of a bookseller on his own account, and to have six months' notice to quit. Differences having arisen between him and the managing committee, they required him to quit possession, which he refused to do, and maintained himself in the premises by force. The court granted an injunction restraining A. from acting as manager, with liberty for him to reside in the premises for two months, and to remove his property. *Spurgin* v. *White*, 7 Jur. (N.S.) 15; 3 L. T. 609; 9 W. R. 266.

**Conditional Notice.**]—The plaintiff jointly with L., was a commission agent for the

defendants, wine and spirit merchants, under an agreement, by which they were to pay a certain commission on sales; a salary of 4*l.* per week; 18*s.* a day travelling expenses; and 15*l.* per annum for an office; the agreement to stand good for six months, and six months' notice from either side to terminate the agreement. The agreement was entered into on the 13th of June, 1866. Shortly afterwards L. died; and the defendants, on the 11th August, 1866, wrote a letter in which they said:—"The death of Mr. L. alters our arrangements altogether. You are at liberty to throw up our agency altogether, if you wish it; and to make all things in order, it would be as well that we hereby give you notice to terminate our agreement in six months from this date; this will give us the power to do so if we wish. We say not we shall do so; time and your own exertions will be the test":—Held, that the engagement could be determined at any time by six months' notice, and that the letter was a sufficient notice to determine the engagement. *Keon* v. *Hart*, Ir. R. 2 C. L. 138. Affirmed, 17 W. R. 681—Ex. Ch.

**Implied Notice—Employé of Company—Appointment of Manager and Receiver.**]—The plaintiff was in the service of the defendant company under a contract which provided that his employment might be determined by six months' notice. A manager and receiver was appointed by order of the chancery division at the instance of holders of debentures of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. In an action for wrongful dismissal:—Held, that the appointment of a manager and receiver operated to discharge the servants of the company and that the plaintiff could not recover. *Reid* v. *Explosives Co.*, 56 L. J., Q. B. 388; 19 Q. B. D. 264; 57 L. T. 439; 35 W. R. 509—C. A.

—— **Resolution to Wind up.**]—The passing of a resolution to wind up a company operates as notice of dismissal to the company's servants. Circumstances may exist which would amount to a waiver of such implied notice, or which would be evidence of a new agreement between the liquidator and the servant; but clear and satisfactory evidence is necessary to establish such a case. *Schumann, Ex parte, Forster & Co., In re*, 19 L. R. Ir. 240.

—— **Order for Winding up.**]—The rule that an order for winding up a company operates as a notice of discharge to the servants when the business of the company is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction. *Chapman's Case* (L. R. 1 Eq. 346) followed; *Harding, Ex parte* (L. R. 3 Eq. 341) distinguished. *Oriental Bank Corporation, In re, MacDowall's Case*, 55 L. J., Ch. 620; 32 Ch. D. 366; 54 L. T. 667; 34 W. R. 529.

—— **Dissolution of Partnership.**]—See *Brace* v. *Calder*, 64 L. J., Q. B. 582; [1895] 2 Q. B. 253; 14 R. 473; 72 L. T. 829; 59 J. P. 693.

**Who entitled to give—Unauthorised Managers of School.**]—A schoolmistress appointed by de facto managers of a school, by an agreement made by her with them, under which either party could terminate the engagement by giving three months' notice does not, by remaining in office for thirteen years, acquire such an interest under the trust deed by which the affairs of the school ought to be regulated, that she is no longer liable to be dismissed by the de facto managers, but can insist on receiving notice from properly appointed trustees of the deed. *Pottle* v. *Sharp*, 65 L. J., Ch. 908; 75 L. T. 265—C. A.

### b. By Death or Bankruptcy.

A contract of service as a farm bailiff is put an end to by the death of the master, unless the contrary is stipulated for by the terms of the contract. *Farrow* v. *Wilson*, 38 L. J., C. P. 326; L. R. 4 C. P. 744; 20 L. T. 810; 18 W. R. 43.

When a contract is for personal services, the death of the person who is to render the services determines the contract for the future, but it does not rescind it ab initio, or take away any right of action already vested. *Stubbs* v. *Holywell Railway Co.*, 36 L. J. Ex. 166; L. R. 2 Ex. 311; 16 L. T. 631; 15 W. R. 869.

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly; the party making default to pay to the other 500*l.* by way or in nature of specific damages. A. was dismissed, he became bankrupt, and after his bankruptcy brought an action on the agreement, to which B. and C. pleaded his bankruptcy:—Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees. *Beckham* v. *Drake*, 2 H. L. Cas. 579; 13 Jur. 921.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. *Thomas* v. *Williams*, 3 N. & M. 545; 1 A. & E. 685; 3 L. J., K. B. 202.

### c. Dismissal without Notice, Grounds for.

**Incompetency.**]—An artizan who has been engaged for a term to work in the art which he practises, upon his representing himself to possess the requisite skill, may, upon his proving to be incompetent, be discharged by his employer before the end of the term for which he was so engaged. *Harmer* v. *Cornelius*, 5 C. B. (N.S.) 236; 28 L. J., C. P. 85; 4 Jur. (N.S.) 1110; 6 W. R. 749.

The plaintiff agreed with the defendant to enter the service of the latter, a railway contractor, as general superintendent of station buildings to be erected, and for general works; his salary to be at a fixed yearly sum, to be paid monthly; two months' notice in writing on either side to be given to terminate the agreement. Before the end of the first month the defendant complained of the plaintiff's incompetency and gave him notice in writing under the agreement. During the second month, the defendant obtained further proof of the plaintiff's incompetency and discharged him. The plaintiff sued in a county court and obtained judgment for one month's salary; he afterwards sued again in the same court for a second month's salary: the judge found as a fact that he was incompetent to do

the work for which he had contracted, and gave judgment on the second plaint for the defendant:—Held, that the plaintiff was not entitled to more than one month's salary. *Searle* v. *Ridley*, 28 L. T. 411.

**Temporary Illness.**]—A plaintiff agreed to serve the defendant for the term of ten years, in the capacity of a brewer; in consideration of the premises, and of the due, full and complete service of the plaintiff, the defendant agreed to pay him 20*l.* on execution of the agreement, to furnish him with a house and coals during the whole of the term of ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the term of ten years. The plaintiff entered into the service under the agreement. Some years afterwards he fell ill, and was unable to attend personally to business; but during that time he instructed the defendant in the art of brewing. The defendant refused to pay the plaintiff his wages for the period during which he had been ill, but retained him in the service; and after he was able to attend again personally to business paid him as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing, or able to render, and did not in fact during any part of such time render, the agreed or any service:—Held, a good plea; the readiness and willingness to perform the service being a condition precedent to the right to wages; and the gist of the plea being that the plaintiff wilfully refused or omitted to serve. *Cuckson* v. *Stones*, 1 El. & El. 248; 28 L. J., Q. B. 25; 5 Jur. (N.S.) 337; 7 W. R. 134.

On shewing cause against a rule to enter a verdict for the plaintiff on the plea:—Held, that the averment that the plaintiff was not ready and willing, or able, was not supported by his physical inability, for a time only, and not through his own default, to attend personally to the business; and that the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time; and the plaintiff was therefore entitled to the verdict. *Ib.*

**Improper Conduct—Generally.**]—To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, or, otherwise, wilful disobedience or habitual neglect. *Callo* v. *Brouncker*, 4 Car. & P. 518.

But if a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect. *Read* v. *Dunsmore*, 9 Car. & P. 588.

—— **Refusal to obey Orders.**]—The messman of a regiment having once distinctly refused to serve up dinner, until threatened with arrest, is rightly dismissed, although it was in a moment of irritation, and, the next day, was followed by an apology. *Churchward* v. *Chambers*, 2 F. & F. 229.

If a servant, hired for a year, refuses to obey his master's orders, the latter is justified in dismissing him before the end of the year, and such servant cannot recover his wages for the time he served. *Spain* v. *Arnott*, 2 Stark. 256; 19 R. R. 715.

In an action for wrongfully discharging the plaintiff and his wife from the service of the defendant, a plea that the wife of the plaintiff obstinately refused to work for him, wherefore he discharged them, is bad on general demurrer. *Jacquot* v. *Bourra*, 7 D. P. C. 348; 3 Jur. 776.

To an action against the proprietors of a manufactory, for refusing to employ the plaintiff as manager, pursuant to agreement, and discharging him from their service before the period mentioned in the agreement, they pleaded, that the plaintiff so wrongfully, disobediently and unskilfully conducted himself as such manager, that they suffered and sustained great loss:—Held, that in order to support such a plea, it was necessary to shew not only disobedience, but such disobedience as occasioned a loss; and, there being no evidence of any loss, that the plea was not supported. *Cussons* v. *Skinner*, 11 M. & W. 161; 12 L. J., Ex. 347.

—— **Absence without Leave.**]—Action by a domestic servant, for discharging her without a month's notice or a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his house during the night; that the defendant refused such leave, and the plaintiff, against his will, absented herself. Replication, that the mother of the plaintiff was seized with sudden and violent sickness, and believing herself in imminent peril of death, had requested the plaintiff to visit her; whereupon the plaintiff requested the defendant to allow her to absent herself from his house until the following day, for the purpose of enabling her to visit her mother in her sickness; and, because the defendant, without any reasonable cause, refused such assent, the plaintiff, for the purpose of visiting her mother, left his house:—Held, that the plea was good, and the replication bad. *Turner* v. *Mason*, 2 D. & L. 898; 14 M. & W. 112; 14 L. J., Ex. 311.

—— **Impertinence.**]—If a person, hired on an annual service as a clerk, to conduct an establishment for his master, sets up a claim to be a partner, although in a respectful manner and bonâ fide, it is a sufficient cause for the master to dismiss him without notice. *Amor* v. *Fearon*, 1 P. & D. 398; 9 A. & E. 548; 2 W. W. & H. 81; 8 L. J., Q. B. 95.

A clerk to a public company, who was hired at a yearly salary, having received on the 29th March a communication that it was the intention of the directors to make a new appointment to the situation of clerk, entered, on the 11th of April, on the minutes, a protest to an entry of that communication, together with an order for calling a special court on the 17th of April, for the purpose of appointing a fit person to be clerk. On the 17th April the directors, by a resolution, declared the clerk to be displaced from his situation. It was put as a question to the jury, in an action for his salary, whether the entry of the protest was a sufficient ground to justify the dismissal, and they found that it was. A verdict having been found for the plaintiff, the court made absolute a rule for entering a nonsuit. *Ridgway* v. *Hungerford Market Co.*, 4 N. & M. 797; 3 A. & E. 171; 1 H. & W. 244; 4 L. J., K. B. 157.

In an action for the wrongful dismissal of a newspaper critic engaged for a year:—Held, that

mere angry expressions, which neither support a plea of justification nor of rescission by mutual assent, and that an isolated instance of neglect or insolence would be no ground of dismissal; at all events, unless the insolence was such as to be incompatible with the continuance of the employment. *Edwards* v. *Levy*, 2 F. & F. 94.

—— **Immorality.**]—A clerk and traveller, hired by the year, assaulted his employer's maid-servant, with intent to ravish her:—Held, to be good cause for his dismissal without any notice. *Athin* v. *Acton*, 4 Car. & P. 208.

Being the father of a bastard child is a good cause of discharge by a master. *Rex* v. *Welford*, Cald. 57.

The defendant pleaded to an action for dismissing a governess contrary to a contract between them, that she, intending thereby to induce the defendant to enter into the contract, concealed from him a fact material to her qualification as such governess, and material to be known by him in engaging her as such governess, and entering into such contract, viz. that she was a divorced woman, and she thereby induced the defendant to enter into the contract:—Held, that this plea was bad. *Fletcher* v. *Krell*, 42 L. J., Q. B. 55; 28 L. T. 105.

—— **Misconduct under Contract of Service.**]—A. was engaged by B. as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ it was the duty of A. to pay freight, dock dues, &c., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of 140*l.*, inclosing an account of the purpose for which it was required, one of them being the payment of 30*l.* for salary due to himself. Ten days afterwards B. sent A. 100*l.*, inclosed in a letter, directing him to apply the money for business purposes. A. having appropriated 30*l.* of the money in satisfaction of his salary, B. discharged him. In an action by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying the discharge of A. on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B.'s orders to apply the money to business purposes. The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys entrusted to him by the defendant, or of any wrongful or improper disobedience of orders:—Held, that this was a proper direction, and that the judge was not bound to tell the jury that it was not necessary to justify the dismissal of the plaintiff that he should have been guilty of any moral delinquency. *Smith* v. *Thompson*, 8 C. B. 44; 18 L. J., C. P. 314.

A person was employed as a traveller to a distillery company at a yearly salary, being bound by the terms of his agreement to remit immediately all sums collected. He sold some of the company's wines to a brothel-keeper, and neglected to remit immediately sums of money collected by him:—Held, that either circumstance was sufficient to justify his dismissal without notice. *Blencarn* v. *Hodges' Distillery Co.*, 16 L. T. 608.

A. was appointed surveyor or agent of B. for two years and a half, at a salary of 200*l.* per annum, payable quarterly, and he was, in addition, to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. The agreement contained a stipulation "that under no pretence whatever should A. contract any debt in the name of B., or be considered as his agent to receive any money on his account," and a proviso, that, in the event of a breach, the agreement should immediately cease and determine. To an action against B. for dismissing A. before the expiration of the term, he pleaded that A., whilst he was such surveyor, contrary to the agreement, and without his knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from them to B., as and under the pretence of being his agent in that behalf:—Held, that the receipt by A. of deposit money from persons to whom he had agreed to let houses on account of B., was a breach of the agreement, and a cause of dismissal, and that proof that he had done so sustained the plea. *Bray* v. *Chandler*, 18 C. B. 718; 4 W. R. 518.

A declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff should serve the defendant faithfully for three years in his business of a manufacturer of lard, and alleged as a breach the wrongful dismissal of the plaintiff before the expiration of that period:—Plea, that the plaintiff did not serve the defendant faithfully, as in the agreement stipulated. At the trial it appeared that bladders are essential in the business of a manufacturer of lard; and that the plaintiff, without the knowledge of the defendant, entered into a contract with C. for the purchase of several thousand bladders, which were invoiced and delivered to G., who allowed the plaintiff, from time to time, to have as many as were required for the defendant's business. C. having made a claim upon the defendant in respect of the bladders, he dismissed the plaintiff:—Held, first, that there was no misdirection in telling the jury that, so far as it was matter of law, the defendant was justified in dismissing the plaintiff. *Horton* v. *M'Murtry*, 5 H. & N. 667; 29 L. J., Ex. 260; 2 L. T. 297; 8 W. R. 285.

Held, secondly, that the facts were admissible in support of the plea, that the plaintiff did not serve the defendant faithfully. *Ib.*

Where defendants pleaded that they made certain promises to plaintiff, as accountant of a company through fraud and collusion of the plaintiff with others, but gave no evidence of the fraudulent inception of the company, nor of any effort made by plaintiff to induce them to become members:—Held, that such plea was not an answer to an action for dismissing the plaintiff from their service in violation of a contract. *Baillie* v. *Kell*, 4 Bing. (N.C.) 638; 6 Sc. 379; 7 L. J., C. P. 249.

The plaintiff had been employed as clerk for many years by the defendants, who were merchants, and ultimately they agreed to retain him in their employment for a term of ten years. Before the expiration of that period the defendants discovered that the plaintiff had for many years previously been engaged in speculating in "differences" upon the Stock Exchange to the extent of many hundreds of thousands of pounds, and they thereupon dismissed him from their service:—Held, that the dismissal of the plaintiff was justifiable. *Pearce* v. *Foster*, 55 L. J., Q. B. 306; 17 Q. B. D. 536; 54 L. T. 664; 34 W. R. 602; 51 J. P. 213—C. A.

—— **Master's Knowledge of Facts—Necessity of.**]—Where there has been disobedience, or an

act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by shewing that the fact existed, and that he knew it, justify such discharge: but, semble, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it. *Cussons* v. *Skinner*, 11 M. & W. 161; 12 L. J., Ex. 347. See *Spotswood* v. *Barrow*, 5 Ex. 110; 19 L. J., Ex. 226.

If an employer discharges a servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of that cause. *Willets* v. *Green*, 3 Car. & K. 59.

To an action for breach of an agreement to continue to employ the plaintiff as an accountant, the defendants pleaded, in one plea, that the plaintiff received money for which he did not account; that he made improper payments with the defendants' money; that he made false entries and representations, and refused to obey his employers' commands; wherefore they discharged him:—Held, that the defendants were entitled to a verdict on the plea, though they proved only that the plaintiff had made a false entry and representation, and though the reason assigned for his discharge was disrespect towards his employers. *Baillie* v. *Kell*, 4 Bing. (N.C.) 638; 6 Scott, 379; 1 Arn. 245; 7 L. J., C. P. 249.

Charges of misconduct having been made against a managing director of a company, he was dismissed, and an action was commenced against him by the company, alleging the misconduct, and claiming damages and certain accounts. The defendant counter-claimed for damages for wrongful dismissal. At the trial of the action the company failed to prove the original charges, but proved that he had received a commission from a firm of shipbuilders on the price of some ships built for the company. This was only discovered after the commencement of the action. It appeared that he had superintended the building of the ships, and given advice concerning their construction:—Held, that the receipt of the commission entitled the company to dismiss him, and they were therefore not liable for damages, though they had dismissed him on other grounds which they had failed to prove, and the commission had been received some time before his dismissal, and was an isolated case of misconduct. *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

—— **Without Cause.**]—A first count alleged an agreement by a company to retain and employ the plaintiff as their permanent solicitor, and assigned, as a breach, the discharging of the plaintiff without just cause from being such solicitor. The evidence was, that, by a resolution of a committee, the plaintiff was appointed permanent solicitor to a company, which afterwards amalgamated with another company; and the plaintiff then acted as solicitor to such company until his dismissal:—Held, that, even assuming the amalgamated company had adopted the resolution appointing the plaintiff, the appointment was only meant to be as the ordinary, and not as the permanent, solicitor of the company, so that he might be dismissed without cause; and that such, therefore, was not evidence to support the count. *Elderton* v. *Emmens*, 4 C. B. 498; 16 L. J., C. P. 209; 11 Jur. 612.

A second count stated an agreement, by which the plaintiff was to receive from the company a salary in lieu of rendering a bill of costs for general business done by him as their attorney and solicitor, and alleged, that, in consideration that the plaintiff promised the company to perform the agreement in all things on his part, the company promised the plaintiff to perform the same in all things on their part, and to retain and employ him as attorney and solicitor of the company. The count assigned, as a breach, the dismissal of the plaintiff from such employment; alleging also, that the company had, since such dismissal, refused to retain or employ him as such attorney or to pay him the salary:—Held, in conformity with the opinions of eight out of nine of the judges who gave their opinions, that the plaintiff was entitled, after verdict, to judgment upon the count, for that it sufficiently alleged a consideration for the company to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the company to perform the agreement. *Emmens* v. *Elderton* 4 H. L. Cas. 624; 13 C. B. 495; 18 Jur. 21. See *S. C.* in Ex. Ch. 6 C. B. 160; 17 L. J., C. P. 307.

### d. Giving into Custody.

If a servant in the house of his master, at a late hour of the night, is violent in his manner and is making a great noise and abuses his master, and lays hold of him and struggles with him, the master will be justified in giving the servant into the custody of a policeman, to be dealt with according to law. *Shaw* v. *Chairitie*, 2 Car. & K. 21.

A domestic servant entered into the defendant's service on the 19th November. On the 15th January, her mistress caused her to be taken before a magistrate, on a charge of stealing some small articles of plate. The magistrate remanded her till the 20th, when she was again brought up and discharged. On the 22nd she went to demand her clothes and wages, including 1*l.* 1*s.*, in lieu of a month's warning. The defendant tendered 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea:—Held, that inasmuch as the placing her in custody, on a charge that was afterwards abandoned, was no dissolution of the contract of hiring, she was, under the circumstances, entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labour. *Smith* v. *Kingsford* or *Gainsford*, 3 Scott, 279; 2 Hodges, 109; 5 L. J., C. P. 271.

### e. Right of Servant to Compensation.

#### i. *Wages or Salary.*

**Menial or Domestic Servants.**]—If a master turns away a servant without a previous notice or warning, the servant is entitled to a month's wages. *Robinson* v. *Hindman*, 3 Esp. 235.

Except where there is some fault or misconduct to warrant it. *Ib.*

If the contract between master and servant is the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract

to have been for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he has served. *Archard* v. *Horner*, 3 Car. & P. 349.

A domestic servant discharged without reason is entitled to the wages accruing up to the time of her discharge, and to a calendar month's wages in addition, but not to board wages for the month. *Gordon* v. *Potter*, 1 F. & F. 644.

The custom of putting an end to a service by giving a month's warning, or paying a month's wages, only holds in the case of menial servants. *Broxham* v. *Wagstaffe*, 5 Jur. 845.

The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500*l.* a year. *Beeston* v. *Collyer*, 4 Bing. 309; 12 Moore, 552; 2 Car. & P. 607; 5 L. J. (o.s.) C. P. 180; 29 R. R. 576.

The additional month's wages to which a menial servant, hired by the year, is entitled if discharged without cause and without a month's warning, cannot be recovered under a common count, but must be declared for specially. *Fewings* v. *Tisdal*, 1 Ex. 295; 5 D. & L. 196; 17 L. J., Ex. 18; 11 Jur. 977.

**Yearly Servants.**]—Where a yearly servant is dismissed by his master before the year is expired, for a cause which in law is sufficient to justify such dismissal, he cannot recover any wages; even pro ratâ for such a period as has elapsed before his dismissal. *Ridgway* v. *Hungerford Market Co.*, 4 N. & M. 797; 3 A. & E. 171; 1 H. & W. 244; 4 L. J., K. B. 157.

Where a justifiable cause of dismissal exists, it is sufficient to prevent the recovering of wages, though the servant might not in fact have been dismissed upon that ground; and it is not necessary that the cause relied on in answer to an action for wages should have been stated at the time of the dismissal. *Ib.*

The plaintiff was employed as engineer to the defendants at a salary of 500*l.* a year, and was dismissed at a three months' notice:—Held, that the plaintiff was entitled to recover salary for the unexpired portion of the year. *Buckingham* v. *Surrey and Hants Canal Co.*, 46 L. T. 885; 46 J. P. 774.

—— **Termination by Mutual Consent.**]—Where a contract for a service at a yearly salary is by mutual consent put an end to in the middle of a quarter, the servant may recover salary pro ratâ; but whether he is so entitled or not is a question for the jury upon the whole of the circumstances. *Lamburn* v. *Cruden*, 2 Scott, (N.R.) 533; 2 Man. & G. 253; 10 L. J., C. P. 121; 5 Jur. 151.

A clerk hired generally by the year at a certain salary may, upon a dissolution of the contract by mutual consent within the year, recover salary pro ratâ, without any express agreement to that effect. *Thomas* v. *Williams*, 3 N. & M. 545; 1 A. & E. 685; 3 L. J., K. B. 202.

So, also, he may recover pro ratâ where the contract has been dissolved by mutual consent within the year, but after the issuing of a commission of bankruptcy. *Ib.*

**Dismissal without Cause during Term.**]—A waiter at a tavern who has contracted to serve by the week and has been dismissed without cause after he has entered upon but before he has completed the third week of his service, cannot under the common indebitatus count, recover his wages for such third week. Where the wages for the week so entered upon formed part of the damages awarded by a jury, the damages were reduced by that amount. *Wood* v. *Moyes*, 1 W. R. 166.

**Travellers.**]—A person having been retained as a traveller on an oral contract for more than a year at a quarter's salary, and his employer at the end of a quarter having given up his business, but not having expressly dismissed him, is entitled to recover the next quarter's salary under an indebitatus count. *Cook* v. *Sherwood*, 3 F. & F. 729. Ruling upheld by the court, 1 N. R. 28; 11 W. R. 595.

**Under Special Agreement.**]—A defendant by deed appointed the plaintiff auditor of his estates at a yearly salary, and in consideration the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever so long as he should hold the office. The defendant covenanted to pay the plaintiff the salary so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as thereinafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.*; and the adequacy and justice of the cause of any revocation by the defendant of the appointment should be determined by W.:—Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until the defendant had previously ascertained, by a reference to W., that he had adequate and just cause to revoke the appointment. *Lowndes* v. *Stamford and Warrington (Earl)*, 18 Q. B. 425; 21 L. J., Q. B. 371; 16 Jur. 903. *S. C.*, in Ex. Ch. 16 Jur. 973.

Held, also, that the jurisdiction of the court to enforce payment of the retiring pension was not ousted, and that the plaintiff might declare for it without shewing that there had been any determination by W., or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed. *Ib.*

**Arrears of Salary, how Recoverable.**]—Where a declaration stated a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c., he might have acquired from being continued in the service:—Held, that he was only entitled to recover, as damages, wages for one month, and that the arrears of salary due to him at the time of dismissal could only be recovered in an action for work and labour. *Hartley* v. *Harman*, 3 P. & D. 567; 11 A. & E. 798; 9 L. J., Q. B. 179.

—— **Quarterly Payments.**]—A. being employed by B. as a clerk, at a salary of 200*l.* per annum, payable quarterly, is discharged in the middle of a quarter, and paid proportionably; he is entitled to recover his salary for the remainder of the quarter, under a count for work and

labour. *Gandall* v. *Pontigny*, 1 Stark. 198; 4 Camp. 375.

A party working under a yearly contract at wages payable quarterly, having been discharged for misconduct after the commencement of the quarter, agreed to finish his month's work:—Held, that, although he could not recover a quarter's wages, still he was entitled to a month's wages under the common count, although the particulars of demand stated that he sought to recover under those counts for a quarter's work. *Hercum* v. *Stericker*, 10 M. & W. 553; 12 L. J., Ex. 17.

**Servant Guilty of Disobedience—No Recovery for Time of Actual Service.**]—A count was framed on a contract of hiring determinable on reasonable notice, alleging a breach in discharging the plaintiff without such notice. There was a count for work and labour, to which the only plea was non assumpsit. Third plea stated a discharge by the defendant for disobedience of orders in not working during harvest till eight o'clock at night. Fourth plea stated that the plaintiff unlawfully quitted his work, and a discharge by a magistrate under 4 Geo. 4, c. 34, s. 3:—Held, that the plaintiff, having been guilty of disobedience of orders, and unlawfully absenting himself from his work, so as to justify his discharge, he could not recover for the time of his actual service on the common count; and that the discharge by the magistrate was sufficiently the act of the defendant to entitle him to a verdict on the third plea, and on the plea of non assumpsit to the common count. *Lilly* v. *Elwin*, 11 Q. B. 742; 17 L. J., Q. B. 132; 12 Jur. 623.

Where a servant under a general hiring, at the rate of so much per annum, is dismissed for misconduct, he is not entitled to any portion of the wages of the current year. *Turner* v. *Robinson*, 2 N. & M. 829; 6 Car. & P. 15; 5 B. & Ad. 789.

So, although the master has previously recovered damages against him for the same act of misconduct. *Ib.* S. P., *Ridgway* v. *Hungerford Market Co.*, 4 N. & M. 797; 3 A. & E. 171; 1 H. & W. 244; 4 L. J., K. B. 157.

Previous to the registration of a company, A., as trustee for the company, entered into an agreement with B., by which, amongst other things, it was agreed that he should be managing director of the company when formed, with a salary at the rate of 800*l.* per annum. The articles of association provided that B. should be the first managing director of the company, and that his salary should be 800*l.* per annum, payable quarterly. B. afterwards entered into an agreement with the company, by which, after reciting the former agreement with A., the company adopted the former agreement, and it was agreed that it should "be binding on the company in the same manner, and be read and construed in all respects as if the company had been in existence at the date thereof, and had by these presents ratified the same":—Held, that the salary being under the agreement payable annually, B. was not entitled to the salary for the quarter which had accrued due previous to his dismissal for misconduct, as the article was an agreement only between the shareholders and the company, and regulated the way in which the payment should be made, and the way in which the accounts should be kept. *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339; 59 L. T. 345—C. A.

**Illness of Servant.**]—The plaintiff agreed to serve the defendant for ten years in the capacity of a brewer, and to do all his lawful commands. The defendant agreed to pay the plaintiff 20*l.* on the execution of the agreement, to find him a home, to supply him with coals, and to pay him weekly 2*l.* 10*s.* during the term. The plaintiff entered upon the service of the defendant, did work for him in pursuance of the agreement, and was duly paid for such work, but falling ill, he was unable to continue his work. After he recovered his health, he returned to the service of the defendant, who employed him and paid him as before:—Held, that the plaintiff was entitled to recover his wages for the weeks during which he was unable to work, for, as the contract was not rescinded there was no suspension of the weekly payments. *Cuckson* v. *Stones*, 1 El. & El. 248; 28 L. J., Q. B. 25; 5 Jur. (N.S.) 337; 7 W. R. 134.

To a declaration upon the agreement, to recover the wages which had not been paid, the defendant pleaded that the plaintiff was not during any part of the time for or in respect of which such wages were claimed, ready, willing, or able, to render, and did not, in fact, during any part of such time render the agreed, or any service, as alleged:—Held, a good plea. *Ib.*

**Apportionable under 4 & 5 Will. 4, c. 22, s. 2.**]—The salary of an auditor and a superintending manager of an estate, holding office during the joint lives of the employer and himself, is not a payment apportionable under 4 & 5 Will. 4, c. 22, s. 2. *Lowndes* v. *Stamford and Warrington (Earl)*, 18 Q. B. 425; 21 L. J., Q. B. 371; 16 Jur. 903.

**When Action to be Commenced.**]—A servant was retained for a year, his wages to be paid quarterly; he was dismissed at the end of a month from the commencement of the second quarter; he then, before the expiration of the quarter, brought an action for work and labour; money was paid into court sufficient to satisfy for the work done:—Held, that the defendant was entitled to a verdict, as, at all events, the plaintiff could not maintain an action until the end of the quarter. *Smith* v. *Haward*, 2 N. & P. 432; 7 A. & E. 544; W. W. & D. 635; 7 L. J., Q. B. 3; 2 Jur. 232.

Under the plea of non assumpsit to a count on a quantum meruit for services, the defendant may shew what the services were worth, and the jury give damages accordingly. *Ib.*

If an agreement is entered into for the employment of a clerk for four years from the 1st of January, 1823, at a salary of 400*l.* a year, and the salary is paid up to the 1st of January, 1825; the clerk, upon being dismissed in July, 1825, may commence an action in Michaelmas term, 1825, though at that time, according to the agreement, a year's salary would not be due. *Pagani* v. *Gandolfi*, 2 Car. & P. 370; 31 R. R. 671.

**Claims against Companies—On Winding-up.**]—A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10*l.* per cent. on all business transacted. Before the five years were expired, the company was wound up voluntarily:—Held, that the agent was not entitled to prove against the

company for the loss of his commission during the remainder of the term of five years. *English and Scottish Marine Insurance Co., In re, Maclure, Ex parte*, 39 L. J., Ch. 685; L. R. 5 Ch. 737; 23 L. T. 685; 18 W. R. 1122.

By the articles of association of a company a manager was appointed; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—Held, that he was entitled to prove in the winding-up for the sum specified by the articles without any such deduction being made. *London and Scottish Bank, In re, Logan, Ex parte*, L. R. 9 Eq. 149; 21 L. T. 742; 18 W. R. 273.

A company engaged D. and G. to act as their commercial travellers for three years in a certain district, at a commission upon goods ordered. The company was wound up before the termination of the three years:—Held, that they were entitled to compensation in respect of commission for the unexpired portion of the term, the amount to be ascertained by the chief clerk in chambers. *Patent Floor Cloth Co., In re, Dean and Gilbert's Claim*, 41 L. J., Ch. 476; 26 L. T. 467.

By articles of association of a company it was provided that, in case of the dismissal of the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the company, and he was appointed liquidator. He had paid 2,000*l.* on his shares, and received 400*l.* for remuneration as liquidator:—Held, that the winding-up was equivalent to his dismissal, and that he was entitled to prove in the winding-up for 2,000*l.*, subject to a set-off of the 400*l.* *Imperial Wine Co., In re, Shirreff's Case*, 42 L. J., Ch. 5; L. R. 14 Eq. 417; 20 W. R. 966.

See also *Boston Deep Sea Fishing Co.* v. *Ansell*, supra.

—— **Effect of s. 10 of Judicature Act, 1875.**]—The rule in bankruptcy that servants' wages shall be paid in priority to all other debts, is by s. 10 of the Judicature Act, 1875, extended to windings-up. *Albion Steel and Wire Co., In re*, (7 Ch. D. 547) followed. *Association of Land Financiers, In re*, 50 L. J., Ch. 201; 16 Ch. D. 373; 43 L. T. 753; 29 W. R. 277.

*See also cases* sub tit. COMPANY.

ii. *Damages.*

**Accrual and Nature of Right.**]—A declaration stated, that in consideration that the plaintiff would agree to enter into the service of the defendant as a courier on the 1st June, and travel with him on the continent of Europe as a courier for three months, and to be ready to start with him on such travels on that day, for a monthly salary, the defendant agreed to employ the plaintiff on and from the 1st June, for three months, to travel with him on the continent of Europe, and to start on such travels with the plaintiff on that day, and to pay him the monthly salary during the continuance of such service. Averment of readiness and willingness of the plaintiff to perform the agreement. Breach, that the defendant, before the 1st June, refused to employ the plaintiff, and wholly discharged the plaintiff from his agreement, and from being ready and willing to perform it; and the defendant broke, put an end to, and determined his promise and engagement:—Held, that the plaintiff was entitled to commence an action before the 1st June, to recover damages for breach of the agreement. *Hochster* v. *De Latour*, 2 El. & Bl. 678; 22 L. J., Q. B. 455; 17 Jur. 972; 1 W. R. 469.

In assessing the damages the jury would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of the trial. *Ib.*

An agreement contained in letters was entered into between the plaintiff and the defendant, by which the former was to be employed by the latter as "commission agent, at a salary of 50*l.* a year, the engagement to be terminated at the expiration of any year, on giving three clear months' notice." The terms as to the duration of the engagement and the mode of terminating it, were settled in the earlier letters: the amount of salary was agreed to in the later letters of the series, which later letters contained no mention of the three months' notice. The plaintiff entered on his duties on 1st April, 1860, and was discharged on 25th March, 1861, without any previous notice, receiving only one year's salary. In an action for a wrongful dismissal, in which he claimed to recover 50*l.*, the amount of a second year's salary:—Held, first, that the arrangement as to notice which had been previously agreed to, ran through all the subsequent letters, although it was not mentioned in them, and that all terms which had been previously settled were unaffected by the subsequent letters about the amount of remuneration. *M'Kean* v. *Cowley*, 7 L. T. 828.

Held, secondly, that the damages were unliquidated, and the plaintiff was not entitled to recover the whole of the second year's salary, but so much as would compensate him for the loss of an opportunity of earning 50*l.*, against which should be set something for the saving of his time and labour by his not having to earn it. *Ib.*

**Mode of Assessing.**]—The plaintiff was engaged by the defendant to superintend draining operations upon his estate, at a salary of 2*l.* per week and a house to live in, or 13*l.* per annum in lieu of it, and was also to receive a gift of 20*l.* if he remained till Lady-day. Before the expiration of the term the plaintiff was wrongfully dismissed, and ordered to leave the house; but he refused, and the defendant accordingly removed his goods into a barn. The barn was broken into, and some of the goods damaged, and 70*l.* taken from a bureau. In an action for a wrongful dismissal:—Held, that in assessing the damages, the jury had a right to take into consideration the gift of 20*l.* which the plaintiff might have earned, but not the damage to the goods, or the money lost, as there was no relationship of landlord and tenant existing, and therefore that the defendant had a right to remove the goods. *Lake* v. *Campbell*, 5 L. T. 582.

In estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary and not any commission obtained by him. *Hartland* v. *General Exchange Bank*, 14 L. T. 863.

A servant is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during that period. *Ib.*

The employer being a company afterwards ordered to be wound up, that fact also should be

taken into consideration in estimating the loss sustained by the servant through his dismissal. *Ib.*

By a deed of apprenticeship the plaintiff bound himself as apprentice to the defendants to learn the business of a draper for the term of four years from May, 1887, and the defendants covenanted to instruct the plaintiff and provide him with food and lodging during that term. It was provided by the deed that, if during the term the plaintiff shewed want of interest in his work, it should be lawful for the defendants to cancel the deed upon giving him a week's notice. In October, 1888, the defendants summarily and without any notice dismissed the plaintiff, assigning as the reason of his dismissal that he had been guilty of frequent acts of insubordination, and had gone out at night without permission. The plaintiff having brought an action for wrongful dismissal in breach of the apprenticeship deed, the jury found that he had not been guilty of the misconduct imputed, and that no grounds existed justifying the defendants in dismissing him without notice, but that grounds did exist which would have justified them in dismissing him with a week's notice. On the question of the measure of the damages to which the plaintiff was entitled under those circumstances, the judge directed the jury that, although they might take into consideration as an element in the case the fact that the defendants would have been justified in dismissing the plaintiff with a week's notice, they were not bound to limit the damages to the value of the week's notice which he had lost:—Held, that this was no misdirection. *Maw* v. *Jones*, 59 L. J., Q. B. 542; 25 Q. B. D. 107; 63 L. T. 347; 38 W. R. 718; 54 J. P. 727.

—— **Salary and Expenses.**]—The directors of a mining company in South America agreed to employ the plaintiff as superintendent of mines, for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving him twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and, if he served the three years, he should be entitled to the expenses attending the return of himself and family. The directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary:—Held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and the jury having found for those sums only, the court refused to increase the verdict by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year when his service would have terminated. *French* v. *Brooke*, 4 M. & P. 11; 6 Bing. 354; 8 L. J. (O.S.) C. P. 91.

Where in an action by a servant for a wrongful dismissal, the jury awarded a sum equal to twelve months' salary, the plaintiff having been discharged after about one quarter's service:—Held, not excessive. *Smith* v. *Thompson*, 8 C. B. 44; 18 L. J., C. P. 314.

—— **When Nominal.**]—Only nominal damages are recoverable for breach by the employer of a contract of hiring, if the person hired could have at once obtained other employment of a precisely similar kind, which a reasonable man would have accepted. *Macdonnell* v. *Marsden*, 1 Cab. & E. 281.

The plaintiff entered into a contract by which he became for a fixed period of two years manager to a firm consisting of four partners. The agreement provided that he could be discharged on a month's written notice, in which case the employers were to pay him the salary for the remainder of the fixed period. Before the two years expired the partnership of the employers was dissolved, two members leaving the firm. No notice was given to the plaintiff, who, on hearing of the dissolution, refused the offer of the new firm to continue his employment on the old terms, and claimed the salary for the remainder of the two years:—Held (Lord Esher, M.R., dissenting), that there had been a breach of agreement in respect of which the plaintiff was entitled to recover, but the damages must be nominal only, because, by reason of the offer of the new firm, he need not have suffered any damage at all. *Brace* v. *Calder*, 64 L. J., Q. B. 582; [1895] 2 Q. B. 253; 14 R. 473; 72 L. T. 829; 59 J. P. 693—C. A.

By an agreement of August 18, 1892, the defendant company engaged the plaintiff as musical director of their theatre until October 1, 1895, upon certain terms as to salary, with a provision that the plaintiff's name should be announced in certain daily newspapers, and on bills and programmes. It appeared that the most important duty of a musical director is to conduct the orchestra. The plaintiff had conducted three pieces at the defendants' theatre with perfect success, when a piece was brought out which was conducted by the composer. Since that time the plaintiff had not been called on to conduct or perform the duties of his office, but his salary had been paid under the agreement, and it was common ground that he was still musical director of the theatre:—Held, that the stipulation that the plaintiff's name should appear as musical director meant, that such a state of things should exist that the defendants should be in a position truly to make such an announcement; or, in other words that they should employ him in that capacity, and the plaintiff, though it had not been shewn that his non-employment had interfered with his obtaining another post, was entitled to more than nominal damages. *Bunning* v. *Lyric Theatre*, 71 L. T. 396.

**Dismissal of Collector—Property in Collecting Books — Expenses.**] — The defendants were a friendly society, and the plaintiff was one of some 1,300 persons employed by them, at a remuneration fixed by the committee of management, to collect the weekly premiums of the members of the society. Rule 16 of the society's enrolled rules provides (inter alia) as follows: "The society shall have an unlimited number of collectors. The collectors shall be furnished with books at the society's expense (the said books to be the property of the society), in which they shall enter the names, ages, residences, date of entrance and premiums of all the members they may collect from. . . . If any collector resign or be dismissed, he shall deliver up all . . . . collecting books . . . . being the property of or belonging to the society to the treasurer, agent or any other person or persons duly authorised to receive the same." It was the usual practice for a person desiring to become a collector of the

society to purchase the collecting book of a collector desiring to resign, and the bargain between them for the sale and purchase of the book, though made outside the society, was recognised by the society. In accordance with the said practice the plaintiff purchased for 135*l.*, the collecting book of one J., a collector, and paid that sum to J. with the knowledge and approval of the society's secretary, and was thereupon appointed a collector in J.'s place and district. A few months afterwards, with their knowledge and approval, he purchased and paid 50*l.* for the collecting book of K., another collector. In the first page of each book was the usual printed notice, "The collector shall be furnished with books at the society's expense. Such books to be the society's property," and on the back of each book, as was the usual practice, there was printed the plaintiff's name, "M. Ellwood," and also the defendants' name. The plaintiff was subsequently dismissed from his office of collector, and in an action by him in the Liverpool Passage Court to recover damages from the defendants for wrongful dismissal and the detention of his collecting books, the jury found that he was rightfully dismissed and that he had an interest in the books amounting to 50*l.*, whereupon judgment was entered for the defendants on the claim for wrongful dismissal, and for the plaintiff as to the books for 50*l.*, damages 1*s.* On appeal from the finding and judgment in favour of the plaintiff, it was held, by the Exchequer Division (Kelly, C.B., and Stephen, J.), overruling that finding and judgment, that the books were the property of the society, and that the plaintiff had never had any property or any interest whatever in them recognisable by law or giving him any right of action against the defendants, and that the question of his interest in the books ought not to have been left to the jury. *Ellwood* v. *Liverpool Victoria Legal Friendly Society*, 42 L. T. 694; 44 J. P. 508.

Per Stephen, J.: Had the plaintiff been wrongfully dismissed, the fact of his having paid money for the books, in order to obtain the appointment of collector, might have been a matter to go to the jury for their consideration with regard to the amount of damages for wrongful dismissal. *Ib.*

**Under Master and Servant Act.**]—A workman dismissed without notice, contrary to the contract of service could recover compensation before two justices under the Master and Servant Act, 1867 (repealed). *Shaw* v. *Alderson*, 44 L. J., M. C. 160; 32 L. T. 724; 23 W. R. 730.

### f. Proceedings.

#### i. *Pleadings.*

**Actions by Servants—Claim.**]—A declaration stated, that, on the 15th October, 1845, in consideration that the plaintiff would enter into the service of the defendant, and serve him for a certain time, to wit, from the day and year aforesaid, until the service should be determined by reasonable notice in that behalf on either side, the defendant promised the plaintiff to retain and employ him, and to continue him in such service until such service should be determined, to wit, by reasonable notice in that behalf as aforesaid. Averment, that the plaintiff afterwards entered into the service of the defendant, and has always, from the commencement thereof, been ready and willing to remain and continue in his service; and during all that time tendered and offered himself to serve the defendant. Breach, that he did not nor would continue the plaintiff in his service, but, on the contrary thereof, did afterwards refuse to suffer him to continue any longer in his service, and wrongfully discharged him therefrom without previous notice in that behalf:—Held, first, that it was not necessary for the plaintiff to shew that he gave no notice to determine the service. *Wilkinson* v. *Gaston*, 9 Q. B. 137; 15 L. J., Q. B. 339; 10 Jur. 804.

Held, secondly, that the discharge sufficiently appeared to have been after the commencement of the service. *Ib.*

**Defences.**]—A plaintiff declared upon a breach of contract, by which the defendant agreed to make her an annual allowance for her maintenance and instruction, until he should require her services as a governess of his children. The defendant pleaded, that he entered into the agreement in the belief and on the representation by the plaintiff that she was an honest and moral person, and a fit and proper person for the situation; that the defendant had discovered that she had become and was an immoral and dishonest person, and wholly unfit and improper for the situation, and a person whom it would have been very improper and wrong to employ as governess of his children; and that he therefore rescinded the contract, and gave her notice:—Held, that the plea was bad, as being too general and uncertain. *Burgess* v. *Beaumont*, 2 D. & L. 590; 8 Scott (N.R.) 669; 7 Man. & G. 962; 14 L. J., C. P. 13; 9 Jur. 14.

To an action for work and services, the defendants pleaded that the claim was in respect of wages for work done by the plaintiff, as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that it was agreed that the plaintiff, as master of the boat, should be chargeable for all pilferings, losses, and damages to goods under his charge, and that the amount should be deducted from his wages, and might be pleaded as a set-off. The plea alleged the pilferage of a pipe of wine, while under the plaintiff's charge, and claimed to set off the damages sustained by the defendants in consequence against the plaintiff's claim:—Held, that the plea was bad, as amounting to the general issue. *Cleworth* v. *Pickford*, 8 D. P. C. 873.

The plaintiff sued for commission and wages due to him on a contract, whereby he agreed with the defendants to sail for them to Bonny River, and purchase for them 1,200 tons of palm oil, and ship it on board of their ships; that he would faithfully abide by their instructions, and would not aid or assist, directly or indirectly, the trading of any other ships or cargoes, by giving advice for the purpose of selling or bartering such cargoes for palm oil, except so far as it might be rendered necessary for carrying the agreement into effect, and for the defendants' benefit, under the penalty of the forfeiture of his commission and wages. The defendants pleaded, that they were merchants in Liverpool, trading to the coast of Africa, and having trading establishments there; that they were desirous of sending out an agent there, to purchase and ship for them palm oil, and to conduct exclusively their trading and take charge of their property there, which the

plaintiff and H. and A. well knew; and that he and those persons, contriving to defraud the defendants, fraudulently conspired and agreed together that H. and A. should fit out two ships for the coast of Africa, and that the plaintiff should obtain the employment as agent for the defendants, and under colour and by means of such employment, and without the defendants' knowledge, and in fraud of his agreement with them, should assist and advise H. and A. in the trading of their ships, and the selling and bartering the cargoes for palm oil, and should assist the ships by employing workmen and servants of the defendants upon them, and endeavour to establish a trade for H. and A., in competition with and to the prejudice of the defendants; that, in pursuance of such conspiracy, they fitted out ships, and the plaintiff obtained the employment as agent, and induced the defendants to enter into the agreement, for the purposes before stated; and that he did, under the colour of his employment, and without the defendants' knowledge, and in fraud of his agreement, aid and assist H. and A. in the trading of their ships, and supplied them with palm oil, by employing the defendants' workmen and servants upon them, and in other ways assisted them in the bartering their cargoes for palm oil, and in establishing a rival trade to the defendants:—Held, that the plea was bad; for that the mere conspiracy to enter into the agreement, for the purposes therein stated, could not vitiate the agreement itself when carried into effect; and the actual aiding and assisting of H. and A., which was charged against the plaintiff, was not such as was specified in the agreement. *Hemingway* v. *Hamilton*, 4 M. & W. 115.

To a declaration which stated that the plaintiff agreed with the defendants to act as their salesman for one year, and not to be connected with any other house in disposing of their goods, and that they agreed to pay the plaintiff 200*l.* for such servitude; that the plaintiff entered into the defendants' employ and continued therein, and was not connected with any other house, and had always, until the expiration of one year from the agreement, been ready and willing and offered to remain in such employ, and not to be connected with any other house. Breach, that the defendant would not suffer the plaintiff to act as salesman for the remainder of the year, but discharged the plaintiff, and had not paid the 200*l.* The defendants pleaded, as to the non-payment of the 200*l.*, that after the plaintiff ceased to be in their employ, and during the year, the plaintiff entered into the service of the house of other persons, and became connected with it in disposing of their goods:—Held, bad on special demurrer, as an argumentative denial of the plaintiff's readiness and willingness to remain in defendants' employ. *Spotswood* v. *Barrow*, 1 Ex. 804; 5 D. & L. 373; 17 L. J., Ex. 98.

**Replication.**]—Debt for wages. Plea, that if plaintiff became intoxicated at any time during the service he should lose the wages then due; and that plaintiff became intoxicated and thereby forfeited the wages. Replication that defendant exonerated plaintiff from the forfeiture, and agreed to pay plaintiff for the service already performed, and continued to employ him as such servant; and that part only of the wages in the declaration mentioned accrued before he became drunk, and the residue afterwards:—Held, on demurrer, that the replication was bad as disclosing no consideration for the agreement therein stated, the future services affording no valuable consideration and no moral consideration being issuable from the situation of the parties. *Monkton* or *Monkman* v. *Shepherdson*, 11 Ad. & E. 411; 3 P. & D. 182; 9 L. J., Q. B. 134.

**Amendments.**]—A declaration stated an agreement whereby the defendant agreed to employ the plaintiff, as a journeyman baker, for four years, and to pay him weekly wages, and also additional sums in the three last years of the term. Breaches, that the defendant, before the expiration of the term, wrongfully discharged the plaintiff from his employ; that the defendant did not pay the plaintiff the weekly wages for the remainder of the term, and that the defendant did not pay the plaintiff the additional sums which he would have been entitled to, if he had continued in the employ of the defendant. General demurrer, and joinder therein, to the two last breaches:—Held, that the proper course was to have applied to a judge to strike out those breaches, and that, upon this record, they could not be treated as surplusage. *Lush* v. *Russell*, 4 Ex. 637.

**Issues raised.**]—To an action for wrongfully discharging the plaintiff from the defendants' service, as a traveller and salesman, the defendants pleaded that the plaintiff refused to obey their lawful and reasonable commands with reference to the plaintiff's conduct and proceedings in the employ, and that the plaintiff received from customers of the defendants moneys which he wrongfully appropriated to his own use, wherefore the defendants did, by reason of the premises, refuse to continue the plaintiff in their employ, and therefore discharged him. At the trial it was proved that the plaintiff had misappropriated the defendants' moneys, but the fact of such misappropriation was not known to the defendants until after they had discharged him:—Held, that, the defendants having justifiable cause for discharging the plaintiff, the judge was wrong in leaving it to the jury to say whether they discharged him for that cause, for that their motive and intention were not in issue under the replication de injuriâ. *Spotswood* v. *Barrow*, 5 Ex. 110; 19 L. J., Ex. 226.

In an action for a breach of the contract to employ the plaintiff for a given time, charging the defendant for having wrongfully and without reasonable and probable cause dismissed the plaintiff, the defendant pleaded that he did not wrongfully, without reasonable or probable cause, dismiss the plaintiff as alleged:—Held, that this merely put in issue the fact of the dismissal, the rest being immaterial. *Powell* v. *Bradbury*, 7 C. B. 201; 18 L. J., C. P. 116; 13 Jur. 349.

The defendant had been the clerk of the plaintiffs, under an agreement for 140*l.* a year, determinable by three months' notice or payment of three months' salary, and had been dismissed without notice. In a plaint in a county court for money had and received, he claimed to set off three months' salary, which claim was disputed on the ground that his conduct to the plaintiffs justified his immediate dismissal:—Held, first, that whether his conduct justified his immediate dismissal was a question of fact. *East Anglian*

*Ry.* v. *Lythgoe*, 10 C. B. 727 ; 2 L. M. & P. 221 ; 20 L. J., C. P. 84.

Held, secondly, that the dismissal, for whatever cause, was not wrongful, inasmuch as it was authorised by the terms of the agreement. *Ib.*

Held, thirdly, that as the plaintiffs, upon such dismissal, became liable immediately to pay the defendant three months' salary, his claim for such salary was the proper subject of a set-off. *Ib.*

In an action for a wrongful dismissal from an employment, the dismissal being justified, it is for the jury to say not only whether matter of fact existed which would be a valid ground of dismissal, but whether the dismissal was bonâ fide and really on such a ground. *Smith* v. *Allen*, 3 F. & F. 157.

In an action for a wrongful dismissal of a servant who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until works should be resumed which had not in fact been resumed :—Held, that it was for the jury to say whether the original contract had been put an end to, and if so, the defence arose under a plea of rescission. *Hopkins* v. *Wanostrocht*, 2 F. & F. 368.

—— **Allegation of Knowledge.**]—In an action by an attorney's clerk for improperly dismissing him, plea, that he conspired with A., and, in pursuance of that conspiracy, was guilty of acts of misconduct which came to the defendant's knowledge, who thereupon dismissed him :—Held, that, to support the plea, it was necessary for the defendant to shew that he knew and acted upon the knowledge of the misconduct when he dismissed the plaintiff. *Mercer* v. *Whall*, 5 Q. B. 447 ; 14 L. J., Q. B. 267 ; 9 Jur. 576.

—— **Breach of Special Agreements.**]—Where, in a declaration, it was stated that by agreement, after reciting that the defendant had requested the plaintiff to enter into his employment, it was witnessed that the parties mutually agreed as follows : first, the plaintiff agreed to serve the defendant for seven years, at a salary of 100*l.* a year ; secondly, the defendant agreed, during the continuance of the term, that he would pay the salary, and if the defendant should, from any cause whatever, give up the business, or not require the plaintiff's services, then he would use his best endeavours to procure for him employment in some similar business, at an equal salary, or, in case he should be unable to do so, the defendant would pay to the plaintiff 100*l.* a year during the residue of the term ; and the declaration averred general performance, and that the plaintiff entered the service ; and that, although the plaintiff was ready and willing to continue, yet the defendant would not continue the plaintiff in his employ until the expiration of the term, but during the term wrongfully discharged him, without reasonable or probable cause ; and although the defendant, during the term, did not nor would continue the plaintiff in his employ, but discharged him, yet the defendant did not use his best or any endeavours to procure, nor did he procure, the plaintiff employment in some similar business, at an equal salary, but had wholly failed :—Held, first, that it was a breach well assigned to say that the defendant had not used his best endeavours to procure for the plaintiff employment in some similar business, and that it was not necessary to negative that the defendant had paid a salary of 100*l.* a year, for that the undertaking to use his best endeavours was absolute and independent, and that there was not merely an alternative undertaking either to use his best endeavours or to pay 100*l.* a year. *Rust* v. *Nottidge*, 1 El. & Bl. 99 ; 22 L. J., Q. B. 73 ; 17 Jur. 278.

Held, secondly, that it was not necessary to aver a request by the plaintiff to the defendant to use his best endeavours, nor that he was ready and willing to accept a situation. *Ib.*

Held, that a plea, that when the plaintiff was discharged the defendant was, and thence hitherto had been, wholly unable to procure for the plaintiff any such employment, was bad on general demurrer, for it tendered an immaterial issue, assuming a breach of the agreement to be charged in the declaration which was wholly different from the breach actually there assigned. *Ib.*

A declaration alleged that, in consideration that the plaintiff would enter into the employ of the defendant in the capacity of European correspondent of a newspaper called the "New York Courier and Inquirer" until the service should be determined by due and customary notice on either side, and for a salary, the defendant promised to retain the plaintiff and to pay the salary, and to continue him in such service until determined as aforesaid. Breach, the wrongful discharge of the plaintiff without notice, and without reasonable or probable cause. Plea, that the engagement and promise were upon the terms and condition that the plaintiff should by every steamer from Liverpool to New York forward a letter to the newspaper office containing European news ; and that whilst so employed the plaintiff wrongfully neglected to forward any letter containing such news by several steamers, wherefore the defendant discharged him. And a second plea alleged the engagement to have been upon the terms and condition, that the plaintiff might draw and negotiate bills of exchange upon the defendant for his salary when due, but not for any sum not due or before it was due ; and that he wrongfully drew and negotiated divers bills of exchange for sums of money not due, which bills were dishonoured, to the damage of the defendant's credit, wherefore he discharged him :—Held, that the pleas shewed only a breach by the plaintiff of stipulations in the contract for which he might be liable in a cross action for damages, and were therefore no bar to the action. *Gould* v. *Webb*, 4 El. & Bl. 933 ; 24 L. J., Q. B. 205 ; 1 Jur. (N.S.) 821 ; 3 W. R. 399.

A declaration stated that the plaintiff entered into the service of the defendant for three years under an agreement that he (the plaintiff) would during that time use his best endeavours to promote the interests of the defendant, and would attend to and carry out all reasonable requests :—Held, in an action for a wrongful dismissal before the end of the term, that a plea that the plaintiff did not whilst in the defendant's employ use his best endeavours to promote the interests of the defendant, according to the contract, wherefore he was dismissed, disclosed a good defence. *Arding* v. *Lomax*, 10 Ex. 734 ; 24 L. J., Ex. 80.

**Justification.**]—In an action for a wrongful dismissal, there being a plea of justification, the plaintiff is entitled to have a verdict taken on

that plea, even although he would, on the declaration alone, be liable to a nonsuit, and the defendant was held to be precluded from taking advantage, on the plea of justification, of a special contract, which he had himself succeeded in excluding, as not being in writing. *Brett* v. *Philips*, 1 F. & F. 398.

—— **Onus of proving Misconduct.**]—In an action by a servant for dismissing him during the period for which he was hired, the declaration stated that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom. Plea, that before the discharge and dismissal the plaintiff conducted himself in an improper and a disobedient manner, and disobeyed the defendant's lawful orders; without this, that he wrongfully dismissed and discharged the plaintiff without reasonable cause: — Held, that although the plea might be bad on special demurrer, as putting in issue an immaterial allegation in the declaration, yet, as issue had been taken on the plea, the plaintiff's misconduct as well as the fact of his dismissal was in issue, and consequently that evidence of such misconduct offered at the trial by the defendant was improperly rejected, and that the onus of such proof lay on the defendant. *Lush* v. *Russell*, 1 L., M. & P. 369; 5 Ex. 203; 7 D. & L. 228; 19 L. J., Ex. 244; 14 Jur. 435.

**Action by Master.**]—A servant is liable to an action for leaving his service without notice. *Huttman* v. *Boulnois*, 2 Car. & P. 510.

—— **Servant absenting Himself — Trade Union — Non-unionists — Preconcerted Notice —Damages.**]—A miner entered into a contract of service with the owners of a coal mine determinable by fourteen days' notice on either side, subject to regulations under which he was liable to be dismissed or suspended for disobedience to the manager's orders. A notice was sent to the owners by the trade union of which the miner was a member that at the expiration of fourteen days all non-unionists must descend and ascend the mine by themselves. After this notice had expired the miner refused to go into the cage with a non-unionist. The miner was willing to go down in the next cage that came up a few seconds later, but the manager would not allow him to do so. The same thing happened on the two following mornings:—Held, that the miner had, but the owners had not, committed a breach of contract, and that, having regard to the preconcerted notice and the absence of all right on the part of the men, the owners were entitled to substantial, and not merely to nominal, damages. *Bowes* v. *Press*, 63 L. J., Q. B. 165; [1894] 1 Q. B. 202; 9 R. 302; 70 L. T. 116; 42 W. R. 340; 58 J. P. 280—C. A.

—— **Sufficiency of Allegations.**]—A declaration stated that on the 7th July, 1848, it was agreed between the plaintiff and the defendant that the defendant and his wife should from that day, for the term of three months, appear and perform as equestrians on the stage, and in the ring, in all performances and entertainments which might be produced at Astley's amphitheatre, or elsewhere, under the direction of the plaintiff, in such parts and manner as the plaintiff should require, and should attend all rehearsals and calls when so required, for a certain weekly salary stated; and alleged for breach, that, although the plaintiff had an establishment at Peebles, in Scotland, under his direction, for equestrian performances and entertainments, and although, under and in pursuance of the agreement, and during the subsistence of it, and before the expiration of the term of three months, the plaintiff gave notice to the defendant that he (the plaintiff) required the defendant and his wife to join the plaintiff's establishment at Peebles, and although a reasonable time had elapsed after the giving of the notice, and before the commencement of the suit, for the defendant and his wife to join the establishment at Peebles, for the purpose aforesaid, yet that the defendant and his wife would not, when required, or at any time afterwards, join the establishment of the plaintiff at Peebles, or appear or assist in the performances and entertainments to be produced there, but refused and neglected so to do:—Held, that the promise to appear in any place under the direction of the plaintiff, in the performances described, in such parts and manner as the plaintiff should require, and to attend all calls and rehearsals, involved an engagement so to join an establishment of the plaintiff for equestrian performances as to be ready to accomplish the objects of the requisition, and a refusal to assist in such performances was sufficiently alleged to shew a breach of the defendant's contract. *Batty* v. *Melillo*, 10 C. B. 282.

Held, also, that it sufficiently appeared that the performances at which the defendant and his wife were required to assist were performances of the description contracted for; that the absence of an averment that a reasonable time had elapsed after the notice, and before the expiration of the three months, was obviated by the statement of the declaration that the writ issued on the 23rd August, 1848, and by the averment that such time had elapsed before the suit; and that the breach, substantially shewing an entire refusal of the defendant to perform his contract, disclosed a good cause of action. *Ib.*

### ii. *Jurisdiction.*

**Arbitration—By Consent—Bar to Summary Proceedings between Master and Servant.**]—B. became conductor of a tramway company under an agreement by which he was to pay them 5*l.*, to be retained, together with his wages for the current week, as security for the discharge of his duties and the observance of the rules of the company, the company to have power, in case of any breach by the conductor of the rules, to retain the 5*l.* and his wages for the current week as liquidated damages for such breach; and it was provided that "the manager of the company should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the 5*l.* and wages for the current week as liquidated damages; and that the certificate should be binding and conclusive evidence in all courts of justice, civil and criminal, and before all stipendiary and police magistrates, that the amount thereby certified as the amount to be retained was the true amount to be retained, and should bar the conductor of all right to recover it." B. having summoned the company before a police magistrate, under 6 & 7 Vict. c. 86, to recover his deposit and wages:—Held, that the agreement was not illegal, and the complaint being substantially a civil proceeding, the

manager's certificate that the deposit and wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry. *London Tramway Co.* v. *Bailey*, 47 L. J., M. C. 3; 3 Q. B. D. 217; 37 L. T. 499; 26 W. R. 494.

—— **Reference by Order.**]—The plaintiff brought an action against the defendants for damages for wrongful dismissal, for balance of account for money paid to the defendants' use, and for an account of profits on sales on which the plaintiff claimed commission. The defendants justified the dismissal, on the ground that the plaintiff had misconducted himself by wilfully disobeying the reasonable orders of defendants, and by habitually neglecting his duties, and by converting to his own use money which he had received to the use of the defendants. By order of a judge at chambers, the issues in the action were referred to an official referee pursuant to s. 57 of the Judicature Act, 1873, the statement of defence being amended by omitting the allegations that the plaintiff converted money to his own use:—Held, that the order of the learned judge at chambers was right. *Sacker* v. *Ragozine*, 44 L. T. 308.

—— **Award a Bar to Future Action.**]—A declaration stated, that, in consideration that the plaintiff would enter into the employ of the defendant, in a certain capacity for a year, at the rate of five guineas per week throughout the year, the defendant undertook to employ him for a year, and alleged as a breach that he dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The action, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages which he would have been entitled to receive from the defendant on the day the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year:—Held, that the award was a bar to such action. *Dunn* v. *Murray*, 9 B. & C. 780; 4 M. & Ry. 571; 7 L. J. (o.s.) K. B. 320.

**Two Actions on the same Ground.**]—A clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury was directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under a common count, and they gave damages accordingly. The plaintiff then brought a second action to recover under a common count for his services during the broken quarter:—Held, that the action was not maintainable, because the plaintiff by his former action on the special contract had treated it as an open contract, and he could not afterwards recover under the common count as for services under a rescinded contract. *Goodman* v. *Pocock*, 15 Q. B. 576; 19 L. J., Q. B. 410; 14 Jur. 1042. S. P., *Lilly* v. *Elwin*, 11 Q. B. 742; 17 L. J., Q. B. 132; 12 Jur. 623.

Held, also, that in the former action the jury ought to have been directed to take the services rendered during the broken quarter into account in awarding damages under the special count for the wrongful dismissal. *Ib.*

**Summary Proceedings after Action.**]—A servant in husbandry being hired for a quarter of a year, entered the service, and was discharged before the end of the quarter; she immediately sued her master in a county court for discharging her without reasonable cause; and a verdict was given for her master. After the quarter had elapsed she took out a summons before justices against the master to recover the quarter's wages:—Held, that the question to be decided was essentially the same in the two courts, viz. whether the discharge was wrongful, and that the decision in the county court was conclusive between the parties. *Routledge* v. *Hislop*, 2 El. & El. 549; 29 L. J., M. C. 90; 6 Jur. (N.S.) 398; 2 L. T. 53; 8 W. R. 363.

**Action after Summary Proceedings.**]—Two journeymen painters took out a summons returnable before a justice of the peace for the recovery of a sum of money alleged to be due to them for wages from C., claiming also a further sum as damages for the detention of such wages. The justice heard the summons under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), s. 9, and dismissed the same upon the merits. They afterwards issued plaints in the county court against C. to recover the wages alone, but judgment was given for C. on the ground that the case was res judicata:—Held, that the county court judge was right, and that, the justice of the peace having jurisdiction under the Master and Servant Act, 1867, ss. 4 and 9, and having exercised that jurisdiction, the matter was res judicata. *Millett* v. *Coleman*, 44 L. J., Q. B. 194; 33 L. T. 204.

**Summary Remedy of Master excludes Civil Proceedings.**]—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 243—which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a court of summary jurisdiction with imprisonment and forfeiture of part of his wages—by implication takes away any other remedy against the seaman for the breach of contract, and the shipowner cannot, where the amount which he claims does not exceed 10*l.*, take proceedings for the recovery of damages under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. *Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225.

**Disputes under 38 & 39 Vict. c. 90—When Matter not raised by Counter-claim.**]—By the Employers and Workmen Act (38 & 39 Vict. c. 90), s. 3, in any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the court may . . . adjust and set off, the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise. By s. 4, a dispute under the act between an employer and a workman

may be heard and determined by a court of summary jurisdiction, and such court for the purposes of the act shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages or damages . . . provided that . . . the court shall not exercise jurisdiction when the amount exceeds 10*l*. A person was employed as a spinner, and was discharged for neglecting his work, the employers refusing to pay him wages in lieu of notice. He took proceedings against them in the county court. At the hearing no counter-claim or set-off was filed or set up, but evidence was produced to shew that he had been guilty of negligence. A verdict for 3*l*. 10*s*. was given in his favour:—Held, that the employers were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, for the only matter decided by the county court was whether there was such negligence on his part as would justify his dismissal without notice. *Hindley* v. *Haslam*, 3 Q. B. D. 481; 27 W. R. 61.

—— **"Dispute"—Six Months' Limitation not Applicable.**]—By the Employers and Workmen Act, 1875, s. 4, "A dispute under this act between an employer and a workman may be heard and determined by a court of summary jurisdiction: and such court, for the purpose of this act, shall be deemed to be a court of summary jurisdiction":—Held, that the word "dispute" is not limited to strictly legal causes of action. *Clemson* v. *Hubbard* (1 Ex. D. 179) followed. The time for bringing a complaint under the above act before the court is not limited to six months from the time when such complaint arose within the terms of s. 11 of the Summary Jurisdiction Act, 1848, nor does the latter act apply to a court of summary jurisdiction sitting as a court of civil jurisdiction under the Employers and Workmen Act, 1875. *Charles* v. *Plymouth Waterworks*, 60 L. J., M. C. 20; 64 L. T. 466; 39 W. R. 122; 55 J. P. 469.

## B. CHARACTER OF SERVANT.

**Right of Refusal.**]—No action lies at common law against a master for refusing to give a menial servant a certificate of discharge. *Handley* v. *Moffat*, Ir. R. 7 C. L. 104; 21 W. R. 231.

An action will not lie at the suit of the servant against his master for not giving him a character. *Carrol* v. *Bird*, 3 Esp. 201; 6 R. R. 824.

**Privileged Communications.**]—If a servant obtains a place upon the strength of a character given by his master, and the master afterwards discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication. *Gardner* v. *Slade*, 13 Q. B. 796; 18 L. J., Q. B. 334; 13 Jur. 826.

If a servant, when he is taken into a service, brings a written character, and is afterwards dismissed for ill behaviour:—Semble, that the master does no wrong, if before he returns the character to the servant he writes upon it that the person was afterwards in his service and dismissed for ill behaviour. *Taylor* v. *Rowan*, 7 Car. & P. 70; 1 M. & Rob. 490. See *Hurrell* v. *Ellis*, 2 C. B. 295; 15 L. J., C. P. 18; and *Rogers* v. *Macnamara*, 14 C. B. 27; 2 C. L. R. 569; 23 L. J., C. P. 1; 17 Jur. 1166; 2 W. R. 19.

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements, it will not support an action for libel, unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party. *Webb* v. *East*, 49 L. J., Ex. 250; 5 Ex. D. 108; 41 L. T. 715; 28 W. R. 336; 44 J. P. 300—C. A.

—— **Evidence of Malice.**]—A master in giving the character of his late servant to a person intending to take her, charged her with theft, and in support of that charge stated that she had borrowed money when she came into his service and repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant in consequence of her loss of character might have gone upon the town, he answered, "What is that to us?":—Held, slight evidence that the communication was made maliciously. *Kelly* v. *Partington*, 4 B. & Ad. 700.

**Written Character defaced by Master.**]—In an action for maliciously defacing the written character of a servant by writing upon it a disparaging statement, the plaintiff may recover substantial damages. *Wennhak* v. *Morgan*, 57 L. J., Q. B. 241; 20 Q. B. D. 635; 59 L. T. 28; 36 W. R. 697; 52 J. P. 470.

## C. INJURIES TO SERVANTS IN COURSE OF EMPLOYMENT.

### 1. General Principles.

**Reasonable Precautions—Necessity of.**]—A master is bound to take all reasonable precautions to secure the safety of his workmen. *Brydon* v. *Stewart*, 2 Macq. H. L. 30. S. P., *Paterson* v. *Wallace*, 1 Macq. H. L. 748.

It is no answer to a claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own. *Ib.*

A master who lets a workman down his mine is bound to bring him up safely, even though he comes up on his own business, and not for that of his master. *Ib.*

From the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment. *Riley* v. *Baxendale*, 6 H. & N. 445; 30 L. J., Ex. 87; 9 W. R. 347.

**Proper Machinery.**]—A master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus is not staunch and appropriate, or if

he permits it to be used without proper guards, and mischief consequently arises, he will be responsible. *Weems* v. *Mathieson*, 4 Macq. H. L. 215.

All that a master is bound to do is to provide machinery fit and proper for the work, and to have it superintended by himself or by his workmen in a fit and proper manner. *Ib.*

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to shew that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine. *Potts* v. *Port Carlisle Dock Co.*, 2 L. T. 283; 8 W. R. 524.

—— **Testing of.**]—A chain broke, partly from wear and partly from bad welding, and injured the servant using it. His master had not had it examined or tested, although there are well known methods for doing so:—Held, that the master was liable for the injury caused to the servant. *Murphy* v. *Phillips*, 35 L. T. 477; 24 W. R. 647.

A declaration by the administratrix of W. stating that the defendant was owner of a factory and machine, and W. was employed by him to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendant it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendant well knew; and by reason of the premises, and also by reason, as he well knew, of no sufficient apparatus having been provided by them to protect W., it was suddenly put in motion whilst he was at work in the machine, and he thereby sustained injuries from which he afterwards died, sufficiently shews that the machine was set in motion by the defendant's negligence, and it therefore discloses a cause of action, although there was no allegation that W. was ignorant of the dangerous and defective character of the machine. *Watling* v. *Oastler*, 40 L. J., Ex. 43; L. R. 6 Ex. 73; 23 L. T. 815; 19 W. R. 388.

H., while in the employment of the defendant company as a second mate on board one of their steamers, sustained injuries, resulting in his death from the fall of a derrick while the vessel was discharging cargo. At the time the accident occurred the derrick was, in accordance with the usual custom on the vessel, and for the discharge of the cargo, being hoisted from the deck to its proper place in the mast by a rope which worked through an iron bolt fixed in a trestle-tree. The greater part of the bolt was concealed, and could not be examined without being drawn out of the trestle-tree. The bolt broke while the derrick was being hoisted, and it fell upon H. In an action by H.'s widow, under Lord Campbell's Act, it was proved that the bolt, to the extent of two-thirds of its thickness, was in a defective state and incapable of bearing a strain, and it was the common case of both parties that there was no skilled person on board whose duty it was to examine the screws and bolts. It was not shewn that the defendants or their officers were in fact aware of the defective condition of the bolt, and no evidence was given as to the usual practice of inspection of vessels of the class, or for what time a bolt of the kind in question would in the ordinary course remain in repair and adequate to its work:—Held, that there was no evidence of negligence on the part of the defendant company, and that the judge at the trial was right in directing a verdict for them. *Hanrahan* v. *Ardnamult Steamship Co.*, 22 L. R. Ir. 55.

**Competency of Servants.**]—The liability or non-liability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen. A master cannot warrant the competency of his servants. *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326; 19 L. T. 30.

**Risk Incidental to Service.**]—The plaintiff was employed by the defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. The plaintiff was aware that a dog of this kind was kept on the premises. The judge at the trial nonsuited the plaintiff on the ground that as she was a servant, and knew the disposition of the dog, no action was maintainable:]—Held, that the nonsuit was wrong, inasmuch as the risk was not incidental to the service, and that there was evidence to go to the jury of the liability of the defendant for the injury sustained by the plaintiff. *Mansfield* v. *Baddeley*, 34 L. T. 696.

### 2. Under Employers' Liability Act.

#### a. Workman—Who is.

**Driver of Tramcar.**]—The driver of a tramcar is not "a person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. *Cook* v. *North Metropolitan Tramways Co.*, 56 L. J., Q. B. 309; 18 Q. B. D. 683; 56 L. T. 448; 57 L. T. 476; 35 W. R. 577; 51 J. P. 630.

**Omnibus Conductor.**]—An omnibus conductor is not a "workman" or person "engaged in

manual labour" within the meaning of s. 10 of the Employers and Workmen Act, 1875, and therefore is not entitled to the benefit of the Employers' Liability Act, 1880. *Morgan* v. *London General Omnibus Co.*, 53 L. J., Q. B. 352; 13 Q. B. D. 832; 51 L. T. 213; 32 W. R. 759; 48 J. P. 503—C. A.

**Driver of Cart.**]—The driver of a cart in the employment of a wharfinger who, for the purposes of his business, is the owner of carts and horses, is a "workman" within the act. *Yarmouth* v. *France*, 57 L. J., Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.

**Potman in Public-House—"Domestic or Menial Servant."**]—Where the duties of a potman in a public-house, although manual, are substantially of a menial or domestic nature, he is not a workman within the Employers' Liability Act. *Pearce* v. *Lansdowne*, 62 L. J., Q. B. 441; 69 L. T. 316; 57 J. P, 760.

Although the facts of the case were admitted, yet it was the duty of the judge to leave to the jury the question whether the plaintiff was a workman and not a domestic servant. *Ib.*

**Practical Mechanic—Originative Work.**]—By an agreement in writing between H. & Co., manufacturers, and J., reciting that J. having a knowledge of mechanics, and H. & Co. requiring the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas they (the firm) might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them," it was mutually agreed that J. should be employed by the firm "for the purpose above specified":—Held, that J. was not "a mechanic or workman" within the Employers and Workmen Act, 1875. *Jackson* v. *Hill*, 13 Q. B. D. 618; 49 J. P. 118.

J. agreed with H., a frilling manufacturer, to serve for seven years at 5*l.* per week during the ordinary hours. He was described in the agreement as having a knowledge of mechanics, and to assist as a practical working mechanic in developing ideas. He in fact drew designs, and had workmen to assist in carrying them out:—Held, that J. was a workman within the meaning of the Employers and Workmen Act, 1875. *Jackson* v. *Hill*, 48 J. P. 7.

**Slater — Contributory Negligence.**] — The plaintiff's husband S. was a slater; the defendant was a builder and had on several occasions employed S. to slate houses for him. The defendant provided the slates, poles and scaffolding, but S. had his own tools, and was paid by the piece. On the occasion of the accident the scaffolding erected by the defendant was in a manifestly unsafe state, and the defect in it was known to the defendant or his superintendent, and S. knew that it was so known to them. S., notwithstanding the defect, ascended a ladder to finish the slating, but the scaffolding gave way, and S., who was on the ladder at the time, fell to the ground, sustaining injuries from which he died:—Held, that the deceased was a workman within the meaning of s. 8 of the Employers' Liability Act; and that, although the deceased was aware of the defect in the scaffolding, yet, as he knew that the defendant or his superintendent was aware of it also, sub-s. 3 of s. 2 of the act would enable the plaintiff to recover compensation for his death. *Stuart* v. *Evans*, 49 L. T. 138; 31 W. R. 706.

**Workman employed by "butty" Men—Liability of Owners of Mine.**] — The defendants were owners of a coal mine worked under the "butty" system. In mines so worked "butty" men contract with the owners of the mine to bring coal up at so much per ton, and for this purpose employ men under them. The deceased had been so employed, and had been killed by an explosion while working in the mine:—Held, that the deceased had been a workman in the employ of the owners of the mine within the meaning of the Employers' Liability Act, 1880, and that his wife would be entitled to damages if the case came within the terms of sub-s. 3 of s. 1 of that act. *Brown* v. *Butterley Coal Co.*, 53 L. T. 964; 50 J. P. 230.

**Grocers' Assistant—Real and Substantial Occupation.**]—The test of whether an employé is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is—whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment. The appellant, a grocer's assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop:—Held, that such occupations were incidental to his real and substantial employment as a salesman, and that he was not engaged in manual labour within the meaning of the Employers and Workmen Act, 1875. *Bound* v. *Lawrence*, 61 L. J., M. C. 21; [1892] 1 Q. B. 226; 65 L. T. 844; 40 W. R. 1; 56 J. P. 118—C. A.

**Employé ordered to work for another Firm.**] —Where a joiner, employed by a firm of lift contractors in the construction of a lift in a house in the course of erection, with the sanction of his employers borrowed a workman from a firm of builders engaged on the premises, it was held that the workman was in the service of the lift contractors. *Wild* v. *Waygood*, 61 L. J., Q. B. 391; [1892] 1 Q. B. 783; 66 L. T. 309; 40 W. R. 501; 56 J. P. 389—C. A.

### b. Notice of Injury.

**In Writing.**]—By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4, an action for the recovery under this act of compensation for an injury shall not be maintainable, unless "notice that injury has been sustained" is given within six weeks. By s. 7, notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post:—Held, that notice under the act must be in writing. *Moyle* v. *Jenkins*, 51 L. J., Q. B. 112; 8 Q. B. D. 116; 46 L. T. 472; 30 W. R. 324.

**Contents of.**]—The notice of injury sustained by a workman which is to be given to an employer under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), must contain in writing all the particulars required by s. 7, in

order to fulfil the condition precedent to bringing an action enacted by s. 4. *Keen* v. *Millwall Dock Co.*, 51 L. J., Q. B. 277 ; 8 Q. B. D. 482 ; 46 L. T. 472 ; 30 W. R. 503 ; 46 J. P. 435—C. A.

**Reference to another Document.**]—Query, if such notice can be made by one writing referring to another writing. *Ib.*

**Omissions and Defects In.**]—Sect. 4 of the Employers' Liability Act, 1880, provides that an action to recover compensation under the act shall not be maintainable unless notice of injury is given as provided by the act. By s. 7, the notice shall state (inter alia) the date of the injury ; and "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that it was for the purpose of misleading. A notice of injury given under s. 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading :—Held, that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of s. 7, and therefore did not render the notice invalid. *Carter* v. *Drysdale*, 53 L. J., Q. B. 557 ; 12 Q. B. D. 91 ; 32 W. R. 171.

It is not a fatal objection to an action brought by a servant under the Employers' Liability Act, 1880, against his employer to omit the address and date in the notice required to be given to the employer under s. 7. *Beckett* v. *Manchester Corporation*, 52 J. P. 346.

A notice given to an employer under ss. 4 and 7 of the Employers' Liability Act, 1880, omitted to give the address of the person injured, or to state the cause of the injury, and the date at which the injury was sustained was wrongly given. The accident occurred on the 9th August. The letter giving notice was served on the defendants by post by an unregistered letter on the 19th September, and to this letter the defendants replied on the 23rd September. The county court judge, before whom the action was tried, found that the defendants had not been prejudiced in their defence by the defects and inaccuracy in the notice, and that such defects and inaccuracy were not for the purpose of misleading. It was proved that the notice was posted on the 19th September :—Held, that the county court judge having found that the defendants were not prejudiced in their defence by the said defects and inaccuracy in the notice, and that they were not for the purpose of misleading, the notice was good within the meaning of ss. 4 and 7 of the Employers' Liability Act, 1880. Held also, that it having been proved that the letter containing the notice was posted on the 19th September, and a reply to it having been received from the defendants, there was sufficient evidence that the notice had been received by the defendants within the time specified in s. 4 of the act, although the letter containing the notice was not registered. *Previdi* v. *Gatti*, 58 L. T. 762 ; 36 W. R. 670 ; 52 J. P. 646.

—— **"Cause of Injury."**]—In an action to recover compensation for injuries under the Employers' Liability Act, 1880, the plaintiff's notice of action stated that she was injured in consequence of the defendants' negligence in leaving a certain hoist in their warehouse unprotected, whereby her foot was caught in the casement of the hoist and crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone :—Held, that the notice of action sufficiently stated "the cause of the injury" within s. 7 of the Employers' Liability Act, 1880. *Clarkson* v. *Musgrave*, 51 L. J., Q. B. 525 ; 9 Q. B. D. 386 ; 31 W. R. 47.

**Amendment.**]—The notice of action under s. 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), need not be expressed in strictly technical language ; it is enough if it substantially conveys to the mind of the person to whom it is given, the name and address of the person injured, and the cause and date of the injury. A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg" :—Held, that having regard to the proviso at the end of s. 7, the defect in the notice did not render it invalid. *Stone* v. *Hyde*, 51 L. J., Q. B. 452 ; 9 Q. B. D. 76 ; 46 L. T. 421 ; 30 W. R. 816 ; 46 J. P. 788.

### c. Acts of what Servants.

**"Person intrusted with Superintendence."**]—In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way :—Held, that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within s. 1, sub-s. 2, as defined by s. 8, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within s. 1, sub-s. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform. *Kellard* v. *Rooke*, 57 L. J., Q. B. 599 ; 21 Q. B. D. 367 ; 36 W. R. 875 ; 52 J. P. 820—C. A.

The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold :—Held, that J. was "engaged in manual labour," and was not "a person having superintendence intrusted to him," within the meaning of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 2, as defined by s. 8. *Shaffers* v. *General Steam Navigation Co.*, 52 L. J., Q. B. 260 ; 10 Q. B. D. 356 ; 48 L. T. 228 ; 31 W. R. 656 ; 47 J. P. 327.

—— **Sufficiency of Machinery or Plant.**]—The defendants, a firm of builders, were erecting a building in Leicester Square, and the plaintiff

was a bricklayer's labourer employed on the work in carrying mortar to and fro along the outside of the basement of the building for the use of the bricklayers. A part of the machinery or plant, used in the building work for raising and lowering a pail with materials from the ground to the upper floor where the bricklayers were at work, was what is called a "gin wheel and fall," consisting of a pulley, over or through which ran a rope to the end of which were attached two short pieces of rope of equal length, with an open hook at the end of each, which hooks clipped the handle of the pail, "one in and one out," on opposite sides. Two men were employed to work this machinery, one at the top of the building and the other at the bottom, it being the duty of the man at the bottom to hold the rope so as to steady the pail. On the occasion in question the bottom man was temporarily absent, without leave and unknown to the foreman of the works; and, in consequence of his absence, a pail of cement, which was being lowered, swayed from side to side in its descent, and, striking against a cross timber, became unhooked and fell, knocking down and injuring the plaintiff, who, in the ordinary course of his employment, was passing with mortar underneath it:—Held, that the jury having found that there was no defect in the defendants' machinery, and that the accident was caused by the negligence or default of the men employed in lowering the pail, who were not persons "intrusted with any superintendence," but ordinary workmen, like the plaintiff himself, the case did not fall within either of the two sub-ss. 1 and 2 of s. 1 of the act, which were the only ones applicable to it, and that, consequently, the defendants were not liable to the plaintiff for the consequences of the accident. *Robins* v. *Cubitt*, 46 L. T. 535.

—— **Voluntarily assisting in Manual Labour.**]—An employer may be liable under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, where personal injury is caused to a workman (sub-s. 2), "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour. *Osborne* v. *Jackson*, 11 Q. B. D. 619; 48 L. T. 642.

An employer may be liable under s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman, within s. 2, "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour; the superintendent need not of necessity have actual superintendence over the workman injured. *Ray* v. *Wallis*, 51 J. P. 519.

**"Person to whose Orders Plaintiff bound to conform."**]—The 1st section of the Employers' Liability Act, 1880, provides that where personal injury is caused to a workman (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman, or, in case the injury results in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work. The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880:—Held, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. *Millward* v. *Midland Ry.*, 54 L. J., Q. B. 202; 14 Q. B. D. 68; 52 L. T. 255; 33 W. R. 366; 49 J. P. 453. And see *Kellard* v. *Rooke*, supra.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff with another workman was employed by the defendants to work a calico-printing machine. Each machine required two men — the back-tenter, who kept the calico straight as it passed through, and the printer who, amongst other things, started it and regulated the speed. The plaintiff was a back-tenter. The printer having told the plaintiff to do something which necessitated his placing his hands between the rollers and the cylinder, before he had time to withdraw them started the machine without warning, and the plaintiff's fingers were cut off:—Held, that the plaintiff was not entitled to recover, the direction by the printer not being an order or direction within the 3rd sub-section of s. 1 of the act, and the injury having been caused by the printer starting the machine too soon. *Howard* v. *Bennett*, 58 L. J., Q. B. 129; 60 L. T. 152; 53 J. P. 359.

The plaintiff, in an action under the Employers' Liability Act, 1880, to recover compensation for personal injury, was employed by the defendant as a machinist, and was accustomed to work at a particular machine in a particular shed. A carpenter, also in the employ of the defendant, used to receive directions from the defendant as to the work to be done, and give orders to the plaintiff as to what work he should do. The plaintiff was bound to conform to these orders, but the authority of the carpenter went no further, and in the performance of the work the plaintiff received no directions from him, and was in no way under his control. On one day, when work was proceeding in this way, the plaintiff, whose regular time was up at half-past five, by his own doing elected to work overtime. While he was so doing the carpenter came into the shed in which he was working, and which was not a safe place for two people to work in at once, and began to work, and by admitted negligence caused injury to the plaintiff:—Held, that the plaintiff was not entitled to recover, as the injury did not result from his having conformed to the

orders of a person in the service of the employer, to whose orders at the time of the injury he was bound to conform, and did conform, and therefore s. 1, sub-s. 3, of the act did not apply. *Snowden* v. *Baynes*, 59 L. J., Q. B. 325; 25 Q. B. D. 193; 38 W. R. 744; 55 J. P. 133—C. A.

The plaintiff (by next friend) sued the defendants under the Employers' Liability Act, 1880, for damages sustained through the negligence of their foreman. The plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen. There was a rule of the company, known to the plaintiff, that no van guard under the age of fifteen was ever to drive a van. The defendant's foreman on the occasion in question ordered the plaintiff to drive a van load of fish to B. market, and he would be paid extra money for so doing. The boy did drive the van, and in consequence was thrown down from his seat and seriously injured. The plaintiff at the trial was nonsuited on the ground that he was offered and accepted extra money to drive, and was not obliged to obey in that respect the foreman who offered the money. The plaintiff obtained a rule nisi for a new trial:—Held, on cause shewn, that the plaintiff had been rightly nonsuited, for the foreman was not a person to whose orders he was bound to conform; and that he had been guilty of contributory negligence disentitling him to recover. *Bunker* v. *Midland Ry.*, 47 L. T. 476; 31 W. R. 231.

—— **Workman ordered to Work for another Firm.**]—A joiner, employed by a firm of lift contractors in the construction of a lift in a house in the course of erection, having with the sanction of his employers borrowed a workman from a firm of builders engaged on the premises, ordered him to put a plank across the well of the lift and stand upon it, and then started the lift, whereby the plank was upset and the workman was injured. The workman sued the lift contractors under the Employer's Liability Act, and obtained a verdict:—Held, that there was evidence to go to the jury, first, that the plaintiff was, at the time of the injury, a workman in the service of the defendants; secondly, that the order to stand upon the plank was given by a person to whose orders the plaintiff was bound to conform:—Held, further, that the injury resulted from the plaintiff having so conformed. *Wild* v. *Waygood*, 61 L. J., Q. B. 391; [1892] 1 Q. B. 783; 66 L. T. 309; 40 W. R. 501; 56 J. P. 389—C. A.

—— **Negligence of.**]—The negligence referred to in s. 1, sub-s. 3, of the Employers' Liability Act is not confined to negligence in the order itself; and in order to establish liability under that sub-section it is not necessary that conformity to the order should be the causa causans of the injury, though, semble, there must be an intimate connection between the negligence, the injury, and the conformity to the order. *Ib.*

**"Act or Omission done or made in Obedience to Rules of Employer."**]—The plaintiff was employed by the defendant, the owner of a saw-mill, containing saws driven by steam power, and on a certain day he was told by the defendant's foreman to cut some wood in specified lengths with the circular saw. This work was generally performed by two men, one "feeding" the saw and the other taking the wood out from it. A. was engaged by the defendant to attend to the engine and boiler, and to assist generally in the saw-mill, and was also told "not to neglect the engine." At the time in question the plaintiff was at one end of the saw-frame pushing the wood through it, and A. was at the other end receiving the wood coming out from the saw. Hearing steam blowing off, A. suddenly, and without notice to the plaintiff, let go the wood and ran to the engine-room, whereupon the wood, becoming unsteady, shook the plaintiff's hand against the saw, which cut and injured his fingers. In an action in the county court, under sub-s. 4 of s. 1 of the Employers' Liability Act, 1880, the plaintiff recovered damages:—Held, that the plaintiff was not entitled to recover, on the ground that, although the injury was caused by "the act or omission" of A. in leaving the saw without notice to the plaintiff, there was no evidence that such act or omission was "done or made in obedience to any rule or by-law of the employer, or to instructions by any delegate of his." *Whatley* v. *Holloway*, 62 L. T. 639; 54 J. P. 645.

**Negligence of Person having "Charge or Control" of Points.**]—In an action for compensation under the Employers' Liability Act, 1880, the evidence shewed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition; and that F. having taken the cover off some points and locking gear, in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman:—Held, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence. *Gibbs* v. *G. W. Ry.*, 53 L. J., Q. B. 543; 12 Q. B. D. 208; 50 L. T. 7; 32 W. R. 329; 48 J. P. 230—C. A.

**Negligence of a Person "in Charge of a Train upon a Railway."**]—H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance:—Held, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). *Cox* v. *G. W. Ry.*, 9 Q. B. D. 106; 30 W. R. 816; 47 J. P. 116.

For the purpose of the Employers' Liability Act, 1880, s. 1, sub-s. 5, by which an employer is made liable for the negligence "of any person" in his service "who has the charge or control of any . . . train upon a railway," the word "train" includes either a locomotive engine by itself or anything drawn along the railway, and does not necessarily import a plurality of vehicles; and

the words "the person having charge or control" do not of necessity point to a person in charge of the whole train. Different duties and different parts of the train may be assigned to different persons, each of whom is charged with the conduct of the train, and by his negligence may make the employer liable. *McCord* v. *Cammell & Co.*, 65 L. J., Q. B. 202; [1896] A. C. 57; 73 L. T. 634; 60 J. P. 180—H. L. (E.)

**"Railway," what is.**]—The meaning of the term "railway" as used in the 5th sub-section of the 1st section of the Employers' Liability Act, 1880, is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies to a temporary railway laid down by a contractor for the purposes of the construction of works. *Doughty* v. *Firbank*, 52 L. J., Q. B. 480; 10 Q. B. D. 358; 48 L. T. 530; 48 J. P. 55.

**"Locomotive Engine"—Steam Crane fixed on a Trolly.**]—A steam crane fixed on a trolly, and propelled by steam along a set of rails when it is desired to move it, is not a "locomotive engine," within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 5. *Murphy* v. *Wilson*, 52 L. J., Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24.

**Defect in Works insufficiently Remedied.**]—The plaintiff, a workman among others in the defendants' employ, was injured by the fall of a wall. The foreman of the works had observed that the wall was unsafe, and having placed the workmen out of danger, ordered a contractor employed in repairing the buildings at the time to bring his whole staff of workmen and shore up the wall. This was done, and the foreman, having been assured by the contractor that the wall was safe, sent the workmen back to their work. Shortly afterwards the wall fell. The foreman trusted to the assurance of the builder that the wall was safe, and did not personally inspect its condition after it had been shored up: —Held, that there was no evidence of negligence on the part of the defendants or of their foreman. *Moore* v. *Gimson*, 58 L. J., Q. B. 169.

**d. In respect of what Plant, Works, &c.**

**Defect in Condition of Way.**]—A defect in the condition of a way within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, must be some defect or alteration in the permanent condition of the way itself; and obstacles lying on the way which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it, do not make it defective within the meaning of the section. *McGiffin* v. *Palmer's Shipbuilding and Iron Co.*, 52 L. J., Q. B. 25; 10 Q. B. D. 1; 47 L. T. 346; 31 W. R. 118; 47 J. P. 70.

During the building of a house the workmen obtained access to the upper part by ladders placed in a well intended for a staircase. There was another well through the house intended for a lift, down which rubbish had been thrown during the building. Upon the staircase being completed, it was closed to the workmen as a means of access, and the ladders were transferred to the lift-well. No precautions had been taken to prevent workmen from throwing rubbish down the lift-well after the ladders had been so transferred. The plaintiff was ascending one of the ladders when a boy threw a plank down from the third floor which struck the plaintiff and broke his collar-bone:—Held, that this was not a "defect in the condition of the way" within the meaning of sub-s. 1 of s. 1 of the act; and that the fact of no notice or warning being given to stop the practice of throwing materials down the lift-hole did not have the effect of bringing the case within that sub-section. *Pegram* v. *Dixon*, 55 L. J., Q. B. 447; 51 J. P. 198.

—— **By Negligent User.**]—By s. 1, sub-s. 1, of the Employers' Liability Act, 1880, a right of compensation is given to a workman for personal injury caused to him by reason of any defect in the condition of the ways connected with or used in the business of the employer. The plaintiff was employed as a steam-hammerman in the service of the defendants, a firm of engineers, upon whose premises was a large covered workshop about 150 feet long and 50 feet wide, over the floor of which were scattered certain machinery and other appliances used in their business. Near the centre of the workshop was a well with a cover which had not been used for about seven years. The plaintiff, who worked at one end of the workshop, whilst walking across it to make some inquiry of a workman at the other end with regard to the steam-power, fell into the well, which had been uncovered by the defendant's foreman for the purpose of emptying water from an iron cylinder into it. There was no defined way where the plaintiff crossed, but he went the most direct line across the workshop. The defendants' workmen also used to pass up and down the workshop. No warning was given by the foreman that the well had been uncovered. In an action under the Employers' Liability Act, 1880, to recover damages for the injury sustained:—Held, that the place where the accident happened was a "way" within s. 1 of the act; that the accident was not caused by "any defect in the condition of the way" within sub-s. 1 of s. 1, but was caused by the negligence of the defendants' foreman in the user of the way within sub-s. 2 of s. 1. *Willetts* v. *Watt*, 61 L. J., Q. B. 540; [1892] 2 Q. B. 92; 66 L. T. 818; 40 W. R. 497; 56 J. P. 772—C. A.

**Defect in Condition of Works — Permanent Premises.**]—The term "works" in s. 1, sub-s. 1, of the Employers' Liability Act, 1880, is not confined to factories, workshops, or permanent premises of an employer. A plot of ground, in the course of being cleared of old buildings in order to form a site for new building operations, is the "works" of the employer of labour who has contracted to clear it, and whose business it is to perform such contracts. *Brannigan* v. *Robinson*, 61 L. J., Q. B. 202; [1892] 1 Q. B. 344; 66 L. T. 647; 56 J. P. 328.

—— **Wall in course of Construction.**]—In the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1—defining the liability of employers for personal injury caused to their workmen (1) "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of

the employed"—the expression "works" must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with or used in the business of the employer. *Howe* v. *Finch*, 17 Q. B. D. 187; 34 W. R. 593; 51 J. P. 276.

**Defect in Condition of Machinery.**]—Defect in the condition of machinery for the purposes of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, includes the absence of proper means to secure safety in the operation for which the machinery is used. *Stanton* v. *Scrutton*, 62 L. J., Q. B. 405; 5 R. 244.

A defect in the condition of the machinery or plant of the employer within s. 1, sub-s. 1, of the Employers' Liability Act, 1880, includes unsuitability of the machinery for the purpose for which it is used, and is not confined to cases where the machinery has become defective. *Heske* v. *Samuelson*, 53 L. J., Q. B. 45; 12 Q. B. D. 30; 49 L. T. 474.

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the machinery used in the business of the employer, applies to a case where the machine, though not defective in its construction was, under the circumstances in which it was used, calculated to cause injury to those using it. The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke:—Held, that under the circumstances there was a "defect in the condition" of the lift for which the defendants were liable. *Ib.*

The plaintiff, a lad of nineteen, was employed in the defendants' paper mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got, and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who, to remedy it, procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that with care both rollers were equally safe. The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants, and not remedied by them:—Held, that this finding was warranted by the evidence. *Paley* v. *Garnett*, 16 Q. B. D. 52; 34 W. R. 295; 50 J. P. 469.

A leather-pressing machine, in every way perfect and in no way defective for the simple purpose of pressing leather, had at its side a wheel and cogs unguarded. The unguarded condition of this wheel and the possible danger likely to arise from it was within the knowledge of the employers. A boy who fed the machine with leather by some means entangled his hand in this wheel and received injuries:—Held, that, taking sub-s. 1 of s. 1, and sub-s. 1 of s. 2, of the Employers' Liability Act together, the danger caused by this wheel was a defect in the condition of the machine within the first of these sub-sections, since, the danger being within the knowledge of the employers, they were negligent in allowing the wheel to remain unguarded. *Morgan* v. *Hutchins*, 59 L. J., Q. B. 197; 38 W. R. 412.

The mere fact that a machine is dangerous to a workman employed to work with it does not shew that there is a defect in the condition of the machine within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, inasmuch as by s. 2, sub-s. 1, of the act, the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service intrusted by him with the duty of seeing that the machine is in proper condition. *Walsh* v. *Whiteley*, 57 L. J., Q. B. 586; 21 Q. B. D. 371; 36 W. R. 876; 53 J. P. 38—C. A.

The plaintiff in an action under the Employers' Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which, while in motion, the plaintiff had to place a band. The disc of the wheel had holes in it, and, while the plaintiff was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine, because it had never entered into his head that it was dangerous:—Held (Lord Esher, M.R., dissenting), that there was no evidence of any defect in the machine implying negligence in the defendants or anyone in their service, and therefore that the defendants were not liable. *Ib.*

The plaintiff was employed by the defendants to assist in the working of a circular saw. The saw bench was provided with a side guard, which was removable for the purpose of taking away the sawdust from under the bench. While the saw was in motion, the plaintiff, in assisting to lift a plank, slipped and, the guard being absent, fell under the bench and was injured by the saw. It was proved that the workman in charge of the saw, whose duty it was to see that the guard was in its place, had on the previous day removed it because it was in his way, and that it had not been replaced:—Held, that the absence of the side guard constituted a defect in the condition of the machinery within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act, 1880. *Willetts* v. *Watt* (61 L. J., Q. B. 540; [1892] 2 Q. B. 92) distinguished. *Tate* v. *Latham*, 66 L. J., Q. B. 349; [1897] 1 Q. B. 502; 76 L. T. 336; 45 W. R. 400—C. A.

And see *Robins* v. *Cubitt* (46 L. T. 535), ante, col. 865.

**"Condition of Plant."**] — The Employers' Liability Act, 1880, which gives a workman a right of action against his employer for personal

injury by reason of any defect in the condition of the plant used in the business of the employer, applies to a case where the plant is unfit for the purpose for which it is used, though no part of it is shewn to be unsound. Plaintiff, a workman in defendants' employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants:—Held, that, under the above circumstances, there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Employers' Liability Act, 1880. *Cripps* v. *Judge*, 53 L. J., Q. B. 517; 13 Q. B. D. 583; 51 L. T. 182; 33 W. R. 35; 49 J. P. 100—C. A.

A wharfinger who for the purposes of his business was the owner of carts and horses, owned one horse of a vicious nature, that was unfit to be driven by a careful driver. The plaintiff was in the wharfinger's employ, and had to drive the carts and to load and unload the goods carried in them. In an action for injury by reason of the viciousness of the horse:—Held, that the horse was "plant" used in the business of the wharfinger, and that the vice in the horse was a "defect" in the condition of such plant within the meaning of s. 1 of the act. *Yarmouth* v. *France*, 57 L. J., Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.

Where a boy was engaged in moving certain iron stanchions on a trolly, and the stanchions were not packed or protected from falling off, and, by reason of their not being so packed or protected, one of them fell and injured one of the boy's fingers so that it had to be amputated:—Held, that the neglect to pack or to protect from falling off did not constitute such a defect in plant as would render his employer liable within the meaning of the Employers' Liability Act, s. 1, sub-s. 1. *Corcoran* v. *East Surrey Ironworks Co.*, 58 L. J., Q. B. 145.

See also *Weblin* v. *Ballard*, infra, col. 874.

—— **"Volenti non fit injuria"—Knowledge of Employer.**]—Where a workman was employed on a staging in the middle of the river Thames, which was protected on one side only, and it was part of his duty to work on the unprotected side, and in the course of his employment he fell over at night and was drowned, the jury found that the structure was defective, and that the deceased lost his life in consequence of the defect; but they also found that he knew of the defect, and was willing to incur the risk:—Held, that his widow could not recover damages from his employer. *Church* v. *Appleby*, 58 L. J., Q. B. 144; 60 L. T. 542.

### e. Contributory Negligence.

**As a Defence.**]—A defence of contributory negligence may be relied on in an action under the Employers' Liability Act. *McEvoy* v. *Waterford Steamship Co.*, 18 L. R., Ir. 159.

**Disobeying Employer's Rules.**]—See *Bunker* v. *Midland Railway Co.*, ante, col. 867.

**Working in Dangerous Mode.**]—If machinery can be worked by a servant in a reasonable manner without danger to himself, no instruction being given to him to work it in a mode which would endanger his safety, where the safe mode, as well as the dangerous mode, of working are known to him, the danger of the latter mode being apparent, the employers are not liable under the Employers' Liability Act, 1880, for damages for the death of the servant, caused by working the machine in a dangerous way. *Noonan* v. *Dublin Distillery Co.*, 32 L. R., Ir. 399.

**Knowledge of Defect.**]—An employer, when sued under the Employers' Liability Act, 1880, for personal injury to a workman caused by any of the matters mentioned in s. 1 of the act, cannot avail himself of the defence that the injury was caused by the negligence of a fellow servant, or that the workman had contracted to take upon himself the risks incident to the employment; but he may avail himself of the defence of contributory negligence on the part of the workman, and also, under s. 2, sub-s. 3, of his failure to give notice of the defect or negligence which caused the injury. The deceased was employed as fireman at the defendant's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Employers' Liability Act, the county court judge found that there was a defect in the condition of the plant within the meaning of s. 1, sub-s. 1, of the act, and that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it:—Held, that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous. *Weblin* v. *Ballard*, 55 L. J., Q. B. 395; 17 Q. B. D. 122; 54 L. T. 532; 34 W. R. 455; 50 J. P. 597.

See also *Stuart* v. *Evans*, supra, col. 862.

Where a waggon was in a defective state, of which a workman was aware, and he used it in such a way as to cause injury to himself, when he knew how to use and might have used it so as not to cause injury to himself, he cannot recover under the Employers' Liability Act, 1880, s. 1. *Martin* v. *Connah's Quay Alkali Co.*, 33 W. R. 216.

### f. Risk Voluntarily Incurred.

**"Volenti non fit injuria."**]—The plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. In an action under the Employers'

Liability Act, 1880:—Held (Lord Esher, M.R., dissenting), that the defence arising from the maxim volenti non fit injuria had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover. *Thomas* v. *Quartermaine*, 56 L. J., Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516—C. A.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal and his leg was broken:—Held (Lopes, L.J., dissenting), that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff. *Thomas* v. *Quartermaine* (18 Q. B. D. 685) distinguished. Per Lopes, L.J., that there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment. *Yarmouth* v. *France*, 57 L. J., Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.

The appellant, a workman in the employment of the respondents, was working in a railway cutting with hammer and drills, when a stone, fastened by a chain to another chain hanging from a crane which was being "jibbed" over his head, slipped from its fastenings, struck and seriously injured him. In the county court the jury found that the machinery used for lifting the stone was not reasonably fit for its purpose: that the omission to supply special means of warning when the stones were being "jibbed" was a defect in the "ways, works, machinery, and plant" within the Employers' Liability Act; that the employers were guilty of negligence, and that the appellant was not guilty of contributory negligence; and they awarded 100*l.* damages, for which the judge entered judgment for the plaintiff. The notice of appeal to the divisional court, and subsequently to the court of appeal, was based solely on the ground that the plaintiff had voluntarily undertaken the risk. The court of appeal decided in favour of the defendants both on this ground and also on the ground that there was no evidence of negligence:—Held, that the appeal must be allowed on the ground that the appellant had not voluntarily undertaken the risk, and that it was not competent to the house to enter into the question of negligence, as the point was not taken in the county court:—Held, also, that there was negligence in that the machinery was not reasonably fit for its purpose, and no special warning was supplied to the men imperilled by the operation. *Smith* v. *Baker*, 60 L. J., Q. B. 683; [1891] A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660—H. L. (E.)

A person who relies on the maxim volenti non fit injuria must show a consent to the particular thing done, though such consent may be inferred from the course of conduct as well as expressed in terms; but mere knowledge of a risk does not necessarily involve consent. A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable, quite apart from the Employers' Liability Act. *Ib.*

The maxim volenti non fit injuria explained and illustrated. *Ib.*

The contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. *Ib.*

—— **Breach of Statutory Duty.**]—The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under s. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft; but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880:—Held, that the defence arising from the maxim volenti non fit injuria was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover. *Thomas* v. *Quartermaine* (supra) discussed. *Baddeley* v. *Granville* (*Earl*), 56 L. J., Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822. See also *Church* v. *Appleby*, supra, col. 873.

### g. Contracting Out.

**Contract not to claim Compensation—Widow bound by.**]—It is competent to a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880. By s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman in certain specified cases, the workman, or in case the injury results in death, his legal personal representatives, and any person entitled in case of death, "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work." A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the act for personal injury, whether resulting in death or not:—Held, that s. 1 only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid. *Griffiths* v. *Dudley* (*Earl*), 51 L. J., Q. B. 543; 9 Q. B. D. 357; 47 L. T. 10; 30 W. R. 797; 46 J. P. 711.

Held, also, that the contract was not against public policy, and that the workman's widow, suing for damages under Lord Campbell's Act, was bound by it. *Ib.*

### h. Proceedings.

**Reviewing Verdict of Jury.**]—Upon an appeal from the judgment of a county court awarding compensation under the act, the high court is not entitled to consider whether the findings are such as the high court would have arrived at, but can only consider whether or not there was reasonable evidence to support them. *Weblin* v. *Ballard*, supra, col. 874.

**Damages—"Earnings"—Tuition.**]—In s. 3 of the Employers' Liability Act, 1880, the word "earnings" means money or things capable of being turned into money by accurate estimation, such as rent, food, and clothes; but it does not include a thing so vague as tuition which an apprentice receives from his master. *Noel* v. *Redruth Foundry Co.*, 65 L. J., Q. B. 330; [1896] 1 Q. B. 453; 74 L. T. 196; 44 W. R. 407.

—— **Limit of—Overtime Wages.**]—The plaintiff, in an action brought under the Employers' Liability Act, 1880, proved as damages loss of wages in respect both of his employment with the defendants, and also in respect of certain overtime labour under another employer. The jury awarded damages under both heads, but the county court judge held that the plaintiff was only entitled to receive damages in respect of his estimated earnings under the defendants. The amount of damages awarded was less than the amount he might have been awarded in respect of his estimated earnings for three years in the defendants' service:—Held, that s. 3 of the Employers' Liability Act, 1880, does not give a measure of damages, but only a limit within which the jury may award damages, and that the plaintiff was entitled to recover in respect of both employments. *Borlick* or *Bortick* v. *Head*, 53 L. T. 909; 34 W. R. 102; 50 J. P. 327.

### 3. Acts of Fellow-Servants.

**Immunity.**]—A master is not in general liable to his servant for damage resulting from the negligence of a fellow-servant, in the course of their common employment. *Wigmore* v. *Jay*, 5 Ex. 354; 19 L. J., Ex. 300; 14 Jur. 837. S. P., *Hutchinson* v. *York, Newcastle, and Berwick Ry. Co.*, 6 Railw. Cas. 580; 5 Ex. 343; 19 L. J., Ex. 296.

A servant has no right of action against his master for injury done to him in the course of his employ by the acts of his fellow-servants; and if killed, no action can be maintained by his representative. *Vose* v. *Lancashire and Yorkshire Ry.*, 2 H. & N. 728; 27 L. J., Ex. 249; 4 Jur. (N.S.) 364; 6 W. R. 295.

**Competency of Servant.**]—A master is not responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant whilst they are acting in one common service; but this rule does not hold where the person doing the injury is not a person of ordinary skill and care. *Wiggett* v. *Fox*, 11 Ex. 832; 25 L. J., Ex. 188; 2 Jur. (N.S.) 955; 4 W. R. 254.

Certain persons, having contracted with the Crystal Palace Company to build a tower there employed a sub-contractor to do the earthwork, who employed workmen under him. While one of these was at his work at the foot of the tower, a workman, employed by the contractors to work at the top of it, negligently let fall a heavy substance upon him, whereby he was killed:—Held, that in the absence of proof that the workman who caused the death was not a person of ordinary skill and care, no action could be maintained against the contractors by the personal representatives of the person killed. *Ib.*

A master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. *Tarrant* v. *Webb*, 18 C. B. 797; 25 L. J., C. P. 261; 4 W. R. 640.

He is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him. *Ib.*

If in the selection of the servant who caused the injury the master has not taken reasonable care to choose a person of ordinary skill and care, or if the servant injured was not at the time of the injury acting in the service of his master, the master is liable. *Wigmore* v. *Jay*, 5 Ex. 354; 19 L. J., Ex. 300; 14 Jur. 837.

Where workmen are engaged in a common work, and an injury happens to one of them through the negligence of another engaged in the same work, the master is not responsible unless the servant causing the injury was incompetent to discharge his duty. *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. H. L. 266; 4 Jur. (N.S.) 767; 6 W. R. 664.

—— **Onus of Proof.**]—The deceased was employed, with others, to shift a cargo on the defendants' vessel. Upon going on board the names of the men employed were taken down by one of the officers, who told them to go down between decks to have supper. In going below it was necessary to pass round an open hatchway, which was insufficiently lighted, and the passage round which was obstructed by some obstacles. The deceased, when returning from supper, fell through the open hatchway, and was killed:—Held, upon these facts, that, even assuming negligence, it was the negligence of a fellow-servant of the deceased, and that, as there was no evidence of the negligent employment by the defendants of the incompetent fellow-servant, the plaintiff suing for damages for the death of the deceased was rightly nonsuited. *M'Carthy* v. *Bristol Shipowners' Co.*, 10 L. R., Ir. 384. S. P., *Byrne* v. *Fennell*, 10 L. R., Ir. 397, n.

It is not true, as a general proposition of law, that a negligent act or default on the part of a servant is in itself evidence of the incompetence of such servant. Upon the plea traversing negligence by the defendant, the defence that the injury complained of was caused by the negligence of a fellow servant is open. *Ib.*

**Negligence of Fellow-Servant.**]—Where servants are engaged in one common object, an injury sustained by one servant, in consequence of the negligence of another servant, does not give a right of action against the master. *Waller* v. *S. E. Ry. Co.*, 2 H. & C. 102; 32 L. J., Ex. 205; 9 Jur. (N.S.) 501; 8 L. T. 325; 11 W. R. 731.

Where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants:—Held, that no action was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both. *Hutchinson* v. *York, Newcastle and Berwick Ry.*, 5 Ex. 343; 6 Railw. Cas. 580; 19 L. J., Ex. 296.

A company having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard. W. to find all labour, the company to provide and place at the disposal of W. the necessary engine power, ropes and hoppets, with an engineer to work the engine (who was employed and paid by the company), the engine and engineer to be under the control of W. One of the men employed and paid by W., while working at the bottom of the shaft, was injured by the negligence of the engineer:—Held, that though the engineer remained the general servant of the company, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of the company, which was therefore not liable for his negligence. *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; 46 L. J., C. P. 283: 36 L. T. 49; 25 W. R. 263—C. A.

A master is not responsible for an injury occasioned to a servant by tackle defective through the neglect of a fellow-servant, if there is no negligence or want of care on the part of the master, either as respects the providing of proper machinery or the competency of the servant. *Searle* v. *Lindsay*, 11 C. B. (N.S.) 429; 31 L. J., C. P. 106; 8 Jur. (N.S.) 746; 5 L. T. 427; 10 W. R. 89.

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his master's presence he had complained that the jiddy was not used for water:—Held, that the master was not liable, because assuming the injury to have arisen from neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the fellow-workmen in omitting to use it. *Griffiths* v. *Gidlow*, 3 H. & N. 648; 27 L. J., Ex. 404.

Plaintiff was employed by defendant to work at a steam saw. It was necessary that he should have an assistant in the performance of his work, and M., defendant's foreman, engaged a boy for this purpose, who proved to be incompetent, and who, although plaintiff complained to M. of his incompetency, was retained in his service. It was M.'s duty as foreman to engage or discharge the person employed for the purpose of assisting plaintiff. An accident happened to plaintiff while working at the saw through the incompetence of the boy, and he brought his action against defendant. Held, that in the absence of any evidence to shew that M. was incompetent for the position of foreman, the plaintiff could not recover; it being M.'s duty to engage and discharge the boy, his retaining him after knowing of his incompetence was merely an act of negligence by plaintiff's fellow-servant for which defendant was not responsible. *Smith* v. *Howard*, 22 L. T. 130.

A company had on its premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. A workman in the employ of the company passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to shew how this happened, nor any evidence that the manager and other persons employed by the company were incompetent:—Held, that the company was not liable, as the plaintiff had not shewn that the persons employed by the company were incompetent, and the negligence, if any, which caused the accident was that of a fellow-workman. *Allen* v. *New Gas Co.*, 45 L. J., Ex. 668; 1 Ex. D. 251; 34 L. T. 541.

—— **Where Servant placed in Authority.**]—To render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shewn that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment. *Murphy* v. *Smith*, 19 C. B. (N.S.) 361; 12 L. T. 605.

In the absence of evidence to shew that the general traffic manager of a railway company occupies, towards the company, a position superior to that of fellow-servant with a milesman employed by the same company, they are to be taken to be fellow-servants, and the company is not liable for injuries caused to the milesman by the negligence of the traffic manager. *Conway* v. *Belfast and Northern Counties Ry.*, Ir. R. 11, C. L. 345—Ex. Ch.

A servant cannot recover against his master for injuries sustained in his service from the negligence of the foreman or manager, whose lawful directions the servant was bound to obey. *Feltham* v. *England*, 7 B. & S. 676; 36 L. J., Q. B. 14; L. R. 2 Q. B. 33; 15 W. R. 151.

A person who is injured by the negligence of another's servant cannot be a fellow-servant with the servant whose negligence causes the injury, so as to exempt the master from liability, unless he is under the control and orders of the master. *Swainson* v. *N. E. Ry.*, 47 L. J., Ex. 372; 3 Ex. D. 341; 38 L. T. 201; 26 W. R. 413—C. A.

The plaintiff was engaged as a scaffolder for the defendants, who were builders, and they employed a general manager of works, through whose negligence in not furnishing proper materials the plaintiff fell and was injured:—Held, that the defendants were not liable for the injuries to the plaintiff. *Gallagher* v. *Piper*, 16 C. B. (N.S.) 669; 33 L. J., C. P. 329; 10 Jur. (N.S.) 879; 10 L. T. 718; 12 W. R. 988.

**Common Employment, what is—Generally.**]—When two persons are working for the same

master for a common general object, there is no liability upon the master to answer to either of them for damage resulting from the negligence of the other, although the actual piece of work on which they are engaged is not the same. *Charles* v. *Taylor*, 3 C. P. D. 492 ; 38 L. T. 773 ; 27 W. R. 32—C. A.

Where servants are engaged in a common employment, and with a common object, injury sustained by one servant in consequence of the negligence of a fellow-servant gives no right of action against the master, although the servants are not engaged in effecting the same common immediate object, but are occupied in different departments of duty. *Morgan* v. *Vale of Neath Ry.*, 5 B. & S. 736 ; 35 L. J., Q. B. 23 ; L. R. 1 Q. B. 149 ; 13 L. T. 564 ; 14 W. R. 144—Ex. Ch.

To constitute fellow-labourers within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury should both be engaged in precisely the same, or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engine-man and the switcher, the man who lets the miners down into and who afterwards brings them up from the mine, and the miners themselves ; all these are fellow-labourers or collaborateurs within the meaning of the doctrine in question. *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. H. L. 266 ; 4 Jur. (N.S.) 767 ; 6 W. R. 664.

In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment but were in the service of a common master. *Johnson* v. *Lindsay*, 61 L. J., Q. B. 90 ; [1891] A. C. 371 ; 65 L. T. 97 ; 40 W. R. 405 ; 55 J. P. 644—H. L. (E.)

The rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow-servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey. *Feltham* v. *England*, 7 B. & S. 676 ; 36 L. J., Q. B. 14 ; L. R. 2 Q. B. 33 ; 15 W. R. 151.

—— **In Particular Cases.**]—The plaintiff was employed to work in a mine of the defendants. The defendants employed an underlooker, whose duty it was to see that the roof of the mine was propped as required when the mineral was withdrawn. The underlooker omitted to see that the roof was propped, and thereby a stone fell and injured the plaintiff :—Held, that the underlooker was a fellow-servant of the plaintiff, and that as there was no evidence to shew that the defendants were negligent in selecting a proper underlooker, or in putting the mine in proper order, the defendants were not liable. *Hall* v. *Johnson*, 3 H. & C. 589 ; 34 L. J., Ex. 222 ; 11 Jur. (N.S.) 80 ; 11 L. T. 779 ; 13 W. R. 411—Ex. Ch.

Where a workman in the employ of one railway company was engaged in repairing their carriages upon a siding belonging to another company, but in the joint occupation of both companies, and he was placed between carriages, so that he could not see what might be coming, and was necessarily making a noise at his work so that he could not hear, and an engine belonging to the other company came up into the siding, and drove the carriages together, so that he was crushed between them and killed, and the jury found that the company to whom the engine belonged was guilty of negligence, by reason that their rails were defective, and that neither the deceased was nor his fellow-servants were so :—Held, that his representatives could maintain an action against that company for compensation. *Vose* v. *Lancashire and Yorkshire Ry.*, 2 H. & N. 728 ; 27 L. J., Ex. 249 ; 4 Jur. (N.S.) 364 ; 6 W. R. 295.

The defendants were brewers, having upon the Thames a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants at the rate of 1*s.* 9*d.* for every ton of coals discharged ; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them ; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved :—Held, that the defendants were not liable to compensate the plaintiff for the injury sustained by him ; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant by whose negligence the injury happened, and there was no concealed danger. *Charles* v. *Taylor*, 3 C. P. D. 492 ; 38 L. T. 773 ; 27 W. R. 32.

The guard of a train and the platelayers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object, the safe conduct and transit of the train, and therefore no action can be maintained against the company by the representative of a guard of a train killed by the train running off the line, in consequence of the neglect of the ganger of the platelayers to renew the decayed metals which fasten the chairs to the sleepers of the railway. *Waller* v. *S. E. Ry.*, 2 H. & C. 102 ; 32 L. J., Ex. 205 ; 9 Jur. (N.S.) 501 ; 8 L. T. 325 ; 11 W. R. 731.

A labourer was employed to do ballasting for a railway company, and a fellow-servant was employed to lay tram-plates for the company, and whilst they were so employed, the labourer, through the negligence of the fellow-servant, was injured :—Held, that they were engaged in a common employment, and that the company was not liable for the damage. *Lovegrove* v. *L. B. & S. C. Ry.*, 16 C. B. (N.S.) 669 ; 33 L. J., C. P. 329 ; 10 Jur. (N.S.) 879 ; 10 L. T. 718 ; 12 W. R. 988.

Whenever the employment of a railway servant is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily

and naturally incident to such an employment; and in case the servant suffers injury from the carelessness of the servants managing the traffic, the company is not liable. *Morgan* v. *Vale of Neath Ry.*, 5 B. & S. 736; 35 L. J., Q B. 23; L. R. 1 Q. B. 149; 13 L. T. 564; 14 W. R. 144—Ex. Ch.

A person was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means he was thrown down and injured:—Held, on the above principle, that the company was not liable. *Ib.*

A railway station, which was used both by the Great Western Company and the London and North Western Company, was under the charge of a servant of the London and North Western Company. A train belonging to the Great Western Company, and driven by one of their drivers, having been improperly and negligently shunted into a siding, injured a servant of the London and North Western Company, who was there engaged in cleaning carriages:—Held, that the injury was caused by the negligence of the driver in the discharge of his ordinary duty to the Great Western Company alone, and not in the course of any common employment with the plaintiff; and that, therefore, he could maintain an action for damages against the Great Western Company. *Warburton* v. *G. W. Ry.*, 4 H. & C. 695; 36 L. J., Ex. 9; L. R. 2 Ex. 30; 15 L. T. 361; 15 W. R. 108.

B. was employed by a railway company as a labourer, to assist in loading what is called a pick-up train with materials left by platelayers and others upon the lines. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which B. was, through the negligence of the guard who had charge of it, came into collision with another train, and he was injured:—Held, that inasmuch as he was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment. *Tunney* v. *Midland Ry.*, L. R. 1 C. P. 291; 12 Jur. (N.S.) 691.

A railway company employed a contractor to unload their coal trucks at shoots on sidings constructed for the purpose. The contractor employed his own labourers, among whom was the plaintiff, whom he engaged and paid, and over whom he had entire control. The plaintiff, while engaged in the work, was injured by the negligent shunting of an engine managed by the servants of the company which was bringing coal trucks on to the sidings to the shoots:—Held, that there was no such common employment between the plaintiff and the shunter as would disentitle the former from bringing an action against the company for the negligence of their servants. *Turner* v. *G. E. Ry.*, 33 L. T. 431.

In an action for negligence by the servants of the defendant in hauling timber so that it struck the plaintiff, who was passing at the time, the evidence being that the hauler was not in the defendant's general service, but was engaged for that particular piece of work, and brought his own horses for it; and that although it was being performed with the assistance of the defendant's workmen, and under the general superintendence of his foreman, the only mode in which the latter had interfered was by telling the men to make the horses go on dragging the timber, which, on their moving, casually swerved and so struck the plaintiff; Willes, J., directed a nonsuit, which the court only set aside because the point was not taken that both parties might be liable if there was evidence of negligence; but the court, doubting if there was any such evidence, and on a second trial the jury, under the direction of Channell, B., found for the defendant. *Dalton* v. *Bachelor*, 1 F. & F. 15.

Builders contracted to build a block of houses under a specification prepared by the owners' architect, certain fire-proof portions of the houses to be executed by the respondents, who were ironfounders. The respondents contracted with the architect to do their portion of the work, and had no contract with the builders and were not under their direction or control. While the respondents were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building negligently let a bucket fall on the appellant, who was working in the lower storey in the employment of the builders. In respect of the injury thus caused the appellant brought an action against the respondents:—Held, that since the relation of master and servant did not exist between the respondents and the appellant the doctrine of collaborateurs did not apply and the action was maintainable. *Wiggett* v. *Fox* (11 Ex. 832) commented on. Lord Cairns' observations in *Wilson* v. *Merry* (L. R. 1 H. L. (Sc.) 331, 332) (ante, col. 860) explained. *Johnson* v. *Lindsay*, 16 L. J., Q. B. 90; [1891] A. C. 371; 65 L. T. 97; 40 W. R. 405; 55 J. P. 644—H. L. (E.)

The master of a ship is engaged in common employment with the seamen on board, and, therefore (the case not being within the Employers' Liability Act), the owner of the vessel is not liable for injury caused to a seaman through the master's negligence. *Wilson* v. *Merry* (L. R. 1 H. L. (Sc.) 326) followed. *Johnson* v. *Lindsay* ([1891] A. C. 371) approved. *Hedley* v. *Pinkney & Sons' Steamship Co.*, 63 L. J., Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 483—H. L. (E.)

Where a shipping company employ a contractor to unload their ship, and appoint certain of the crew to assist in the unlading, it is a question of fact whether members of the crew were under the orders and control of the contractor's foreman or not, and whether, therefore, the company are liable to one of the contractor's workmen, who receives injuries through the negligence of such members of the crew. *Union Steamship Co.* v. *Claridge*, 63 L. J., P. C. 56; [1894] A. C. 185; 6 R. 434; 70 L. T. 177; 7 Asp. M. C. 412; 58 J. P. 366—P. C.

Where two vessels come into collision with each other, belonging to the same owners and the same line, and frequent the same port and river in which the collision occurred, the master and crew of one vessel are not in a common

employment with the master and crew of the other vessel. *The Petrel*, 62 L. J., P. 92 ; [1893] P. 230 ; 1 R. 651 ; 70 L. T. 417 ; 7 Asp. M. C. 434.

A firm of stevedores was employed by the master of a ship to discharge her cargo at a certain rate per ton. The ship was to supply the discharging gear, but the stevedores brought their own men to effect the discharge. The discharging gear had been fixed in an improper and negligent manner by the stevedores' foreman, and its being so fixed was the cause of injury to the plaintiff, a seaman employed on board the vessel. The placing of the plaintiff where he was working at the time of the accident was, in the circumstances, an act of negligence :—Held, that the stevedores were liable for the injury to the plaintiff caused through the negligence of their servants. *Johnson* v. *Lindsay* (supra) approved and followed. *Cameron* v. *Nystrom*, 62 L. J., P. C. 85 ; [1893] A. C. 308 ; 1 R. 362 ; 68 L. T. 772 ; 7 Asp. M. C. 320 ; 57 J. P. 550—P. C.

A stevedore contracted to load a ship and hired an engine from P., who sent his servant N. to work it. M., a servant of the stevedore, gave the signals to N., and by N.'s negligence a sack fell and killed M. The wages of M. were paid by P. :—Held, that N. was the servant of P., and that P. was liable to M.'s representatives for compensation. *Moore* v. *Palmer*, 51 J. P. 196—C. A.

The plaintiff, employed as foreman of a stevedore to unload a ship with the assistance of the crew, was injured by the negligence of one of the crew in the quasi-employment of the stevedore : —Held, that the shipowners were not liable. *Manning* v. *Adams*, 32 W. R. 430.

—— **Ordinary Risks.**]—The principle which exempts a master from liability to his servant for injury caused by the negligent act of a fellow-servant or fellow-workman, is, that the servant must be assumed to have contemplated and tacitly assented to encounter the ordinary risks incident to the service or employment, at the time of entering into the contract. *Lovell* v. *Howell*, 45 L. J., C. P. 387 ; 1 C. P. D. 161 ; 34 L. T. 183 ; 24 W. R. 672.

The plaintiff (who was a licensed waterman and lighterman) was in the employ at weekly wages of the defendant, a corn merchant and warehouse keeper ; his ordinary duty being to attend at the waterside of the premises every tide for about an hour and a half before and after high water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse ; but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz. by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for to the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a waggon :—Held, that this was an injury caused by the negligence of a fellow-workman, within the above-mentioned exception, and consequently that the master was not liable. *Ib.*

—— **Persons assisting with Consent of Master.**]—A railway company contracted to carry a heifer by train to Penrith station on their line. The plaintiff travelled by the same train, and on arriving at Penrith he, with the assent of the station-master, assisted to shunt the horse-box, in which the heifer was, in order to hasten delivery, and while so doing was injured by the servants of the company :—Held, that the company was liable. *Wright* v. *L. & N. W. Ry.*, 45 L. J., Q. B. 570 ; 1 Q. B. D. 252 ; 33 L. T. 830—C. A.

—— **Two Railway Companies using same Rails.**]—At Leeds there are two railway stations adjoining one another, one belonging to the Great Northern Railway Company and the other to the North Eastern Railway Company. Part of the lines running into the two stations is used in common by the two companies for the interchange of traffic between the two lines. This part is under the management of a joint station staff in the employment of the Great Northern Railway Company. Half of the wages of the joint station staff is paid by the North Eastern to the Great Northern Railway Company. While S., a signalman on that staff, was employed in his ordinary duties, he was struck and killed by a passing engine of the North Eastern Railway Company, which at the time he was not engaged in signalling, through the negligence of the driver. In an action against the North Eastern Railway Company by his widow, under Lord Campbell's Act :—Held, that the deceased was not, at the time of his death, engaged in a common employment or service with the engine-driver so as to take away the liability of that company for the negligence of their servant ; and that the widow was entitled to recover. *Swainson* v. *N. E. Ry.*, 47 L. J., Ex. 372 ; 3 Ex. D. 341 ; 38 L. T. 201 ; 26 W. R. 413—C. A.

—— **Under Mines Regulation Act.**] — The owners of a colliery within the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), appointed a certificated manager as required by s. 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager : —Held, that the fact that the manager was appointed pursuant to the act did not put him in any different position from that which he would have held had he been simply appointed manager ; and that he was a fellow-servant with the deceased ; and that the owners were, therefore, not liable to his representatives for his death. *Howells* v. *Landore Steel Co.*, 44 L. J., Q. B. 25 ; L. R. 10 Q. B. 62 ; 32 L. T. 19 ; 23 W. R. 335.

### 4. Master's Negligence.

**Personal Interference.**]—A master is responsible to his servant for an injury received in the course of his service, if it is shewn to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master, by shewing either his personal

interference to be the cause of the accident, or that he negligently retained incompetent servants whose incompetency was the cause of the accident; but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence. *Ormond* v. *Holland*, El. Bl. & El. 102.

The principle that a servant sustaining an injury from the negligence of a fellow-servant while engaged in the common employment cannot recover in an action against the common master does not exempt from liability a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence. *Ashworth* v. *Stanwix*, 3 El. & El. 701; 30 L. J., Q. B. 183; 7 Jur. (N.S.) 467; 4 L. T. 85.

**Employment of Agent or Foreman.**]—A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person. *Brown* v. *Accrington Cotton Spinning and Manufacturing Co.*, 3 H. & C. 511; 34 L. J., Ex. 208; 13 L. T. 94.

A master builder, having contracted to build a certain building, employed A. as a bricklayer. The scaffolding was erected under the superintendence of the master's foreman, he not being present, and was constructed by men in his employ, who used an unsound ledger pole, in consequence of which the scaffold broke while A. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—Held, that no action could be maintained against the master builder, there being no evidence that the foreman was an improper person to employ for that purpose. *Wigmore* v. *Jay*, 5 Ex. 354; 19 L. J., Ex. 296; 14 Jur. 837. And see *Ormond* v. *Holland*, supra.

**Master's Knowledge of Risk.**]—A master cannot be rendered liable on the ground of negligence by shewing that the work was essential to the safety of a ship on which the servant was employed by the master, and that he permitted the ship to leave port without its being done, and without having on board a skilled machinist to do it, and that it was outside the scope of the servant's employment, and that he was unfit to do it, unless it is also shewn that the work was dangerous, and that the master knew or ought to know that it was so. *Smyly* v. *Glasgow and Londonderry Steam Packet Co.*, 16 W. R. 483.

In an action by a widow of a labouring man, who had been employed, with others, by the defendant, to shore up an arch, which had sunk, and was killed by its falling upon him:—Held, that the question was not as to the original construction of the arch, but as to the knowledge of the danger at the time of the accident, and whether the defendant had any better means of knowing of it than the deceased; and if not, then the jury should find for the defendant. *Ogden* v. *Rummens*, 3 F. & F. 751.

Where a master builder personally interferes, and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way, and a workman upon it, in his employ, who has notice of the unsoundness, is injured thereby. *Roberts* v. *Smith*, 2 H. & N. 213; 26 L. J., Ex. 319; 3 Jur. (N.S.) 469; 5 W. R. 581—Ex. Ch.

A master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the builder were in bad condition. The workmen broke several of the putlogs (the pieces of wood between the wall and the upright poles), but was ordered by the builder not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs:—Held, in an action by B. against the builder, to recover compensation for the injuries received, that there was evidence to go to the jury in support of B.'s case, and that such evidence ought to have been left to the jury. *Ib.*

A declaration stated that the defendant was possessed of a granary, and a ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary; that the plaintiff, believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder into the granary, and by reason of the ladder being unsafe he fell from it:—Held, that the declaration, without an averment that the plaintiff had no notice that the ladder was unsafe, was sufficient. *Williams* v. *Clough*, 3 H. & N. 258; 27 L. J., Ex. 325.

The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced:—Held, that the defendant was liable for the injury. *Clarke* v. *Holmes*, 7 H. & N. 937; 31 L. J., Ex. 356; 8 Jur. (N.S.) 992; 10 W. R. 405—Ex. Ch.

Where a master of a coal-mine authorised his workmen to use the shaft while it was in an unsafe condition to his knowledge, and an injury resulted therefrom to one of the workmen who was using the shaft without knowledge of the danger:—Held, that the master was liable for personal negligence. *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L. J., Q. B. 333; 7 Jur. (N.S.) 845; 9 W. R. 748.

Held, also, that where one of two partners in a coal-mine acts as manager, and is guilty of personal negligence, his co-partner is jointly liable for the injury resulting from such negligence. *Ib.*

Where an employer, the owner of premises, allows them to remain and be used for the purpose for which they were erected and designed in a state unsafe and insufficient for that purpose,

and an accident occurs in the use of them, not through the particular manner of user, but by reason of such unsafe and insufficient state, he is liable for any injury thus caused to his servants using them. Thus where an engineer had a crane worked on a tramway, supported on piers of brickwork, which were of insufficient strength, and which gave way, and thus caused an accident to one of the men engaged in working the crane :—Held, that there was evidence of negligence, for which the employer was liable. *Feltham* v. *England*, 4 F. & F. 460.

In an action by a labourer against his employers for an injury caused by the fall of a scaffold-pole proved to have fallen through the rottenness of the end put into the earth, it appeared that it had been in the earth two years, and that though some poles might last as long without being rotten, others would not, and that no one was employed from time to time to take up the poles to see if they were sound : —Held, that if the jury thought the pole was left in the ground an unreasonable time without examination, there was evidence of negligence to sustain the action. *Webb* v. *Rennie*, 4 F. & F. 608.

Where a cab proprietor sent out a restive horse, he was held liable for injuries resulting to driver. *Fowler* v. *Lock*, 30 L. T. 810—Ex. Ch.

A master is not liable to an action, at the suit of his servant, for an injury sustained by the latter caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware. *Priestly* v. *Fowler*, 3 M. & W. 1 ; M. & H. 305 ; 7 L. J., Ex. 42 ; 1 Jur. 987.

A declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher ; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey ; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van with the goods : and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby ; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried, in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured :—Held, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van ; but, secondly, that, even in that case, the action was not maintainable. *Ib.*

—— **Sufficiency of Allegations.**]—A count alleged that one of the defendants was a contractor for the supply of beef to the navy, and the other his foreman, having the control and management of the supply of cattle, and of the slaughter of the same ; that it was the duty of the defendants to take care that sound and healthy beasts should be supplied and slaughtered, and that none others should be supplied for the purpose ; yet that they supplied and slaughtered diseased cattle, whereby the plaintiff, who was employed to cut up the carcases of the cattle, became infected with the disease of the cattle. A second count alleged, that the defendants, by representing slaughtered carcases of cattle to be sound, caused and procured the plaintiff to cut up the same ; that the beasts were unsound and diseased, whereby he contracted the disease and was permanently injured :—Held, that the counts were bad. *Davies* v. *England*, 33 L. J., Q. B. 321 ; 10 Jur. (N.S.) 1235.

A third count stating that the defendants, well knowing that certain carcases of slaughtered cattle were diseased and dangerous to persons cutting up the same, invited and employed the plaintiff, who was ignorant of the diseased state of the carcases, to cut up the same ; that he, not knowing the premises, did, on the invitation and request, and on the employment of the defendants, cut up the carcases, whereby he became infected and was injured, is a good count. *Ib.*

### 5. Servant's own Negligence or Knowledge of Danger.

**Knowledge of Danger—Contributory Negligence.**]—When a servant is injured or killed, while in the employ of his master, by an accident resulting from the habitual negligence of his fellow-servants, known to and acquiesced in by the master, the master is not liable to an action by the servant, or, if killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. Unless there is such contributory negligence by the servant, the master is liable. *Senior* v. *Ward*, 1 El. & El. 385 ; 28 L. J., Q. B. 139 ; 5 Jur. (N.S.) 172 ; 7 W. R. 261.

A., who was in the employ of a railway company, his duty being to attach carriages of the luggage trains to the locomotive engine, was thrown under the carriages, and severely injured. There was evidence that the company's staff for the performance of this work was not sufficient ; but A. had been employed in this particular service for several months prior to the accident, and had not made any complaint on the subject to the company :—Held, that the company was not liable. *Skipp* v. *Eastern Counties Ry.*, 9 Ex. 223 ; 2 C. L. R. 185 ; 23 L. J., Ex. 23.

In such circumstances, it is not a question for the jury whether the number of servants employed by the company is sufficient for the performance of the work. *Ib.*

Where an injury happens to a servant while in the actual use of an instrument, an engine, or a machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is therefore the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor, in case of his dying from the injury, can his representative, recover against his master, there being no evidence that the injury arose through the personal negligence of his master ; nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or a machine less safe than some other which is in general use. *Dynen* v. *Leach*, 26 L. J., Ex. 221 ; 5 W. R. 490.

Therefore, where a labourer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on it a clip, and the clip had slipped

off it:—Held, that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the orders of the master. *Ib.*

A railway company employed a contractor to do work upon a side wall of a dark tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its approach. Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a look-out man or altering the usual mode of conduct in the traffic:—Held, that the plaintiff, having continued the work with full knowledge of its dangerous nature, had no remedy against the company. *Woodley* v. *Metropolitan Ry.*, 46 L. J., Ex. 521; 2 Ex. D. 384; 36 L. T. 419—C. A.

A workman, whose duty it was to attend to and work at a machine that was defective and of which defect he had knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman. In consequence of the defect the workman was obliged to stand upon the "bed" or plate of the machine to adjust a part of it, and whilst doing so received injuries:—Held, that the plaintiff's knowledge of the defect did not amount to that thorough comprehension of the risk incurred which alone would justify the case being withdrawn from the jury. *Brooke* v. *Ramsden*, 63 L. T. 287; 55 J. P. 262.

—— **Risk not voluntarily incurred.**]—The plaintiff was a workman, who was directed by his employer to work in a particular place. The defendants were contractors engaged in work above the place where the plaintiff was working. The defendants' work was of such a nature as to be dangerous to persons working below unless proper precautions were taken for their safety. The plaintiff was aware of the danger. The plaintiff, while working where he was directed by his employer, was injured by a piece of iron dropped by the defendants' workmen, and brought an action to recover damages for the injury. The jury found that the defendants had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk:—Held, that the case was rightly left to the jury; that although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim volenti non fit injuria did not apply, and he was entitled to recover. *Woodley* v. *Metropolitan District Ry.* (2 Ex. D. 384) distinguished. *Thrussell* v. *Handyside*, 57 L. J., Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279.

*See also* cases supra, cols. 873, 874.

**Complaint by Servant—Continuing Work.**]—A declaration against a master alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding, and knocked down the machine against the plaintiff. The hoarding, which had been erected by the defendant, a builder, projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding, and close to it. A cart in passing struck against the hoarding, and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work, though the machine was not moved:—Held, that there was no evidence to go to the jury of the master's liability. *Alsop* v. *Yates*, 2 H. & N. 768; 27 L. J., Ex. 156

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his master's presence he had complained that the jiddy was not used for water. The master was at the workings several times each day:—Held, that the master was not liable, first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shewn that the injury was not caused by his own rashness. *Griffiths* v. *Gidlow*, 3 H. & N. 648; 27 L. J., Ex. 404.

—— **Expectation of Repair.**]—When a servant, knowing of a defect in machinery which he has to work in his master's employ, complains of it to him, but continues in the use of it in the reasonable expectation of its being repaired, and an accident happens through its defective condition, he is not precluded from recovering against his master. *Holmes* v. *Worthington*, 2 F. & F. 533.

Where work is being carried on part of which is unsafe without certain precautions which the employer promises to provide, and he goes away leaving general directions to get on with the work, and in his absence the dangerous work is carried on before the precautions have been taken, and an injury results to a workman engaged on another part of the work while knowing of the danger, the latter cannot recover against the employer. *Smith* v. *Dowell*, 3 F. & F. 238. S. P., *Holmes* v. *Clarke*, post, col. 900.

**Dangers Incidental to Employment.**]—S. was a sheet-roller in the service of the defendants at their steel works, and had been so for three

years. Five steam engines properly constructed were used in the factory. Some stood at a distance from the other, but two men only were employed to attend to them all, as S. always well knew. During the necessary absence of both the engine tenters, without negligence on their part, an engine ran away, or revolved too fast, and caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where S. worked, and hurt him. The runaway engine might have been stopped in time to prevent mischief if an attendant had been near it:—Held, that S., being aware of the dangers incidental to his employment, contracted to take the risks, and therefore could not recover compensation for the injuries against the defendants. *Saxton* v. *Hawksworth*, 26 L. T. 851—Ex. Ch.

If a party, whether a servant or not, undertakes an employment which involves danger of accident, and an accident occur, he cannot sue his employer for damages, although such accident might have been avoided by additional care on the part of the master. *Brooks* v. *Courtney*, 20 L. T. 440.

**Knowledge of Fellow-workman's Incompetence.**]—In an action by a workman against his employer for negligence in the construction of scaffolding, the insecurity of which it was alleged was known to the defendant, but not to the plaintiff, the defendant simply traversed negligence; it appeared that the scaffolding was made by a fellow-workman, also in the employment of the defendant. The jury having found that the scaffolding was not constructed of unsound materials supplied by the defendant, and that he did not know that the materials were unsound; that the scaffolding was insecurely constructed, but that the defendant did not know it, and that the plaintiff did know it; that the fellow-workman was incompetent to make the scaffolding, but that the defendant was not aware of his incompetency; the judge, upon these findings, directed a verdict for the defendant:—Held, first, that the verdict so directed could not be upheld, inasmuch as the question whether the plaintiff knew that the scaffolding was insecure was not put in issue by the mere traverse of negligence; and, secondly, that the verdict should be set aside for misdirection and a new trial awarded, upon the ground that the question whether the defendant had used due care in the selection of the fellow-workman had not been submitted to the jury. *Sherritt* v. *Scallan*, Ir. R. 11 C. L. 389.

When it is shewn that a servant is incompetent, and that through his incompetency injury results to his fellow-servant, the mere fact of his incompetency throws the onus on the master of shewing that he exercised due and reasonable care in selecting him. Absence of knowledge of the fellow-servant's incompetency is not, per se, an answer to the action, the master's true obligation being to use due care in selecting the servant. *Ib.*

To an action by a servant against his employer for negligence in choosing a fellow-servant owing to whose incompetency he suffered an injury, it is not a sufficient answer that he previously to the injury, for a reasonable time in that behalf, was aware of the fellow-servant's incompetence. *Hoey* v. *Dublin and Belfast Junction Ry.*, Ir. R. 5 C. L. 206; 18 W. R. 930.

Negligence on the part of the plaintiff would disentitle him to recover; but knowledge of the incompetence of the fellow-servant is only evidence of negligence on the plaintiff's part to be submitted to the jury. *Ib.*

**Injury by Dog.**]—C. owned a mischievous dog, which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. C. supposed the dog to be quite harmless. B. having been bitten by the dog, and having brought an action for the injuries, the judge directed the jury that there was evidence of the scienter, since the knowledge of such a servant was enough to make the master liable:—Held, that the direction was right. *Baldwin* v. *Casella*, 41 L. J., Ex. 167; L. R. 7 Ex. 325; 26 L. T. 707; 21 W. R. 16.

The plaintiff was employed by the defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. The plaintiff was aware that a dog of this kind was kept on the premises. The judge at the trial nonsuited the plaintiff, on the ground that, as she was a servant and knew the disposition of the dog, no action was maintainable:—Held, that the nonsuit was wrong, inasmuch as the risk was not incidental to the service, and that there was evidence to go to the jury of the liability of the defendant for the injury sustained by the plaintiff. *Mansfield* v. *Baddeley*, 34 L. T. 696.

**Pleading—Allegation of Ignorance.**]—In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger. *Griffiths* v. *London and St. Katharine Dock Co.*, 53 L. J., Q. B. 504; 13 Q. B. D. 259; 51 L. T. 533; 33 W. R. 35; 49 J. P. 100—C. A.

## D. UNDER THE FACTORY ACTS.

### 1. Definition of Factory and Manufacturing Process.

**Particular Department of Large Works.**]—A company carried on works which formed one trade establishment, comprising the business of blast furnaces, iron rolling mills, engine-building, and iron ship building in all its branches. The whole of the several branches communicated and were open from one end to the other, and were confined within one common boundary. Steam machinery was used for the purposes of the company, and in each department more than fifty persons were employed. A child under eleven was employed as a rivet boy, and in the department where he worked steam machinery was in use for cutting and shaping iron plates, and rivets were heated. Both plates and rivets were used in the building of iron ships:—Held, that the department in which the child was employed was a factory within the 30 & 31 Vict. c. 103, sub-s. 5 (*b*) (repealed). *Palmer's Shipbuilding and Iron Co.* v. *Chaytor*, 10 B. & S. 177; 38 L. J., M. C. 63; L. R. 4 Q. B. 209; 19 L. T. 638; 17 W. R. 401.

**Where no Large Building used.**]—Premises, consisting of ten acres, in which the manufacture of cement from chalk and mud is carried on chiefly in the open air, and in which 200 people are employed in grinding and washing in mills, but in which there is no great building in which men and women are employed under cover, are not a factory within 30 & 31 Vict. c. 103 (repealed), s. 3, sub-s. 7. *Redgrave* v. *Lee*, 43 L. J., M. C. 105 ; L. R. 9 Q. B. 363 ; 30 L. T. 519 ; 22 W. R. 857.

—— **Slate Quarry—Manufacturing Process.**]—In a slate quarry, which was a large open space extending over about 400 acres, hundreds of men and boys were employed in getting large blocks of slate which were drawn to other parts of the quarry, and split with hammers and chisels into laminæ or slates ; these were edged square or dressed with an iron knife by hand into separate articles, and divided into quantities for sale. Tombstones, chimney-pieces, &c., were made out of the blocks, and ornamented according to order. A boy fourteen years old was employed with other boys in a shed on an open bank in shaping the slates. Covered sheds where the splitters worked were erected in different parts of the quarry :—Held, that the process of shaping the slate was a "manufacturing process" within 30 & 31 Vict. c. 103 (repealed), s. 3 ; and that the quarry was not a factory within s. 3, sub-s. 7 ; and that in respect of the making of the roofing slates it was not a "trade establishment." *Kent* v. *Astley*, 10 B. & S. 802 ; 39 L. J., M. C. 3 ; L. R. 5 Q. B. 19 ; 21 L. T. 425 ; 18 W. R. 185.

**Finishing of Cotton Fabrics.**]—One whose sole business consists in the finishing of cotton fabrics, but who neither bleaches nor dyes, is not within 23 & 24 Vict. c. 78. *Howarth* v. *Coles*, 12 C. B. (N.S.) 139 ; 31 L. J., M. C. 262 ; 9 Jur. (N.S.) 251 ; 6 L. T. 785.

**Weaving of Cotton Thread.**]—The weaving or plaiting by steam or other mechanical power of cotton thread into a covering for strips of steel to be used for making crinoline skirts is a manufacture or a process incidental to the manufacture of a cotton fabric within 7 & 8 Vict. c. 15, s. 73. *Whymper* v. *Harney*, 18 C. B. (N.S.) 243 ; 34 L. J., M. C. 113 ; 11 Jur. (N.S.) 269 ; 11 L. T. 711 ; 13 W. R. 440.

**Business in Different Places.**]—Parties carried on the business of calico printers at two places distant from each other seven miles. The business of a calico printer consists of four processes, viz. bleaching, printing (by impressing the pattern on the bleached cloth by means of mordants), dyeing, and finishing. Three of these processes, viz. the bleaching, dyeing, and finishing, were performed at one branch of the establishment, and the fourth, viz. the printing, at the other :—Held, that a child employed on the premises where the bleaching, dyeing, and finishing were performed, was employed in an incidental printing process within 8 & 9 Vict. c. 29, s. 2, and that the place where he was so employed formed part of the establishment where the chief process of printing was carried on within that act ; and, consequently, that the parties were not liable to be convicted of an offence against the 23 & 24 Vict. c. 78 in employing him without a schoolmaster's certificate. *Hoyle* v. *Oram*, 12 C. B. (N.S.) 124 ; 31 L. J., M. C. 213 ; 8 Jur. (N.S.) 1154.

A factory used for the manufacture of waste cotton into half-stuff, which is afterwards conveyed to another factory to be converted into paper, is a factory used solely for the manufacture of paper within 7 & 8 Vict. c. 15, s. 73, and the distance between the two factories is immaterial. *Coles* v. *Dickinson*, 16 C. B. (N.S.) 604 ; 33 L. J., M. C. 235 ; 10 Jur. (N.S.) 802 ; 10 L. T. 616 ; 12 W. R. 918.

A. was a manufacturer of cotton sewing thread, and owner of a factory at M., and of premises in L. At the factory at M., he doubled cotton yarns into sewing thread, in hanks ready for the wholesale market ; for the retail dealers and small consumers, it was sent to the premises in L. in hanks, and there wound by machinery moved by steam power on to bobbins :—Held, that the winding at the premises in L. was within 3 & 4 Will. 4, c. 103, s. 1, and 7 & 8 Vict. c. 15, s. 73, so as to render A. liable for not keeping a register of young persons employed in his factory in L., according to the form prescribed in schedule (B.) by 7 & 8 Vict. c. 15, s. 27. *Haydon* v. *Taylor*, 4 B. & S. 519 ; 33 L. J., M. C. 30 ; 9 L. T. 382 ; 12 W. R. 103.

### 2. Offences under the Acts.

**Employment of Child—Room near to, but without Machinery.**]—A child under thirteen was employed in a room in a building within the precincts of which there was a quantity of machinery moved by steam, and devoted to the manufacture of an article composed of wool and cotton mixed, but the child was not employed in any respect upon, or in attendance to, the machinery, nor was there any machinery in the room in which he was employed in pricking pieces of leather with an awl, to fit them for adaptation to form parts of the thing manufactured in the building :—Held, not to be a case within the exception in the 3 & 4 Will. 4, c. 103, and 7 & 8 Vict. c. 15, s. 73. *Taylor* v. *Hickes*, 12 C. B. (N.S.) 152 : 31 L. J., M. C. 242 ; 9 Jur. (N.S.) 21 ; 6 L. T. 784.

—— **Cleaning Fixed Part of Machinery in Motion.**]—By s. 9 of the Factory and Workshop Act, 1878, "a child shall not be allowed to clean any part of machinery in a factory while the same is in motion . . . ." :—Held, that the word "same" referred to machinery as a whole, whether fixed or in motion, and not merely to the part in motion ; so that to employ a child under fourteen to clean the fixed part of machinery was to infringe the act. *Pearson* v. *Belgian Mills Co.*, 65 L. J., M. C. 48 ; [1896] 1 Q. B. 244 ; 74 L. T. 101 ; 44 W. R. 334 ; 18 Cox, C. C. 241 ; 60 J. P. 151.

—— **In Print Work.**]—A child employed in finishing goods in a shed in which finishing alone is carried on, but which communicates internally with other buildings in which printing is carried on, is employed in a print works within 8 & 9 Vict. c. 29, s. 2, whether the particular finishing is incidental to the process of printing or not ; and a surgeon's certificate of its health is therefore necessary under s. 20. *Hardcastle* v. *Jones*, 3 B. & S. 153 ; 32 L. J., M. C. 49 ; 9 Jur. (N.S.) 19 ; 7 L. T. 322 ; 11 W. R. 36.

—— **For more than Ten Hours.**]—It is no offence against 7 & 8 Vict. c. 15, to employ a

young person or female for ten hours in any one day, such ten hours ending at a period which is more than ten hours (in addition to the hour and a half allowed for meal-times) from the period another child or young person or female began to work. *Ryder* v. *Mills*, 3 Ex. 853; 19 L. J., M. C. 82.

—— **Substitution of other Days for Saturday Half-holiday.**]—A half-holiday of equal length may, under 30 & 31 Vict. c. 146 (repealed), sched. 1, s. 9, by permission of the secretary of state, be substituted on some other day of the week for the half-holiday required by the act to be given on Saturday to children, young persons and women employed in workshops coming within the act. Permission having been given to substitute Wednesday for Saturday afternoon in a particular workshop, an information was preferred against the proprietor for employing a young person after two p.m. on Wednesday:—Held, that it could not be sustained. *Cameron* v. *Foy*, 30 L. T. 517.

—— **Under Age.**]—A child under eight years was sent to a workshop to be taught to make straw plait and to read: the child was kept in a room making straw plait under the owner or occupier of the workshop's superintendence. The straw was provided by the child's mother, and the plait was taken home to her, and she sold it. She paid the occupier 3*d.* a week, but he had no interest in the proceeds of the sale of the work:—Held, that he had committed the offence of employing a child under eight years of age, within 30 & 31 Vict. c. 146, ss. 6, 7 (repealed), as read by the aid of the interpretation clause. *Beadon* v. *Parrott*, 40 L. J., M. C. 200; L. R. 6 Q. B. 718; 19 W. R. 1144.

A person was the occupier of and rated for a brickyard, and had sole control over the sale of the bricks. He received a sum per annum for the use of the yard from a contractor, who gave his exclusive services in making bricks at a certain price per thousand; he also found the coal, but exercised no control over the management of the brickyard or of the manufacturing process, nor was he party or privy to any contract with any other person employed in the yard:—Held, that he was not liable, as an occupier of a workshop who has employed a child, for neglecting the provisions of s. 16 of the Workshops Regulation Act, 1867, 30 & 31 Vict. c. 146 (repealed), with respect to a child employed by the contractor. *Fitton* v. *Wood*, 32 L. T. 554.

**Report of Accidents.**]—By 7 & 8 Vict. c. 15, s. 22, if any accident shall occur in a factory which shall cause bodily injury to any person employed therein of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory shall, within twenty-four hours of such absence, send notice to the certifying surgeon of the district:—Held, first, that a returning to the factory before nine a.m. on the following morning without the capacity to work, and soon afterwards leaving, was not "returning to work" within the section. *Lakeman* v. *Stephenson*, 9 B. & S. 54; 37 L. J., M. C. 57; L. R. 3 Q. B. 192; 18 L. T. 539; 16 W. R. 509.

Held, secondly, that every accident causing bodily injury, whether connected with the machinery or not, is within the section. *Ib.*

**Dangerous Machinery — Fencing.**]— Sect. 5, sub-s. 3, of the Factory and Workshop Act, 1878, as amended by s. 6, sub-s. 2, of the Factory and Workshop Act, 1891, applies to all dangerous machinery in a factory without distinction. It is for the magistrate before whom a case arising under these acts is heard to decide as to the alleged dangerous nature of the machinery. *Redgrave* v. *Lloyd*, 64 L. J., M. C. 155; [1895] 1 Q. B. 876; 15 R. 403; 72 L. T. 565; 43 W. R. 527; 18 Cox, C. C. 149; 59 J. P. 293.

The provision in s. 5, sub-s. 3, of the Factory and Workshop Act, 1878 (as amended by s. 6, sub-s. 2, of the Factory and Workshop Act, 1891), that "all dangerous parts of the machinery" in a factory shall be securely fenced, applies to all machinery from which, in the ordinary course of working it, danger may reasonably be anticipated, although such danger may arise by reason only of careless working or of external causes. *Birtwistle* v. *Hindle*, 66 L. J., Q. B. 173; [1897] 1 Q. B. 192; 76 L. T. 159; 45 W. R. 207; 18 Cox, C. C. 508; 61 J. P. 70.

**Workshop "Open for Traffic on Sunday"—Exception in favour of Jews.**]—The appellant, who is of the Jewish religion, was the occupier of a workshop. He made arrangements with his customers to do certain work at certain prices upon certain articles sent to him. The workshop was closed on Saturday, and was open on Sunday in order that the articles might be sent to and fetched from his workshop in pursuance of such prior arrangements, and for no other purpose whatever:—Held, that the appellant did not keep his workshop "open for traffic on Sunday" within s. 51 of the Factory and Workshop Act, 1878. *Goldstein* v. *Vaughan*, 66 L. J. Q. B. 380; [1897] 1 Q. B. 549; 76 L. T. 262; 45 W. R. 399; 18 Cox, C. C. 523; 61 J. P. 277.

**Attendance at School — By-Laws of School Board.**]—A school board is not entitled to enforce the provisions of its by-laws, with regard to the hours of attendance of children at school, in the case of children employed in factories who are attending efficient elementary schools pursuant to the factory acts. The elementary education acts do not control the provisions of the factory acts regulating the education of children employed in accordance with those acts. *Mellor* v. *Denham*, 48 L. J., M. C. 113; 4 Q. B. D. 241; 40 L. T. 395; 27 W. R. 496.

A by-law made by a school board, with the approval of the education department, under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, provided that all children in the district subject to the act should attend school for thirty hours a week. The justices refused to convict a father for neglecting to cause his son, between five and thirteen years of age, to attend school as required by that by-law, because the son was employed in a boot manufactory, and attending school more than ten hours a week, pursuant to the Workshops Regulation Act, 1867 (30 & 31 Vict. c. 146), s. 14:—Held, that this by-law was not contrary to the section of the Workshops Act, which requires every child who is employed in a workshop to attend school for at least ten hours a week; and that the father ought to have been convicted. *Bury* v. *Cherrybohn*, 1 Ex. D. 457; 35 L. T. 403.

**Steam Whistle—Use of Compressed Air.**]—L. formerly used a steam whistle directly connected

with an engine boiler, but discontinued it and used other means to produce the same noise:—Held, that this was a steam whistle and required the consent of the sanitary authority under s. 2 of the Factories Steam Whistle Act, 1872. *Herbert* v. *Leigh Mills Co.*, 53 J. P. 679.

### 3. Convictions.

**Fine—Discretion of Justices.**]—Where by s. 13 of the Cotton Cloth Factories Act, 1889, a fine of "not less than 5*l.* shall be imposed" for the first offence, which offence is to be dealt with by a court of summary jurisdiction, the general discretion to reduce fines given by s. 4 of the Summary Jurisdiction Act, 1879, must be taken to be limited in this particular instance to that extent. *Osborn* v. *Wood*, 66 L. J., Q. B. 178; [1897] 1 Q. B. 197; 45 W. R. 319; 18 Cox, C. C. 494; 61 J. P. 118.

**Appeal—Question of Fact—Engagement by Piece—Not supplying Particulars as to Rate of Wages.**]—B., a woollen weaver by the piece, employed by N., had a card given to her with particulars as to rate of payment. The card was incorrect, though B. might have discovered the error by counting, or by applying to the manager of the machine. The justices convicted N. under s. 24 of the Factory Act, 1891:—Held, it being a question of fact, the court could not interfere with the conviction. *Nussey* v. *Birtwhistle*, 58 J. P. 735.

**Removal.**]—The 7 & 8 Vict. c. 15, s. 69, takes away certiorari in certain cases of conviction under the act:—Held, that a conviction cannot in such cases be removed on the suggestion that the party was convicted on summons of justices under s. 47, giving unreasonable short notice, and in the absence of himself, or any one appearing on his behalf, except an attorney authorised only to apply for an adjournment, and that the conviction took place without proof of service of summons, and without any evidence of the facts charged; such objections not going to the jurisdiction. *Hopwood, Ex parte*, 15 Q. B. 121; 4 New Sess. Cas. 174; 19 L. J., M. C. 197.

### 4. Liability to Actions.

**Injuries from Machinery.**]—In an action for an injury caused to a child by machinery in a factory, the declaration averred, that at the time of the accident the machinery was not securely fenced:—Held, that the declaration was insufficient, in not alleging that the machinery was in motion for a manufacturing process, no offence being committed under 7 & 8 Vict. c. 15, s. 21, unless the machinery at the time of the accident was in motion for a manufacturing process. *Coe* v. *Platt*, 7 Ex. 460; 21 L. J., Ex. 146; 16 Jur. 174—Ex. Ch. Affirming 2 L. M. & P. 488.

The machinery of a cotton factory was worked by a steam-engine, which drove a horizontal shaft, passing along the lower floor of the factory. This horizontal shaft moved several vertical shafts which passed through the upper floors, and worked the machinery by which the cotton was manufactured in the different rooms of the factory. One of these vertical shafts had its fencing removed for the purpose of repair, and all the machines which were worked by this shaft were at rest; but the vertical shaft itself revolved, and the process of manufacture continued to be carried on in the other rooms of the factory:—Held, that the master of the factory was not liable, under 7 & 8 Vict. c. 15, s. 21, for an accidental injury occasioned to a little girl, in the room where no manufacturing process was being carried on, by the revolution of the vertical shaft. *Coe* v. *Platt*, 7 Ex. 923; 22 L. J., Ex. 164.

—— **Contributory Negligence.**]—The 7 & 8 Vict. c. 15, s. 21, enacts, that all parts of a mill-gearing in a factory shall be securely fenced while in motion for any manufacturing process, and ss. 59 and 60 impose penalties for not fencing. A declaration against the occupier of a mill for compensation for injury sustained from a shaft, alleged a breach of duty by the defendant in not securely fencing the shaft, contrary to the statute. Plea, that the driving-strap, by which the plaintiff was entangled, was not in motion for any manufacturing process, but was at rest, and that he wilfully and wrongfully, contrary to the express command of the defendant, set in motion the strap, well knowing that it was dangerous, and contrary to the express command of the defendant, to meddle with it, and thereby the plaintiff received the injury:—Held, that, assuming the common-law right to bring an action for an injury occasioned by the alleged unlawful act, it was subject to the principle that the plaintiff did not by his own negligence or misconduct contribute to the injury, and therefore that the plea was an answer to the action. *Caswell* v. *Worth*, 5 El. & Bl. 849; 25 L. J., Q. B. 121; 2 Jur. (N.S.) 116; 4 W. R. 231.

The provisions in the 7 & 8 Vict. c. 15, ss. 24, 25, respecting the bringing actions under the authority of the secretary of state, in the name of any person injured by the machinery in a factory, do not take away the right of the party injured to sue for damages in person. Nor does the imposition of penalties in s. 60. *Ib.*

—— **Improbability of Accident.**]—Declaration for not securely fencing a shaft while in motion, contrary to 7 & 8 Vict. c. 15, s. 21, whereby the plaintiff was injured. A plea, that the shaft was not near to where children or young persons were liable to pass or be employed and was so placed and situated in the factory that there did not exist any liability to injury from the same as to require such fencing as in the declaration mentioned, whilst in motion, and that all such liability was sufficiently guarded against by such position and situation of the shaft, is a bad plea. *Doel* v. *Sheppard*, 5 El. & Bl. 856; 25 L. J., Q. B. 124; 2 Jur. (N.S.) 218; 4 W. R. 232.

—— **Servant remaining with Machinery Unfenced.**]—Where machinery is required by statute to be fenced, and a servant enters into the employment of the owner whilst it is protected, and continues in the service after the protection is removed by decay or otherwise, but complains of the danger, and is promised that the protection shall be restored, the master is liable for injury to the servant arising from the want of such protection. *Holmes* v. *Clarke*, 6 H. & N. 349; 30 L. J., Ex. 135; 7 Jur. (N.S.) 397; 3 L. T. 675; 9 W. R. 419. Affirmed 7 H. & N. 937; 9 L. T. 178; 10 W. R. 405—Ex. Ch.

The mill-gearing which under 7 & 8 Vict. c. 15, ss. 21, 73, and 19 & 20 Vict. c. 38, s. 4, must be

fenced, includes the machinery, except the part which is necessarily exposed for the purposes of manufacture, and is not confined to those parts by which the motion of the moving power is first communicated to the machine. *Ib.*

—— **For Negligent Instruction by Foreman.**]—The owners of dangerous machinery, who by their foreman employ a young person about it unacquainted with its nature and use, are bound to take due care that such person is duly instructed therein; and if they either neglect this, or if express directions are given by the foreman to use the machinery in a manner that must lead to danger, of which the young person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. *Grizzle* v. *Frost*, 3 F. & F. 622.

—— **Right of Administratrix to Sue.**]—A company for the manufacture of cotton employed a servant to grease the bearings between the fly-wheel and the spur-wheel of a steam-engine in their factory. The fly-wheel revolved in a wheel race parallel to a wall and on one side of it, and the spur-wheel revolved parallel on the other side. The extreme distance between the two wheels was two feet ten inches, and the wall was two feet three inches thick. In a hole made in this wall the servant stood or sat while he greased the bearings. The wheel race was one which ought to have been fenced or otherwise secured within 7 & 8 Vict. c. 15, s. 21 (repealed). The fly-wheel on the side next the wall and the edge of the wheel race on that side were not fenced. The servant having been at this work for five days, was found on the sixth lying dead on the bearings, and it was not disputed that he must have been caught and killed by the fly-wheel. His administratrix having brought an action, on behalf of herself and child, against the company for negligence in not fencing the wheel race as required by the statute:—Held, assuming that the deceased was not guilty of contributory negligence, either in undertaking the employment or conducting it, that the action was maintainable. *Britton* v. *Great Western Cotton Co.*, 41 L. J., Ex. 99; L. R. 7 Ex. 130; 27 L. T. 125; 20 W. R. 525.

## E. UNDER THE EMPLOYERS AND WORKMEN ACT.

### 1. Summary Jurisdiction of Justices—Generally.

#### a. Applicable to what Servant.

**Agricultural.**]—The 20 Geo. 2, c. 19, extends to labourers of all descriptions, and not merely in the particular trades or businesses there enumerated; and consequently, includes wages earned by a labourer who contracted to dig and stein a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Lowther* v. *Radnor* (*Earl*), 8 East, 113.

Upon a rule calling upon justices to issue their warrant of distress to enforce an order made by two justices for the payment of wages to H., it appeared that she was hired to serve at a farm for a year as a dairy-maid, and to assist in the harvesting of the hay and corn, if required, and, according to the affidavit of the master, as a servant of all work necessary to be done in housekeeping, and to cook for the servants and labourers, and make their beds, and also to attend upon him and his family on their occasional visits to the farm, their residence being two miles off:—Held, that there was evidence from which the justices might find that H. was a servant in husbandry, within 20 Geo. 2, c. 19; and therefore the court made the rule absolute. *Hughes, Ex parte*, 2 C. L. R. 1542; 23 L. J., M. C. 138; 18 Jur. 447; 2 W. R. 465.

A. contracted with B. to keep the general accounts belonging to his farm, to weigh out food for cattle, and set the men to work, to lend a hand to anything if wanted, and especially at all times to carry out the orders of B. He was convicted, for refusing to obey the order of B. to go through the whole of the cattle stock under his charge:—Held, that he was not a servant in husbandry within 4 Geo. 4, c. 34, s. 3. *Davies* v. *Berwick* (*Lord*), 3 El. & El. 549; 30 L. J., M. C. 84; 7 Jur. (N.S.) 410; 3 L. T. 697; 9 W. R. 334.

**Domestic.**]—A magistrate has no authority by 6 Geo. 3, c. 25, s. 4, to determine disputes between domestic servants and their masters, relative to their contracts of hiring. *Kitchen* v. *Shaw*, 1 N. & P. 791; 6 A. & E. 729; W. W. & D. 278; 7 L. J., M. C. 14.

**Manufacturing.**]—A contract to weave certain goods at the house of the weaver is not a contract to serve within 4 Geo. 4, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver, for neglecting his work after commencing upon the same. *Hardy* v. *Ryle*, 4 M. & Ry. 295; 9 B. & C. 603; 7 L. J. (O.S.) M. C. 118.

The summary jurisdiction given to justices by the 4 Geo. 4, c. 34, s. 3, extends only to cases where the relation of master and servant exists; and, therefore, where A. had contracted with B. to build a wall for a certain price, within a certain time, and having performed part of the work, refused to complete it:—Held, not to be within the statute. *Lancaster* v. *Greaves*, 9 B. & C. 628; 7 L. J. (O.S.) M. C. 116.

So a contract "to print certain pieces of woollen cotton goods," is not within 4 Geo. 4, c. 34, s. 3, and consequently a breach of such contract is not punishable under that statute. *Johnson, Ex parte*, 7 D. P. C. 702; 3 Jur. 481.

But a contract to serve H. & Co., calico printers, as a designer for a term of years, is an employment within 4 Geo. 4, c. 34, s. 3. *Ormerod, Ex parte*, 1 D. & L. 825; 1 New Sess. Cas. 38; 13 L. J., M. C. 73; 8 Jur. 495.

By agreement in writing, A. agreed to serve B. and C., potters, as a biscuit-oven placer, at daily wages for twelve months. By another agreement of the same date, R. agreed to serve B. and C. for the same period as a biscuit-oven fireman, to be paid by piece-work, he paying A. wages out of what he earned:—Held, that the relation of master and servant subsisted between B. and C. and A., notwithstanding his wages were paid by R., and consequently that he was properly convicted for absenting himself from B. and C.'s service. *Willett* v. *Boote*, 6 H. & N. 26; 30 L. J., M. C. 6; 3 L. T. 276.

An iron-shipbuilder contracted in writing with six skilled handicraftsmen to plate a vessel; they agreed exclusively to serve him subject to the rules and regulations of the yard, and to execute the whole of the skilled and unskilled

labour requisite to complete the entire hull of the vessel, of the best workmanship, and to the entire satisfaction of their employer (they employing and paying such skilled and unskilled assistants as might be requisite to complete the vessel with all dispatch), and to be paid 5*l.* per ton for the work so done by them :—Held, that the contracting parties were handicraftsmen or artificers within 4 Geo. 4, c. 34, s. 3. *Lawrence* v. *Todd*, 14 C. B. (N.S.) 554 ; 32 L. J., M. C. 238 ; 10 Jur. (N.S.) 179 ; 8 L. T. 505 ; 11 W. R. 835.

So a person working manually at weekly wages and a commission, and superintending other workmen, is an artificer. *Whiteley* v. *Armitage*, 13 W. R. 144.

A journeyman tailor was employed to do any particular piece of work his master might set him upon. There was no contract to serve for any specific time, but he was to work exclusively for the master upon his premises till he had finished any particular job which he had undertaken. He was convicted by a justice for neglecting to go on with the making of a waistcoat which he had in hand :—Held, that such employment created the relation of master and servant, and the justice had jurisdiction to convict. *Gordon, Ex parte*, 25 L. J., M. C. 12 ; 1 Jur. (N.S.) 683 ; 3 W. R. 568.

—— **"Workman."**]—By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, "a dispute under this act, between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this act, shall be deemed to be a court of civil jurisdiction" limited to 10*l.* By s. 10, "In this act the expression 'workman,' . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . . has entered into works under a contract with an employer, whether the contract be . . . a contract of service or a contract personally to execute any work or labour." The expression "court of summary jurisdiction" means (inter alia) a stipendiary magistrate :—Held, that a potter's printer, under a contract with his employers to do work in which he was assisted by "transferers," whom he himself engaged and paid, was a "workman" within the act, and liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers, caused by his transferer's refusal to do the work, although he was ready and willing to do it. *Grainger* v. *Aynsley, Bromley* v. *Tams*, 50 L. J., M. C. 48 ; 6 Q. B. D. 182 ; 43 L. T. 608 ; 29 W. R. 242 ; 45 J. P. 142. *See further cases*, ante, cols. 860, et seq.

**Bailiff.**]—Where a person employed by an attorney to keep possession of goods seized under a fi. fa. made complaint to a magistrate that he could not obtain payment for his services, and the magistrate having summoned the attorney, and heard the complaint, proceeded under 20 Geo. 2, c. 19, and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods :—Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 Geo. 2, c. 19. *Bramwell* v. *Pennock*, 1 M. & Ry. 409 ; 7 B. & C. 536 ; 6 L. J. (O.S.) M.C. 47.

**Under Special Contract—Mutuality.**]—By an agreement between W. and B., on behalf of himself and his partners, constituting a coal company, W., in consideration of wages to be paid to him fortnightly by the company, contracted to serve them faithfully and exclusively as their servant as a collier, and not to quit the service of the company without twenty-eight days' notice ; and in consideration of such faithful service, and of the proper performance of the stipulations therein mentioned, the company agreed that W. should not be discharged without twenty-eight days' notice in writing. An information was afterwards laid, under 4 Geo. 4, c. 34, s. 3, by F., "agent to B. and his partners," alleging the contract to be with "B. and his partners" :—Held, first, that the contract, although the amount of wages was not thereby expressly and definitely fixed, was not void for want of mutuality, but was to be understood, by necessary implication, as binding upon the employers to find work and pay wages, after a reasonable rate, fortnightly. *Whittle* v. *Frankland*, 2 B. & S. 49 ; 31 L. J., M. C. 81 ; 8 Jur. (N.S.) 382 ; 5 L. T. 639.

Justices under 3 & 4 Geo. 4, c. 34, s. 3, have power to entertain an information arising out of an agreement, from the term of which a contract to employ, i.e., to furnish reasonable work, and to pay for the same, may be implied on the part of the employers, and the contract on the part of the employed to do the work being express. *Reg.* v. *Birmingham JJ.*, 1 W. R. 368.

—— **Posting up of Rules—Custom.**]—The proprietors of a mill had a weaver in their employ who was paid by the piece. Rules were posted so that the workpeople passed them on going to their work, and one required fourteen days' notice before termination of employment. The weaver left his work without notice, but it was not proved that his attention had been called to the rules or that he had seen them or assented to them, or was able to read. The justices held that there was not sufficient evidence of a contract to justify a conviction of the respondent under the Master and Servant Act, 1867, s. 9 (repealed), and they refused to admit evidence of custom :—Held, that the rules as they were posted, or a well-known custom in the district, might be sufficient to establish a contract, if found as a fact to exist. *Carus* v. *Eastwood*, 32 L. T. 855.

—— **Contract not in Writing.**]—When a contract for service in husbandry was not in writing, and had not been entered upon, no proceedings could be taken to enforce it under the Master and Servant Act, 1867, s. 3 (repealed). *Banks* v. *Crossland*, 44 L. J., M. C. 8 ; L. R. 10 Q. B. 97 ; 32 L. T. 226 ; 23 W. R. 414.

When such parol contract is not to be performed within a year from the making thereof, s. 4 of the Statute of Frauds, also prevents its being enforced by any means. *Ib.*

A contract which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract and is not void altogether, and a fresh contract cannot be implied from acts done in pursuance of it. *Britain* v. *Rossiter*, 48 L. J., Ex. 362 ; 11 Q. B. D. 123 ; 40 L. T. 240 ; 27 W. R. 482—C. A.

—— **By Wife independently of Husband.**]—A wife could not enter into a contract of service

within the meaning of the Master and Servants Act, 1867, s. 2 (repealed), independently of her husband. *Tomkinson* v. *West*, 32 L. T. 462.

—— **By Infant.**]—By 38 & 39 Vict. c. 90, s. 4, disputes between an employer and a workman may be heard and determined by a court of summary jurisdiction, who may order payment of any sum not exceeding 10*l.* which it may find to be due as wages or damages. A master, under the above section, sought to recover from an infant a sum of money, as damages for breach of contract in absenting himself from service. By the contract the infant undertook to serve the master for five years, at a certain scale of wages therein specified, power being reserved to the master, in case he should cease to carry on business, or find it necessary to reduce the operation of his works from want of materials, strikes, &c., to terminate the contract on giving fourteen days' notice of his intention so to do. The justices held that the contract was invalid as against the infant, and accordingly dismissed the summons:—Held, that if the provisions contained in the agreement were common to labour contracts, or were such as the master was reasonably justified in imposing, and if the wages were a fair compensation for the services, the contract was beneficial and therefore binding, and the case was accordingly remitted to the justices for further consideration. *Leslie* v. *Fitzpatrick*, 47 L. J., M. C. 22; 3 Q. B. D. 229; 37 L. T. 446.

An agreement in writing was entered into by an infant to serve a master, and no one else, for twelve months. The infant entered into the service. By the terms of the agreement the master was authorised to stop the wages of the infant at any time during which the master's steam-engine should, for any reason, stop working; but the master was not compelled to provide employment for the infant during such time:—Held, that the agreement was inequitable and void, and the court quashed a conviction of the infant for absenting himself without leave. *Reg.* v. *Lord*, 12 Q. B. 757; 3 New Sess. Cas. 246; 17 L. J., M. C. 181; 12 Jur. 1001.

### b. For what Misconduct.

**Absence without Leave or Lawful Excuse.**]—To render an artificer liable for absenting himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse. *Rider* v. *Wood*, 2 El. & El. 338; 29 L. J., M. C. 1; 5 Jur (N.S.) 1354; 1 L. T. 30; 8 W. R. 23.

On 5th of July, 1858, A., an artificer, made a written contract with P., signed by A. and P., to serve P. for five years from that date, and then entered into the service. On 15th of October, 1858, A., so being in P.'s service, made a written contract with H., signed by them both, to serve H. for five years from this latter date. On the next day A. refused to enter into H.'s service, giving as a reason that P. insisted on his remaining in his (P.'s) service:—Held, that A. could not be convicted for not entering into H.'s service, if he had a lawful excuse for not entering into it; and that the fact that he could not do so without committing the criminal offence of absenting himself from P.'s service was sufficient to constitute such an excuse. *Ashmore* v. *Horton*, 2 El. & El. 360; 29 L. J., M. C. 13; 6 Jur. (N.S.) 15; 1 L. T. 58; 8 W. R. 43.

The absenting himself from a weekly employment without notice and without assigning cause by a workman, and a complaint thereon to justices, shews a dispute arising out of, or incidental to, their relation as employer and workman, so as to give justices jurisdiction under the Employers and Workmen Act, s. 4, notwithstanding that the workman had not expressly had notice that a week's notice was necessary before leaving the service, and that he said nothing to dispute that fact. *Clemson* v. *Hubbard*, 45 L. J., M. C. 69; 1 Ex. D. 179; 33 L. T. 814; 24 W. R. 312.

Where a servant leaves his employment bonâ fide believing that he has a right to go, he is not guilty of an offence under the statute 4 Geo. 4, c. 34; but other facts must reasonably shew that the desertion complained of was in pursuance of that supposed right, and it is not sufficient that it was merely possible he acted under it. *Willett* v. *Boote*, 6 H. & N. 26; 30 L. J., M. C. 6; 3 L. T. 276.

—— **Absence through Illness.**]—P. was by deed apprenticed in 1881 for seven years to W., and in the fifth year W. covenanted to pay 14*s.* a week. In that year P. had a tumour in his hand and was in hospital; he claimed wages while so absent and incapable of work under s. 5 of the Employers and Workmen Act, 1875:—Held, that W. was liable to pay the wages during the illness of P. *Patten* v. *Wood*, 51 J. P. 549.

—— **Conviction for.**]—A coal miner had been convicted by a justice, under 30 & 31 Vict. c. 141 (repealed), of neglecting to fulfil a contract of service with his employers, and absenting himself without just cause or lawful excuse. The contract was to give and take fourteen days' notice, and the employers had received notice of that length from one of their workmen that the whole of the men employed by them would leave unless two non-union men were discharged. No evidence was given of any authority from the miner to his fellow-workman to give the notice; and when the period elapsed the non-union men were not discharged. The miner and some others left work, and the remainder continued in the employ:—Held, that the conviction way right. *Smart* v. *Pessol*, 30 L. T. 632.

A fire-iron forger, in 1871, agreed to serve five years. On the 1st of April, 1873, he was summoned under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141) (repealed), for absenting himself from his employers' service, and was, on the 13th of May, ordered to pay 11*l.* 8*s.* to his employers as compensation for the breach of contract, which sum was paid. Not having returned to his employment, he was again summoned, and, on the 7th of July, ordered to fulfil his contract and to give security for its fulfilment, and in default to be imprisoned for a term not exceeding three months. He did not comply with the order, and underwent three months' imprisonment. On his liberation he continued to absent himself, and was again summoned for absenting himself from his employers' service, and ordered, on the 18th of November, to pay 11*l.* 14*s.* to his employers as compensation:—Held, that the orders did not annul the contract of service, and were no bar to the subsequent summons and order of the 18th of November; and that that order was rightly made. *Cutler* v. *Turner*, 43 L. J., M. C. 124; L. R. 9 Q. B. 502; 30 L. T. 706; 22 W. R. 840.

By a memorandum in writing, Y. agreed to serve M. as a cutler for three years, and M. agreed to employ him and pay him for his work according to a schedule of prices. Having quitted his service during the term, he was convicted and imprisoned for twenty-one days, for unlawfully absenting himself from his service. After his discharge from prison, he did not return to the service of M., but went and worked elsewhere. On a second information laid against him for unlawfully absenting himself from the service, it was proved to the satisfaction of the justices that on the first occasion he absented himself on account of a difference with his master as to the scale of prices; that when, after his discharge from prison, he refused to return, he was advised by his attorney that he was not bound to do so; and the justices stated that they thought it very probable that he bonâ fide believed what his attorney told him. The justices convicted him under the 6 Geo. 3, c. 25, for unlawfully absenting himself, and sentenced him to one month's imprisonment:—Held, that the conviction could not be sustained: first, because the servant in refusing to return appeared to have been acting bonâ fide in the exercise of a supposed right; secondly, because the provisions of the 6 Geo. 3, c. 25, s. 4, relating to this matter, are repealed or superseded by the 4 Geo. 4, c. 34; and thirdly, because the servant having been once convicted for a departure, with intent to leave his service altogether, could not be convicted a second time under the 6 Geo. 3, c. 25, s. 4. *Reg.* v. *Youle*, 6 H. & N. 753; 30 L. J., M. C. 234; 4 L. T. 299; 9 W. R. 637.

A servant having been convicted, under 4 Geo. 4, c. 34, s. 3, for absenting himself without leave or lawful excuse from his service, and imprisoned, and still refusing to return after his imprisonment to the service, the term of which is incomplete, may be again convicted; and it is immaterial that he intended in the first instance to break the contract once for all, or bonâ fide believed that in point of law the first imprisonment put an end to the contract. *Unwin* v. *Clarke*, 35 L. J., M. C. 193; L. R. 1 Q. B. 417; 12 Jur. (N.S.) 429; 14 L. T. 356; 14 W. R. 688.

A potter was convicted and sentenced to imprisonment for leaving his service before the time of contract was expired. After the imprisonment had expired, but before the original time of contract had expired, he, not having returned to the service, was again convicted for absenting himself:—Held, that the second conviction was good, as the contract, notwithstanding the first conviction and imprisonment, was not dissolved. *Baker, Ex parte*, 7 El. & Bl. 697; 26 L. J., M. C. 193; 3 Jur (N.S.) 514; 5 W. R. 623. *S. C.* and S. P., 2 H. & N. 219; 26 L. J., M. C. 155; 3 Jur. (N.S.) 937.

**Non-fulfilment of Contract.**]—A magistrate has a jurisdiction under 4 Geo. 4, c. 34, to discharge, unless it shall appear to him that the servant "shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid." *Lilly* v. *Elwin*, 11 Q. B. 742; 17 L. J., Q. B. 132; 12 Jur. 623.

An information by a master under 32 & 33 Vict. c. 85, claimed a fulfilment of the contract, but not payment of damages in the alternative:—Held, that it was not invalid to sustain an order for fulfilment. *Crane* v. *Powell*, 38 L. J., M. C. 43; L. R. 4 C. P. 123; 20 L. T. 703; 17 W. R. 161.

The justices on the information ordered that the servant should fulfil the contract; and they adjudged that if, upon a copy of a minute of the order being served on him, he should neglect or refuse to comply with the same, he should, for such his disobedience, be imprisoned for one calendar month:—Held, that if the justices had not jurisdiction to imprison the servant, except on a fresh summons after he had disobeyed the order, the latter part of the order might be rejected as surplusage, and the order itself was still good. *Ib.*

D. was employed by B. under a contract, by the terms of which he was to keep the general accounts belonging to a farm of B., to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out his orders. He entered upon the employment, and in the course of it was ordered by B. to go through the whole of the cattle stock under his charge on the farm, and to give particulars of all the animals which had died under his care, and all bullings and calvings which had taken place. Having refused to obey the order, he was summoned before justices and convicted under 4 Geo. 4, c. 34, s. 3, for such refusal. On appeal against this conviction:—Held, that it was bad; because, assuming that he was such a servant, he had not been guilty of any misconduct or misdemeanor in the execution of his contract to serve in that capacity. *Davies* v. *Berwick (Lord)*, 3 El. & El. 549; 30 L. J., M. C. 84; 7 Jur. (N.S.) 410; 3 L. T. 697; 9 W. R. 334.

**Felony.**]—The 4 Geo. 4, c. 34, s. 1, does not authorise magistrates to punish misconduct on the part of a servant which amounts to a felony. *Jacklin, Ex parte*, 2 D. & L. 103; 1 New Sess. Cas. 280; 13 L. J., M. C. 139; 8 Jur. 576.

### c. Procedure.

**Information.**]—The return to a habeas corpus stated that S. T. was detained under a warrant of commitment and conviction by a justice, which, after reciting a complaint by R. T., agent of J. D., that S. T. had contracted with J. D. to serve J. D. in the capacity of a miner, and had entered into such service and did, before the term of his contract was completed, absent himself from his service, and did thereby neglect to fulfil the same contrary to the form of the statute in such case made and provided, set forth the contract of service, and evidence of S. T. having left the service without the consent of J. D., and convicted S. T. of the offence charged in the information and complaint:—Held, that no offence was laid in the information, though it followed the words of the 4 Geo. 4, c. 34, s. 3, inasmuch as it did not appear that the absence of S. T. was without lawful excuse; and the prisoner was discharged. *Reg.* v. *Turner*, 2 New Sess. Cas. 403; 9 Q. B. 80; 15 L. J., M. C. 140; 10 Jur. 522.

**Convictions.**]—In a commitment in execution, under the 4 Geo. 4, c. 34, s. 3, which is intended by the statute to operate as a conviction, the warrant must shew that the magistrate has done all that is necessary to make the conviction lawful. *Reg.* v. *Tordoff*, D. & M. 693; 5 Q. B. 933; 1 New Sess. Cas. 171; 13 L. J., M. C. 145; 8 Jur. 772.

A conviction did not expressly state that the

servant had entered the service, but it found that he did "misconduct himself in his said service":—Held, that this was a sufficient finding of his having entered into the service. *Baker, Ex parte*, 7 El. & Bl. 697; 26 L. J., M. C. 193; 3 Jur. (N.S.) 514; 5 W. R. 623. S. P. and *S. C.*, 2 H. & N. 219; 26 L. J., M. C. 155; 3 Jur. (N.S.) 987; 5 W. R. 661.

The conviction stated that it appeared to the magistrate, as well on the examination on oath of M., in presence of the party charged, "as otherwise," that the party had absented himself:—Held, that it was not to be inferred from this that the justice had proceeded upon evidence not given in the presence of the party. *Ib.*

The conviction stated that the party misconducted himself, &c., "by neglecting and absenting himself from his master's service":—Held, that this was not a finding of two statutable offences, but only of the absenting. *Ib.*

In an action for false imprisonment, it appeared that the plaintiff had been committed to prison by warrant of a justice, under 4 Geo. 4, c. 34, s. 3. The warrant alleged that the plaintiff, a collier, had been guilty of divers misdemeanors, particularly that he had absented himself from the service of his masters before the term of his contract with them was completed, contrary to the form of the statute:—Held, that no conviction was necessary under the statute; and that the warrant, whether it was an order or in the nature of a conviction, was the only instrument contemplated by the legislature, and the legality of the imprisonment depended upon the sufficiency of that instrument alone. *Lindsay* v. *Leigh*, 11 Q. B. 455; 3 New Sess. Cas. 99; 17 L. J., M. C. 50; 12 Jur. 286—Ex. Ch.

Held, also, that whether the warrant was to be construed with less strictness as being in the nature of an order, or with greater strictness as being in the nature of a conviction, it was bad, as it did not bring the case within the statute, by averring either that the contract was in writing, or else that the service had been entered upon. *Ib.*

—— **Under 17 Geo. 3, c. 56, s. 10—Theft of Manufacturing Materials.**]—A conviction under 17 Geo. 3, c. 56, s. 10, stated, that materials used in woollen manufactures, suspected to have been purloined, had been found in the house of A., and that he had given no satisfactory account thereof to the convicting justices:—Held, that it was not necessary that the conviction should state that they were found concealed in the house, nor that they were found under a search-warrant. *Reg.* v. *Wilcock* or *Wilcocks*, 7 Q. B. 317; 1 New Sess. Cas. 651; 14 L. J., M. C. 104; 9 Jur. 729.

The 17 Geo. 3, c. 56, so far as regards the distribution of the penalties thereby imposed, is repealed by 58 Geo. 3, c. 57. *Ib.*

Where the information under 17 Geo. 3, c. 56, s. 10, has been laid before two justices, and the conviction has taken place before two other justices, this fact must appear on the face of the conviction (unnecessary since 11 & 12 Vict. c. 43, s. 36). *Ib.*

The offence created by 17 Geo. 3, c. 56, s. 10, consists in the accused party not giving, when brought before the justices, a satisfactory explanation of how he came by the goods suspected to have been purloined or embezzled. *Boothroyd, In re*, 2 New Sess. Cas. 251; 15 M. & W. 1; 15 L. J., M. C. 57; 10 Jur. 117.

Therefore, where a party was convicted under that section:—Held to be no objection, first, that the conviction purported to be founded on the information of A. and the oaths of him and other credible witnesses, whose names were set out; and, secondly, that the warrant on which the premises of the defendant had been searched for the suspected materials was granted on an affidavit of A., in which he only stated that he had cause to suspect that there were purloined or embezzled materials on the premises of the defendant, and did not shew the offence to have been committed within the jurisdiction of the justices. *Ib.*

A conviction under 17 Geo. 3, c. 56, s. 10, and 58 Geo. 3, c. 51, for having in possession articles suspected to be purloined or embezzled, was not in the form given by the schedule to the latter statute, and purported to be made on the information of the informer and the oaths of him and certain other credible witnesses, whose names were set out, and concluded by awarding the penalty to be paid as the law directs:—Held, first, that it was not necessary that the conviction should state—1, the value of the materials; 2, to whom they belonged; 3, that the defendant knew them to be purloined or embezzled; 4, that the informer or witnesses were sworn in the presence of the accused; 5, that the accused, when before the magistrates, had not applied for time to produce the parties from whom he received the suspected materials. *Ib.*

If yarn, of a description liable to be condemned, is found in the house of a party, magistrates have jurisdiction to condemn it under 17 Geo. 3, c. 56, and to convict the party, although the yarn was not found on the execution of a search-warrant previously granted. *Davis* v. *Nest*, 6 Car. & P. 167.

A conviction on this statute, stating that A. was convicted before the magistrates upon the oath of a credible witness, of having in his possession, in his dwelling-house, certain materials used in woollen manufacture, suspected to be embezzled and purloined, he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, is good. *Ib.*

By 17 Geo. 3, c. 56, s. 10, it shall be lawful for any two justices, upon complaint made to them upon oath that there is cause to suspect that purloined or embezzled materials, used in certain manufactures, are concealed in any dwelling-house, outhouse, yard, garden or other place or places, to issue a search-warrant for the search, in the daytime, of every such dwelling-house, &c.; and if any such materials, suspected to be purloined or embezzled, are found therein, to cause the same, and the person in whose house, outhouse, yard, garden or other place they are found, to be brought before two justices, and if the person shall not give an account to their satisfaction of how he came by the same, he shall be adjudged guilty of a misdemeanor:—Held, that a warehouse occupied for business purposes only, and not within the curtilage of or connected with any dwelling-house, was a "place" within the meaning of the above section. *Reg.* v. *Edmundson*, 2 El. & El. 77; 28 L. J., M. C. 213; 5 Jur. (N.S.) 1351: 7 W. R. 565; 8 Cox, C. C. 212.

**Appeals—Under 17 Geo. 3, c. 56.**]—Under 17 Geo. 3, c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment; and the party convicted may appeal to the sessions, giving notice to the justices at the time of con-

viction, and at the same time entering into recognizance with sufficient sureties to try the appeal and abide the judgment of the sessions; but if he does not at such time enter into such recognisance, the convicting justices are to commit him till the sessions, unless such recognizance be sooner entered into, and are to transmit the conviction to the sessions, and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation. *Reg.* v. *Twyford*, 5 A. & E. 430; 6 N. & M. 836.

By 17 Geo. 3, c. 56, s. 20, an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, and entering into a recognizance to try the appeal, and those justices are required to give notice to the party of his right to appeal; if those justices do inform him of such right, without saying anything about the notice, and he enters into the recognizance, the sessions are bound to receive the appeal, though he did not give the notice in writing. *Rex* v. *Leeds JJ.*, 4 Term Rep. 583.

Or if the justices at the time of such conviction make known to the party convicted his right to appeal, and he declines appealing, they need not go on to inform him of the necessary steps to be taken in order to appeal. *Rex* v. *W. R. Yorkshire JJ.*, 3 M. & S. 493.

**Damages—Subsequent Proceedings in respect of Continuing Breach—Jurisdiction.**]—Where an employer recovers before a magistrate a sum of 10*l.* against a workman as damages for a breach of contract under s. 4 of the Employers and Workmen Act, 1875, the jurisdiction of the magistrate under that section is exhausted, and the employer is not entitled in subsequent proceedings in the police court to recover any further damages in respect of a continuing breach of the contract. *James* v. *Evans & Co.*, 66 L. J., Q. B. 742; [1897] 2 Q. B. 180; 77 L. T. 78; 45 W. R. 654; 61 J. P. 631.

**Punishments.**]—Under 20 Geo. 2, c. 19, s. 2, if a justice of the peace upon a complaint made to him of misconduct, sentences the offender to be committed to the house of correction for a time not exceeding one calendar month, he must, if he intends to proceed upon that statute, also sentence him there to be corrected and held to hard labour; but the statute gives the justice an option to punish the offender in that manner, or otherwise, by abating part of his wages, or by discharging him from his employment. And the meaning of the terms "there to be corrected" is to be understood of a correction by whipping. But this latter punishment cannot be inflicted upon the like offender under 6 Geo. 3, c. 25, which enables the justice to commit the offenders to the house of correction for any time not exceeding three months, nor less than one month; nor can the punishments inflicted by the two acts be blended. *Rex* v. *Hoseason*, 14 East, 605.

**Commitment Warrants—Validity.**]—A commitment under 4 Geo. 4, c. 34, s. 2, which states that the defendant, a miner, had contracted to serve A., but omits the words "in the employment of a miner," is ill. *Reg.* v. *Jones* or *Lewis*, 1 New Sess. Cas. 3; 1 D. & L. 822; 13 L. J., M. C. 46; 8 Jur. 470.

So a commitment, stating that complaint had been made against E., servant to G., for misconduct in his said service, is insufficient, for not stating the nature of the service. *Copestick, In re*, 1 New Sess. Cas. 181; 13 L. J., M. C. 161.

A warrant of committal stated that A. contracted to serve H. & Co., calico printers, "as a designer," and that, whilst he was in such service, and in the execution of the said contract, he was guilty of, &c.:—Held, that it was not necessary to state under which of the various classes of employment enumerated in the 4 Geo. 4, c. 34, s. 3, that of a designer came, and that it was sufficient, if the court should be of opinion that a designer was a service or employment within that section. *Ormerod, Ex parte*, 1 D. & L. 825; 1 New Sess. Cas. 38; 13 L. J., M. C. 73; 8 Jur. 495.

Upon a complaint against a servant for absenting himself from his service, the conviction adjudged that he should be imprisoned in the house of correction, there to remain and be held to hard labour for one month. The commitment required the keeper to receive him into custody, there to remain and be corrected, and held to hard labour for one month (following the words of 20 Geo. 2, c. 19, s. 2):—Held, that the "correction" therein mentioned must be understood to mean something beyond the hard labour, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorising a punishment not warranted by the statute. *Wood* v. *Fenwick*, 10 M. & W. 195; 11 L. J., M. C. 127.

A party was committed by a magistrate, under 4 Geo. 4, c. 34, s. 3, by warrant of commitment, which was in the following form:—"To the constable of M., Surrey, &c. Whereas, information and complaint hath been made unto me, one &c., upon the oaths of J. H. and S. M., both of M., in the said county of S., calico printers, that W. J., of M. aforesaid, in the county aforesaid, calico printer, did, on Wednesday, the 8th of May inst., contract with the said S. M. to print certain pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M., under such contract, and that the said W. J. hath, in his said service, been guilty of divers misdemeanors, miscarriages, and ill behaviour towards the said S. M., and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his licence or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the parties, touching the matter of the complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true." It then commanded the constable to convey the party to the house of correction, and deliver him to the keeper thereof who was ordered to detain him in custody:—Held, that this was a commitment in execution, and that it was bad, because it did not shew, either that the contract was entered into, or the work refused to be done or the party found within the jurisdiction of the magistrate. *Johnson* v. *Reid*, 6 M. & W. 124; 9 L. J., M. C. 25.

A warrant of commitment of a servant for leaving his master's employment is bad, if it does not aver either that the contract was in writing, or that the service had been entered upon. *Askew, Ex parte* and *In re*, 2 L. M. & P. 429; 20 L. J., M. C. 241; 15 Jur. 705.

A warrant of commitment under 4 Geo. 4, c. 34, ss. 1, 3, should state that the examination was on oath, and taken in the presence of the defendant. *Gray, Ex parte* and *In re*, 1 New Sess. Cas. 354; 2 D. & L. 539; 14 L. J., M. C. 26; 8 Jur. 1049. S. P., *Reg.* v. *Jones*, 1 New Sess. Cas. 3; 1 D. & L. 822; 13 L. J., M. C. 46; 8 Jur. 470.

A commitment of a servant under 4 Geo. 4, c. 34, s. 3, for absenting himself, need not set forth the evidence on which the conviction proceeded; but it must shew on the face of it that the servant has been convicted of an offence within the meaning of the act. It is therefore not sufficient that it shews that the servant absented himself without assigning any sufficient reason. *Geswood, In re*, 2 El. & Bl. 952; 2 C. L. R. 269; 23 L. J., M. C. 35; 17 Jur. 1163; 2 W. R. 94.

A return to a habeas corpus set forth a warrant, which recited that the prisoner had been on the same day convicted before a justice of an offence against the 4 Geo. 4, c. 34, s. 3, and that the justice had adjudged that he should be committed for two months, and commanded the constable to take and the gaoler to receive him:—Held, that the conviction and warrant of commitment might be in separate instruments; that this instrument was a warrant of commitment, and therefore it was no objection that it did not set forth the evidence before the justice, nor state that it was taken in the presence of the prisoner or upon oath. *Bailey, In re*, 3 El. & Bl. 607; 2 C. L. R. 1645; 23 L. J., M. C. 161; 18 Jur. 930; 2 W. R. 422.

Held, also, that it might be shewn by affidavits that there was no evidence before the justice of such a contract to serve as would give him jurisdiction; but that if there was any evidence to justify the finding of the justice, the court could not interfere. *Ib.*

The return to a habeas corpus stated, that the prisoner was committed for three months by warrant of a justice set forth in the return, reciting a conviction by the justice, on which the warrant purported to proceed, for an offence under the 4 Geo. 4, c. 34, s. 3. The recited conviction was, on the face of it, bad. The return then stated, that, a week after such commitment, the prisoner being still in custody, the same justice delivered to the gaoler another warrant of commitment, reciting and grounded upon a conviction of the same date as the first, by the same justice, setting forth the same offence, and imposing the same punishment. In this conviction no material defect appeared:—Held, that the prisoner was not entitled to be discharged, the return shewing a good warrant, under which he was in custody. *Reg.* v. *Richards*, 5 Q. B. 926; D. & M. 777; 13 L. J., M. C. 147; 8 Jur. 752.

A habeas corpus having issued, directed to the keeper of a house of correction in the borough of Kingston-upon-Hull, to bring up S., a prisoner, detained in his custody; he made a return, setting out a warrant of commitment by a magistrate of the borough, stating that S. did unlawfully aid and abet T., a handicraftsman, who had contracted in writing to serve H., a shipbuilder, in neglecting and refusing to commence his service with H., according to his contract. The return then stated that whilst S. was in the keeper's custody, the same magistrate delivered to him another warrant of commitment, which stated that S. was duly convicted "for that T., a handicraftsman, did, at the parish of Holy Trinity, in the borough, contract with H., a shipbuilder, to serve him in the capacity of a shipwright, for a period not then expired, the contract being in writing and signed by the contracting parties; and that T. did not then and there, or at any day since then, enter into his service, according to his contract, and that he had not the consent of H. nor any lawful excuse for such his default in not entering into his service; and that S., before the committing of the offence by T., unlawfully did aid, abet, counsel and procure T. the said offence in manner and form aforesaid to commit; that is to say, S. did then and there aid, abet, counsel and procure T. so as aforesaid not to enter his service according to the said contract"; and it was thereby adjudged that S., for his offence, should be imprisoned in the house of correction in the borough, &c. The first warrant of commitment was bad on the face of it:—Held, first, that the defect in the first warrant was cured by the second, it appearing by the return that the second was substituted by the same magistrate as an amendment of the first. *Smith, In re*, 3 H. & N. 227; 27 L. J., M. C. 186; 6 W. R. 440.

Held, secondly, that the second warrant sufficiently stated that S. aided T., "knowing that he had not the consent of H., or any lawful excuse for not entering into his service." *Ib.*

Held, thirdly, that the warrant was not bad, because it stated that S. "did aid, abet, counsel, and procure," without stating of which offence he was convicted. *Ib.*

Held, fourthly, that an affidavit could not be received for the purpose of shewing that T. did not, in fact, contract within the borough, as stated in the warrant. *Ib.*

A warrant of commitment stating that A. had contracted in writing, to serve two persons for a certain time, but had absented himself without leave of his "said master," and not stating that at the hearing of the complaint by the magistrate the evidence of the said A. himself had been heard:—Held, sufficient. *Price, In re*, 2 W. R. 473.

**Examinations on Oath—Necessity for.**]—Where the Statute of Labourers gives a magistrate jurisdiction to examine upon oath any servant, and to make order for payment of wages to such servant, and a magistrate, in his adjudication on this act, avers a complaint made on oath, and an examination on oath, it is not competent in replevin for taking the plaintiff's goods, for the plaintiff to plead in bar of a recognizance made under a warrant of distress and sale founded on that adjudication, that the servant did not duly make oath before the magistrate that the sum claimed was justly due to him for wages; nor can he plead that the sum claimed was not due. *Wilson* v. *Weller*, 1 Br. & B. 57; 3 Moore, 294.

**Order of Discharge.**]—An order of a justice for discharging a servant from her master's services under 5 Eliz. c. 4, was void, and not merely voidable, because it did not appear on the order itself, that "she was a servant in husbandry." *Rex* v. *Hullcott*, 6 Term Rep. 583

### F. UNDER THE SHOP HOURS ACTS.

**Hours of Employment—Young Persons—"In or about a Shop."**]—The period of seventy-four hours a week limited by s. 3 of the Shop Hours Act, 1892, for the employment of a young person in or about a shop, is inclusive of time occupied upon the employer's business elsewhere than in the shop. *Collman* v. *Roberts*, 65 L. J., M. C. 63; [1896] 1 Q. B. 457; 74 L. T. 198; 44 W. R. 445; 18 Cox, C. C. 273; 60 J. P. 184.

—— **Failure to exhibit Notice—Penalty.**]—The fine imposed by s. 5 of the Shop Hours Act, 1892, does not apply to a failure to exhibit the notice required by s. 4 of the act. No penalty is provided by the act for the contravention of s. 4. *Hammond* v. *Pulsford*, 64 L. J., M. C. 63; [1895] 1 Q. B. 223; 15 R. 95; 71 L. T. 767; 43 W. R. 236; 18 Cox, C. C. 58; 59 J. P. 533. *See* 58 & 59 Vict. c. 5.

## II. RIGHTS AND LIABILITIES OF MASTER AND THIRD PARTIES.

### A. RIGHTS OF MASTER.

#### 1. Injuries to Servants.

##### a. Accidents.

**Damages.**]—If the plaintiff's son, who was in fact his servant, in delivering parcels from a stage-coach, receives an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages, for loss of his son's services, to have compensation for the injury done to his parental feelings. *Flemington* v. *Smithers*, 2 Car. & P. 292.

The plaintiffs sued the defendant in case for loss of services of their traveller from an accidental collision with the defendant:—Held, that the action was maintainable, and the damages not too remote, though case and not trespass would have been the proper remedy had the servant been the plaintiff. *Martinez* v. *Gerber*, 3 Scott (N.R.) 386; 3 Man. & G. 88; 10 L. J., C. P. 314; 5 Jur. 463.

Held, also, that the plaintiffs need not allege in their declaration that the servant was hired at wages or salary. *Ib.*

**To young Child.**]—A boy two and a half years old was run over by a carriage and much injured. The parent, having expended some money in his cure, sued the owner of the carriage for loss of the services of his son as his servant:—Held, that the plaintiff could not maintain the action, because it was impossible that such a boy could render any services to him; and because the expenses incurred were not the gist of the action. *Hall* v. *Hollander*, 1 B. & C. 660; 7 D. & R. 133; 4 L. J. (O.S.) K. B. 39.

**Action against Railway Company—Contract.**]—A master cannot maintain an action per quod servitium amisit against a railway company for an injury to his servant, whilst a passenger on the railway, caused by neglect of their duty to safely carry the servant according to their contract with him as such passenger, unless the master was a party to the contract. *Alton* v. *Midland Ry.*, 19 C. B. (N.S.) 213; 34 L. J., C. P. 292; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.

Claim alleged that the servant of the plaintiff took a ticket and travelled by the L. T. & S. Railway; that the defendants, the Great Eastern Railway Company, supplied the engines, drivers, and firemen for working the traffic of the L. T. & S. Railway, and also the signalmen for working the said traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the defendant company at the junction, through the negligence of the defendants' signalman there; that the servant was hurt, whereby the plaintiff lost his services and was damnified. On demurrer:—Held, that the claim was independent of the contract of carriage for a pure tort, and could therefore be maintained. *Berringer* v. *G. E. Ry.*, 48 L. J., C. P. 400; 4 C. P. D. 163; 27 W. R. 681.

**Death of Servant.**]—A master cannot maintain an action for injuries which cause the immediate death of his servant. *Osborn* v. *Gillett*, 42 L. J., Ex. 53; L. R. 8 Ex. 88; 28 L. T. 197; 21 W. R. 409.

To a declaration against the defendant for injuries caused to the plaintiff's daughter and servant, by the negligent driving of the defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of her services, and her burial expenses. A plea that she was killed on the spot; and a second plea that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted:—Held (by Kelly, C.B., and Pigott, B.; Bramwell, B., dissentiente), that the first plea was good; and (by the whole court) that the second plea was bad. *Ib.*

##### b. Assault.

**Proof of Service.**]—In an action for beating the son of the plaintiff, stating him as the servant of the father, per quod servitium amisit, it is not necessary to shew that the son did any material business for the father; it is sufficient that he lives in his house and is part of his family. *Jones* v. *Brown*, 1 Esp. 217; Peake, 233.

**Damages—Medical Expenses.**]—In an action for wounding the plaintiff's son per quod servitium amisit, the plaintiff is entitled to recover the amount of the surgeon's bill, although it has not been paid; but he cannot recover physician's fees, which have not been paid. *Dixon* v. *Bell*, 5 M. & S. 198; 1 Stark. 287.

##### c. Seduction.

**Action for.**]—A master may maintain an action for debauching his servant, though he is in no way related to her in blood. *Fores* v. *Wilson*, Peake, 55; 3 R. R. 652.

—— **Right of Master's Assignee.**]—The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy. *Howard* v. *Crowther*, 8 M. & W. 601; 10 L. J., Ex. 355; 5 Jur. 91.

—— **Right of Parent.**]—A father may bring an action for entering his house and debauching his daughter, per quod servitium amisit, though the daughter is above twenty-one, where acts of service are proved, though there is no contract for service. *Bennett* v. *Allcott*, 2 Term Rep. 166.

A father may maintain an action for the seduction of his daughter, who was a married woman, but living with him as his servant, being separated from her husband. *Harper* v.

*Luffkin*, 7 B. & C. 387; 1 M. & Ry. 166; 6 L. J. (O.S.) K. B. 23; 31 R. R. 236.

A father, who permits a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her. *Reddie* v. *Scoolt*, Peake, 240.

If the daughter of a person, who, performs all the duties of a servant and domestic offices in her father's house, though she does not actually sleep in the house, is seduced, the father may support an action per quod servitium amisit. *Mann* v. *Barret*, 6 Esp. 32; 9 R. R. 804.

Where it appeared that the defendant debauched the plaintiff's daughter, and that she was delivered of a child, but the jury found that the child was not the defendant's:—Held, that the jury was rightly directed to find a verdict for the defendant. *Eager* v. *Grimwood*, 1 Ex. 61; 16 L. J., Ex. 236.

No action will lie for debauching a daughter, though the mother maintains her and her child during her lying-in, unless on the ground of the loss of service. *Satterthwaite* v. *Dewhurst*, 4 Dougl. 315; 5 East, 47, n.; 7 R. R. 654, n.

But an action will lie for enticing away the plaintiff's daughter, though there is no allegation that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff. *Evans* v. *Walton*, 36 L. J., C. P. 307; L. R. 2 C. P. 615; 17 L. T. 92; 15 W. R. 1062.

A defendant intending to seduce the servant, being the daughter of the plaintiff, hired her as his servant, and thereby obtained possession of her person:—Held, that the father might maintain an action against him for such seduction. *Speight* v. *Oliviera*, 2 Stark. 493; 20 R. R. 728.

**Loss of Service—Necessity and Proof of.**]—In order to sustain the action for seduction, some service, either actual or constructive, rendered by the daughter to the plaintiff, must be shewn. *Blaymire* v. *Hayley*, 6 M. & W. 55; 9 L. J., Ex. 147; 4 Jur. 107.

An action is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of housekeeper, and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age, in consequence of the seduction, and was maintained by her father. *Dean* v. *Peel*, 5 East, 45; 1 Smith, 333; 7 R. R. 653.

A. occupied two farms seven miles distant from each other; A. resided at one and his son and daughter at the other. The daughter acted as mistress of the house of the latter, and had the poultry for her benefit:—Held, that she was sufficiently the servant of A. for him to maintain an action for her seduction. *Holloway* v. *Abell*, 7 Car. & P. 528.

Evidence that a niece, being about sixteen years of age, occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece, and such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly 500*l.*, of which the interest is applied in the meantime for her benefit. *Manvell* v. *Thomson*, 2 Car. & P. 303; 31 R. R. 666.

It is not necessary to shew any acts of service done by the daughter, it is enough that she lived in the father's family under such circumstances that he had a right to her service. *Maunder* v. *Venn*, M. & M. 323; 31 R. R. 734.

A father cannot maintain an action for the seduction of his daughter, when he is unable to allege in his declaration the loss of his daughter's services by reason of the wrongful act of the defendant. *Grinnell* v. *Wells*, 7 Man. & G. 1033; 8 Scott (N.R.) 741; 2 D. & L. 610; 14 L. J., C. P. 19; 8 Jur. 1101.

When a daughter has been seduced while out at service, and had left her service in a state of pregnancy, and returned home, where she was supported by the plaintiff until and after her confinement:—Held, that as the implied relation of mistress and servant did not subsist between the plaintiff and the daughter at the time of the seduction, the action was not maintainable. *Davies* v. *Williams*, 10 Q. B. 725; 16 L. J., Q. B. 369; 11 Jur. 750.

A daughter, who was living with her father, at the defendant's request, went and resided at his house to assist in his shop during the temporary absence of his wife; she was to be paid for doing so, but no sum was fixed; she remained three or four weeks, and received 8*s.* when she left and returned to her father's; while she was at the defendant's he seduced her:—Held, that there was nothing in the position which the daughter held at the defendant's house inconsistent with the subsistence of the relation of servant to her father, and that he could, therefore, maintain the action. *Griffiths* v. *Teetgen*, 15 C. B. 344; 24 L. J., C. P. 35; 1 Jur. (N.S.) 426; 3 W. R. 11.

A daughter was employed by the defendant as an out-door farm servant from February to November, being absent during the usual working hours from her father's house, where she passed the remainder of her time, sleeping there and assisting in the household duties. In April of the following year she gave birth to a child, of which the defendant was the father:—Held, that these facts constituted a sufficient service to the father to support an action at his suit. *Rist* v. *Faux*, 4 B. & S. 409; 32 L. J., Q. B. 386; 10 Jur. (N.S.) 202; 8 L. T. 737; 11 W. R. 918—Ex. Ch.

A daughter lived in her father's house, but worked during the day at the defendant's mill, receiving wages. She did washing and other domestic duties for her father:—Held, sufficient evidence of service to entitle the father to maintain the action. *Ogden* v. *Lancashire*, 15 W. R. 158.

The plaintiff's daughter, aged twenty-four years, was seduced in the house and service of the plaintiff, and the day after left this country, pursuant to prior arrangements, for America, but, while in service there, finding herself pregnant, she returned to this country and went to her sister's house, where she was confined, and after her confinement she returned to the house of the plaintiff:—Held, that there was evidence of loss of service sufficient to sustain the plaintiff's action. *Long* v. *Keightley*, Ir. R. 11 C. L. 221.

An action for seduction is supported by evidence that the daughter, who was under the age of twenty-one, being discharged from service, was returning home at the time of the seduction, and was on her return received into her father's house. *Terry* v. *Hutchinson*, 9 B. & S. 487; 37 L. J., Q. B. 257; L. R. 3 Q. B. 599; 18 L. T. 521; 16 W. R. 932.

A parent cannot maintain an action for the seduction of a daughter, not residing in the house of such parent, but being a domestic

servant, living in the house of her master, though with the permission of her master she had been in the habit, during any leisure time, of assisting in the work by which her parent earned a livelihood. *Thompson* v. *Ross*, 5 H. & N. 16; 29 L. J., Ex. 1; 5 Jur. (N.S.) 1133; 1 L. T. 43; 8 W. R. 44.

It is necessary to shew something like the relation of master and servant, however slight the degree. *Manley* v. *Field*, 7 C. B. (N.S) 96; 29 L. J., C. P. 79; 6 Jur. (N.S.) 300.

Where a daughter rented a house, and carried on the business of a milliner at the time of her seduction:—Held, that the circumstance of her mother and the younger branches of the family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere) did not constitute such services as to entitle the father to maintain the action. *Ib.*

A daughter was in service as a governess, and was seduced whilst on a three days' visit, with her employer's permission, to her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother. In an action for her seduction brought by the mother:—Held (by Kelly, C.B., Martin, Bramwell and Channell, BB.), that there was no evidence of service at the time of the seduction; and that, therefore, the action was not maintainable. *Hedges* v. *Tagg*, 41 L. J., Ex. 169; L. R. 7 Ex. 283; 20 W. R. 976.

Held, by Kelly, C.B., and Martin and Bramwell, BB., that the action must also fail on the ground that the confinement did not take place whilst the daughter was in her mother's service. *Ib.*

Where a girl under age was seduced by her master whilst his hired servant, and rendering no service to her parents, and afterwards, having quitted his service, gave birth to a child in her parents' home:—Held, that her father could not maintain an action for seduction, although the girl intended to return home at the termination of her service. *Gladney* v. *Murphy*, 26 L. R., Ir. 651.

In an action for the seduction of her daughter, evidence that the daughter was a widow, that she was in employment of a third party, which occupied her time each week day from 9.30 a.m. to 8 p.m., that she resided in lodgings rented by herself, but was in the habit during the time which remained at her disposal of coming to her mother's house and helping her by the discharge of household duties, which were of such a nature as would be usually performed by a servant, is evidence proper to be submitted to the jury in support of the plaintiff's case. *O'Reilly* v. *Glavey*, 32 L. R. Ir. 316.

**Damages.**]—A master may recover special damages for debauching his servant, though not related to her in blood. *Fores* v. *Wilson*, Peake, 55; 3 R. R. 652.

Damages ultra the mere loss of service may be given against a defendant for debauching and getting with child the adopted daughter and servant of the plaintiff. *Irwin* v. *Dearman*, 11 East, 23; 10 R. R. 423.

In an action by a widow, the jury is not confined to the mere loss of service of her daughter, but may give some damages for the distress and anxiety of mind which the mother has felt; and it is for the jury to say, taking into consideration the situation in life of the parties, what they think is a reasonable compensation to be given to her. *Andrews* v. *Askey*, 8 Car. & P. 7.

On an inquisition of damages for seduction, where 1,000*l.* had been awarded by the jury, although the parties were in a moderate sphere of life, the court refused to set it aside on the ground of the damages being excessive. *Elliott* v. *Nicklin*, 5 Price, 641.

Where the loss of service has been established, further damages may be conceded for the loss which the father or master has sustained by being deprived of the society and comfort of his child, and for the dishonour he receives. *Bedford* v. *M'Kowl*, 3 Esp. 119.

So, in the case of an aunt. *Chambers* v. *Irwin*. *Ib.*

In estimating the damages the jury may take into account the expense of maintaining a bastard child, and the dishonour done to the parent and his daughter. *Terry* v. *Hutchinson*, 9 B. & S. 487; 37 L. J., Q. B. 257; L. R. 3 Q. B. 599; 18 L. T. 521; 16 W. R. 932.

**Pleadings and Evidence—Claim.**]—A declaration stating that M., being the daughter and servant of the plaintiff, with the consent of the plaintiff became the apprentice of A., the wife of the defendant, for the term of two years, for the purpose of learning the business of a milliner, in consideration of 29*l.* paid by the plaintiff, and in consideration that A., with the consent of the defendant, should find and provide M. with meat, drink, and lodging, nevertheless the defendant debauched her, whereby she became ill, and incapable of serving A., and of learning the business, is bad on demurrer, as not shewing any duty arising out of the contract, for the defendant to take care of M.'s morals. *Harris* v. *Butler*, 2 M. & W. 539; M. & H. 117; 6 L. J., Ex. 133; 1 Jur. 608.

The ordinary count for seduction, and a special count framed on the authority of *Speight* v. *Oliveira* (2 Stark. 495), are substantially the same. *Morgan* v. *Malony*, Ir. R. 7 C. L. 101.

A count for debauching the plaintiff's daughter may be joined with a count for breaking into and entering the house. *Woodward* v. *Walton*, 2 Bos. & P. (N.R.) 476.

—— **Defence.**]—The defendant may shew that the daughter is not a servant of the father under the general issue, without pleading specially the fact. *Holloway* v. *Abell*, 7 Car. & P. 528.

In an action for the seduction of the plaintiff's daughter and servant, the plea of not guilty puts in issue the fact of seduction only, and not the fact of service. *Torrence* v. *Gibbins*, D. & M. 226; 5 Q. B. 297; 13 L. J., Q. B. 36; 7 Jur. 1158.

To a declaration, complaining that the defendant debauched J., being daughter and servant of the plaintiff, and alleging damage by loss of service, a plea that she was not the servant of the plaintiff is a good plea, on special demurrer, assigning for cause that it amounted to not guilty. *Ib.*

In an action for seduction the plea of not guilty does not put in issue the relationship of master and servant. If, therefore, it is intended to dispute the existence of this relationship it must be specially pleaded. *Salter* v. *Walker*, 21 L. T. 360; 18 W. R. 65.

To a special count for seduction, framed on the authority of *Speight* v. *Oliveira* (2 Stark. 495; 20 R. R. 728), a plea, that at the time of the seduction the girl was the servant of the defen-

dant and not of the plaintiff, is bad, as traversing an inference of law. *Morgan* v. *Malony*, Ir. R. 7 C. L. 240.

—— **Evidence.**]—It is not necessary to sustain the action that the daughter should be produced as a witness at the trial. *Farmer* v. *Joseph*, Holt, 451.

General evidence of the defendant's condition in life, though not of his specific pecuniary means, is admissible in support of damages. *Salter* v. *Walter*, 21 L. T. 360; 18 W. R. 65.

The father cannot examine witnesses to the daughter's general character, except in answer to evidence of general bad character adduced on the part of the defendant. *Bamfield* v. *Massey*, 1 Camp. 460. S. P., *Bate* v. *Hill*, 1 Car. & P. 100; 28 R. R. 766.

The daughter is not bound to answer in cross-examination, whether she had not previously been criminal with other men. *Dodd* v. *Norris*, 3 Camp. 519; 14 R. R. 832.

Nor does the mere cross-examination of the daughter, to shew that she had been guilty of improper conduct, entitle the plaintiff to call other witnesses to her character. *Ib.*

Evidence cannot be admitted that the defendant accomplished the seduction by means of a promise of marriage. *Ib.*

The defendant may examine witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses, who may each be asked as to the fact, and the time and place of its occurrence; but if the jury is of opinion that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child, the plaintiff is entitled to the verdict; and the evidence of her unchastity with others is only to be considered in mitigation of damages. *Verry* v. *Watkins*, 7 Car. & P. 308.

If the daughter is called as a witness, she cannot be contradicted by evidence of statements to which she was not cross-examined; but she may be called up again and asked the questions, though they should tend to charge her with having had connection with another person. *Andrews* v. *Askey*, 8 Car. & P. 7.

The daughter was called and asked on cross-examination if she knew one A., which she denied. In defence, it was sought to contradict her, by proving that she had stated that A. was the father of her illegitimate child, and that he had deserted her:—Held, that the evidence was inadmissible as a contradiction, the witness not having been cross-examined as to these statements; but semble, that the evidence might have been given to prove her loose character. *Carpenter* v. *Wahl*, 3 P. & D. 457; 11 A. & E. 803; 9 L. J., Q. B. 217; 4 Jur. 964.

Evidence may be given on an inquisition of damages, that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter with an intention of marriage. *Elliott* v. *Nicklin*, 5 Price, 641.

It is no ground for a new trial that evidence of a promise of marriage has been given. *Tullidge* v. *Wade*, 3 Wils. 18.

To prove that her connection with the defendant (which happened but once) was against her consent, the daughter can be asked only as to circumstances occurring immediately after the event. *Colyer* v. *Mayne*, 2 Car. & K. 1011.

—— **Particulars.**]—In an action for seduction, to entitle the defendant to an order for particulars, he must shew special circumstances other than those which would tend to a mere restriction of the proof necessarily incident to such an action. *Lagan* v. *Gibson*, Ir. R. 9 C. L. 507.

The defendant sought to obtain particulars of the times and places at which the alleged connection took place:—Held, that under the circumstances the defendant, without denying the seduction on oath, was not entitled to an order. *Thompson* v. *Birkley*, 47 L. T. 700; 31 W. R. 230.

In an action for seduction, particulars of the time and place of the alleged seduction will not be ordered on the application of the defendant before delivering his defence, unless the application is accompanied by an affidavit stating his intention to deny the seduction. *Knight* v. *Engle*, 61 L. T. 780.

—— **Interrogatories.**]—In an action for the seduction of a daughter, interrogatories as to the defendant's pecuniary means cannot be administered to the defendant; but interrogatories as to whether the defendant had had sexual intercourse with the daughter, and had stated that he believed that she had not had such intercourse with any other man, are allowable. *Hodsoll* v. *Taylor*, 43 L. J., Q. B. 14; L. R. 9 Q. B. 79; 29 L. T. 53; 22 W. R. 89.

### 2. Enticing from Service.

**Action for—In what Cases.**]—Trespass lies by a master for seducing his journeyman away. *Hart* v. *Aldridge*, Cowp. 54.

Although only hired by the piece, and not for any certain time. *Anon.*, Lofft, 493.

An action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know, when he employed him that he was the servant of another. *Blake* v. *Lanyon*, 6 Term Rep. 221; 3 R. R. 162.

No action lies for seducing a servant from his master, who has paid the penalties stipulated by his articles for leaving him. *Bird* v. *Randall*, 3 Burr. 1345; 1 W. Bl. 373, 387.

Nor for inducing a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention, at the time, of quitting his master's service. *Nichol* v. *Martyn*, 2 Esp. 734; 5 R. R. 770.

A declaration by the lessee of a theatre, alleged in the first and second counts that W. contracted with the plaintiff to sing at his theatre, and not elsewhere, during a certain term, without the plaintiff's consent, and that the defendant during the term, maliciously enticed and procured W. to depart from her contract against the will of the plaintiff, whereby W. refused to sing for the plaintiff at his theatre during the term. A third count alleged that W. had been hired by the plaintiff as and was his dramatic artiste for a term, and that the defendant maliciously enticed and procured her to depart from her employment during the term:—Held (by Wightman, J., Erle, J., and Crompton, J.), that the action was maintainable at common law, as the maliciously procuring W. to break her contract was a wrongful act, from which damage accrued to the plaintiff; that the rule of law giving a remedy for enticing away servants is not confined to menial servants, or to such as fall within the Statute of Labourers (23 Edw. 3), but extends to

all cases where there is an unlawful or a malicious enticing away of a person employed to give his exclusive personal service for a given time, under the direction of the employer, who is injured by the wrongful act, and that the action for maliciously persuading a servant to quit his service is maintainable wherever there is, at the time of the persuading, a binding contract of hiring and service existing between the two parties, whether the service is then actually subsisting or not. *Lumley* v. *Gye*, 2 El. & Bl. 216 ; 22 L. J., Q. B. 463 ; 17 Jur. 827 ; 1 W. R. 432.

Semble, per Crompton, J., that the contract need not be for exclusive service, and that an action will lie for maliciously inducing another to break a contract of any description whereby damage accrues to the party with whom the contract has been made. *Ib.*

But, by Coleridge, J., that the persuading or procuring, whether maliciously or not, a free contracting party to break his contract, to the damage of the party with whom he has contracted, is not actionable ; the general rule of the law being to confine the remedy for breaches of contract to the contracting parties. That between master and servant there is an exception to this law, founded solely on the Statute of Labourers, and limited by it, and that W. not falling within the class of persons provided for in that statute, the action was not maintainable. *Ib.*

An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed. *Lumley* v. *Gye* (2 El. & Bl. 216), approved. *Bowen* v. *Hall*, 50 L. J., Q. B. 305 ; 6 Q. B. D. 333 ; 44 L. T. 75 ; 29 W. R. 367 ; 45 J. P. 373—C. A.

In order to support an action for enticing away the plaintiff's servant, it is sufficient if a contract of service can be implied from the position in which the plaintiff stood towards the person enticed away. Therefore, where the plaintiff was a publican, and his daughter lived with him, and acted in the capacity of barmaid, but without any express contract of service, and was induced by the defendant to leave the plaintiff's house :—Held, that it might be inferred from the circumstances of the case that the relation of master and servant existed between the plaintiff and his daughter, and that therefore the plaintiff was entitled to sue the defendant for enticing his daughter away. *Evans* v. *Walton*, 36 L. J., C. P. 307 ; L. R. 2 C. P. 615 ; 17 L. T. 92 ; 15 W. R. 1062.

—— **Employment after Notice of Prior Contract.**]—An action will lie against a person who continues to employ the servant of another after notice of a prior contract of service, and in order to maintain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant. *De Francesco* v. *Barnum*, 63 L. T. 514.

—— **Service under a Void Contract.**]—B., by a memorandum of agreement signed by himself only, agreed to work for the plaintiff, "manufacturer of powder flasks, and for no other person whatsoever, from the 17th August, 1833, during and until the expiration of twelve months, and so on from twelve months' end to twelve months, and until I shall give J. S. (plaintiff) twelve months' notice in writing to quit" :—Held, that, as this agreement contained nothing binding on the plaintiff, it was nudum pactum ; and therefore, although B. served under the agreement till April, 1836, when he left the service and worked for the defendant, who was shewn the agreement in question, and warned that B. was the plaintiff's hired servant, that in an action against the defendant for harbouring the plaintiff's servant, it was competent to the defendant to shew that the contract of hiring was altogether void, under 29 Car. 2, c. 3, s. 4. *Sykes* v. *Dixon*, 1 P. & D. 463 ; 9 A. & E. 693 ; 1 W. W. & H. 120 ; 8 L. J., Q. B. 102.

—— **Evidence.**]—In an action against A., for seducing the servant of B. from his service, it is sufficient evidence that A. asked the servant to enlist in the army, and afterwards gave him money. *Keane* v. *Boycott*, 2 H. Bl. 511 ; 3 R. R. 494.

**Damages where Injunction only Claimed.**]—Where in such an action the employed was also a defendant, but as against him the plaintiff claimed only an injunction, and not damages, it was held that damages might, in the discretion of the court, be given under Lord Cairns' Act (21 & 22 Vict. c. 27), and that the jury, therefore, should be directed by the judge, in the event of a verdict for the plaintiff, to find such damages as should be awarded ; first, if the court should think it a proper case both for injunction and damages ; and secondly, if the court should think it a proper case for damages only, and not for an injunction. *Bowen* v. *Hall*, 50 L. J., Q. B. 305 ; 6 Q. B. D. 333 ; 44 L. T. 75 ; 29 W. R. 367 ; 45 J. P. 373—C. A.

**Measure of Damages.**]—In an action for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss which he sustained at the time, but for the injury done him by causing them to leave his employment. *Gunter* v. *Astor*, 4 Moore, 12 ; 21 R. R. 733. S. P., *Dixon* v. *Bell*, 1 Stark. 287 ; 5 M. & S. 198 ; 17 R. R. 308.

### 3. Right to Defend Servant.

**Against Assault.**]—A master may justify an assault in preventing his servant from being beaten. *Tickell* v. *Read*, Lofft, 215.

**Against Legal Proceedings.**]—Where a master and his servant are both liable to an action for libel in respect of matter published by the servant in the master's newspaper, and the action is brought against the servant only, the master is entitled to undertake the defence of the servant. *Breay* v. *Royal British Nurses Association*, 66 L. J., Ch. 587 ; [1897] 2 Ch. 272 ; 76 L. T. 735 ; 46 W. R. 86—C. A.

## B. Liability of Master.

### 1. On Contracts of Servants.

#### a. Goods Supplied.

**For Use of Master.**]—Where articles are furnished for the use of a master, though the servant was by agreement to provide them, the

master is liable to the tradesman who furnishes them. *Precious* v. *Abel*, 1 Esp. 350.

If a coachman goes in his master's livery to the plaintiff, and hires horses, which his master afterwards uses, he is bound to pay for the hire of the horses, although he has previously agreed with the coachman that he would pay him a large salary to provide horses, unless the person of whom the horses were hired had some notice that the coachman hired them on his own account and not for his master. *Rimell* v. *Sampayo*, 1 Car. & P. 254.

—— **New Tradesman.**]—If a servant employs a tradesman to do any work who has not been employed before by the master, and the tradesman does the work without communication with the master, though the thing to which the work was done was the property of the master, he is not liable. *Hiscox* v. *Greenwood*, 4 Esp. 174.

—— **Ready Money Transactions.**]—If a person who has been in the habit of paying ready money gives his servant money to buy meat for the use of the family, and the servant, instead of paying ready money, orders the meat on credit and embezzles the money, the master is not liable. *Stubbing* v. *Heintz*, Peake, 47; 3 R. R. 651.

And so where the master gives the servant money beforehand to pay for goods. *Rusby* v. *Scarlett*, 5 Esp. 76.

But where he authorises his servant to take up goods, and afterwards gives him money to pay, if the servant embezzles the money, the master is liable for the goods. *Ib.*

Where the master of a family is in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesman suffers other goods of the same sort to be delivered without informing the master, or satisfying himself that they were for his use, when in fact they were not, the master will not be liable. *Pearce* v. *Rogers*, 3 Esp. 214.

—— **Weekly Bills—Negligence.**]—A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid:—Held, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question. *Miller* v. *Hamilton*, 5 Car. & P. 433.

—— **Servant altering Master's Order.**]—A. ordered of B. two suits of livery a year for her coachman. B. supplied one suit of livery, and at the desire of the coachman supplied plain clothes instead of the other:—Held that B. could only recover from A. the price of the livery actually supplied. *Hunter* v. *Berkeley (Countess Dowager)*, 7 Car. & P. 413.

B. had, on a previous bill delivered, been paid for a livery suit which he had furnished and immediately taken back from the coachman:—Held, that A. was entitled to be allowed the amount paid for this suit, on a plea of set-off for money had and received pleaded in an action for the amount of a subsequent account for clothes. *Ib.*

B., who was a tailor, put lace, with the arms of A., his customer, wrought in it, on the livery suits he made for A. B. had the lace made in pieces of fifty yards each at a certain price, but when he made a livery suit he charged A. with the quantity of lace used on that suit, but at a higher price per yard than he gave for it:—Held, than when A. ceased dealing with B., she was not bound to pay for any of this lace that B. then had in his hands. *Ib.*

—— **Scope of Authority.**]—A master is not liable for spirituous liquors ordered by his butler in the name of the master, unless he has on former occasions paid for goods so ordered, or there is evidence to shew that the butler had authority from the master for so doing. *Maunder* v. *Conyers*, 2 Stark. 281.

**Evidence of Authority.**]—The defendant's shopman had on various occasions ordered goods on credit for the shop and these orders had been ratified by the defendant; but on every occasion the goods had been ordered by the shopman at the shop, and had also been delivered there:—Held, that this afforded evidence of authority in the shopman to purchase goods on credit from the shopman at another place, and to carry them away himself. *Summers* v. *Solomon*, 7 El. & Bl. 879; 26 L. J., Q. B. 301; 3 Jur. (N.S.) 962; 5 W. R. 660.

**Notice to Tradesman.**]—Where a party has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he means to pay ready money in future; it must be given to the tradesman himself. *Gratland* v. *Freeman*, 3 Esp. 85.

A gentleman is liable for corn ordered in his name by a livery stable-keeper, who had been his coachman, and continued to wear his livery, not having given notice to the tradesmen of the employment being at an end. *Aste* v. *Montague*, 1 F. & F. 264.

Although, where a servant has once been held out by his master as having authority to pledge his credit, that authority cannot be withdrawn merely by orders to the servant, but there must be notice to the tradesmen; yet, without express evidence of actual notice, there may be evidence from all the circumstances, as lapse of time, or the not sending in accounts, from which it may be inferred that the tradesmen must have known that there was no such authority, and that he did not contract on the credit of the master. *Stavely* v. *Uzielli*, 2 F. & F. 30.

### b. Other Contracts.

**Implied Authority—Railway Servants.**]—A servant of a railway company was injured by an accident on the railway. The general manager of the company engaged a medical man to attend upon him, not having any express authority from the company to do so:—Held, in an action against the company by the medical man to recover for his services, that the general manager had an implied authority to engage him, and that the company was therefore liable. *Walker* v. *G. W. Ry.*, 36 L. J., Ex. 123; L. R. 2 Ex. 228; 16 L. T. 327; 15 W. R. 769.

After a railway company was incorporated by statute, an accident occurred to a passenger on the line in consequence of the negligence of one of the servants of the company:—Held, that

neither the engine-driver, the railway guard at the station where this took place, nor the superintendent of the traffic department had implied authority to make contracts obligatory on the company with medical men called in to assist the injured person. *Cox* v. *Midland Counties Ry.*, 3 Ex. 268 ; 18 L. J., Ex. 65 ; 13 Jur. 65.

But such an authority might be inferred from the conduct of the directors of the company on former occasions in recognising similar contracts made by their officers, or perhaps from evidence that such powers were usually exercised by similar agents of similar companies. *Ib.*

The person injured by a collision on a railway were carried into an inn, partly by the help of the station-master of the station where the collision took place. A sub-inspector of railway police for the district within which the collision took place, whose duty it was to attend on the spot where an accident occurred, being at such place and time the superior of all station-masters and other servants of the railway company, ordered some brandy to be given to the injured persons, and, in reply to a question of the innkeeper's, as to who would pay for the maintenance of the injured persons, replied, "Don't trouble yourself about that, we'll see that all is right." The innkeeper having brought an action against the railway company for board, lodging, necessaries and goods supplied to the injured persons :—Held, that there was sufficient evidence in support of his claim, and to prove the authority of the sub-inspector to pledge the credit of the company for the items in question supplied to the persons injured. *Langan* v. *G. W. Ry.*, 30 L. T. 173—Ex. Ch.

**Continuing Authority.**]—An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere. *Metcalfe* v. *Lumsden*, 1 Car. & K. 309.

**Warranty.**]—The servant of a private owner, intrusted to sell and deliver a horse on one particular occasion, is not by law authorised to bind his master by a warranty ; the buyer therefore, taking such a warranty, takes it at the risk of being able to prove that the servant had in fact his master's authority for giving it. *Brady* v. *Todd*, 9 C. B. (N.S.) 592 ; 30 L. J., C. P. 223 ; 7 Jur. (N.S.) 827 ; 4 L. T. 212 ; 9 W. R. 483.

But if a servant of a horsedealer warrants his employer's horse on sale without authority, his master is bound thereby. *Howard* v. *Sheward*, 36 L. J., C. P. 42 ; L. R. 2 C. P. 148 ; 12 Jur. (N.S.) 1015 ; 15 L. T. 183 ; 15 W. R. 45.

**Evidence of Agency.**]—The foreman of a contractor attended a public auction in the neighbourhood for the sale of hay ; the owner, the foreman and contractor were well known to each other, and all were present at the auction, but the owner did not in any way interfere. The foreman bid, lots were knocked down to him as the highest bidder ; he was asked by the auctioneer, who neither knew him nor his master, for his name ; he gave his own, and it was written down by the auctioneer as being declared the purchaser. The goods were afterwards delivered to the master's carts, taken to the master's premises, and consumed by the master's horses, and were in truth bought for the master :—Held, per Pollock, C.B., and Bramwell, B., that there was evidence to go to the jury that the defendant was buying for his master (the contractor), and that the plaintiff knew it, and the jury having found a verdict for the defendant, such verdict should remain :—Held, per Channell and Wilde, BB., that the defendant had made himself personally liable ; that the jury should have been told that if they believed the plaintiff's evidence, although they equally believed the defendant's evidence, that the defendant had made himself a contracting party at the sale, and was liable, though in fact he was only an agent. *Williamson* v. *Barton*, 7 H. & N. 899 ; 31 L. J., Ex. 170 ; 8 Jur. (N.S.) 341 ; 5 L. T. 800 ; 10 W. R. 321.

### 2. For Wrongful Acts of Servants.

#### a. General Principles.

**Acts within Scope of Authority.**]—A master is liable for all the acts of his servant within the scope of his authority, whatever may be the extent to which the servant, acting as such, may abuse that authority. *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 42 L. J., C. P. 78 ; L. R. 8 C. P. 148 ; 28 L. T. 366—Ex. Ch.

—— **Where Criminal.**]—The defence that the act complained of amounted to a felony does not apply to an action against a master for damages sustained through the wrongful act of a servant. *Osborn* v. *Gillett*, 42 L. J., Ex. 53 ; L. R. 8 Ex. 88 ; 28 L. T. 197 ; 21 W. R. 409.

The master is liable for an act of his servant done in the course of his employment in furtherance of that employment and in his master's interest, and not for purposes of his own, even though a criminal offence may be involved and the master's authority be exceeded. The master's liability is not restricted to the tortious, though non-criminal, acts of his servant. *Dyer* v. *Munday*, 64 L. J., Q. B. 448 ; [1895] 1 Q. B. 742 ; 14 R. 306 ; 72 L. T. 448 ; 43 W. R. 440 ; 59 J. P. 276—C. A.

**Act contrary to Orders.**]—A master is not liable for the wilful act of his servant done contrary to his orders. *Green* v. *Macnamara*, 1 L. T. 9.

**Unlawful Act.**]—A master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service ; but not so if the act is in itself unlawful, and if not proved to have been authorised by the master. *Lyons* v. *Martin*, 8 A. & E. 512 ; 3 N. & P. 509 ; 7 L. J., Q. B. 214.

As if a servant authorised merely to distrain cattle, damage feasant, drives cattle from the highway into his master's close and there distrains them. *Ib.*

A master is not liable in trespass for an injury done, without his knowledge, by his servant, though in the course of his employ. *Gordon* v. *Rolt*, 4 Ex. 365 ; 7 D. & L. 87 ; 18 L. J., Ex. 432.

—— **Servant Employed to Commit.**]—Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet if the act itself is wrongful the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from

the doing of that wrong. *Ellis* v. *Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767; 2 C. L. R. 249; 23 L. J., Q. B. 42; 18 Jur. 146; 2 W. R. 19.

### b. Assault.

**By Servant of Railway.**]—If a servant of a railway company commits an assault by the authority of the company, an action for assault and battery may be maintained against the company. *Eastern Counties Ry.* v. *Broom*, 6 Ex. 314; 20 L. J., Ex. 196; 15 Jur. 297—Ex. Ch.

It is not necessary that the servant should be authorised to do the act by an instrument under the seal of the company. *Ib.*

But where the plaintiff came to the station of a railway company when a passenger train was shortly about to start, and having entered the compartment of the ticket-office where the clerk was then issuing tickets, approached the ticket-press and asked for a ticket, but did not get or pay for one, and a person outside the office called the plaintiff out as the train was about to leave the platform, and, as the plaintiff was leaving the ticket-office, the ticket-clerk, erroneously believing that he had seen a ticket in plaintiff's hand, detained him, asked him for the ticket, and searched him, and subsequently charged the plaintiff, in the presence of the station-master, with having stolen a ticket, whereupon the plaintiff was also searched by the station-master, in an action by the plaintiff against the railway company for assault and false imprisonment:—Held, that there was evidence of their liability for the acts of the ticket-clerk and station-master. *Van den Eynde* v. *Ulster Ry.*, Ir. R. 5 C. L. 6. Affirmed on appeal, Ir. R. 5 C. L. 328—Ex. Ch.

—— **Removing Person from Carriage.**]—A passenger sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the porters, who acted under an erroneous impression that the passenger was not in the right train for the place to which he had booked. The rules of the railway company, a copy of which was given to each porter in their employ, assigned various specific duties to the porters, among others that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the company. It was the duty of the porters to prevent passengers going by wrong trains as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage:—Held, that there was evidence on which a jury might find that the act of the porter in pulling the passenger out of the carriage was an act done within the course of his employment as the servant of the company, and one for which the company was therefore responsible. *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 42 L. J., C. P. 78; L. R. 8 C. P. 148; 28 L. T. 366.

A passenger was ejected from a railway carriage by the railway company's servants without excessive violence under an erroneous supposition that he was travelling wrongfully in the carriage:—Held, that there was evidence that what was done was within the scope of the servants' authority. *Lowe* v. *G. N. Ry.*, 62 L. J., Q. B. 524; 5 R. 535.

**By Conductor of Omnibus.**]—A passenger by an omnibus, while being forcibly removed from it by a conductor in charge, was thrown on the ground and seriously injured. The proprietor of the omnibus, on being applied to for compensation, stated that the passenger was drunk and had refused to pay his fare. On cross-examination he did not deny that he had been drinking:—Held, that if the conductor intended to put him safely out of the omnibus there was evidence that in so doing he was executing the commands of the proprietor, his master; and that if the injury was caused by the conductor acting without due care in executing such command, the proprietor was responsible. *Seymour* v. *Greenwood*, 6 H. & N. 359; 30 L. J., Ex. 189; 9 W. R. 518. Affirmed on appeal, 7 H. & N. 355; 30 L. J., Ex. 327; 4 L. T. 833; 9 W. R. 785—Ex. Ch.

A conductor of a tramcar had by the company's by-laws power to collect fares which were payable on demand, and to prevent people travelling without paying. A passenger refused to pay his fare, and thereupon the conductor took him by the collar and pushed him off the car:—Held, that the company were liable in respect of the assault upon and injuries sustained by the passenger. *Smith* v. *North Metropolitan Tramways Co.*, 55 J. P. 630—C. A.

**Removing Person from House.**]—A person who requests another, his servant in that behalf, to remove one making a disturbance in his house, is not responsible for excess of force or violence in carrying out his command. *Pidgeon* v. *Legge*, 5 W. R. 649.

Semble, that he may be answerable for a negligent performance of his order. *Ib.*

**By Servant levying Distress.**]—The defendant delivered a warrant to bailiffs to levy a distress for rent. The tenant and others resisted the distress, and in the affray one K. was killed by the bailiffs or those assisting them. There was no evidence that the defendant authorised the bailiffs to distrain in an illegal manner:—Held, that the illegal manner in which the distress was effected did not render the defendant liable in an action under Lord Campbell's Act; that K.'s death was caused by an act collateral to the distress, and was not expressly or impliedly the result of the authority given to the bailiffs. *Kinsella* v. *Hamilton*, 26 L. R., Ir. 671.

A servant who commits an unnecessary assault in levying a distress is not acting within the scope of his employment. *Richards* v. *West Middlesex Waterworks Co.*, 54 L. J., Q. B. 551; 15 Q. B. D. 660; 33 W. R. 902; 49 J. P. 631.

**Effect of Conviction of Servant.**]—Where an assault is committed by a servant acting in the course of his employment, the liability of the master is not affected by the fact that the servant has been released from all further proceedings for the same cause under the provisions of s. 45 of the Offences against the Person Act, 1861. *Dyer* v. *Munday*, 64 L. J., Q. B. 448; [1895] 1 Q. B. 742; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276—C. A.

### c. False Imprisonment and Arrest.

**Liability of Railway Company.**]—A railway company, though a corporation, is liable to an action for false imprisonment if the act is committed by the authority of the company; the

authority need not be under seal, but it lies on the plaintiff to give evidence justifying the jury in finding that the company's servants who imprisoned him or some of them had authority from the company to do so. *Goff* v. *G. N. Ry.* 3 El. & El. 672 ; 30 L. J., Q. B. 148 ; 7 Jur. (N.S.) 286 ; 3 L. T. 850.

An action for a malicious prosecution will lie against a company. *Stevens* v. *Midland Ry.* (10 Ex. 352) not followed. The employment of policemen by a railway company to protect their property is an act within the scope of the incorporation of the company. *Edwards* v. *Midland Ry.*, 50 L. J., Q. B. 281 ; 6 Q. B. D. 287 ; 43 L. T. 694 ; 29 W. R. 609 ; 45 J. P. 374.

A constable, who was a servant also of the railway company, after the conclusion of a scuffle in a station-yard between some of the company's servants and other persons, wrongfully gave A. into custody on a charge of assaulting the servants of the company. By the regulations of the company their constables were authorised to take into custody any one they saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or affray ; but they were directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed :—Held, that the company was not liable for the act of their servant, as the constable in giving A. into custody was not acting within the scope of his employment. *Walker* v. *S. E. Ry.*, 39 L. J., C. P. 346 ; L. R. 5 C. P. 640 ; 23 L. T. 14 ; 18 W. R. 1032.

B. refused to leave a station-yard of the company, and a struggle thereupon ensued between him and the servants of the company, during which he was wrongfully given in charge by a constable of the company, employed under the above rule :—Held, that there was evidence that the constable was acting within the scope of his employment. *Ib.*

A foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property ; and, if he gives in charge on such suspicion an innocent person, the company is not liable. *Edwards* v. *L. & N. W. Ry.*, 39 L. J., C. P. 241 ; L. R. 5 C. P. 445 ; 22 L. T. 656 ; 18 W. R. 834.

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and to receive the money, and to keep it in a till under his charge, has no implied authority from the company to give into custody a person who he suspects has attempted to rob the till after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property ; and the company is therefore not liable for the act of the clerk. *Allen* v. *L. & S. W. Ry.*, 40 L. J., Q. B. 55 ; L. R. 6 Q. B. 65 ; 23 L. T. 612 ; 19 W. R. 127 ; 11 Cox, C. C. 621.

A passenger took a return ticket from the Mansion House to Notting-hill Gate. On reaching Edgware Road, a station beyond Notting-hill Gate, he got out, but was informed that he must pay an additional fare of 2*d.* This he refused to do. He was thereupon given into custody by the inspector of the railway station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the company. This charge was dismissed. The passenger having brought an action of trespass and false imprisonment :—Held, that, as the company was empowered under the Railways Clauses Act (8 & 9 Vict. c. 20), s. 104, to arrest persons committing frauds under s. 103, and as the inspector was their representative at Edgware Road, it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the company to arrest persons supposed to be guilty of committing offences against that section, and that the company was liable for his mistake. *Moore* v. *Metropolitan Ry.*, 42 L. J., Q. B. 23 ; L. R. 8 Q. B. 36 ; 27 L. T. 579 ; 21 W. R. 145.

A passenger took his ticket from Monk's Ferry to Bangor and back. The company's line extended from Monk's Ferry to Chester, and the Chester and Holyhead Railway continued the line to Bangor. On his return at Chester, the ticket collector demanded 2*s.* 6*d.*, which the passenger refused to pay ; he was thereupon taken into custody by a railway servant, under the direction of a superintendent, and removed to the police station, where he paid the money under protest, and was released. The Chester station was occupied by the company, and by other railway companies ; one of the witnesses stated that he believed the person who took the passenger into custody was a servant of the company. His attorney having written to the secretary of the company for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. He afterwards stated that it was an awkward business, and that the blame would fall upon the station-clerk ; he also offered to repay to the attorney the 2*s.* 6*d.* which had been overpaid. This was refused :—Held, in an action against the company for the arrest, that there was no evidence of authority for the arrest, or of subsequent ratification by them, and that they were not liable. *Roe* v. *Birkenhead, Lancashire, and Cheshire Junction Ry.*, 7 Ex. 36 ; 6 Railw. Cas. 795 ; 21 L. J., Ex. 9.

A person took a ticket as a passenger by a railway, and by the same train his horse was conveyed, in respect of which (by an arrangement of the company) nothing was payable. On reaching his destination, he gave up his ticket, and was leaving the station with his horse, when he was taken into custody by the direction of the station-master for non-payment of the fare alleged to be due for the horse :—Held, that the arrest was not within the powers conferred on railway companies by 8 & 9 Vict. c. 20, ss. 103, 104, and that the company was not liable for the act of the station-master. *Poulton* v. *L. & S. W. Ry.*, 8 B. & S. 616 ; 36 L. J., Q. B. 294 ; L. R. 2 Q. B. 534 ; 17 L. T. 11 ; 16 W. R. 309.

If a servant of a railway company, acting on behalf of the company, assaults and imprisons a passenger to compel him to pay his fare for riding in a carriage of the company, the act of the servant is one which may be for the benefit of the company, and may be ratified by the company. *Eastern Counties Ry.* v. *Broom*, 6 Ex. 314 ; 20 L. J., Ex. 196 ; 15 Jur. 297—Ex. Ch.

A passenger had been taken into custody by a railway inspector charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector. At the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings :—Held, that such attendance was no evidence of ratification by the company. *Ib.*

A quarrel having arisen on the premises of

a railway company between a servant of the company and a number of persons, amongst whom was A., the company's servant gave A. into custody on a charge of assaulting him and obstructing him in the discharge of his duty. In an action by A. against the company for an assault and false imprisonment:—Held, that the company could not be made responsible for this act of their servant. *Lumsden* v. *L. & S. W. Ry.*, 16 L. T. 609. And see *Van den Eynde* v. *Ulster Ry.*, supra, col. 929.

**Liability of Tramway Company.**]—Where the servant of a public company, who was directed to exclude the public from an inclosed portion of a street, then being repaired by the company under the provisions of a local act of parliament (which empowered the company to exclude the public, and rendered any person obstructing the company's servants liable to a fine), forcibly prevented one of the public from driving into and through such inclosure, and such person was arrested in consequence by a police constable:—Held, that even if such arrest was caused by the direct accusation or charge of the servant, the company were not responsible for such arrest, as being a matter not within the scope of the servant's employment. *Barry* v. *Dublin Tramways Co.*, 26 L. R., Ir. 150.

A passenger on a tramway tendered a half-sovereign to the conductor of the car in payment of the fare. The conductor, supposing the coin to be counterfeit, gave the passenger in charge to the police:—Held, that the tramway company were liable in an action against them by the passenger for false imprisonment. *Furlong* v. *South London Tramways Co.*, 1 Cab. & E. 316; 48 J. P. 329.

Sect. 52 of the Tramways Act, 1870, which enacts that "it shall be lawful for any officer or servant of the promoters or lessees of any tramway" to detain any person defrauding the company of his fare, must be construed as limited to any officer or servant appointed for that purpose. A tramway company gave to their conductors printed instructions, in which it was ordered that, except in cases of assault, conductors were not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car, in which the plaintiff was a passenger, detained the plaintiff, and gave her into custody on a charge of passing bad money:—Held, in an action for false imprisonment against the company, that the defendants were not liable. *Charleston* v. *London Tramways Co.*, 36 W. R. 367. Affirmed, 32 S. J. 557—C. A.

**Liability of Public-house Proprietor.**]—The plaintiff and M. went to a public-house belonging to the defendant, and ordered some refreshment from the bar-manager. M. tendered a foreign gold coin in payment, but the manager refused to take it, and handed it back to M., who then gave him a half-sovereign and received the change. The plaintiff and M. shortly afterwards left the house. The manager followed them, and subsequently gave them into custody upon a charge of attempting to pass bad coin. In an action for false imprisonment:—Held, that the bar-manager had no implied authority from the defendant to give the plaintiff and M. into custody, the supposed attempt having ceased, and the arrest being unnecessary for the protection of the defendant's property, and that the action was therefore not maintainable. *Abrahams* v. *Deakin*, 60 L. J., Q. B. 238; [1891] 1 Q. B. 516; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212—C. A.

**Protection of Master's Property.**]—A servant has an implied authority to give a person into custody only when it is necessary to take such a step to protect his master's property. If a servant gives a person into custody when no such danger exists, the master will not be liable. *Stevens* v. *Hinshelwood*, 55 J. P. 341—C. A.

### d. Conversion.

**By Servants of Railway Company.**]—Trover for quicks and plants against a railway company. On the trial the judge ruled that there was sufficient evidence of a conversion by the company. To this ruling the company excepted. The verdict was for the plaintiff. The bill of exceptions set forth the evidence. By this it appeared that the plaintiff was a contractor, planting hedges for the company at one of their stations, and was owner of live thorns which had been placed, by leave of A. (called in the bill or exceptions the general superintendent of the company), in a piece of ground belonging to the company, and close to the station. The plaintiff demanded these thorns from the station-master, and was referred to A., and A., professing to act for the company, refused to let the plaintiff remove them. It did not appear when or under what circumstances the thorns were brought to the station. The majority of the judges construed the bill of exceptions as meaning that the thorns had been carried as merchandise on the line, and left in the company's ground with their roots covered, as a mode of warehousing them for a reasonable time, in such a manner as they might remain alive. *Taff Vale Ry.* v. *Giles*, 2 El. & Bl. 822; 2 C. L. R. 132; 23 L. J., Q. B. 43; 18 Jur. 510; 2 W. R. 57—Ex. Ch.

Held, that it is the duty of a company carrying on trade to have on the spot all that in ordinary exigencies of their business might require to be done promptly, that there was sufficient evidence that A. had authority to this extent from the company, and that it was unnecessary to shew any authority under seal. *Ib.*

Held, also, that to give up, or refuse to give up on demand, goods left with the company in the course of their trade as carriers, was an act within the scope of such authority, and that, on the construction put on the bill of exceptions by the majority of the judges, the thorns were so left, and, therefore, there was evidence of a conversion by the company. *Ib.*

**Privity of Contract.**]—By an agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington called the Agricultural Hall, the club was to have the exclusive use of the hall during the period of their annual show of stock, the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club) to receive, take care of, and re-deliver the stock exhibited, and also paying the club 1,000*l.*, in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by Sharman (upon orders signed by the

secretary of the Smithfield Club), who contracted with the defendants for a lump sum to receive them and to re-deliver them at the end of the show upon like orders: the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff; and upon the plaintiff's drover producing an order for their removal signed by Stilgoe, Sharman or one of his men delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought an action against the defendants for converting his sheep: —Held, that, as between the plaintiff and the defendants, there was no privity of contract and no duty on the part of the latter to re-deliver the stock at the close of the show. *Goslin* v. *Agricultural Hall Co.*, 1 C. P. D. 482; 45 L. J., C. P. 354, n.; 35 L. T. 92—C. A. Affirming, 45 L. J., C. P. 348; 34 L. T. 59.

### e. Negligence.

#### i. *Generally.*

According to the principles of English law, the responsibility of a master for the negligence of his servant is founded on the presumption that the owner chooses his servant, and gives him orders which he is bound to obey. *The Halley*, 5 Moore, P. C. (N.S.) 262; 37 L. J., Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.

For complaints by the public the master is responsible. Thus, if a servant drives his master's carriage over a bystander; or if a gamekeeper, employed to kill game, fires at a hare so as to shoot a bystander; or if a workman employed in building negligently drops a stone from the scaffold and so hurts a bystander, in all these cases the bystander is entitled to claim reparation from the master, because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself or of his servants. *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. 266; 4 Jur. (N.S.) 767; 6 W. R. 664.

In all cases where a master gives the direction and control over a carriage or an animal to a rational agent, the master is only responsible in an action on the case for want of skill or care of the agent. *Sharrod* v. *L. & N. W. Ry.*, 6 Railw. Cas. 239; 7 D. & L. 213; 20 L. J., Ex. 185; 14 Jur. 23.

**Intervention of Act of Third Person between Servant's Negligence and Injury.**] —Where the negligence of a servant is an effective cause of an injury, the intervention, between the negligence of the servant and the injury, of the negligence of another person which immediately causes the injury, does not relieve the master from his liability for the negligence of his servant. *Engelhart* v. *Farrant*, 66 L. J., Q. B. 122; [1897] 1 Q. B. 240; 75 L. T. 617; 45 W. R. 179—C. A. See also *Murphy* v. *G. N. Ry.*, infra, col. 937.

#### ii. *Railway Employees.*

Plaintiff travelled with a ticket issued by the D. company over defendants' railway in a carriage belonging to the D. company. By the defendants' act of parliament, the D. company had running powers over the line, the defendants receiving a percentage on the traffic receipts, such percentage to include the cost of all services connected with manning the lines, use of stations, and services of station staff necessary for dispatch of business connected with the traffic. The plaintiff was injured at a station belonging to the defendants by the negligence of a porter employed on a platform which was exclusively allotted to the D. company's traffic:—Held, that the porter was acting as the defendants' servant, and that therefore the defendants were liable. *Self* v. *L., B. & S. C. Ry.*, 42 L. T. 173; 44 J. P. 344—C. A.

The defendants' railway crossed a level crossing which was some twenty yards distant from a footbridge. Both the crossing and the bridge were private crossings, intended for the use of persons employed in a neighbouring manufactory. About thirty yards from the crossing was a box where a railway man was commonly stationed, who was sometimes shouted to by persons wishing to pass the level crossing with carts, and answered "All right." The plaintiff, a boy of eleven years of age, who was employed at the manufactory, having occasion to go over the line, was waiting at the level crossing until one train had passed, but was knocked down and severely injured, when in the act of crossing, by another train, which he had not observed, and which was passing in the opposite direction immediately afterwards. At the trial there was evidence that the bridge was dirty and not lighted at the time of the accident; that the train did not whistle; that the plaintiff knew the bridge, having crossed it several times; and that the man at the box used to bring out a stick to stop him from going over the bridge, but that when the accident happened he was not present. There was no evidence to shew what the man's special duties were, or whether he had any duties in respect to foot-passengers. Upon this evidence the learned judge was asked to nonsuit the plaintiff:—Held, on further consideration, that there was evidence of negligence to go to the jury, and that the conduct of the railway man was a distinct breach of duty which amounted to negligence and contributed to the accident. *Clarke* v. *Midland Ry.*, 43 L. T. 381.

The stations of the defendants and of two other railway companies at Bristol adjoined, and were open to one another, and the passengers of each company were in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendants' platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendants negligently drove a truck laden with luggage, and a portmanteau fell off and injured the plaintiff:—Held, that as the negligence complained of was an act of misfeasance by a servant of the defendants in the course of his employment, the maxim of respondeat superior applied; and that, in the circumstances, they were liable. *Tebbutt* v. *Bristol and Exeter Ry.*, 40 L. J., Q. B. 78; L. R. 6 Q. B. 73; 23 L. T. 772; 19 W. R. 383.

M. was a cloak-room clerk in the defendants' employ, and assisted at the parcels office; he "used to take up parcels for passengers from the cloak room to the train, when there was no porter there, and that was a regular thing for him to do." A passenger had asked him to take a parcel to the train, which he did, and as he was running back, he ran against another porter,

who in his turn came against the ticket-collector, and the ticket-collector upset the plaintiff's wife, causing injuries which resulted in her death. At the trial the plaintiff was nonsuited, on the ground that there was no evidence that at the time of the accident M. was acting within the scope of his employment. It was agreed at the trial that, if the court should be of opinion that the nonsuit was wrong, judgment should be entered for the plaintiff for 236*l.* and costs :—Held, that there was evidence to go to the jury that at the time of the accident M. was acting within the scope of his employment, that the nonsuit was wrong, and that judgment should be entered for the plaintiff as agreed. *Milner* v. *G. N. Ry.*, 50 L. T. 367.

A railway porter wheeled a barrow with luggage thereon to a side entrance to the defendants' station, and left it stationary close to the top of some steps leading down to the public footpath outside. Some licensed porters, not employed by or subject to the control of the defendants, rushed up the steps—as was usual when the constable whose duty it was to keep them off the platform and to maintain order amongst them was absent, as he was on this occasion—and in a struggle for the luggage upset the barrow of trunks. These tumbled down the steps and injured the plaintiff, a passenger, who was waiting on the footpath for his luggage to be brought out :—Held, that the plaintiff was not entitled to recover. *Murphy* v. *G. N. Ry.*, [1897] 2 Ir. R. 301.

A railway train, driven at the rate of forty miles an hour according to the general directions of the railway company to the driver, ran over and killed some sheep, which had strayed on the line in consequence of the defective fences of the company :—Held, that, the train being under the direction and control of a rational agent, the company was not liable in trespass for the injury, but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod* v. *L. & N. W. Ry.*, 6 Railw. Cas. 239 ; 7 D. & L. 213 ; 20 L. J., Ex. 185 ; 14 Jur. 23.

iii. *Servants in Charge of Horses and Vehicles.*

**Horse.**]—The plaintiff was driving a waggon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the waggon on the wrong side), when just as he passed the plaintiff, the groom touched his horse with his spur and the horse kicked out and struck the plaintiff :—Held, that the act of using the spur when so near to the plaintiff was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence. *North* v. *Smith*, 10 C. B. (N.S.) 572 ; 4 L. T. 407.

A person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say, whether or not the horse was taken by the servant with the implied consent or authority of the defendant ; and they having found a verdict for the plaintiff, the court refused to grant a new trial. *Goodman* v. *Kennell*, 1 M. & P. 241 ; 3 Car. & P. 167 ; 6 L. J. (O.S.) C. P. 61.

Where a servant wantonly, and not in the execution of his master's orders, struck the plaintiff's horses, and thereby produced an accident, the master is not liable ; but where he so struck them in the course of his employment, although injudiciously, the master is responsible. *Croft* v. *Alison*, 4 B. & Ald. 590 ; 23 R. R. 407.

**Stage Coach.**]—The proprietors of a mail-coach are answerable for any injury happening to a passenger through the misconduct of their driver. *White* v. *Boulton*, Peake, 81 ; 3 R. R. 657.

But coach-owners are not liable for injuries happening to passengers from accident or misfortune, where there has been no negligence nor default in the driver. *Aston* v. *Heaven*, 2 Esp. 533 ; 5 R. R. 750. S. P., *Christie* v. *Griggs*, 2 Camp. 79 ; *Crofts* v. *Waterhouse*, 11 Moore, 133 ; 3 Bing. 319 ; 4 L. J. (O.S.) C. P. 75 ; 28 R. R. 631.

The proprietor of a stage-coach is answerable for the negligence of the driver, from the usual place of taking passengers, not only till the coach arrives at its destination, but till the passengers are safely set down. *Dudley* v. *Smith*, 1 Camp. 167 ; 10 R. R. 661.

The driver of a stage-coach before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger ; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby suffer, which they might have escaped by alighting. *Ib.*

If, when dangers occur, the driver of a stage-coach does not take the safest course, the owner is responsible for the mischief which ensues. *Jackson* v. *Tollett*, 2 Stark. 37 ; 19 R. R. 673.

If a declaration in an action against coach proprietors, for an injury received by the overturning of a coach, states that it was their duty to carry the plaintiff safely for a certain hire, it does not mean to carry safely at all events, but will be sufficiently supported by proof of the want of due care. *Harris* v. *Costar*, 1 Car. & P. 636.

**Omnibus.**]—A driver of an omnibus while driving his master's omnibus in regular course, wilfully and contrary to express orders endeavoured to obstruct the passage along the road of another omnibus belonging to a rival proprietor, by drawing his omnibus across the road :—Held, this was such an act as the master was not responsible for. *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526 ; 32 L. J., Ex. 34 ; 9 Jur. (N.S.) 333 ; 7 L. T. 641 ; 11 W. R. 149—Ex. Ch.

The fact that a passenger in an omnibus is struck by the driver's whip is primâ facie evidence of negligence by the driver in the course of his employment ; and even if it appears that the blow was struck at the servant of another omnibus with whom there had been a dispute, and who had jumped on the omnibus step to get its number, it is a question for the jury whether the blow was struck by the driver in private spite or in supposed furtherance of his employer's interests. *Ward* v. *London General Omnibus Co.*, 42 L. J., C. P. 265 ; 28 L. T. 850—Ex. Ch. Affirming, 21 W. R. 358.

A passenger was getting out of an omnibus before it stopped, when the conductor told her to wait. She continued to move towards the door, and he took her hand and supported her to the step, from which she fell to the ground :—

Held, that this was not such negligence on the part of the servant as to render the master liable. *Lingard* v. *Kirkpatrick*, 15 L. T. 245.

—— **Proceedings before Magistrate—Bar to Action.**]—In an action for damages against the proprietors of an omnibus, in respect of injuries caused by negligence of their driver, they pleaded that plaintiff was awarded and had accepted a sum of money as compensation, by a magistrate having jurisdiction to award the same :—Held, a good defence to the action, notwithstanding such order was not made on the proprietors but on the driver. *Wright* v. *London General Omnibus Co.*, 46 L. J., Q. B. 429 ; 2 Q. B. D. 271 ; 25 W. R. 647.

**Cab.**]—In an action against the registered proprietor of a cab for the loss of a portmanteau by the negligence of the licensed driver, it appeared that the arrangement between the proprietor and the driver was, that the driver paid each morning a fixed sum for the use of the cab and two horses during the day, and was allowed to keep for himself all the money which he received. The cab had upon it a plate with the name of the defendant as the proprietor, in pursuance of 1 & 2 Will. 4, c. 22, s. 20, but the proprietor did not exercise any control over the driver as to where he should ply with the cab :—Held, that, under the circumstances proved, and the 1 & 2 Will. 4, c. 22, and 6 & 7 Vict. c. 86, the driver was the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor was liable ; and therefore the action was rightly brought against him. *Powles* v. *Hider*, 6 El. & Bl. 207 ; 25 L. J., Q. B. 331 ; 2 Jur. (N.S.) 472 ; 4 W. R. 492.

A person was run over and sustained injuries through furious driving on the part of a cab driver, and brought an action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the driver was that the horse and cab were entrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16*s.* for the cab ; all that he made above that sum was his perquisite for his labour, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor, intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened :—Held, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting. *Venables* v. *Smith*, 46 L. J., Q. B. 470 ; 2 Q. B. D. 279 ; 36 L. T. 509 ; 25 W. R. 584.

The provisions of the Hackney Carriage Acts do not necessarily impose upon cab proprietors and drivers the relation of master and servant. Where, therefore, by the terms of the contract between them, such a relation is not established, and, apart from the provisions of the act, they are only in the position of bailor and bailee, the proprietor is not liable in an action for damages caused by the negligent driving of the driver. *Powles* v. *Hider* (6 El. & Bl. 207) and *Venables* v. *Smith* (2 Q. B. D. 279) distinguished. *King* v. *Spurr*, 51 L. J., Q. B. 105 ; 8 Q. B. D. 104 ; 45 L. T. 709 ; 30 W. R. 152 ; 46 J. P. 198.

Under the Metropolitan Hackney Carriage Act, 1843, so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them. *Venables* v. *Smith* (2 Q. B. D. 279) approved. *King* v. *London Improved Cab Co.*, 58 L. J., Q. B. 456 ; 23 Q. B. D. 281 ; 61 L. T. 34 ; 37 W. R. 737 ; 53 J. P. 788—C. A.

**Carriage or Chaise.**]—A master is responsible for injury resulting from the negligence of his servant whilst driving his cart or carriage, provided the servant is at the time engaged in the business of his master, even though the accident happened in a place where his master's business did not call him ; but if the journey on which the servant starts is solely for his own purposes, and undertaken without the knowledge or consent of his master, the latter is not responsible. *Mitchell* v. *Crasweller*, 13 C. B. 237 ; 22 L. J., C. P., 100 ; 17 Jur. 716 ; 1 W. R. 153.

A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master ; but he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant acting in his employ. *M'Manus* v. *Crickett*, 1 East, 106 ; 5 R. R. 518.

Where a master intrusts his servant with his carriage for a given purpose, and the servant drives it for another purpose of his own, in a direction different from that ordered by his master, and in doing so drives over a person, the master is liable for such negligence. *Heath* or *Sleath* v. *Wilson*, 2 M. & Rob. 181 ; 9 Car. & P. 607.

The defendant, who kept two horses at a livery stable, being desirous of trying them in double harness, had them put into his carriage and driven by a groom employed at the stable, whilst he himself sat beside the groom. As the groom was driving, the horses were startled by a dog and became unmanageable to such an extent that the groom could not stop them, though he still retained some control over them. The groom endeavoured to turn down a side street, but, failing to do so, drove on to the pavement and injured the plaintiff. The jury having found that there was no negligence on the part of any one :—Held, that the act of the groom in giving to the horses the direction which brought them on the pavement and into collision with the plaintiff, being neither negligent nor wilful, did not give a cause of action. *Holmes* v. *Mather*, 44 L. J., Ex. 176 ; L. R. 10 Ex. 261 ; 33 L. T. 361 ; 23 W. R. 364.

In an action for injuries sustained through the negligent driving of one of defendant's servants, the only question being whether the defendant was responsible for such negligence, it appeared that the defendant was the proprietor of an hotel and shop in the town of C., and kept a pony and chaise for his own personal use. They were not used for the purpose of the defendant's business. The accident which occasioned the injuries occurred during the temporary absence of the defendant, who had left a servant, E., in charge of the shop only, with authority to sell goods

and generally to see that things went right in his absence. The defendant gave E. no authority to drive. Another servant, named M., was in charge of the yard, and it was his duty to drive when defendant required. A housekeeper had charge of the house. While the defendant was so absent, one of his relatives, Q., who admittedly had no authority to act as his agent, called at the house, and when leaving E., at Q.'s request, drove Q. in the pony chaise to the neighbouring railway station. When E. was driving the pony and chaise back from the station the accident took place:—Held, that there was no evidence proper to be submitted to the jury that E. was at the time of the accident acting in the course of his employment as the defendant's servant. *Wilson* v. *Owens*, 16 L. R. Ir. 225. Affirmed in C. A.

A van was standing at A.'s door, from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and, there not being room for the carriage to pass, the coachman got off his box and laid hold of the van horse's head; this caused the van to move and thereby a packing-case fell out of the van upon the shafts of the gig and broke them:—Held, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time of the accident. *Lamb* v. *Palk*, 9 Car. & P. 629.

A master is responsible for an injury occasioned by negligent driving of his servant, where he is acting at the time in his service, and in a manner impliedly sanctioned by him. *Patten* v. *Rea*, 2 C. B. (N.S.) 606; 26 L. J., C. P. 235; 3 Jur. (N.S.) 892; 5 W. R. 689.

A., the general manager of a defendant, proprietor of a horse repository, was possessed of a horse and gig, which were kept for a time upon the defendant's premises free of charge, and were used by A. in the conduct of the defendant's business. In going (without the knowledge of the defendant) upon his business, with the horse and gig, A. drove against and killed the plaintiff's horse:—Held, that the defendant was responsible; and that it was immaterial that A. was also going on private business of his own. *Ib.*

Trespass lies against a master for the act of his servant, where, while the servant is driving his master in a gig, the horse runs away and does damage. *Chandler* v. *Broughton*, 1 C. & M. 29; 3 Tyr. 220; 2 L. J., Ex. 25.

**Cart.**]—A herd got leave from his master to go for the day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some meat from the town for the master. He drove the horse and tax-cart so negligently that he injured the plaintiff:—Held, in an action against the master for the negligence of the servant, that the court could not hold as a matter of law, upon the evidence, that the master was responsible for the negligence of the servant. *Cormick* v. *Digby*, Ir. R. 9 C. L. 557.

If a servant in driving his master's cart, on his master's business, makes a detour from the direct road for some purpose of his own, his master will be answerable for any injury occasioned by his negligent driving while so out of the road. *Joel* v. *Morison*, 6 Car. & P. 501.

But if a servant takes his master's cart without leave, at a time when it is not wanted for the purpose of business, and drives it about solely for his own purposes, the master will not be answerable for any injury which he may do. *Ib.*

A carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was, that, with the horse and cart, he took out beer to the customers of his master, who was a brewer, and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from his master a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public-house which his master supplied, and for which he afterwards received the customary 1*d.*:—Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. *Rayner* v. *Mitchell*, 2 C. P. D. 357; 25 W. R. 633.

A wine merchant sent his clerk with his horse and cart under the care of his carman, to deliver wine and bring back empty bottles. On their return, when within a quarter of a mile from his master's stable, the carman, at the request of the clerk and for his business, drove the horse and cart in another direction, and when two miles from the stable injured a person by negligent driving:—Held, that the master was not liable, as the act of the servant was not done in the course of his employment, but on a new and an independent journey. *Storey* v. *Ashton*, 10 B. & S. 337; 38 L. J., Q. B. 223; L. R. 4 Q. B. 476; 17 W. R. 727.

In an action for damage done to the plaintiff's cabriolet, against which the defendant's cart was driven, the defendant will be liable, although it should appear that his servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him, and who was not in the service of the defendant. *Booth* v. *Mister*, 7 Car. & P. 66.

The defendant sent out with a horse and cart for the delivery of parcels a driver, whose duty it was to drive the cart, and a youth whose duty it was to deliver the parcels, but not to drive at all. The driver left the cart, and during his absence the youth, in order to further the defendant's business, proceeded to turn the cart round, and while so doing caused injury to the plaintiff's vehicle:—Held, that the negligence of the driver in leaving the cart without proper attendance was an effective cause of the injury, and that the defendant was liable for that negligence; and that his liability was not removed by the intervention of the act of the youth outside the scope of his employment, which was the proximate cause of the injury. *Engelhart* v. *Farrant*, 66 L. J., Q. B. 122; [1897] 1 Q. B. 240; 75 L. T. 617; 45 W. R. 179—C. A.

In an action for death caused or injuries sustained, through being run over by a vehicle driven by a servant, evidence that he might have seen the plaintiff or the deceased in time to pull up, if he had not been looking at his horses owing to the want of a skid in going down hill, is sufficient evidence of negligence; and even although there was some negligence on the part of the deceased in crossing the road, yet the master is liable if his servant, by the exercise of reasonable care, could have seen the deceased and avoided

the accident. *Springett* v. *Ball*, 4 F. & F. 472.

—— **Privity of Contract.**]—The plaintiff, a person of full age, contracted with the defendant to carry goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way the cart broke down, and the plaintiff was thrown out and severely injured:—Held, that, as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. *Lygo* v. *Newbold*, 9 Ex. 302; 2 C. L. R. 449; 23 L. J., Ex. 108; 2 W. R. 158.

—— **Pleadings.**]—A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse is supported by evidence that the defendant's servant drove the cart. *Brucker* v. *Formont*, 6 Term Rep. 659; 3 R. R. 303.

iv. *Servants in Charge of Harbours and Docks.*

**Harbour-master.**]—The R., which was anchored in F., outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the R. where to beach her. Before the R. left the outer harbour, S. came on board, although a Trinity-house pilot was on board, and when she had arrived near the place where she had to be beached, gave directions as to the lowering of her anchor. The R. overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found as a fact that there was negligence on the part of S., and that the place where the R. grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed the functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the R. *The Rhosina*, 54 L. J., P. 72; 10 P. D. 131; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 460—C. A.

A ship having sustained an injury which made it necessary that she should be grounded, the acting harbour-master suggested or permitted that she should be grounded in a lock which had previously been used for a like purpose. The harbour-master represented that the bottom of the lock was even, and that the operation could safely be performed. There was, however, a sill several inches high at the bottom, and the ship being fully laden, her keel was broken and the hull strained. The owners sued the dock company for damages:—Held, that the harbour-master was acting within the scope of his authority in permitting this use of the lock; that the company was responsible for his representation, and that he was guilty of negligence. *The Apollo, Little* v. *Port Talbot Co.*, 61 L. J., P. 25; [1891] A. C. 499; 65 L. T. 590; 7 Asp. M. C. 115; 55 J. P. 820—H. L. (E.)

**Foreman of Dockyard—Liability of Government Officials.**]—A barge belonging to the plaintiffs was moored in Chatham Dockyard at a berth pointed out by the foreman, and the barge was there damaged. In an action to recover the amount of the damage from the port admiral, the admiral superintendent, and the queen's harbour-master of Chatham dockyard, being the officials in charge of the dockyard, the jury found that the berth was unsafe, and gave a verdict for the plaintiffs:—Held, that there being no act of parliament and no order in council rendering the defendants liable, their liability must be decided on common law principles, and that the doctrine of "respondeat superior" does not apply in such a case, but the doctrine of invitation does apply, and as there was no evidence that the defendants invited the plaintiff to moor the barge where they did, the defendants were not liable, and judgment must be for them. *Wright* v. *Lethbridge*, 63 L. T. 572; 6 Asp. M. C. 558—C. A.

**Traffic Foreman—Authority of.**]—The plaintiff's ship, the C., was ordered by the defendant company, the consignees of the C.'s cargo, to proceed to the defendant's wharf to discharge. On her arrival the defendant's traffic foreman wrote to her master saying he could bring the C. to the wharf at a certain time, and stating the then depth of the water, and asking him to inform the pilot thereof. On the C. proceeding to the wharf, but before she got into her berth, she grounded on a ridge of mud which had been formed between the berth next the quay and another outside it, and sustained the damage in respect of which her owners now sued the wharfingers:—Held, that even if there had been any misrepresentation the traffic foreman had no authority to make it. *The Calliope*, 59 L. T. 901; 6 Asp. M. C. 359. But see *S. C.* in C. A., 58 L. J., P. 76; 14 P. D. 138; 38 W. R. 155.

v. *Other Servants.*

**Carman delivering Coals—Removal of Plate in Footway.**]—The carman of a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries:—Held, in an action against the coal merchant for negligence, that he was responsible, as the carman was acting as his servant in the delivery of the coals. *Whiteley* v. *Pepper*, 46 L. J., Q. B. 436; 2 Q. B. D. 276; 36 L. T. 588; 25 W. R. 607.

**Servant delivering Goods—Truck left on Road—Intoxication.**]—A cornfactor was absent from his shop, and during his absence his sister managed his business. She wanted to send out some corn to a customer, and for this purpose employed a person who occasionally worked for her brother, and who at the time of such employment was in a state of inebriety. This man, contrary to the practice of the cornfactor's shop, took out the corn on a small warehouse truck, which he negligently left on the road, whereby a person driving along in a chaise was injured:—Held, that the cornfactor was liable in an action at the suit of this person, on the ground that the employment of a tipsy man was an act of

negligence, and that by such employment he set the whole thing in motion, and must therefore be answerable for the consequences. *Wanstall* v. *Pooley*, 6 C. & F. 910, n.

**Foreman of Stevedore—Assisting Carman.**]—A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured a person who was passing by:—Held (per Grove and Denman, JJ., Brett, J., dissentiente), that there was evidence for a jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. *Burns* v. *Poulsom* or *Poulson*, 42 L. J., C. P. 302; L. R. 8 C. P. 563; 29 L. T. 329; 22 W. R. 20.

**Pilot—Damage to Oyster Beds.**]—A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster bed. On notice of the existence of the oyster bed being given to the master, he took all reasonable means to remove the ship as speedily as possible. In an action by the lessee of the oyster bed against the shipowner and the pilot:—Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done. *The Octavia Stella*, 57 L. T. 632; 6 Asp. M. C. 182.

**Clerk—Overflow of Water from Lavatory.**]—The defendants sublet to the plaintiffs the lower rooms of their house, while they retained the upper rooms for carrying on their own business. In these upper rooms there was a lavatory for the use of the defendants' clerks, the key of which was kept by the defendants' foreman. This foreman, leaving off work at seven o'clock, went at ten minutes past seven to the lavatory to wash his hands. Turning on the tap, and finding no water, he went away without turning the tap off. When the water was turned on next morning it overflowed, went through the floor, and damaged the plaintiff's goods in the room below. The jury found that the damage was caused by the negligence of the clerk in leaving the tap open:—Held, that the defendants were liable for the damage so caused by the negligence of their clerk, upon the ground that whether the use of the lavatory by the clerk was or was not within the scope of his authority, it was at all events an incident to his employment, so as to render his employer liable for the damage resulting from his negligence in such use. *Ruddiman* v. *Smith*, 60 L. T. 708; 37 W. R. 528; 53 J. P. 518.

The plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the water tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them. In an action for negligence:—Held, that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. *Stevens* v. *Woodward*, 50 L. J., Q. B. 231; 6 Q. B. D. 318; 44 L. T. 153; 29 W. R. 506; 45 J. P. 603.

**Servant in Occupation of Premises—Setting on Fire.**]—By the law of Scotland, a tenant is liable to his landlord, if premises demised are burnt down by the negligence or misconduct of the tenant's servant, in the ordinary scope of his employment. The defendant's servant burnt down a house demised to the defendant, in Scotland, by lighting furze and straw, with a view to cleanse a chimney which smoked, although she had been cautioned against the danger of such a proceeding. In an action brought against the defendant by his landlord for this injury:—Held, that it was properly left to the jury to say whether the servant was acting within the general scope of her duty; and the jury having found for the defendant, the court refused to grant a new trial. *M'Kenzie* v. *M'Leod*, 10 Bing. 385; 4 M. & Scott, 249; 3 L. J., C. P. 79.

A defendant, having purchased some timber of the plaintiff, a timber merchant, was permitted by the plaintiff to use a shed of the plaintiff's for the purpose of working up the timber. The defendant, with the knowledge of the plaintiff, employed a carpenter to work up the timber in the shed; the carpenter, in lighting his pipe, set fire to the shed, which was burnt down:—Held, first, that the defendant's right to use the shed was not a letting by the plaintiff, but a mere licence to use the shed. *Williams* v. *Jones*, 3 H. & C. 256; 33 L. J., Ex. 297. Affirmed, 3 H. & C. 602; 11 Jur. (N.S.) 843; 13 L. T. 300; 13 W. R. 1023—Ex. Ch.

Held, secondly, that the negligence of the carpenter in setting the shed on fire was not in the course of his employment as the defendant's servant so as to render the defendant liable. *Ib.*

**Servant of Bailee.**]—The bailee for hire of a chattel is responsible to the bailor for damage done to the chattel through negligence of the bailee's servant, though not done in the course of his employment. *Coupé Co.* v. *Maddick*, 60 L. J., Q. B. 676; [1891] 2 Q. B. 413; 65 L. T. 489; 56 J. P. 39.

The defendants' hall was hired for the purpose of an evening concert, at which the plaintiff was to take part as one of the orchestra. There was no agreement between the hirer of the hall and the defendants as to the use of the hall for a rehearsal, but a rehearsal in which the plaintiff took part was held, without objection, in the afternoon of the day fixed for the concert. The plaintiff, after the rehearsal, placed the instrument he had been playing in an ante-room, in a secure position, but without any notice to the defendants or their hall-keeper. In the evening, the hall-keeper, in the course of his duty, went to the ante-room to turn on the gas at the meter and had to move the instrument, which he then placed in another part of the room as carefully

as he could. The instrument fell and was damaged:—Held, (i.) that there was no bailment between the parties; (ii.) that it was not within the scope of the hall-keeper's employment to take care of the instrument; and (iii.) that there was no evidence of negligence on the part of the hall-keeper. *Newwith* v. *Over Darwen Industrial Society*, 63 L. J., Q. B. 290; 10 R. 588; 70 L. T. 374.

**Servant of Highway Board—Heap of Stones by Roadside.**]—The defendants, a highway board, had left a heap of stones on the side of a road within their jurisdiction; their servant in placing the stones there had allowed them to project into the road. A person while driving on a dark night drove against the stones and was killed. In an action under Lord Campbell's Act:—Held, that the defendants were liable for the act of their servant. *Tucker* v. *Axbridge Highway Board*, 53 J. P. 87.

**Servant in charge of Dog—Scienter.**]—If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. *Baldwin* v. *Casella*, 41 L. J., Ex. 167; L. R. 7 Ex. 325; 26 L. T. 707; 21 W. R. 16. *See also* ANIMALS.

vi. *Acts of Contractors and their Servants.*

A person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which flow out of the fulfilment of the contract. *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195; 19 W. R. 884.

The defendant employed P. to clean out a drain which was on the defendant's land. P. was not in the defendant's service, but was a common labourer, selected by the defendant on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, and without the further direction or inspection of the defendant. He received five shillings for the job from the defendant. In the course of cleaning out the drain P. took up part of an adjoining highway and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured:—Held, that in these circumstances P. was not an independent contractor, but was acting as the servant and under the control of the defendant, and consequently that the defendant was responsible for the injury. *Sadler* v. *Henlock*, 4 El. & Bl. 570; 3 C. L. R. 760; 24 L. J., Q. B. 138; 1 Jur. (N.S.) 677; 3 W. R. 181.

A captain of a vessel employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the crew, named Davis, whom he paid, and over whom he had entire control, to assist them in unloading. The plaintiff while engaged in the work was injured through the negligence of Davis:—Held, that the captain was not responsible for the injury. *Murray* v. *Currie*, 40 L. J., C. P. 26; L. R. 6 C. P. 24; 23 L. T. 557; 19 W. R. 104.

A lessee of a ferry hired of the defendant a steamer, with a crew to ply to and fro. The plaintiff purchased of the lessee of the ferry a season ticket, and while on board the vessel, was injured by the breaking of a rope through the negligence of the crew:—Held, that the crew remained the servants of the defendant, and that he was therefore liable to the plaintiff for the negligence. *Dalyell* v. *Tyrer*, El. Bl. & El. 899; 28 L. J., Q. B. 52; 5 Jur. (N.S.) 335; 6 W. R. 684.

Held, also, that the liability of the defendant in such a case is independent of any contract, and that it was immaterial whether the purchase of the ticket was from the lessee or the defendant. *Ib.*

The defendants sent a barge under the management of their lighterman to a wharf for the purpose of being loaded. He was unable to get up to it, in consequence of a barge belonging to the plaintiff lying in the way, without any one in charge of it. The foreman of the wharf told him to shove the other barge away, as it had no business there, and to bring his alongside. He then moved the plaintiff's barge from the wharf, and made it fast to a pile in the river. When the tide went down, the barge settled upon a projection in the bed of the river, and was injured:—Held, that the defendants were responsible, as the lighterman in doing the act complained of was acting as their servant. *Page* v. *Defries*, 7 B. & S. 137.

A master porter, employed by a merchant at Liverpool to hoist or lower goods, cannot be considered in the light of a bailee, but of a servant; and the party employing him is liable for any injury caused through his negligence or want of skill. *Randleson* v. *Murray*, 3 N. & P. 239; 8 A. & E. 109; 1 W. W. & H. 149; 7 L. J., Q. B. 132; 2 Jur. 324.

D. contracted with the defendants, an urban authority, to supply by the day a driver and horse to drive and draw a watering-cart belonging to the defendants. The driver was employed and paid by D., and was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart:—Held, that the defendants were not liable. *Quarman* v. *Burnett* (6 M. & W. 499) followed; *Rourke* v. *White Moss Colliery Co.* (2 C. P. D. 205) distinguished. *Jones* v. *Liverpool Corporation*, 54 L. J., Q. B. 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P. 311.

Where a person was hired and paid by W. as a driver of a horse kept by its owner for the service of the defendant, but which the owner could use as he liked when the defendant did not require it:—Held, that the driver was not the servant of the defendant, and that, an accident having happened through the servant's negligence when he was not out on the defendant's service, the defendant was not liable. *Nicholson* v. *Harrison*, 4 W. R. 459.

A butcher who had purchased a beast at Smithfield in the city of London, employed a licensed drover to drive it home. By the by-laws of the city, such beasts must, within the limits of the city, be driven by licensed drovers, unless driven by the purchasers themselves. The drover employed a boy to drive the beast, and through the boy negligently driving the beast, after it had passed the limits of the city, it ran into the plaintiff's premises and damaged his property:—Held, that although the damage was not done within the city, the boy was not to be deemed the servant of the owner of the beast, and that the owner therefore was not liable. *Milligan* v. *Wedge*, 4 P. & D. 714; 1 Q. B. 714; 12 Ad. & E. 737; 10 L. J., Q. B. 19.

The defendant sent some bales of cotton to a

warehouse, and they were piled there by his men, under the direction of the warehouseman's foreman. Owing to a fault in the piling, the pile fell and hurt the plaintiff:—Held, that the defendant was not liable. *Murphy* v. *Caralli*, 3 H. & C. 462; 34 L. J., Ex. 14; 10 Jur. (N.S.) 1207; 13 W. R. 165.

The defendant engaged the services of S., a thatcher, for a certain period at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having, during the period, thatched some stacks of wheat for the plaintiff, for which work the defendant claimed and received payment:—Held, that the defendant was responsible to the plaintiff for injury to the wheat, occasioned by the negligent manner in which S. did the work. *Holmes* v. *Onion*, 2 C. B. (N.S.) 790; 26 L. J., C. P. 261.

The appellant and respondent were owners of adjoining houses, between which was a party wall. The appellant's house also adjoined B.'s house, and between them was a party wall. The appellant employed a builder to pull down his house and rebuild it. In the course of rebuilding, the builder's workmen, in fixing a staircase, negligently and without the knowledge of the appellant, cut into the party wall between the appellant's house and B.'s house, in consequence of which the appellant's house fell, and the fall injured the respondent's house. The cutting of the party wall was not authorised by the contract between the appellant and his builder:—Held, that the appellant could not get rid of responsibility by delegating the performance to a third person, and was liable to the respondent for the injury to his house. *Bower* v. *Peate* (1 Q. B. D.) commented on. *Hughes* v. *Percival*, 52 L. J., Q. B. 719; 8 App. Cas. 443; 49 L. T. 189; 31 W. R. 725; 47 J. P. 772—H. L. (E.)

The defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts. The men so employed were allowed an hour for dinner, but were not permitted to go home and dine or to leave their horses and carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff:—Held, that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was. *Whitman* v. *Pearson*, 37 L. J., C. P. 156; L. R. 3 C. P. 422; 16 W. R. 649.

The plaintiff received personal injuries through the negligence of one S., who was under the immediate control of one J. The defendants made an arrangement with J. to do certain work on which S. was subsequently employed, and was so employed at the time the plaintiff was injured. Under that arrangement the defendants might at any moment stop J. from going on with the work without committing any breach of contract:—Held, that J. was a servant of the defendants, and that the defendants were, therefore liable to the plaintiff for the negligence of S. *Oldfield* v. *Furness*, 58 J. P. 102—C. A.

*See also* PRINCIPAL AND AGENT.

vii. *Servant lent to Third Party.*

If a person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be considered as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him:—Semble, that that relation is the same whether the lender is paid, or lends his servant gratuitously. *Rourke* v. *White Moss Colliery Co.* (2 C. P. D. 205) followed; *Jones* v. *Liverpool Corporation* (14 Q. B. D. 890) discussed. *Donovan* v. *Laing*, 63 L. J., Q. B. 25; [1893] 1 Q. B. 629; 4 R. 317; 68 L. T. 512; 41 W. R. 455; 57 J. P. 583—C. A.

**f. Fraudulent Acts.**

A master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. *Coleman* v. *Riches*, 16 C. B. 104; 3 C. L. R. 795; 24 L. J., C. P. 125; 1 Jur. (N.S.) 596; 3 W. R. 453.

Therefore, where the servant of a wharfinger fraudulently signed a receipt purporting to be an acknowledgment that wheat had been delivered at his employer's wharf to be shipped to the order of C., no such wheat having in fact been delivered, and thereby wilfully induced C. to pay the price to the pretended vendor:—Held, that the wharfinger was not liable, although it was proved that C.'s course of dealing was to pay for all wheat delivered for him at the wharf, on the production, by the vendor, of the wharfinger's receipt, and that the latter knew it. *Ib.*

An attorney's clerk by giving a receipt for money on account to a different person from that to whom he gives credit, to enable such person to deceive others, does not bind the master. *Williams* v. *Goodison*, 2 Car. & P. 257.

A master is answerable for every such wrong of his servant or of his agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved; and there is no distinction between the case of fraud and the case of any other wrong. *Mackay* v. *Commercial Bank of New Brunswick*, 43 L. J., P. C. 31; L. R. 5 P. C. 394; 30 L. T. 180; 22 W. R. 473.

When one party has suffered, and another has profited by, the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages. *Ib.*

An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent. *Ib.*

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled him, and induced him to accept a bill in which the bank was interested; and he was compelled to pay the bill:—Held, that he could recover from the bank the amount so paid. *Ib.*

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal. *Ib.*

### g. Other Wrongful Acts.

**Trespass.**]—A master is liable in trespass for any act done by his servant, in the course of executing his orders with ordinary care; and, therefore, where a master ordered his servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall:—Held, that the master was liable in trespass. *Gregory* v. *Piper*, 9 B. & C. 591; 4 M. & Ry. 500.

A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plaintiff's land and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plaintiff's side as impeded the flow of drainage along the ditch:—Held, that the acts so done by B. were not within the scope of his employment; and consequently the local board was not liable for them at the suit of the plaintiff, there being no implied authority from the board to do them. *Bolingbroke (Lord)* v. *Swindon New Town Local Board*, 43 L. J., C. P. 287; L. R. 9 C. P. 575; 30 L. T. 723; 23 W. R. 47.

**Infringement of Patent.**] — The workmen employed on the works of a company, in the manufacture of certain foils and sheet metals, infringed, in the carrying out of the process upon which they were employed, a patent for a method of combining lead and tin and a metal so produced:—Held, that the directors and managers, as well as the company, were personally liable for the acts of the workmen, even on the supposition that the workmen had been directed by them not to infringe the patent. *Betts* v. *De Vitre*, 37 L. J., Ch. 325; L. R. 3 Ch. 429; 18 L. T. 165; 16 W. R. 529.

**Interference with Ferry.**]—A boatman left his boat to a lad in his employ, who was accustomed to ply in it for hire, and to carry passengers across a haven; and the lad on one occasion received a passenger and carried him across near to the line of an ancient ferry, paying the fare over to his master:—Held, that the master was responsible for his act. *Huzzy* v. *Field*, 1 C. & M. 345; 3 Tyr. 371; 4 L. J., Ex. 239.

**Accident caused by Music in Street—Salvation Army.**]—A horse belonging to the plaintiffs was injured by another horse which became restive owing to the noise of the music played by a detachment of the Salvation Army in a public street. In an action brought by the plaintiffs against the defendant as head of the Salvation Army to recover damages for such injury:—Held, that in the absence of evidence to show what the relationship was between the particular members of the army and the defendant, it could not be inferred that such members were the servants of the defendant or were acting under his authority. *London General Omnibus Co.* v. *Booth*, 63 L. J., Q. B. 244.

### 3. Injuries to Volunteers assisting Servants.

**General Rule.**]—The rule of law, that a master is not in general responsible to his servant for an injury occasioned by the negligence of a fellow-servant, in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work. *Degg* v. *Midland Ry.*, 1 H. & N. 773; 26 L. J., Ex. 171; 3 Jur. (N.S.) 395; 5 W. R. 364.

Therefore, where the servants of a railway company were turning a truck on a turntable, and a person not in the employment of the company volunteered to assist them, and whilst so engaged, other servants of the company negligently propelled a steam-engine, and thereby caused the death of the person who so volunteered, and the servants were persons of competent skill, and the company did not authorise the negligence:—Held, that the company was not liable to an action by the personal representative of the deceased. *Ib.*

A person who, in a transaction of common interest, assists the servants of another with the master's consent, can recover against the master for injuries caused by the negligence of the servants. *Wright* v. *L. & N. W. Ry.*, 45 L. J., Q. B. 570; 1 Q. B. D. 252; 33 L. T. 830—C. A.

**Consent of Master—Volunteer, who is.**]—It is not in every case where a party works with the servants of another for a common purpose, that he becomes a volunteer, so as to prevent his maintaining an action against the party for an injury accruing from the negligence of his servants while working for the common purpose. *Abraham* v. *Reynolds*, 5 H. & N. 143; 6 Jur. (N.S.) 53; 1 L. T. 330; 8 W. R. 181.

A. sold to B. some bales of cotton, which were in the upper storey of a warehouse. B. employed C. to see it weighed, and lower it by means of a rope into a cart, which he contracted with D. to provide for it, who sent his servant E. for that purpose. In lowering one of the bales the rope broke, through the negligence of C., in consequence of which the bale fell on E. and injured him:—Held, first, that E. might maintain an action against B. *Ib.*

Held, secondly, that there was not even evidence to go to a jury, that at the time of the accident E. was either a fellow-servant of C. or a volunteer. *Ib.*

**Stranger invited by Servant.**]—If a stranger, invited by a servant to assist him in his work, is, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment, the stranger cannot hold the master responsible. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; and if the master takes care that his servants are persons of competent skill and ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another. *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L. J., Q. B. 30; 8 Jur. (N.S.) 259; 5 L. T. 455; 10 W. R. 93—Ex. Ch.

A passer-by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare,

is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Cleveland* v. *Spier*, 16 C. B. (N.S.) 399.

The plaintiff, after purchasing some felt from the defendants, went into a loft where the felt was stored, to inspect the article purchased. The loft was open at one end, and the plaintiff was acquainted with the construction of it. The plaintiff and C., a servant of the defendants, proceeded to unroll the felt, and the plaintiff, who, in the act of so doing, was walking backwards, fell from the loft, and sustained personal injuries. He brought an action against the defendants for damages for injuries caused by their negligence, and the jury by whom the case was tried, among other findings, found that, but for the plaintiff's own negligence, the accident would not have happened, and also that C. was not acting within the scope of his employment in obtaining the plaintiff's assistance to unroll the felt:—Held, that the verdict should be entered for the defendants. *Sullivan* v. *O'Connor*, 22 L. R., Ir. 467—C. A.

—— **Sudden Emergency—Agent of Necessity.**]—The driver of an omnibus, when within a quarter of a mile of his master's premises, was forbidden by the police to drive further on the ground that he was not sober. A bystander volunteered to drive the omnibus home, and was authorised to do so by the driver and conductor, no effort being made to communicate with the master:—Held, that there was no evidence upon which it could be held that any necessity to delegate the duty of driving to the bystander had risen. Quære, whether the driver and conductor could become agents of necessity of the proprietor of the omnibus, so as to make the substitute appointed by them a servant of the proprietor, and render the latter responsible for the consequences of his want of care and skill. Per Lord Esher, M.R.: The principle of agency of necessity does not extend to such a case, but is restricted to certain well-known cases, such as those of the master of a ship, of the acceptor of a bill of exchange for the honour of the drawer, and of salvors. *Gwilliam* v. *Twist*, 64 L. J., Q. B. 474; [1895] 2 Q. B. 84; 14 R. 461; 72 L. T. 579; 43 W. R. 566; 59 J. P. 484—C. A.

### 4. Criminal or Quasi-Criminal Liability.

#### a. Public Nuisance.

If A. employs another to do a lawful act, and he in doing it commits a public nuisance, A. is not responsible. *Peachey* v. *Rowland*, 13 C. B. 182; 22 L. J., C. P. 81; 17 Jur. 764.

Aliter, if the act to be done necessarily involves the committing of a public nuisance. *Ib.*

Where a business is conducted so as to be a public nuisance, the owner is liable to be indicted, although the nuisance is entirely occasioned by the conduct of his servants in disregarding his directions, and although he has no knowledge of the existence of the nuisance. *Reg.* v. *Stephens*, 7 B. & S. 710; 35 L. J., Q. B. 251; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.

An owner of a quarry on the margin of a navigable river, being very old and infirm, did not personally superintend it; he, however, gave directions to his men to dispose of the refuse in a certain way, and conduct the business in a proper way. These directions were disregarded, and the refuse was suffered to fall into the river, whereby its navigation was obstructed. Upon an indictment for the nuisance against him:—Held, that he was liable. *Ib.*

#### b. Offences under Particular Statutes.

**Under Licensing Acts—Supplying a Constable.**]—The Licensing Act, 1872 (35 & 36 Vict. c. 74), s. 16, enacts, that "if any licensed person . . . . supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable," he shall be liable to a penalty. The servant of a licensed person having supplied to a constable in uniform and on duty a certain quantity of brandy, in the ordinary course of business:—Held, that the master was liable to the penalty imposed by the statute, personal knowledge on the part of the master not being necessary to constitute the offence. *Mullins* v. *Collins*, 43 L. J., M. C. 67; L. R. 9 Q. B. 292; 29 L. T. 838; 22 W. R. 297.

—— **Suffering and Permitting Gaming.**]—In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, by which if any person licensed under the act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties, it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises. *Bosley* v. *Davies*, 45 L. J., M. C. 27; 1 Q. B. D. 84; 33 L. T. 528; 24 W. R. 140.

At the hearing of an information against an hotel-keeper for suffering gaming on his licensed premises, it was proved that a police-constable, about half-past twelve in the morning, was in the street in which the premises were situate. Two of the windows had the blinds up, so that the constable could see three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went upstairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The hotel-keeper having been convicted:—Held, that the case must be sent back to the justices with an intimation of the opinion of the court that, though actual knowledge on the part of the hotel-keeper or his servants, in the sense of seeing or knowing of the card-playing, was not necessary to be shewn, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on. *Ib.*

The offence of suffering gaming on licensed premises may be committed by connivance, either on the part of the principal or the person in charge. *Redgate* v. *Haynes*, 45 L. J., M. C. 65; 1 Q. B. D. 89; 33 L. T. 779.

A gentleman took a sitting-room and three bedrooms in an hotel; one of these bedrooms was occupied by himself, the other two by a horse-trainer and a jockey, both of whom lived

in the immediate neighbourhood. The hotel-keeper retired to bed shortly before 11 p.m. and the hall-porter was left in charge. Between 1.30 and 2.15 the following morning the three persons were discovered in the sitting-room playing cards for money, the noise they made having been heard outside the premises. During all this time the hall-porter, whose duty it was to stay up and attend to customers, was in a parlour at the extreme end of the house where he could not hear what was going on:—Held, that there was sufficient evidence to convict the hotel-keeper of suffering gaming on her premises, and that it was unnecessary to prove an actual knowledge on her part of what was going on. *Ib.*

**Under Metropolitan Police Act.**]—If a keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of 2 & 3 Vict. c. 47, s. 44, and the servant does so, the master is guilty of an offence within the act. *Wilson* v. *Stewart*, 3 B. & S. 913; 32 L. J., M. C. 198; 9 Jur. (N.S.) 1130; 8 L. T. 277; 11 W. R. 640.

**Under Mines Regulation Act.**]—By s. 22 of 23 & 24 Vict. c. 151, a penalty is imposed on the owner or agent, if through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, are neglected or wilfully violated. One of the rules was that whenever safety lamps were required, they should be first examined and locked by a person duly authorised for that purpose. The owner appointed a competent person to examine and lock the lamps, but such person delivered them to the miners for use in the mine unlocked:—Held, that in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him. *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R. 9 C. P. 1; 29 L. T. 540.

**Under Weights and Measures Act—Sale of Coal.**]—By s. 29, sub-s. 1, of the Weights and Measures Act, 1889, "any inspector of weights and measures, or officer appointed for the purpose by the local authority, may, at all reasonable times, enter any building or part of a building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser." By sub-s. 2: "If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding 5*l.*":—Held, that in order to convict the seller of coal of an offence under the above section there must be an actual representation by him as to the weight of the coal sold, and that a representation made to an inspector by a servant in charge of a vehicle carrying coal for delivery to a purchaser was not of itself the representation of the master so as to make him liable under the section. *Roberts* v. *Woodward*, 59 L. J., M. C. 129; 25 Q. B. D. 412; 63 L. T. 200; 38 W. R. 770; 17 Cox, C. C. 139

**Under Metropolis Management Act—Damage to Street Lamp.**]—A master is not liable under s. 207 of the Metropolis Local Management Act, 1855, for the accidental breaking by his servant of a street lamp, the top of which projected over the kerb, such accident having been caused by some goods on a van, which the servant was driving, coming in contact with, and wrecking the top of the lamp. *Harding* v. *Barker*, 37 W. R. 78; 53 J. P. 308.

**Smoke Nuisance.**]—The defendant, who was the owner and occupier of certain premises in the metropolis used for the purpose of manufacture, was summoned under the Smoke Nuisance (Metropolis) Act, 1853, for negligently using a furnace in such premises so that the smoke arising therefrom was not effectually consumed. The furnace in question was constructed so as to consume its own smoke if carefully used; and the emission of smoke complained of was caused by the carelessness of the stoker employed by the defendant to attend to the furnace. The defendant was not personally guilty of any negligence in connection with the matter:—Held, that the defendant was not criminally responsible for the negligence of his servant, and could not be convicted of the offence. *Chisholm* v. *Doulton*, 58 L. J., M. C. 133; 22 Q. B. D. 736; 60 L. T. 966; 37 W. R. 749; 16 Cox, C. C. 675; 53 J. P. 550.

The chimney of a mill sent forth black smoke. The furnace was properly constructed and efficient foremen superintended; the stoker's own negligence being the sole cause of the smoke:—Held, that the owner of the mill was liable under s. 96 of the Public Health Act, 1875. *Niven* v. *Greaves*, 54 J. P. 548.

**Slaughter-house.**]—The Slaughter-houses, &c. (Metropolis) Act, 1874, which contains in terms no prohibition as to the manner in which the slaughter of cattle is to be performed, enacts by s. 4 that the local authority may make by-laws regulating the conduct of any business specified in the act, and the by-laws made under the act prohibit the occupier of a slaughter-house from slaughtering or permitting to be slaughtered any animal contrary to certain regulations laid down in them:—Held, that these by-laws were not repugnant to the common law, and that upon breach of them the occupier of a slaughter-house was liable for the act of his servant, although the offence of the servant was committed without the knowledge and contrary to the express order of his master. *Collman* v. *Mills*, 66 L. J., Q. B. 170; [1897] 1 Q. B. 396; 75 L. T. 590; 18 Cox, C. C. 481; 61 J. P. 102.

**Regulation as to Lights on Tramway Engine—Breach by Engine-driver.**]—A tramway company were convicted before justices of the breach of a regulation of the Board of Trade, made under a local act, relative to lamps being placed and lighted in a conspicuous position on the front of a tramway engine:—Held, that the regulation was not invalid as a regulation, and that its subject-matter need not have been dealt with by a by-law; that the offence being stated in the words of the regulation was sufficiently described, and that the company were responsible for the personal neglect of their engine-driver.

*St. Helen's Tramways Co.* v. *Wood*, 60 L. J., M. C. 141 ; 56 J. P. 70.

**Protecting Smuggled Goods from Seizure.**]—A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Thus, where, after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit, by which he intended to protect the goods from seizure, the master is liable for the penalty attached to the offence of unduly using a permit. *Att.-Gen.* v. *Siddon*, 1 C. & J. 220 ; 1 Tyr. 41 ; 9 L. J. (O.S.) Ex. 7.

**Adulteration of Food.**]—*See* LOCAL GOVERNMENT.

## III. RIGHTS AND LIABILITIES OF SERVANT AND THIRD PARTIES.

### A. RIGHTS OF SERVANT.

**Procuring Discharge of Workman—Cause of Action — Legal Injury.**] — Boiler-makers in common employment with the respondents, objected to work with the latter on account of what they had done at another time. The appellant, an official of the Boiler-makers' Union, in response to a telegram from one of the boiler-makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union, and also fined ; they must wait till the matter was settled. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler-makers would leave their work or be called out. The respondents were thereupon dismissed :—Held, that no actionable wrong had been committed by the appellant. *Allen* v. *Flood*, 67 L. J., Q. B. 119 ; [1898] A. C. 1 ; 77 L. T. 717 ; 46 W. R. 258—H. L. (E.)

**Action against Servant instead of Master—Relief in Equity.**]—Where one recovered in trover against a servant of the African Company, equity would not relieve, because plaintiff in equity might at law have defended himself, but decreed that the company should indemnify the servant, and that the plaintiff at law (one of the defendants in equity) might prosecute the decree in the servant's name. *Langdon* v. *African Co.*, Pre. Ch. 221.

### B. LIABILITY OF SERVANT.

**Acts done under Authority.**]—Where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding and unquestionable there, the servant who does the act cannot be made responsible in the courts of this country (of which he is a subject) for the consequence of such acts, merely by reason of a personal disability, imposed by the law of this country upon him for contracting such engagement. *Dobree* v. *Napier*, 3 Scott, 201 ; 2 Bing. (N.C.) 781 ; 5 L. J., C. P. 273.

**Unlawful Acts.**]—If a keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of 2 & 3 Vict. c. 47, s. 44, and the servant does so, the master is guilty of an offence within that act, and the servant is guilty as aiding and abetting him within 11 & 12 Vict. c. 43, s. 5. *Wilson* v. *Stewart*, 3 B. & S. 913 ; 32 L. J., M. C. 198 ; 9 Jur. (N.S.) 1130 ; 8 L. T. 277 ; 11 W. R. 640.

A servant who joins with and assists his master in the commission of a fraud is civilly responsible for the consequences, though his concurrence is unknown to the party injured, for all directly concerned in the commission of a fraud are principals. *Cullen* v. *Thomson*, 4 Macq. H. L. 441 ; 9 Jur. (N.S.) 85 ; 6 L. T. 870.

**Conversion for Benefit of Master.**]—A servant is liable for an action of trover for a conversion for the benefit of his master. *Cranch* v. *White*, 1 Scott, 314 ; 1 Bing. (N.C.) 414 ; 1 Hodges, 61.

The defendant received from R. a bill of exchange, with notice that it was the plaintiff's property, and that it had been placed in the hands of R. for the purpose of his procuring it to be discounted for the plaintiff. R. being indebted to the defendant's mother, in whose employ the defendant was, the latter appropriated the bill in discharge of R.'s debt :—Held, that this was a conversion for which the defendant was liable in trover. *Ib.*

A servant may be charged in trover, although the act of conversion is done by him for the benefit of the master. *Stephens* v. *Elwall*, 4 M. & S. 259. And see *Perkins* v. *Smith*, 1 Wils. 328.

A servant or an agent who has received goods from his master or principal, may, on a demand made by the true owner, give a qualified refusal to deliver them up, without being liable to an action of trover. *Lee* v. *Bayes* or *Robinson*, 18 C. B. 599 ; 25 L. J., C. P. 249 ; 2 Jur. (N.S.) 1093.

**Money Had and Received.**]—A party who, in the character of a servant to a debtor, receives money from his master to discharge the debt, is not liable to be sued by the creditor as for money received to his use. *Howell* v. *Batt*, 2 N. & M. 381 ; 5 B. & Ad. 504 ; 3 L. J., K. B. 49.

**Beating Fellow Servant.**]—One servant has no right to beat another ; and if an under servant misconducts himself, an upper servant is not justified in striking him, but should inform their master. *Reg.* v *Huntley*, 3 Car. & K. 143.

**Injuries Due to Negligence.**]—Under circumstances of danger, if the driver of a public conveyance fails to take the safest course, he would be liable, and he cannot, in such case, insist upon the fact that he kept to his own side of the road. *Mayhew* v. *Boyce*, 1 Stark. 423 ; 18 R. R. 796.

J. R.

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## MAURITIUS.

*See* COLONY.

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## MAXIMS.

**Generally.**]—I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading ; they are for the most part so large and general in their language that they always include something which really is not intended to be included in

them. Per Esher (Lord), M.R. *Yarmouth* v. *France*, 57 L. J., Q. B. 7; 19 Q. B. D. 653; 36 W. R. 283.

**Actio personalis moritur cum personâ.**]—The plaintiff brought his action for damages and an injunction against the firm of T. & Co., for torts committed by the firm. The firm consisted of T. alone, who died more than six months after the commencement of action, and the action was continued against his executors:—Held, that T. having died more than six months after the commission of the acts complained of, no action, either for damages or injunction, could be maintained against his executors; although the action had been commenced in the lifetime of the testator, and although the executors continued the business in the name of the firm. *Kirk* v. *Todd*, 52 L. J., Ch. 224: 21 Ch. D. 484; 47 L. T. 676; 31 W. R. 69—C. A. See also *Blyth* v. *Fladgate*, 60 L. J., Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422. *Story* v. *Sheard*, 61 L. J., M. C. 178; [1892] 2 Q. B. 515; 67 L. T. 433; 41 W. R. 31; 56 J. P. 760.

*And see* PRACTICE (PARTIES, CHANGE BY DEATH).

**Actor sequitur forum rei.**] — See *Sirdar Gurdyal Singh* v. *Faridkote (Rajah)*, [1894] A. C. 670; 11 R. 340—P. C.

**Audi alteram partem.**]—Under an act in 1846 the B. Canal Company were authorised to charge certain tolls, rates, and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an order to reduce, advance, or otherwise vary all or any of such tolls, rates, or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4*l.* per cent. on the capital of the canal company, the railway company would make up the deficiency. The B. Canal Company was one link in a chain of canals owned by various companies and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies, the railway commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. Canal Company below the maximum allowed by the act of 1846, and below the amounts theretofore charged by the company. The railway company were not represented before the commissioners, and did not consent to the order or to any variation of the tolls:—Held, that the order was made without jurisdiction, and must be restrained by prohibition. By Kelly, C.B., because the commissioners could not make an order affecting the liability of the railway company under their guarantee without at least hearing them. By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the commissioners no power without such consent to reduce the tolls, rates, or dues as authorised by the act of 1846. *Warwick Canal Co.* v. *Birmingham Canal Co.*, 48 L. J., Ex. 550; 5 Ex. D. 1; 40 L. T. 846.

**Causa proxima non causa remota spectatur.**]—A ship was chartered for time on monthly hire: the charterers agreeing to pay the freight during employment and efficient performance of the service, and the owner covenanting that the ship should be seaworthy during the continuance of the charter; provided that if at any time it should appear to the charterers that the ship became inefficient it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance "on freight outstanding." During the time the ship became inefficient through perils of the seas, and the charterers refused to pay freight after that date. The owner having brought an action on the policy:—Held, that on the true construction of the charterparty the efficiency of the ship was not a condition precedent to the earning of the freight: that the pecuniary loss was caused by the charterers availing themselves of the abatement clause, and not by the perils of the seas; and that the underwriters were not liable. *Inman Steamship Co.* v. *Bischoff*, 52 L. J., Q. B. 169; 7 App. Cas. 670; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6—H. L. (E.)

**Cuicunque aliquis quid concedit, &c.**]—An action was brought against a railway company to recover an amount assessed by a jury, as compensation for vibration from the use of the railway after construction. The damage did not arise from negligence, but was the inevitable consequence of the proper and ordinary use of the railway:—Held, that no action would lie for the damage sustained; for the legislature having given power to the company to employ locomotive engines, if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit, it must be taken that power is given to cause that vibration without liability to an action. *Hammersmith and City Ry.* v. *Brand*, 38 L. J., Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.

**"Cujus est solum ejus est usque ad cœlum."**]—See *Wandsworth Board of Works* v. *United Telephone Co.*, 53 L. J., Q. B. 449; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

**"Damnum absque injuriâ."**]—See *Street* v *Union Bank of Spain and England*, 55 L. J., Ch. 31; 30 Ch. D. 156; 53 L. T. 262; 32 W. R. 901.

The court does not interfere to prevent the infringement of a right producing no mischief. *Saunders* v. *Smith*, 2 Jur. 491.

**De minimis non curat lex.**]—This maxim has no application to a conveyance of real estate. *Clifford* v. *Hoare*, 43 L. J., C. P. 225; L. R. 9 C. P. 362; 30 L. T. 465; 22 W. R. 828.

**Debitor non præsumitur donare.**]—See *Johnstone* v. *Haviland*, [1896] A. C. 95—H. L. (Sc.)

**Delegatus non potest delegare.**]—See *Huth* v. *Clarke*, 59 L. J., M. C. 120; 25 Q. B. D. 391; 63 L. T. 348; 38 W. R. 655.

**Equity—Rules.**]—Equity will not enforce that which is the cause of public inconvenience. *Anon.*, Cary, 12.

Legal right prevented by act of equity, party will be reinstated therein. *O'Donel* v. *Browne*, 1 Ball & B. 263. *Pulteney* v. *Warren*, 6 Ves. 93.

A bill to enforce a right springing from a statutory engagement is analogous to a bill for specific performance, and the plaintiff must come into court with clean hands. *Fisher* v. *Tully*, 38 L. T. 236

—— **Applicant must do Equity.**]—He that will have equity, must do equity. *Browne* v. *Jones*, 1 Atk. 190.

The rule that the plaintiff seeking equity must do equity, applies only to the one matter which is the subject of a given suit. *Hanson* v. *Keating*, 4 Hare, 5; 8 Jur. 949.

The principle that he who comes into equity must do equity applies only to equity arising out of the same transaction. *Whitaker* v. *Hall*, 1 Glyn. & J. 213.

Where wife sues (which she may do) to avoid annuity charged by her on her separate estate, on account of defect in the memorial, the maxim he that will have equity must do it to the same person, does not apply to compel her to repay the consideration money, nor can it be recovered against her. *Aguilar* v. *Aguilar*, 5 Madd. 414.

If it be necessary to have the assistance of a court of equity to set aside a usurious contract, it must be on the terms of paying what is fairly due with legal interest. *Scott* v. *Nesbitt*, 2 Cox, 183; 2 Bro. C. C. 641.

The rule that a party coming for equity must do equity does not extend so far as to affect matters unconnected with the transaction in respect of which the relief is sought. *Wilkinson* v. *Fowkes*, 9 Hare, 592.

Conveyance of an estate, to which defendant is entitled in equity, suspended till an account of the rest of the estate taken in the original suit from the danger of the plaintiff's losing his demand; the rule that he who will have equity must do it holds so as not to tack together things independent; but the court will lay hold of any circumstance for it, as danger from absconding or living abroad. *Shish* v. *Foster*, 1 Ves. 88.

The maxim "he who seeks equity must do equity" considered. The equity to be observed by a person seeking equity must be some equity which is involved in the subject of the suit. *United States of America* v. *M'Rea*, 37 L. J., Ch. 129; L. R. 3 Ch. 79; 17 L. T. 428; 16 W. R. 377.

The rule that "he who seeks equity must do equity" is restricted to an equity in respect of the subject-matter of the suit. *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757; 24 L. J., Ch. 279; 3 Eq. R. 106; 1 Jur. (N.S.) 1; 3 W. R. 79.

The maxim in chancery that "he who seeks equity must do equity," when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance; the breach being a bar when it goes to the whole, but no bar to a partial failure, in which case the party injured is entitled by a cross action to compensation. *Oxford* v. *Provand*, 5 Moore, P. C. (N.S.) 150; L. R. 2 P. C. 136.

Where a creditor by judgment extends lands by elegit, he holds quousque debitum satisfactum fuerit, and at law the debtor cannot on a writ ad computandum insist on the creditors doing more than account for the extended value; for if the debtor comes into equity for relief, the court will give it him by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, they will direct the debtor to pay interest to the creditor, though it should exceed the principal. *Godfrey* v. *Watson*, 3 Atk. 517.

—— **"Equity looks on that as Done which ought to be Done."**]—The maxim that equity looks upon that as done which ought to be done, applies only (in cases depending upon contract) in favour of persons who are entitled to enforce the contract, and cannot be invoked by volunteers. *Austis, In re, Chetwynd* v. *Morgan*, 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483—C. A.

Nothing is looked upon in equity as done, but what ought to have been done: not what might have been done. *Burgess* v. *Wheate*, 1 Eden, 186; 1 W. Bl. 121.

The principle of equity that "what is agreed to be done is considered as done," applies equally to companies as to individuals. *Strand Music Hall Co., In re*, 14 W. R. 6—L.JJ.

**Expressio unius est exclusio alterius.**]—I may observe that the method of construction summarised in the maxim, "expressio unius, exclusio alterius," is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits—Per Wills, J. *Colquhoun* v. *Brooks*, 57 L. J., Q. B. 70; 19 Q. B. D. 406; 57 L. T. 448; 36 W. R. 332. See also *S. C.*, in C. A., per Esher (Lord), M.R., 57 L. J., Q. B. 439; 21 Q. B. D. 65; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.

The maxim "expressio unius, exclusio alterius" is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice—Per Lopes, L.J. *Colquhoun* v. *Brooks*, 57 L. J., Q. B. 439; 21 Q. B. D. 65; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.

Lands taken under a conditional sale and afterwards forfeited to the crown are not open to a conditional purchase under s. 13 of the Crown Lands Alienation Act, 1861. The crown has, under the 18th section, the option either to sell them by public auction or to retain them in its own hands. *Blackburn* v. *Flavelle*, 50 L. J., P. C. 58; 6 App. Cas. 628; 45 L. T. 52; 30 W. R. 67.

An underlease of a nursery ground contained an express covenant by the underlessee to deliver up all landlord's fixtures thereon at the end of the term:—Held, that a representation and covenant by the grantors of the under-lease that the underlessee should be at liberty, without hindrance from anyone, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right could not be implied. *Porter* v. *Drew*, 49 L. J., C. P. 482; 5 C. P. D. 143; 42 L. T. 151; 28 W. R. 672; 44 J. P. 267. See *McGuire* v. *Scully*, Beat. 370.

**Extra territorium jus dicenti impune non paretur.**]—See *MacLeod* v. *Att.-Gen.* (*N.S.W.*),

60 L. J., P. C. 55; [1891] A. C. 455; 65 L. T. 321; 17 Cox, C. C. 341—P. C.

**Fictions of Law.**]—Fictions of law shall never be contradicted so as to defeat the end for which they were invented; but for every other purpose they may be contradicted. *Mostyn* v. *Fabrigas*, Cowp. 177.

And the court will notice legal fictions, to avoid their working injustice, by affording ground for objections merely technical, and having no real foundation. *Bennett* v. *Isaac*, 10 Price, 154.

**Fraus non est fallere fallentem.**]—Where debtor combines with creditor in fraud upon others, and creditor breaks trust, there is no punishment, but goods fraudulently transferred ordered to be retransferred for benefit of creditors. "Fraus non est fallere fallentem." *Woodford* v. *Multon*, Cary, 13.

**"Grantor shall not Derogate from his own Grant."**]—The maxim that a grantor shall not derogate from his own grant, does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. *Birmingham Banking Co.* v. *Ross*, 57 L. J., Ch. 601; 38 Ch. D. 295; 59 L. T. 609; 36 W. R. 914—C. A.

Tenant for life having made a lease of coal mines, amounting to a forfeiture, cannot join the remainderman in a bill for injunction. *Wentworth* v. *Turner*, 3 Ves. 3.

**Ignorantia juris neminem excusat.**]—The rule "Ignorantia juris neminem excusat" applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief in equity. *Beauchamp* (*Earl*) v. *Winn*, L. R. 6 H. L. 223; 22 W. R. 193.

A witness's knowledge of the law enabling him to decline to answer criminating questions, must be presumed on the maxim "Ignorantia juris non excusat." *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553.

You must ascribe to every subject a knowledge of the law, more especially in cases where it prescribes a rule of civil conduct—Per Lord Westbury. *Carter* v. *M'Laren*, L. R. 2 H. L. (Sc.) 120, 126.

A. entered into an agreement for a lease of a fishery from B. At the time of entering into the agreement both parties bonâ fide believed that B. was the owner of the fishery; but it was afterwards discovered that B. was not the true owner. There was no fraud on either side, and the deeds establishing A.'s title to the fishery were equally known and accessible to both parties:—Held, that A. was entitled to have the agreement set aside, subject to certain equitable terms for the benefit of B., and that the maxim of "Ignorantia juris non excusat" did not apply. *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049.

It is said "Ignorantia juris haud excusat," but in that maxim the word "jus" is used in the sense of denoting general law, the ordinary law of the country. But when the word "jus" is used in the sense of denoting a private right, that maxim has no application. *Ib.*

Ignorantia legis may be a good plea in equity, though not at law. *Watson* v. *Marston*, 1 W. R. 362.

See also *Katharina, Cargo Ex*, Lush. 142; 30 L. J., P. 21; 3 L. T. 597.

**In pari delicto potior est conditio possidentis.**]—The plaintiff deposited with the defendant the half of a 50*l.* bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in debauch. The plaintiff having brought an action to recover the half-note:—Held, that the maxim "In pari delicto potior est conditio possidentis" applied; and that as the plaintiff could not recover without shewing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. *Taylor* v. *Chester*, 10 B. & S. 237; 38 L. J., Q. B. 225; L. R. 4 Q. B. 309; 21 L. T. 359.

M. wrote to B. to the effect that he had forged B.'s name by putting it with his own to a bill of exchange for 100*l.*, which would become due in a few days. He implored B. to meet the bill, and offered, if he would do so, to give him a bill of sale of all his property to secure what he owed him. B., who was already an unsecured creditor of M. for 100*l.*, paid the 100*l.* bill and took a bill of sale of all M.'s property to secure 200*l.* Three weeks later B. entered and sold the property and satisfied his debt. The following month M. was adjudicated a bankrupt, the act of bankruptcy alleged being the execution of the bill of sale. The trustee applied for an order that B. should refund the proceeds of sale received by him, on the ground that the bill of sale was void as being given only for a past debt, and as being the price of a bargain for the concealment of a felony:—Held, that the wrong done not being an offence against the bankrupt law, the trustee was in no better position than the bankrupt would have been, and that, the latter having been a party to the wrong, the maxim "In pari delicto potior est conditio possidentis" would have applied, and no action could have been maintained. *Mapleback, In re*, *Butt, Ex parte*, 46 L. J., Bk. 14; 4 Ch. D. 150; 35 L. T. 503; 25 W. R. 103; 13 Cox, C. C. 374—C. A.

Parties to a contract which is against public policy or illegal, are not always regarded as being in pari delicto, but public policy is sometimes considered as advanced by allowing either or the more excusable of the parties to sue for relief against the transaction. *Reynell* v. *Sprye*, 8 Hare, 275. Affirmed, 1 De G. M. & G. 660; 21 L. J., Ch. 633.

The rule "In pari delicto melior est conditio possidentis," preventing suit, is not universal; it admits of degrees of guilt by concurring in the same criminal act. *Osborne* v. *Williams*, 18 Ves. 379; 11 R. R. 218.

See also *Herman* v. *Zeuchner*, 54 L. J., Q. B. 340; 15 Q. B. D. 561; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A. And *Scott* v. *Brown*, 61 L. J., Q. B. 738; [1892] 2 Q. B. 724; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213—C. A.

**Interest Rei publicæ ut sit finis litium.**]—See *March, Ex parte*, 67 L. T. 594 ; 9 Morrell, 286.

**Knowledge of Result of Acts.**]—You must ascribe to every man a knowledge of that which is a necessary and an inevitable result of an act deliberately done by him. Semble. *Carter* v. *M'Laren*, L. R. 2 H. L. (Sc.) 120, 126.

**Leges posteriores contrarias abrogant.**]—See *Kutner* v. *Phillips*, 60 L. J., Q. B. 505 ; [1891] 2 Q. B. 267 ; 64 L. T. 628 ; 39 W. R. 526 ; 56 J. P. 54. *West Ham* v. *Fourth City Mutual Building Society*, 61 L. J., M. C. 128 ; [1892] 1 Q. B. 654 ; 66 L. T. 350 ; 40 W. R. 446 ; 56 J. P. 438.

**Lex non cogit ad impossibilia.**]—A declaration alleged that the defendant in 1840 demised certain premises to the plaintiff for a long term of years, and the defendant covenanted that "neither he nor his assigns would, during the term, permit any messuage to be built on a paddock fronting the demised premises"; alleging as breaches, first, that he, during the term, permitted a railway station to be built on the paddock ; and, secondly, that he assigned the paddock to a railway company, who erected the railway station on the paddock. Plea, that the company required to take the paddock under powers given them by an act of parliament of 1862, for purposes for which they were by the act empowered to take the same ; that the paddock was land which the company was empowered to take compulsorily for the purposes of the undertaking authorised by the act ; and that the company under the powers so conferred did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase ; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the act. Replication : that though the erections were reasonable, it was not necessary or compulsory for the company to build them :—Held, that the defendant was entitled to judgment, for he was discharged from his covenant by the subsequent act of parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim of "Lex non cogit ad impossibilia" ; and that it conld make no difference whether the company was only empowered or was compelled to build the station on the paddock. *Baily* v. *De Crespigny*, 38 L. J., Q. B. 98 ; L. R. 4 Q. B. 180 ; 19 L. T. 681 ; 17 W. R. 494. See also *Hick* v. *Raymond*, 62 L. J., Q. B. 98 ; [1893] A. C. 22 ; 1 R. 125 ; 68 L. T. 175 ; 41 W. R. 384 ; 7 Asp. M. C. 233—H. L. (E.)

**Nemo debet esse judex in propria sua causa.**]—See *Leeson* v. *Medical Council*, 59 L. J., Ch. 233 ; 43 Ch. D. 366 ; 61 L. T. 849 ; 38 W. R. 303—C. A.

**Nemo debet lacesseri pro una et eadem causa.**]—A workman having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending, he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for solatium for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action :—Held, that the second action was incompetent. *Wood* v. *Gray*, [1892] A. C. 576 ; 67 L. T. 628—H. L. (Sc.)

**Nemo debet bis puniri pro uno delicto.**]—See *Reg.* v. *Miles*, 59 L. J., M. C. 56 ; 24 Q. B. D. 423 ; 62 L. T. 572 ; 38 W. R. 334 ; 17 Cox, C. C. 9 ; 54 J. P. 549—C. C. R.

**Nemo debet bis vexari pro eadem causa.**]—See *Ryley* v. *Brown*, 62 L. T. 458 ; 17 Cox, C. C. 79 ; 54 J. P. 486. *Clarke* v. *Midland Great Western Ry.*, [1895] 2 Ir. R. 294—C. A. *Brunsden* v. *Humphrey*, 53 L. J., Q. B. 476 ; 14 Q. B. D. 141 ; 51 L. T. 529 ; 32 W. R. 944 ; 49 J. P. 4—C. A.

**Nemo tenetur seipsum accusare.**]—The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "Nemo tenetur seipsum accusare," but does not apply to answers given without objection, which are to be deemed voluntary. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463 ; 42 L. J., P. C. 45 ; L. R. 4 P. C. 599 ; 29 L. T. 111 ; 21 W. R. 553 ; 12 Cox, C.C. 557.

**No one can take Advantage of his own Wrong.**]—The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a bonâ fide purchaser without notice, and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong—Per M.R., *Barrow's Case*, 49 L. J., Ch. 498 ; 14 Ch. D. 445 ; 42 L. T. 891—C. A.

The maxim that no man can take advantage of his own wrong is somewhat obscure ; but in my opinion it only means this : that a man cannot enforce against a person whom he has wronged by a breach of contract or a breach of duty, a right created against such person by such breach of contract or duty. The maxim can only be employed by the person against whom the wrong has been done, except where the person having a derivative right has been clothed with the full rights of the person from whom he has derived his title.—Per Bowen, L.J. *London Celluloid Co., In re, Bayley and Hanbury's Case*, 57 L. J., Ch. 843 ; 39 Ch. D. 190 ; 59 L. T. 109 ; 36 W. R. 673 ; 1 Meg. 45.

**Omnia præsumuntur rite esse acta.**]—The presumption when a foreign court has purported to act properly and within its jurisdiction is omnia rite esse acta. *Taylor* v. *Ford*, 29 L. T. 392 ; 22 W. R. 47. See also *Harris* v. *Knight*, 15 P. D. 170 ; 62 L. T. 507—C. A. *Byles* v. *Cox*, 74 L. T. 222. *Dayman* v. *Dayman*, 71 L. T. 699. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

**"Omnis nova constitutio futuris formam imponere debet et non præteritis."**]—See *Hough* v. *Windus*, 53 L. J., Q. B. 165 ; 12 Q. B. D. 224 ; 50 L. T. 312 ; 32 W. R. 452 ; 1 Morrell, 1—C. A. And *Reid* v. *Reid*, 55 L. J., Ch. 294 ; 31

Ch. D. 102; 54 L. T. 100; 34 W. R. 333—Per Bowen, L.J.

**Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.**]—It is doubtful whether this maxim applies in the case of a will. *Mills* v. *Millward*, 59 L. J., P. 23; 15 P. D. 20; 61 L. T. 651. See *Bolton* v. *Lambert*, 58 L. J., Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434—C. A.

**Particeps criminis.**]—In general cases, where a debt is cut down by the policy of the law, the complaint may be by particeps criminis. *Kirk, Ex parte*, 15 Ves. 469.

Relief given to particeps criminis on ground of public policy. *Hatch* v. *Hatch*, 9 Ves. 292; 1 Smith, 226. But no costs. *Debenham* v. *Ox*, 1 Ves. 277.

**Pendente lite nihil innovetur.**]—Effect of maxim "pendente lite nihil innovetur" limited to rights and parties in that suit, not absolutely annulling a conveyance pendente lite; therefore a plea in bar to bill by purchaser from defendant, with actual notice, overruled. *Metcalfe* v. *Pulvertoft*, 2 Ves. & B. 200; 13 R. R. 63.

**"Quando aliquid prohibetur fieri, ex directo prohibetur et per obliquum."**]—See *Rosher, In re, Rosher* v. *Rosher*, 53 L. J., Ch. 722; 26 Ch. D. 821.

**"Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud."**]—See *Murray* v. *Scott*, 53 L. J., Ch. 745; 9 App. Cas. 519; 51 L. T. 462; 33 W. R. 173—H. L. (E.)

**"Qui facit per alium facit per se."**]—See *Mills* v. *Armstrong*, 57 L. J., P. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212—H. L. (E.)

**Qui prior est tempore, potior est jure.**]—If an executor, in pursuance of the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle the judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise. *Ray* v. *Ray* (G. Coop. 264) distinguished. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183—C. A. See also *Société Générale de Paris* v. *Walker*, 55 L. J., Q. B. 169; 11 App. Cas. 20; 54 L. T. 389; 34 W. R. 662—H. L. (E.). And *Lambert's Estate, In re*, 13 L. R., Ir. 234—C. A. *See also Cases under* MORTGAGE.

**Qui sentit commodum, sentire debet et onus.**]—A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Will. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property:—Held, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death. *Woodhouse* v. *Walker*, 49 L. J., Q. B. 609; 5 Q. B. D. 404; 42 L. T. 770; 28 W. R. 765; 44 J. P. 666.

**Quicquid plantatur solo, solo cedit.**]—Miners working under customs established by the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. xciv.), lawfully erected machinery and buildings necessary thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction, of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to shew that the property in them was intended to be irrevocably annexed to the soil:—Held, that the maxim "Quicquid plantatur solo, solo cedit," was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing. *Wake* v. *Hall*, 52 L. J., Q. B. 494; 8 App. Cas. 195; 48 L. T. 834; 31 W. R. 585; 47 J. P. 548—H. L. (E.) See also *Ainslie, In re, Swinburne* v. *Ainslie*, 55 L. J., Ch. 615; 30 Ch. D. 485; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C. A.

**Quilibet potest renunciare juri pro se introducto.**]—See *Wilson* v. *McIntosh*, 63 L. J., P. C. 49; [1894] A. C. 129; 6 R. 429; 70 L. T. 536—P. C.

**Quod semel placuit in electionibus, amplius displicere non potest.**]—Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted; it is final and cannot be altered. *Scarf* v. *Jardine*, 51 L. J., Q. B. 612; 7 App. Cas. 360; 47 L. T. 258; 30 W. R. 893—H. L. (E.)

**Res perit domino.**]—A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—Held, by Denman, J., that the plaintiff could not maintain an action for the price, as for goods sold and delivered. *Elphick* v. *Barnes*, 49 L. J., C. P. 698; 5 C. P. D. 321; 29 W. R. 139; 44 J. P. 651.

**"Respondeat superior."**]—See *White* v. *Peto*, 58 L. T. 710; and *Harding* v. *Barker*, 37 W. R. 78; 53 J. P. 308. See also *Wright* v. *Lethbridge*, 63 L. T. 572; 6 Asp. M. C. 558—C. A.

**Sic utere tuo, ut alienum non lædas.**]—The defendants, a burial board, planted on their own land, and about four feet distant from their

boundary railings, a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow, which was hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the yew tree which projected over the meadow, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants. The plaintiff having brought an action for the value of the horse:—Held, that the defendants were liable on the principle of the maxim, "Sic utere tuo, ut alienum non lædas." *Crowhurst* v. *Amersham Burial Board*, 48 L. J., Ex. 109; 4 Ex. D. 5; 39 L. T. 355; 27 W. R. 95. See also *Whalley* v. *Lancashire and Yorkshire Ry.*, 53 L. J., Q. B. 285; 13 Q. B. D. 131; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500—C. A. *Love* v. *Bell*, 53 L. J., Q. B. 257; 9 App. Cas. 286; 51 L. T. 1; 32 W. R. 725; 48 J. P. 516—H. L. (E.) *Farrer* v. *Nelson*, 54 L. J., Q. B. 385; 15 Q. B. D. 258; 52 L. T. 769; 33 W. R. 800; 49 J.P. 725; and *Black* v. *Christchurch Finance Co.*, 63 L. J., P. C. 32; [1894] A. C. 48; 6 R. 394; 70 L. T. 77; 58 J. P. 332—P. C. *Reinhardt* v. *Mentasti*, 58 L. J., Ch. 787; 42 Ch. D. 685; 61 L. T. 328; 38 W. R. 10.

**Transit terra cum onere.**]—Where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud. *London and South Western Bank* v. *Wentworth*, 49 L. J., Ex. 657; 5 Ex. D. 96; 42 L. T. 188; 28 W. R. 516.

**"Verba chartarum fortius accipiuntur contra proferentem."**]—See *Birrell* v. *Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.) And *Burton* v. *English*, 53 L. J., Q. B. 133; 12 Q. B. D. 218; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187—C. A.

**"Volenti non fit Injuria."**]—See *Thomas* v. *Quartermaine*, 56 L. J., Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516—C. A. *Baddeley* v. *Granville* (*Lord*), 56 L. J., Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822. *Yarmouth* v. *France*, 57 L. J., Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281. *Thrussell* v. *Handyside*, 57 L. J., Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279. *Osborne* v. *L. & N. W. Ry.*, 57 L. J., Q. B. 618; 21 Q. B. D. 220; 59 L. T. 227; 36 W. R. 809; 52 J. P. 806. *Brooke* v. *Ramsden*, 63 L. T. 287. *Membery* v. *G. W. Ry.*, 58 L. J., Q. B. 563; 14 App. Cas. 179; 61 L. T. 566; 38 W. R. 145; 54 J. P. 244—H. L. (E.) *Lee* v. *Nixey*, 63 L. T. 285; 54 J. P. 807. *Church* v. *Appleby*, 58 L. J., Q. B. 144; 60 L. T. 542, and *Smith* v. *Baker*, 60 L. J., Q. B. 683; [1891] A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660—H. L. (E.)

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## MAYOR'S COURT.

1. *Jurisdiction*, 970.
2. *Prohibition*, 974.
3. *Foreign Attachment*, 976.
4. *Practice*, 985.

### 1. Jurisdiction.

**Extent of—Inferior Court.**]—The mayor's court is an inferior court of local jurisdiction, confined to the limits and liberties of the city. *London Corporation* v. *Cox*, 36 L. J., Ex. 225; L. R. 2 H. L. 239; 16 W. R. 44.

**"Carry on Business"—Railway Station.**]—The South-Eastern Railway Company has a station in Cannon Street, City, where a considerable portion of its business is transacted. Their principal station, where the meetings of the directors are held and the general and substantial business of the company is conducted, is without the city:—Held, that the company does not carry on business within the jurisdiction of the mayor's court, within the meaning of s. 12 of the Mayor's Court Extension Act, 1857 (20 & 21 Vict. c. clvii.). *Le Tailleur* v. *S. E. Ry.*, 3 C. P. D. 18.

The place where a railway company carries on its business within s. 12 of the Mayor's Court Procedure Act, is where the general superintendence and management of the business take place. *Rogers* v. *L. C. & D. Ry.*, 26 W. R. 192.

When, therefore, it appeared that a railway company had a chief office, which was also a terminal station, in London, but that its business was managed at Victoria Station, which was not within the city:—Held, that the company carried on their business at Victoria Station and not within the city. *Ib.*

—— **Solicitor's Clerk.**]—By s. 12 of the Mayor's Court (Extension) Act, 1857, "Where the debt or damage claimed in any action shall not exceed 50*l.* no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants shall dwell or carry on business within the city of London":—Held, that a clerk, employed by a solicitor at his office, which was within the city of London, did not "carry on business" there within the meaning of s. 12, so as to give the mayor's court jurisdiction to try an action in which the clerk was defendant. *Graham* v. *Lewis*, 58 L. J., Q. B. 117; 22 Q. B. D. 1; 37 W. R. 73; 53 J. P. 116—C. A. Affirming 59 L. T. 35.

**Residence of Parties—Action on Bill of Exchange.**]—Bills of exchange were drawn and accepted abroad, and indorsed by the defendant abroad, one of them being payable in London, the others in Liverpool. The foreign bankers having no residence or place of business in London, as indorsees of the bills, sued the defendant (who likewise had no residence or place of business in London) in the mayor's court, and attached moneys of the defendant in the hands of the garnishee, a banker in London:—The court made absolute a rule for a prohibition, holding that the mayor's court had no jurisdiction, the cause of action not arising within the city, and the parties to the suit being both resident abroad. *Banque de Crédit Commercial* v. *De Gas*, L. R. 6 C. P. 142; 24 L. T. 235.

**Cheque payable in City, Indorsed in Yorkshire.**]—A defendant, for valuable consideration, indorsed to the plaintiff a cheque for 10*l.* payable at a bank in the city of London; the cheque was dishonoured on presentation; the indorsement was in Yorkshire. The plaintiff having sued in the mayor's court to recover the amount of the cheque, the defendant's attorney applied for a prohibition:—Held, that the dishonour of the cheque within the city of London

did not give the mayor's court jurisdiction, and that a prohibition ought to issue. *Robinson* v. *Emanuel*, 43 L. J., C. P. 244; L. R. 9 C. P. 414; 30 L. T. 500.

**"Cause of Action arising wholly or in part within the City"—Assignment of Debt.**]—The plaintiff brought an action in the mayor's court as assignee of a debt alleged to be due in respect of the price of goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city of London, but the debt had been assigned in writing to the plaintiff pursuant to s. 25, sub.-s. 6 of the Judicature Act, 1873, within the city of London:—Held, that the assignment of the debt was part of the cause of action, and that the cause of action having arisen in part within the city of London there was no ground for a prohibition. *Read* v. *Brown*, 58 L. J., Q. B. 120; 22 Q. B. D. 128; 60 L. T. 250; 37 W. R. 131—C. A.

**Equitable Jurisdiction—Part of Cause of Action arising out of the Jurisdiction.**]—The mayor's court has no equitable jurisdiction, unless the whole cause of action has arisen within its jurisdiction. Sect. 12 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.) does not apply to a suit on the equity side of that court. *Reg.* v. *London Corporation*, 61 L. J., Q. B. 329.

The defendants agreed to transfer to the plaintiff shares of the nominal value of 6,000*l.* in a projected company as soon as the company was incorporated. The company was afterwards incorporated by registration under the companies acts at Somerset House, which is outside the jurisdiction of the mayor's court, London. The plaintiff commenced an action in the mayor's court for specific performance of the agreement:—Held, that the defendants were entitled to prohibition, as part of the cause of action—namely, the incorporation of the company—arose outside the jurisdiction. *Bowler* v. *Barberton Development Syndicate*, 66 L. J., Q. B. 144; [1897] 1 Q. B. 164; 75 L. T. 620; 45 W. R. 162—C. A.

**Claim over £50—Contract by Telegram—Offer received and accepted within City.**]—When an offer is sent by telegram and a telegram in reply is sent accepting the offer, the contract is complete on the despatch of the telegram in reply. An action was brought in the mayor's court for a sum of 50*l.* for money had and received, alleged to have been received under bets made by the defendant on behalf of the plaintiff. The plaintiff had sent a telegram, "Put me on so much on such a horse," from a post-office outside the city, to the defendant, a "bookmaker," who had offices within the city. This telegram was received by the defendant within the city, and it was answered by a telegram sent from a telegraph office within the city accepting the offer:—Held, refusing a motion for a prohibition, that the contract (if any) was complete on the receipt of the telegram within the city and the sending the telegram in reply within the city; that the whole cause of action (if any) arose within the city; and that the mayor's court had jurisdiction. *Cowan* v. *O'Connor*, 57 L. J., Q. B. 401; 20 Q. B. D. 640; 58 L. T. 857; 36 W. R. 895.

**Goods Sold—Order and Delivery.**]—Orders were given for goods at Poplar, to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier (on delivery orders handed to him by the seller in the city of London) partly within and partly without the city. An action having been brought for the price in the mayor's court:—Held, that part of the cause of action arose out of the jurisdiction of the court, and therefore the defendant was entitled to a prohibition. *Gold* v. *Turner*, L. R. 10 C. P. 149; 23 W. R. 732.

The defendant, who carried on business in the city of London, posted a letter there containing an order for goods, addressed to the plaintiff in Surrey. No letter was sent accepting the offer; but the goods were taken by a servant of the plaintiff and delivered to the defendant in London:—Held, that the whole cause of action arose in the city. *Taylor* v. *Jones*, 45 L. J., C. P. 110; 1 C. P. D. 87; 34 L. T. 131.

In an action in the mayor's court for the price of goods sold, it was sworn that part of the goods for the price of which the plaintiff sued was ordered by a letter posted in Liverpool, and received by the defendant at his house of business in London. A rule for a prohibition was discharged, on the ground that the letter was a continuing order, and spoke in the place where it was received, and therefore that part of the cause of action arose within the jurisdiction. *Bennett* v. *Cosgriff*, 38 L. T. 177.

If a merchant abroad orders goods of a shopkeeper residing within the city of London, to be put on board a ship lying beyond the limits of the city, and the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the mayor's court, as a debt arising within the city. *Huxham* v. *Smith*, 2 Camp. 21; 11 R. R. 651.

**Sale of Property—Agreement where made.**]—The defendant verbally agreed outside the city of London and the liberties thereof, to purchase from the plaintiff the lease of a shop at New Cross, in Surrey, with the goodwill and stock-in-trade of a drapery business carried on there, and the terms thereof were embodied in two counterpart documents, one of which was signed by the defendant at Bow, in Middlesex, and the other was subsequently signed by the plaintiff within the city, and the documents so signed were then exchanged between the parties' solicitors within the city. Neither of the parties dwelt or carried on business within the city. There remained a sum of 50*l.*, balance of the purchase-money, unpaid, and the plaintiff sued the defendant for it in the mayor's court. The defendant thereupon obtained a writ of prohibition to restrain the mayor's court from further proceeding with the action:—Held, that the writ had been rightly issued, as no part of the cause of action arose within the jurisdiction of the mayor's court. *Alderton* v. *Archer*, 54 L. J., Q. B. 12; 14 Q. B. D. 1; 51 L. T. 661; 33 W. R. 136.

**Account stated by Letter received in City.**]—A defendant, in an action in the mayor's court, had written a letter addressed to and received by the plaintiff in the city, but posted out of the city, in which there was a distinct admission of the debt afterwards sued for. A rule nisi having been obtained for a prohibition to the mayor's court, it was held that upon a claim on an account stated the prohibition

could not issue, as the mayor's court had jurisdiction; that by the receipt of the letter in the city an account was stated in the jurisdiction, and, therefore, a complete cause of action arose there. *Evans* v. *Nicholson*, 32 L. T. 778.

Held, that the statement of an account is analogous to the acceptance of a contract, and that an account was here stated by the defendant at the moment when he posted the letter, and that the statement was continuous until it reached the plaintiff, at which time it was an account stated to him at the place where he received it. *Ib.*

The defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea, where he resided. There was no statment as to the place from which the goods were sent; but, after they had been received by him, the defendant, in answer to a letter written to him by the plaintiff's solicitor in King William Street, City, demanding payment of the price, 8*l.* 8*s.* 6*d.*, wrote to the solicitor (whether by post or otherwise did not appear), "I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim." Upon a rule for a prohibition to restrain the position in an action brought in the mayor's court for goods sold and delivered at the defendant's request, and upon accounts stated:—Held, a sufficient admission of the debt to support an account stated, and to warrant the court in assuming that there was a cause of action arising within the jurisdiction of the mayor's court. *Taylor* v. *Nicholls*, 45 L. J., C. P. 455; 1 C. P. D. 242; 24 W. R. 673.

—— **Nature of Statement.**]—When it is sought to shew jurisdiction in the mayor's court by reason of an account stated, the account on which the jurisdiction is sought to be based must be a real account stated in the strictest sense of the term, not a mere acknowledgment of a balance due from the defendant. *Brenan* v. *Crawley*, 16 W. R. 754. See *Morris* v. *Lautour*, 9 L. T. 767.

The plaintiff's solicitor, who carried on business within the jurisdiction of the mayor's court, wrote to the defendant demanding payment of 7*l.* 6*s.* 6*d.* for goods sold and delivered by him to the plaintiff. Neither of the parties resided or carried on business, nor was the contract entered into within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor— posted outside, but received within the jurisdiction—admitted that he owed 5*l.* 6*s.* 6*d.* to the plaintiff. The plaintiff having brought an action in the mayor's court to recover 5*l.* 6*s.* 6*d.* on an account stated, the defendant obtained a writ of prohibition:—Held, that the admission of the defendant and the bringing of the action amounted to an account stated within the jurisdiction of the mayor's court, and that therefore the mayor's court had jurisdiction to try the action. *Grundy* v. *Townsend*, 36 W. R. 531—C. A.

**In Actions for Sums of less Amount than 50*l.***]—The effect of ss. 12 & 15 of the Mayor's Court Procedure Act, 1857 (20 & 21 Vict. c. clvii.), is to extend the jurisdiction of the mayor's court in cases within s. 12, and consequently a prohibition cannot be granted to prohibit an action in the mayor's court for a sum of less than 50*l.*, the defendant carrying on business, and part of the cause of action having arisen, within the city. *Hawes* v. *Pavely* or *Pavely*, 46 L. J., C. P. 18; 1 C. P. D. 418; 34 L. T. 835; 24 W. R. 895. S. P., *Hawkins* v. *Jeffreys*, 34 L. T. 837—C. A.

The circumstance of the debt or damages being under 50*l.* does not prevent the court from issuing a prohibition to the lord mayor's court, where the cause of action arose without its jurisdiction. *Robinson* v. *Emanuel*, infra.

**Abandoning Part of Claim.**]—An action having been brought in the mayor's court, upon a guarantee given by the defendant for an attorney's bill, upon shewing cause against a rule for a prohibition obtained (before declaration) on the ground that the whole of the cause of action did not arise within the city of London, certain of the charges in the bill being for attendances at Westminster, the plaintiff consenting altogether to abandon his claim, in respect of those items; the court discharged the rule, but without costs. *Ellis* v. *Fleming*, 45 L. J., C. P. 512; 1 C. P. D. 237.

**Objection to, how taken.**]—A defendant, wishing to object to the jurisdiction of the mayor's court, must do so by plea, and not by application for a prohibition. *Brenan* v. *Cradley*, 17 L. T. 549. *But see* infra.

**Effect of Plea to.**]—A plea to the jurisdiction in an action by concessit solvere in the mayor's court by an indorsee against the acceptor of a bill of exchange made payable at a banker's in London (but not specially), admits the drawing, acceptance, indorsement and dishonour of the bill, but not that either of the acts took place within the city of London. *Sewell* v. *Cheetham*, 43 L. J., C. P. 239; L. R. 9 C. P. 420; 22 W. R. 695. See *Jacobs* v. *Brett* and *Evans* v. *Nicholson*, infra.

**Appearance by Defendant—Waiver.**]—When an action has been commenced in the mayor's court, the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is. *Lee* v. *Cohen*, 71 L. T. 824—C. A.

### 2. PROHIBITION.

**Application by whom made—Solicitor.**]—In order to allow the mayor's court of London to entertain a suit, the cause of action must have arisen within its jurisdiction, even although the amount in dispute is less than 50*l.*, and the defendant carries on business in the city of London:—Held, that an attorney is sufficiently a stranger to the suit in the mayor's court to entitle him to apply for a prohibition, although the defendant himself can only raise an objection to the jurisdiction by plea under 20 & 21 Vict. c. clvii. s. 15. *Willis* v. *Harris*, 43 L. J., C. P. 208.

When a party not residing within the jurisdiction of the mayor's court is made a defendant by process therein, a prohibition will be granted with costs upon the court being informed of such process by the attorney of the defendant. *Robinson* v. *Emanuel*, 43 L. J., C. P. 244; L. R. 9 C. P. 414; 30 L. T. 500.

—— **Defendant.**]—A defendant in a suit in the mayor's court cannot move for a writ of prohibition to stay the proceedings in a foreign attachment. *Baker* v. *Clark*, L. R. 8 C. P. 121.

A defendant can himself apply in the superior court to prohibit the mayor's court from proceeding further in an action when the court is proceeding without jurisdiction. *Bridge* v. *Branch*, 1 C. P. D. 633 : 34 L. T. 905.

A defendant in an action in the mayor's court may obtain a writ of prohibition, notwithstanding the Mayor's Court Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 15, which enacts that "no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever except by plea" ; the real effect of that section being only to limit the mode of objecting within the mayor's court to the jurisdiction. *Jacobs* v. *Brett*, 44 L. J., Ch. 377 ; L. R. 20 Eq. 1 ; 32 L. T. 522.; 23 W. R. 556.

—— **Stranger.**]—The court, at the instance of a stranger, made a rule absolute for a prohibition to the mayor's court, after verdict for the plaintiff, notwithstanding that the claim was below 50*l*., and consequently there could be no plea to the jurisdiction. *Quartly* v. *Timmins*, L. R. 9 C. P. 416 ; 22 W. R. 488.

Whether a writ of prohibition is applied for by either of the parties to the suit in an inferior court, or by a stranger to such suit, the only discretion which the superior court has to refuse such writ is if in doubt, in fact or law, whether the inferior court is exceeding its jurisdiction or is acting without jurisdiction. *Worthington* v. *Jeffries*, 44 L. J., C. P. 209 ; L. R. 10 C. P. 379 ; 32 L. T. 606 ; 23 W. R. 750.

But when a writ of prohibition has been issued to restrain proceedings in the mayor's court on the application of a stranger to the suit, it cannot be sustained unless he can shew that the court has exceeded its jurisdiction both with reference to the facts and the law, and then it is a matter of discretion with the superior court whether or not to set it aside. *Chambers* v. *Green*, 44 L. J., Ch. 600 ; L. R. 20 Eq. 552.

**Plea to Jurisdiction.**]—The same facts which would allow a stranger to obtain a prohibition to the mayor's court will not entitle the defendant to plead to the jurisdiction of that court. *Evans* v. *Nicholson*, 32 L. T. 664.

By the Mayor's Court Act, s. 12, no plea to the jurisdiction shall be allowed in cases where the plaintiff claims not more than 50*l*., and where the cause of action arises either wholly or in part within the city ; and, by s. 15, no defendant may object to the jurisdiction except by plea. The plaintiff's cause of action arose in part within the city, and the defendant pleaded to the jurisdiction :—Held, that although a prohibition might be granted, the defendant was not entitled to plead to the jurisdiction. *Ib.*

A prohibition will not be granted to restrain the mayor's court from proceeding where no plea to the jurisdiction is allowed under s. 12 of the Mayor's Court Procedure Act, 1857. *Hawes* v. *Paveley*, 46 L. J., C. P. 18 ; 1 C. P. D. 418 ; 34 L. T. 835—C. A.

By s. 15 of the Mayor's Court of London Procedure Act, 1857, no defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever, except by plea. The court therefore refused to grant a prohibition, although the cause of action in respect of which proceedings were taken in the mayor's court, did not arise within the jurisdiction of that court. *Manning* v. *Farquharson*, 30 L. J., Q. B. 22 ; 6 Jur. (N.S.) 1300 ; 3 L. T. 378 ; 9 W. R. 107.

**On what Grounds granted.**]—A superior court is not bound to grant prohibition to the mayor's court, to prevent that court from proceeding in an action from want of jurisdiction, unless it is clear that the cause of action sued on arose outside the jurisdiction. *Taylor* v. *Nicholls*, 45 L. J., C. P. 455 ; 1 C. P. D. 242 ; 24 W. R. 673.

**By Court of Chancery.**]—Semble, that the Court of Chancery has jurisdiction to issue a prohibition to the mayor's court. *Jacobs* v. *Friedburg*, 21 W. R. 353.

**Costs of Rules for Prohibition.**]—In pursuance of the intimation given by the court in *Robinson* v. *Emanuel* (L. R. 9 C. P. 414), that the court would, in future, in virtue of its general jurisdiction over its officers, order the costs of a rule for a prohibition to be paid by the plaintiff's attorney in every case in which the action had been improperly brought in the mayor's court in respect of a cause of action not arising within the jurisdiction of that court, the costs were, on the 12th July, 1874, ordered to be paid by the respective attorneys for the plaintiffs in several cases. *Mem.*, L. R. 9 C. P. 751, n.

The order for costs of a prohibition will not be made against the plaintiff's solicitor personally, unless the rule has been moved for in that form, and the solicitor has had an opportunity of shewing cause. *Rogers* v. *L. C. & D. Ry.*, 26 W. R. 192.

**Against Attachment of Goods not within the Jurisdiction.**]—A prohibition lies to prohibit the mayor's court attaching the goods of a garnishee which are not within its jurisdiction. *Mayar* v. *Carmot* or *Cannot*, 24 L. T. 583 ; 19 W. R. 756. *And see Cases* infra.

### 3. Foreign Attachment.

**Corporation Aggregate cannot be Garnishee.**]—The process against a garnishee to enforce obedience to the jurisdiction of the mayor's court in foreign attachment is personal, and cannot be applied to a corporation aggregate. Where, therefore, a corporation aggregate was cited as garnishee to appear in the mayor's court, it was held entitled to maintain prohibition. *London Corporation* v. *London Joint Stock Bank*, 50 L. J., Q. B. 594 ; 6 App. Cas. 393 ; 45 L. T. 81 ; 29 W. R. 870.

**Custom must be strictly Pursued.**]—The suit of foreign attachment is founded upon ancient custom, and in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses and returns will render the suit invalid. *Ib.*

**Discharge of Garnishee.**]—No payment but a payment made by compulsion of law can discharge a garnishee from his original liability to his creditor. *Ib.*

**Not against Dead Man.**]—The custom of foreign attachment does not warrant proceedings

against one who at the time of their commencement was dead. *Matthey* v. *Wiseman*, 18 C. B. (N.S.) 657; 34 L. J., C. P. 216; 11 Jur. (N.S.) 603; 12 L. T. 846; 13 W. R. 914.

Therefore a judgment and execution and payment by the garnishees in a suit so commenced in the mayor's court cannot be set up by them as an answer to a claim against them by the personal representative of the deceased, for a debt due to him in his lifetime, notwithstanding that the letters of administration were granted before execution had, and (as was suggested) by the custom that she might have appeared in the mayor's court and dissolved the attachment. *Ib.*

**What Sums Attachable.**]—A judgment was obtained by the plaintiff against the defendant in China. In an action upon the judgment in the queen's bench here, judgment was, pursuant to a consent given by the defendant's attorney in the city of London, signed at the queen's bench office, Temple:—Held, that the judgment so signed was not a debt arising within the city of London, so as to give jurisdiction to the mayor's court to attach moneys of the defendant in the hands of his attorneys there. *Tapp* v. *Jones*, 43 L. J., C. P. 250; L. R. 9 C. P. 418; 30 L. T. 499; 22 W. R. 632.

It is not so absolutely clear that a debt, the subject of an action upon which judgment has not been recovered, is protected from foreign attachment, as to make it the duty of the debtor to disregard such attachment, and pay the debt, after judgment, to the judgment creditor or his assignees. *Nelson* v. *Barter*, 2 Hem. & M. 334; 33 L. J., Ch. 705; 10 Jur. (N.S.) 832; 10 L. T. 743; 12 W. R. 1043.

A foreign attachment can only affect moneys for which the debtor himself could maintain an action at the time of the attachment. *Webster* v. *Webster*, 31 Beav. 393; 31 L. J., Ch. 655; 8 Jur. (N.S.) 1047; 6 L. T. 11; 10 W. R. 503.

A sum of money directed to be paid by A. to B. by the master's allocatur, cannot be attached in A.'s hands by process out of the sheriff's court in an action against B. *Coppell* v. *Smith*, 4 Term Rep. 312.

A sum directed to be paid by A. to B. by the award of an arbitrator, cannot be attached in A.'s hands at the suit of a creditor of B. *Caila* v. *Elgood*, 2 D. & R. 193; 1 L. J. (O.S.) K. B. 33.

Money awarded under a rule of court cannot be attached. *Grant* v. *Harding*, 4 Term Rep. 313, n.

The court will not grant a prohibition to restrain the mayor's court from proceeding upon an attachment of shares in a mining company worked on the cost-book principle, upon the suggestion that such shares are not goods and effects. *Tredinnick* v. *Oliver*, 5 H. & N. 780; 29 L. J., Ex. 466.

**Where Lien Exists.**]—A plaintiff in a foreign attachment cannot take money or goods out of the hands of a garnishee who has a lien thereon, without discharging the lien. *Giles* v. *Nathan*, 5 Taunt. 558; 1 Marsh. 226; 15 R. R. 581, 584.

**Where other Equitable Rights.**]—Property belonging to a defendant in the hands of the garnishee, with whom the defendant has pledged it, cannot, after it has been equitably assigned by the defendant to a third person, be attached by a creditor of the defendant, although no notice of the assignment has been given to the garnishee. *Robinson* v. *Nesbitt*, 37 L. J., C. P. 124; L. R. 3 C. P. 264; 17 L. T. 653; 16 W. R. 543.

The custom of foreign attachment does not apply to debts, the beneficial interest of which is vested in a person other than the defendant sued in the mayor's court, whereof the garnishee has notice, and such debts are not attachable under the custom. *Westoby* v. *Day*, 2 El. & Bl. 605; 22 L. J., Q. B. 418; 18 Jur. 10; 1 W. R. 431.

**Priority.**]—A creditor who, after his debtor's death, obtains an attachment in the mayor's court against part of the assets, gains no priority over the fund attached, as against the other creditors of the deceased. *Redhead* v. *Welton*, 29 Beav. 521; 30 L. J., Ch. 577; 4 L. T. 230; 9 W. R. 473.

A judgment in the mayor's court obtained against the garnishee, does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. *Holt* v. *Murray*, 1 Sim. 485.

**Jurisdiction—Bill of Exchange.**]—The cause of action, that is, the whole substantial cause of action, must arise, and the garnishee must reside or carry on business within the city of London, in order to give the mayor's court jurisdiction to attach moneys of the debtor in the hands of a garnishee. *Cooke* v. *Gill*, 42 L. J., C. P. 98; L. R. 8 C. P. 107; 28 L. T. 32; 21 W. R. 334.

The defendant, who had no residence or place of business in London, drew bills in Philadelphia upon the Union Bank of London, and indorsed them in Philadelphia, and there delivered them to the agents of the plaintiff, who remitted them to the plaintiff in London. The drawees refusing to accept the bills, the plaintiff issued an attachment out of the mayor's court to attach moneys of the drawer in the hands of the garnishees, bankers in London:—Held, that the cause of action arose in America and not in London, and consequently that the garnishees were entitled to a prohibition. *Ib.*

—— **Sale of Shares in Company.**]—A plaintiff attached by process in the mayor's court money of the defendant in the hands of the garnishees. A rule nisi was obtained for a writ of prohibition, on the ground that the action was brought to recover calls in a public company in course of winding-up, under an order made by the Master of the Rolls out of the jurisdiction of the mayor's court, and that the defendant was a foreigner having no residence or place of business in England. Cause was shewn upon an affidavit stating that the contract for the purchase of the shares was made in London, and that the defendant carried on a large banking business through the garnishees as his agents in the city of London. The plaintiff being desirous of questioning the decision in *Cooke* v. *Gill* (supra), the rule was enlarged upon his undertaking to declare in prohibition. *Whinney* v. *Schmidt*, L. R. 8 C. P. 118.

—— **Freight, where Payable — Parties.**]—Where process had issued out of the mayor's court against garnishees, and on cause being shewn against a rule for a prohibition, it appeared that the claim against the original defendant was for extra freight due on a charter-party in respect of a voyage from the Chincha Islands to the Victoria Docks, not within the city of London, and that neither the defendant nor the garnishees

resided within the city of London :—Held, that the prohibition must issue, although, by the terms of the charter-party, payment of the freight was to be made within the city of London. *Byrne* v. *Guano Consignment Co.*, 25 L. T. 935.

—— **Residence of Parties.**] — In a foreign attachment, it is not necessary that the debt should arise within the jurisdiction, or that the defendant in that court should reside within it, or be actually summoned. *Harrington* v. *Macmorris*, 5 Taunt. 228 ; 1 Marsh. 33.

Foreign attachment is a bad plea, either where the parties are not both resident in London, or where the plaintiff is an executor or an administrator. *Barrymore* (*Lord*) v. *Taylor*, 1 Esp. 327.

—— **Fund only within.**]—A bank in Belgium, having funds in the hands of their agent in London, failed. A merchant firm at Hamburg, creditors of the bank, attached the fund in London in the mayor's court ; a demurrer to a bill filed to restrain the proceedings in the mayor's court, and to obtain a writ of prohibition, was overruled. *Jacobs* v. *Friedburg*, 21 W. R. 353.

Where the mayor's court has no jurisdiction over the person of a defendant against whom a plaint has been entered in that court, the awarding process of foreign attachment against a person having funds in his hands belonging to the defendant, as a means of compelling an appearance, is an excess of jurisdiction for which prohibition will lie. *De Haber* v. *Portugal* (*Queen*), 17 Q. B. 171 ; 20 L. J., Q. B. 488 ; 16 Jur. 164.

The process of foreign attachment can only be resorted to where the cause of action against the original defendant arises within the jurisdiction of the court from which the attachment issues. *Ib.*

A custom of foreign attachment of a debt due to the defendant from a third person on the bare fact of the latter being found within the city when neither the plaintiff nor the defendant nor the garnishee is in any way connected with the city, and when neither the cause of action between the plaintiff and the defendant, nor the alleged debt from the garnishee to the defendant, arose within the jurisdiction of the city, is bad. *London Corporation* v. *Cox*, 36 L. J., Ex. 225 ; L. R. 2 H. L. 239 ; 16 W. R. 44. Affirming 2 H. & C. 401 ; 9 Jur. (N.S.) 800 ; 8 L. T. 700.

The garnishee is entitled to move for prohibition against the mayor's court proceeding with the garnishment without first raising in that court the question of jurisdiction. Prohibition would only have issued at the suit of the original defendant, after the defendant had first raised the question by plea in the mayor's court, under 20 & 21 Vict. c. clvii. *Ib.*

**Pleading.**]—If a plea of foreign attachment states the custom to be "that if any person be or hath been indebted to any other person within the city," it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city. *Morris* v. *Ludlam*, 2 H. Bl. 362.

A plea of foreign attachment must state that the garnishee is within the jurisdiction of the mayor's court at the time of the attachment. *Crosby* v. *Hetherington*, 5 Scott (N.R.) 637 ; 4 Man. & G. 933 ; 12 L. J., C. P. 261.

—— **Money in Hands of "Self and Partner."**] —A plea of foreign attachment stated the custom to be, that if the plaintiff in a plaint in debt against another in the mayor's court alleges that any other person owes to the then defendant any money that may be attached ; and that the plaintiff below alleged that he and any other person owed to the defendant below a certain sum of money :—Held, that such plea was bad, as the person owing the money to the defendant must, within the custom as pleaded, be a different person from the plaintiff ; and it is doubtful whether a custom for a party to attach money in the hands of himself and partner can be supported, even if properly pleaded. *Nonell* v. *Hullett*, 4 B. & Ald. 646.

—— **Warning to Shew Cause.**]—It is not necessary to aver the custom that the plaintiff below shall swear to the debt, or the fact that he did swear to it ; neither is it necessary to aver that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court ; nor that a scire facias issued against the garnishee ; it is enough to state that he was "warned to shew cause." *Banks* v. *Self*, 5 Taunt. 234.

Where it was alleged that a plaint had been levied against the plaintiff in the lord mayor's court before action, but there was no allegation of issuing a scire facias to warn the defendant, who was the alleged garnishee, previously to the commencement of the action :—Held, a good plea. *Webb* v. *Hurrell*, 4 D. & L. 824 ; 4 C. B. 287 ; 16 L. J., C. P. 187.

—— **Previous Summons.**]—Where, pending an action, a foreign attachment was executed, but which latter suit had been commenced previously to the action :—Held, that it might be pleaded to the further maintenance. *Ib.*

A custom in an inferior court to issue process of foreign attachment for the purpose of compelling the appearance of the defendant, without a previous summons, is bad. *Bruce* v. *Waite*, 1 Man. & G. 1 ; 1 Scott (N.R.) 81 ; 9 L. J., C. P. 237.

The creditors of the garnishee must be summoned (though it is alleged to be the custom of London to give notice), otherwise the judgment against the garnishee will be erroneous and the money paid or levied in execution of it will not discharge the garnishee of his debt to his creditors. *Fisher* v. *Lane*, 3 Wils. 297 ; 2 W. Bl. 834.

**Issue of Execution—At what Time.**]—On a plea of foreign attachment, not stating that it was after suit, it is necessary that it should be proved that it was executed before suit. And if it appears that it was after plea, and after time for pleading expired, the judge will not amend. *Belbo* v. *Ionides*, 2 F. & F. 674.

To an action for money had and received, the defendant pleaded a recovery by foreign attachment, at the suit of a creditor of the plaintiff's ; and that the creditor had execution of the sum recovered, according to the custom of London : the plaintiff replied that no execution was executed, on which the defendant joined issue :—Held, that without execution executed, the defendant was not discharged from his debt to the plaintiff ; and that, having joined issue on the fact of the execution, the jury was not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact ; and that it is no answer to a plea of recovery under a foreign attachment that the plaintiff had no

notice of the proceedings. *Magrath* v. *Hardy*, 4 Bing. (N.C.) 782; 6 Scott, 627; 6 D. P. C. 749; 1 Arn. 352; 7 L. J., C. P. 299; 2 Jur. 594.

A summons to the defendant of nihil returned, and information of the goods in the hands of the garnishee, must appear on the face of the record in the court below. *Ib.*

—— **Compulsory Payment — What.**] — The plaintiffs, being foreign merchants, had a sum of money belonging to them in the hands of the defendants. The plaintiffs also dealt with R. & Co., who resided abroad, and were indebted to them in a sum exceeding the debt due from the defendants to the plaintiffs. R. & Co. attached money in the hands of the defendants, according to the custom of London, as being the money of the plaintiffs. The attachment was tried and a verdict recovered against the defendants, as garnishees. Judgment was obtained and a certificate granted by the officer of the court, informing the defendants that judgment had been entered. On the production of the certificate by R. & Co., the defendants, as garnishees, paid the amount of the verdict by debiting the plaintiffs in the defendants' books of account, and crediting R. & Co. therewith, under an engagement that the money should be returned if the proceeding failed. The plaintiffs afterwards appeared to the action in the mayor's court, and put in bail, by which the attachment was dissolved:—Held, first, that this was not a compulsory payment, as by the custom it was not required to be made until after execution executed; and, secondly, that the transfer made by the defendants in their books of account did not amount to payment, unless the plaintiffs had directed it to be done, or had subsequently assented to it. *Wetter* v. *Rucker*, 4 Moore, 172; 1 Br. & B. 494; 21 R. R. 690.

—— **Where Garnishee Removes.**] — Where judgment had been obtained in the mayor's court against a garnishee who had removed his person and effects out of the jurisdiction of that court:—Held, that execution could not issue against him out of the court of K. B., under 19 Geo. 3, c. 70, s. 4, as that statute is confined to suits in inferior courts, where the proceedings are similar to those in the courts above. *Bulmer* v. *Marshall*, 1 D. & R. 537; 5 B. & Ald. 821.

**Staying Proceedings.**]—The court will not stay proceedings in an action commenced there, to abide the event of an action in the mayor's court, where it is sought to try in a foreign attachment the title to the same property which is in suit there. *Smidt* v. *Ogle*, 6 Taunt. 74; 16 R. R. 575.

Where a foreign attachment had been sued out of the mayor's court against a railway company by their corporate name, the company being only provisionally registered, and money in the hands of their bankers was attached thereunder, but no further proceedings taken, the court refused to stay proceedings in an action subsequently brought therein against three provisional committee-men of the company for the same debt which was sought to be recovered under the attachment. *Denton* v. *Maitland*, 11 Jur. 42.

**Election.**]—A plaintiff sued the defendants, who resided abroad, in respect of a cause of action arising abroad, and whilst the action was pending he commenced an action in the mayor's court against them for the same cause of action, and by foreign attachment he attached certain moneys of the defendants, in the hands of their attorneys, to answer his claim in the mayor's court:—Held, that as the mayor's court had no jurisdiction in the matter, the proceedings there, whilst the action in the superior court was pending, were vexatious, and the plaintiff was therefore put to the election of abandoning the action in the mayor's court, or of having the proceedings stayed in the cause in the superior court. *Frith* v. *Guppy*, 36 L. J., C. P. 45; L. R. 2 C. P. 32; 12 Jur. (N.S.) 1011; 15 L. T. 616; 15 W. R. 280.

A plaintiff, who had obtained a judgment in the exchequer, proceeded on it by foreign attachment in the mayor's court, and while the defendant was in custody under the attachment sued out a ca. sa. in the exchequer on the judgment:—Held, that the ca. sa. was not irregular, however the defendant might be entitled to apply to the equitable jurisdiction of the court to compel the plaintiff to forego either it or the foreign attachment. *Chamberlayne* v. *Green*, 9 M. & W. 790; 1 D. (N.S.) 649; 11 L. J., Ex. 307; 6 Jur. 400.

**Form of Return to Certiorari.**]—A cause commenced by foreign attachment in the mayor's court, was removed into the queen's bench by certiorari. A return was made omitting to shew that the garnishee resided within the jurisdiction of the mayor's court:—Held, no objection to the return, which was in the usual form. *Day* v. *Paupierre*, 13 Q. B. 802; 7 D. & L. 12; 18 L. J., Q. B. 270; 14 Jur. 40.

**Evidence of Proceedings.**]—In a declaration for maliciously and without reasonable or probable cause issuing out of the mayor's court, London, an attachment of a debt owing from third persons to the plaintiff, it must appear that the action in which the attachment issued was terminated. *Parton* v. *Hill*, 10 L. T. 414; 12 W. R. 753.

The plaintiff purchased wine lying at the defendant's wharf from the holder of a warrant, given by the defendant for its delivery. The vendor indorsed the warrant generally. The plaintiff sent it so indorsed to the wharf, and obtained samples of the wine. A notice from the mayor's court was subsequently served at the wharf attaching the vendor's goods in the defendant's custody, and a description of the wine was at the time of service indorsed on the back of the notice, and shewn to the defendant's manager. The plaintiff, on afterwards producing his warrant at the wharf, and demanding the wine, was told by the manager (the defendant being absent) that the wine was stopped on account of the attachment. The same day the plaintiff's attorney wrote to the defendant to demand the delivery of the wine by eleven o'clock the next day. The defendant's manager called next morning on the plaintiff's attorney after seeing the defendant, and stated that the matter required consideration, and that the defendant would consult his attorney. But the same day at noon a writ was issued:—Held, first, that the wine was not in the custody of the law; and that the attachment was a circumstance to be considered by the jury in forming a conclusion whether there was a conversion.

*Pillot* v. *Wilkinson*, 3 H. & C. 345; 34 L. J., Ex. 22; 12 W. R. 1084—Ex. Ch.

Held, secondly, that on these facts there was evidence of a conversion; and it was a question for the jury whether the defendant entertained a bonâ fide doubt as to the plaintiff's title to the wine, and whether a reasonable time had elapsed for clearing up that doubt. *Ib.*

A judge at nisi prius will take judicial notice of the custom of foreign attachment, and of the seal affixed to proceedings in the mayor's court. *Jeffs* v. *Day*, 12 L. T. 852.

To prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the mayor's court, with an entry of satisfaction, is conclusive evidence: the record is only primâ facie evidence that the debt for which the action was brought in the mayor's court arose within the limits of the city. *Huxham* v. *Smith*, 2 Camp. 21; 11 R. R. 651.

—— **Proof of Debt.**]—A garnishee, against whom a recovery was had in the mayor's court, after a summons to the defendant, and nihil returned, might protect himself by giving such proceedings in evidence upon non assumpsit in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands; although, by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M'Daniel* v. *Hughes*, 3 East, 367.

**Effect of—Garnishee Order.**]—The existence of an attachment in the mayor's court does not prevent the operation of a garnishee order made under ss. 60—64 of the Common Law Procedure Act, 1854. *Richter* v. *Laxton*, 48 L. J., Q. B. 184; 39 L. T. 499; 27 W. R. 214.

—— **Validity of Debt.**]—The plaintiffs, merchants in London and Madras, issued an attachment out of the lord mayor's court, to attach moneys in the hands of B. for a debt due from V. of Madras. B. pleaded a prior attachment by S., a foreign creditor, and so the action of the plaintiffs in the mayor's court was defeated. The plaintiffs filed a bill alleging that the prior attachment was not for a bonâ fide debt, and praying for an account and payment of their debt:—Held, that the court had jurisdiction to decide the matter, and the court being of opinion that no debt was due to S., directed payment to the plaintiffs of the debt due to them. *Shand* v. *Du Buisson*, 43 L. J., Ch. 508; L. R. 18 Eq. 283; 22 W. R. 483.

In an action for a debt by W. against D., he pleaded that the debt had been attached in the hands of D. as garnishee in a plaint in the Mayor's Court by C. against W. A replication, that the debt sued for in the mayor's court did not arise or accrue within the jurisdiction thereof, is bad. *Westoby* v. *Day*, 2 El. & Bl. 605; 22 L. J., Q. B. 418; 18 Jur. 10; 1 W. R. 431.

—— **Bar to further Action.**]—In an action by A. against B., execution executed upon a foreign attachment in the mayor's court of London is a good plea in bar of the further maintenance of an action against C., the garnishee, in respect of the same debt. *Webb* v. *Hurrell*, 4 C. B. 287; 4 D. & L. 824; 16 L. J., C. P. 187.

In order to render a recovery by foreign attachment, according to the custom of London, an answer to an action in the superior courts, there must have been execution executed. *Magrath* v. *Hardy*, 6 Scott, 627; 4 Bing. (N.C.) 782; 6 D. P. C. 749; 1 Arn. 352; 7 L. J., C. P. 299; 2 Jur. 594.

A foreign attachment pending is no bar to an action, until judgment is recovered in the attachment. *Nathan* v. *Giles*, 5 Taunt. 558; 1 Marsh. 226; 15 R. R. 581.

A. deposited goods with B. as a security for money advanced by B., with a promise to deliver the bill of lading, when it should arrive, indorsed to B.; C. was employed as a broker to dispose of the goods for B.'s benefit. Before the bill of lading arrived, the goods were attached in the mayor's court in the hands of C. by a creditor of A.:—Held, that the transfer of the property to B. was complete, though the bill of lading had never been indorsed, and that, therefore, the foreign attachment was no answer to an action by B. against C. for the proceeds. *Ib.*

—— **Founding Petition on.**]—A debt, which has been attached in the mayor's court, is not sufficient to support a petition for winding up a company. *European Bank, In re, Baylis, Ex parte*, 35 L. J., Ch. 690.

—— **Secured Creditor—Writ served but Judgment not obtained.**]—A creditor who has served a writ of foreign attachment in an action in the mayor's court, but has not obtained judgment in the action before the commencement of the bankruptcy or liquidation of his debtor, is not "a creditor holding security on the property of the debtor" within the meaning of s. 12 of the Bankruptcy Act, 1869. *Levy* v. *Lovell*, 49 L. J., Ch. 305; 14 Ch. D. 234; 42 L. T. 242; 28 W. R. 602—C. A. Contra, *London Cotton Mills Co., In re, Brander, In re*, 25 W. R. 109.

An attachment of the goods of the defendant in an action of debt in the tolzey court of Bristol is only a process to compel the appearance of the defendant, and does not make the plaintiff a secured creditor within the meaning of s. 16, sub-s. 5, of the Bankruptcy Act, 1869, the effect of an attachment in the tolzey court being the same as that of a foreign attachment under the custom of the mayor's court of London. *Levy* v. *Lovell* (14 Ch. D. 234) followed. *Sear, Ex parte, Price, In re*, 17 Ch. D. 74; 44 L. T. 887—C. A.

—— **Arrest on Mesne Process.**]—The customary process of foreign attachment in the city of London was not equivalent to an arrest on mesne process, though the attachment could only be dissolved by the defendant putting in bail or rendering himself to prison; and 1 & 2 Vict. c. 110, does not affect the custom. *Day* v. *Paupierre*, 7 D. & L. 12; 13 Q. B. 802; 18 L. J., Q. B. 270; 14 Jur. 40.

—— **Render of Defendant.**]—When, in a proceeding by foreign attachment, the defendant renders himself in dissolution of the attachment and the plaintiff goes on in the action and recovers judgment, the defendant is entitled to be discharged from custody by virtue of s. 4 of the Debtors Act, 1869. The 29th section, which preserves the custom of foreign attachment, does not operate so as to make the defendant, under such circumstances, liable to be detained in

custody. *Waine* v. *Wilkins*, 42 L. J., Q. B. 95; L. R. 8 Q. B. 107; 27 L. T. 825.

4. PRACTICE.

**Solicitor of High Court may be Sued.**]—A solicitor of the high court who had also been admitted a solicitor in the mayor's court was sued in the latter court:—Held, that he was not entitled to have the action removed into the high court on the ground of the privilege of a solicitor of the high court to be sued in that court only. *Day* v. *Ward*, 55 L. J., Q. B. 494; 17 Q. B. D. 703; 55 L. T. 518; 35 W. R. 59.

**Counter-claims.**]—When in an action in the mayor's court on a cause of action within the jurisdiction, a counter-claim beyond the jurisdiction is set up, the court will not grant a prohibition. *Davis* v. *Flagstaff Silver Mining Co.*, 47 L. J., C. P. 503; 3 C. P. D. 228; 38 L. T. 769; 26 W. R. 431—C. A.

Such counter-claim should be dealt with by the mayor's court itself, under the powers conferred on it by the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 89, 90. *Ib.*

**Certiorari—Discretion of Judge—Action "fit to be tried in Superior Court."**]—By clause 12 in the schedule to the Borough and Local Courts of Record Act, 1872, which has been applied by order in council to the mayor's court, "No action entered in the court shall before judgment be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts":—Held, that the question whether an action was fit to be tried in the superior court was a matter of opinion for the judge, and that he had a discretion in all cases as to whether an action should be removed into the superior court. The words "fit to be tried" mean "ought to be tried" in the superior court. *Banks* v. *Hollingsworth*, 62 L. J., Q. B. 239; [1893] 1 Q. B. 442; 4 R. 228; 68 L. T. 477; 41 W. R. 225; 57 J. P. 436—C. A.

In an action in the mayor's court against two defendants, one of whom was a corporation aggregate, an application was made by the defendant corporation to have the action transferred to the chancery division of the high court, on the grounds (1) that accounts were required from persons who were not within the jurisdiction of the mayor's court; (2) that it would be necessary to bring several persons into the action as third parties, which could not be effectually done if the action remained in the mayor's court; (3) that, according to recent decisions, a corporation aggregate could not be made defendants in an action in the mayor's court:—Held, that under these circumstances, it was "fit" that the whole proceeding should be transferred from the inferior court to the high court. *Vickers* v. *Stevens*, 44 L. T. 679; 29 W. R. 562.

A party to an action in the mayor's court is not entitled as of right to remove the action by writ of certiorari into the high court, but can only do so by leave of a judge of the high court in a case where it shall appear to him that the action is one which is fit to be tried there. *Cherry* v. *Endean*, 55 L. J., Q. B. 292; 54 L. T. 763; 34 W. R. 458.

Rule 12 of the Borough and Local Courts of Record Act, 1872, which is applicable to the mayor's court, provides that "no action entered in the court shall, before judgment, be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts," &c. The plaintiff brought an action in the mayor's court against the defendant, a stockbroker, for alleged misconduct in connection with the purchase of certain shares, and claimed 110*l.* as damages:—Held, that the action was one which was "fit to be tried" in the superior courts, and that the defendant was accordingly entitled to a writ of certiorari. *Simpson* v. *Shaw*, 56 L. J., Q. B. 92; 56 L. T. 24.

—— **Time for lodging Writ.**]—By the Mayor's Court of London Procedure Act, 1857, s. 17, "No cause depending in the mayor's court shall be removed before judgment therein into any superior court, unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the mayor's court":—Held that the section gave alternative periods for lodging the writ, and that the defendant could avail himself of whichever was the longer period. *Prim* v. *Smith*, 57 L. J., Q. B. 336; 20 Q. B. D. 643; 58 L. T. 606; 36 W. R. 530—C. A.

By the Borough and Local Courts of Record Act, 1872, schedule, r. 12, it is enacted that no action shall before judgment be removed into any superior court except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, security for debt and costs, or such other terms as such judge shall think fit:—Held, that this rule does not override s. 17 of the Mayor's Court of London Procedure Act, 1857, and does not substitute the discretion of a judge for the strict limit of time imposed in that section. *Price* v. *Shaw*, 59 L. T. 480.

**Previous Practice.**]—Circumstances under which a writ of certiorari was granted to the mayor's court. *Jones* v. *Hey*, 17 W. R. 996.

When a suit in the lord mayor's court was removed by writ of certiorari into the court of chancery, and it appeared upon the face of the bill that some of the plaintiffs were out of the jurisdiction of the lord mayor's court, an order was made ex parte, without further evidence, that the suit in the mayor's court be retained in the court of chancery. *Tracy* v. *Open Stock Exchange Co.*, 40 L. J., Ch., 159; L. R. 11 Eq., 556; 19 W. R. 379.

An order was also made in a suit from the mayor's court that the registrar of that court might be at liberty to pay over to the credit of the cause in the court of chancery the money paid into the mayor's court. *Ib.*

A writ of certiorari will be issued to remove a suit out of the equity side of the lord mayor's court into the court of chancery on a bill being filed for the purpose, and evidence being given that neither the plaintiff nor the defendant, nor the subject-matter of the suit, was within the jurisdiction of the lord mayor's court, and that the cause of action did not arise there. *Davies* v. *MacHenry*, L. R. 3 Ch. 200.

A plaintiff in an action against a defendant in the lord mayor's court for 80*l.*, attached his balance at her bankers', within the lord mayor's jurisdiction. The defendant paid 80*l.* into court in lieu of special bail, discharged the attachment, and pleaded coverture. The action failed. Thereupon the plaintiff filed a bill against the defendant on the equity side of the lord mayor's court, which was removed by certiorari into the court of chancery. *MacHenry* v. *Davies*, L. R. 6 Eq. 462.

—— **Security for Costs.**]—A cause was removed by certiorari from the mayor's court. The defendant paid a sum of money into court in lieu of bail, and shortly afterwards obtained a rule for security for costs, on the ground that the plaintiff resided out of England. The security for costs was never given, and a period of nearly two years elapsed without any proceeding in the cause. The court made absolute a rule calling on the plaintiff to give security for costs within a fortnight, otherwise the defendant to be at liberty to take the money paid in, in lieu of bail, out of court. *Tassie* v. *Kennedy*, 5 D. & L. 587; 2 B. C. Rep. 278; 17 L. J., Q. B. 215; 12 Jur. 854.

When a cause had been removed from an inferior court by habeas corpus at the defendant's instance, and no further steps taken on either side for a year, the plaintiff might apply ex parte for a procedendo to issue, unless bail in the queen's bench were given within four days. And the bail below cannot move to set aside such procedendo when issued, until they or the defendant have put in bail in that court. *Blanchard* v. *De la Crouée*, 9 Q. B. 869; 16 L. J., Q. B. 181; 11 Jur. 283.

Upon the removal of a cause by certiorari from the lord mayor's court, the defendant is not at liberty, under 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail. *Morgan* v. *Pebrer*, 2 Scott, 853.

The general rule, that where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court where a custom of foreign attachment exists which can only be dissolved on putting in special bail. *Bustow* v. *Gant*, 13 Q. B. 807; 21 L. J., Q. B. 377; 17 Jur. 299.

**Removal of Judgment for Purposes of Execution.**]—Under the Mayor's Court of London Procedure Act, 1857, s. 48, a plaintiff who has recovered a judgment in an action in the mayor's court, against a defendant having goods within its jurisdiction, is entitled, as of right, to remove such judgment into one of the superior courts, and to issue execution thereout against the goods of the defendant; and such execution will not be set aside as an abuse of the process of the court, notwithstanding that execution could have been issued out of the mayor's court with as full effect as out of the superior court, and that the only object of removing the judgment into the superior court may have been to obtain the increased costs of such execution. *Haywood* v. *Saint*, 32 L. T. 566.

By the Mayor's Court of London Procedure Act, 1857, s. 48, execution might be issued in a superior court upon a judgment obtained in the mayor's court. By the Borough and Local Courts of Record Act, 1872, s. 6, where final judgment has been obtained in any local court for a sum not exceeding 20*l.*, "such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels . . . and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court":—Held, that the two statutes were not inconsistent, and that the Mayor's Court of London Procedure Act, 1857, s. 48, had not been repealed by the Borough and Local Courts of Record Act, 1872, s. 6; and that notwithstanding the latter statute, execution might be issued in the High Court of Justice upon a judgment for a sum not exceeding 20*l.* obtained in the mayor's court. *Paine* v. *Slater*, 52 L. J., Q. B. 282; 11 Q. B. D. 120; 48 L. T. 623; 31 W. R. 941—C. A.

—— **Setting aside after Removal.**]—By the Mayor's Court Procedure Act, 1857, s. 48, a judgment removed from that court to a superior court shall have the same force and effect as a judgment recovered in the superior court:—Held, that it is competent to the court to which such judgment is so removed to set it aside, if satisfied that it was obtained in a matter over which the inferior court had no jurisdiction. *Bridge* v. *Branch*, 1 C. P. D. 633; 34 L. T. 905.

**Jurisdiction to Commit—Debtors Act.**]—The jurisdiction of the mayor's court to commit a person for nonpayment of a judgment debt, conferred by ss. 36 & 38 of the Mayor's Court Act, 1857, is not affected by s. 5 of the Debtors Act, 1869. *Washer* v. *Elliott* (1 C. P. D. 169) considered and followed. *Schuller* v. *Wood*, 64 L. J., Q. B. 243; 15 R. 91.

The mayor's court, and other inferior courts, can only enforce judgments of superior courts, under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, against debtors resident or carrying on business within the local limits of the jurisdiction of the court so enforcing. *Washer* v. *Elliott*, 45 L. J., C. P. 144; 1 C. P. D. 169; 34 L. T. 56; 24 W. R. 432.

**Appointment of Receiver.**]—A receiver appointed by court of chancery pending administration proceedings in the mayor's court. *Nothard* v. *Proctor*, 45 L. J., Ch. 302; 1 Ch. D. 4; 33 L. T. 709.

**Taxation of Costs—Certificate—Prohibition.**]—Where the judge of the mayor's court has granted a certificate for the taxation of the costs of an action in that court upon a higher scale than the scale which would otherwise be applicable, without stating any ground for granting such a certificate, it is a mere irregularity, and no prohibition will lie. *Reg.* v. *London Corporation and Stock*, 62 L. J., Q. B. 589; 5 R. 544; 69 L. T. 721.

**New Trial.**]—Upon a rule for a mandamus to compel the mayor's court to enter judgment for the plaintiff, that court having granted a new trial on the ground that the verdict found for him was against the weight of evidence:—The court of queen's bench expressed an opinion that the mayor's court had power to grant a new trial on such ground, but, not being clear about the matter, a rule for a writ to issue was made absolute. *Reg.* v. *London Corporation*, *Roux* v. *Merton*, 27 L. T. 61.

Notwithstanding s. 10 of the Mayor's Court Act, a superior court has no power to prohibit the mayor's court from proceeding to retry an action there, after a rule absolute for a nonsuit in the superior court upon a point reserved. *Lebeau* v. *General Steam Navigation Co.*, 42 L. J., C. P. 76; L. R. 8 C. P. 129; 21 W. R. 358.

In an action in the mayor's court, the recorder directed a verdict for the plaintiff, with leave to the defendant to move for misdirection:—Held, that the defendant was confined to the leave reserved, and was not entitled to insist on a new trial upon the ground that his own evidence had been improperly excluded. *Ellis* v. *Marriott*, 8 W. R. 192.

Where a rule has been obtained to enter a nonsuit or for a new trial in the mayor's court, London, under s. 22 of 20 & 21 Vict. c. clvii., it is not competent to the unsuccessful party afterwards, even with the leave of the judge, to move the divisional court under s. 10. *Mears* v. *Chittick*, 9 Q. B. D. 35.

—— **Power to give Judgment.**]—The judge of the mayor's court, London, has no power, on a motion before that court for a new trial, to direct judgment to be entered for either of the parties in the action as a judge of the high court can do under Ord. XL. r. 10, no rules having been made for applying the rules of the judicature acts to that court, and no such power being given to an inferior court by s. 89 of the Judicature Act, 1873. *Pryor* v. *City Offices Co.*, infra.

**Appeal—To Court of Appeal.**]—The court of appeal from inferior courts has no jurisdiction to hear and determine questions of law arising upon the records of the mayor's court; the proper tribunal to entertain them is the court of appeal under the Judicature Act, 1873, s. 18, sub.-s. 4. *Le Blanch* v. *Reuter's Telegraph Co.*, 1 Ex. D. 408; 34 L. T. 691; 25 W. R. 115.

Where, notwithstanding the absence of jurisdiction to enter judgment on an application for a new trial, the judge of the mayor's court has acted as if he had such power, an appeal will lie to the court of appeal in respect of his having so erroneously acted. *Pryor* v. *City Offices Co.*, 52 L. J., Q. B. 362; 10 Q. B. D. 504; 48 L. T. 698; 31 W. R. 777—C. A.

—— **By Leave.**]—The mayor's court is an inferior court within s. 45 of the Judicature Act, 1873, and where there has been an appeal from that court to a divisional court under that section no further appeal lies to the court of appeal except by special leave of the divisional court. *Appleford* v. *Judkins*, 47 L. J., C. P. 615; 3 C. P. D. 489; 38 L. T. 801; 26 W. R. 734—C. A.

—— **Before Judicature Act.**]—The Mayor's Court Act (20 & 21 Vict. c. clvii.), ss. 8, 10, provides that in certain cases a party may appeal, if he gives notice within two days of the decision, and gives security; and that, "if upon the trial" the judge gives him leave to move in a superior court, he may move within the time limited for like motions in such court. At the conclusion, on a Thursday, of a trial in the mayor's court, the judge refused to give the plaintiff, who was nonsuited, leave to move, but on the ensuing Monday, on application made to him, granted such leave:—Held, that he had no power to do so, because, even if there had been no refusal, the leave must be given within a reasonable time, and that would be two days. *Folkard* v. *Metropolitan Ry.*, 42 L. J., C. P. 162; L. R. 8 C. P. 470; 29 L. T. 101; 21 W. R. 736.

—— **To High Court—Claim over £20—Leave to Appeal.**]—By the Mayor's Court of London Procedure Act, 1857, s. 8, an appeal from the mayor's court to the superior courts is given where the sum sought to be recovered exceeds 20*l.*, and by s. 9, such appeal is to be by special case. By s. 10, the parties in any case in the mayor's court may, if the judge grants leave, move in the superior courts to set aside the verdict:—Held, that Ord. LIX. r. 10, which provides that all appeals from inferior courts shall be by notice of motion, does not make it necessary where the sum sought to be recovered in the mayor's court exceeds 20*l.*, and a motion to set aside the verdict and judgment on the ground of misdirection is made in the high court, that the leave of the judge of the mayor's court should be obtained. *Eder* v. *Levy*, 56 L. J., Q. B. 650; 19 Q. B. D. 210.

—— **Condition precedent—Security for Costs.**]—It is a condition precedent to the right of appeal under s. 8 of the Mayor's Court Procedure Act, 1857, that the appellant should have given security for the costs of the appeal; that section has not been repealed by Ord. LIX. rr. 10–17. *Morgan* v. *Bowles*, 63 L. J., Q. B. 84; [1894] 1 Q. B. 236; 10 R. 62; 42 W. R. 269.

—— **Time for Giving Notice.**]—The provision in s. 8 of the Mayor's Court of London Procedure Act, 1857, that a party desiring to appeal shall, within two days of the determination or direction against which he appeals, give notice of appeal to the other party, is a condition precedent to the appeal, and the high court has no power, under r. 16 of Ord. LIX., to extend the time for giving such notice. *Kirby* v. *North British and Mercantile Insurance Co.*, 65 L. J., Q. B. 527; [1896] 2 Q. B. 99; 74 L. T. 723; 44 W. R. 529; 60 J. P. 549—C. A.

## MEASURE.

**Weights and Measures.**]—*See* WEIGHTS AND MEASURES.

**Of Damages.**]—*See* DAMAGES.

## MEAT.

**Warranty on Sale of.**]—*See* SALE OF GOODS.

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## MEDICINE.

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## A. APOTHECARIES.

### 1. QUALIFICATION.

**Apprenticeship and Certificate.**]—In an action for a libel upon the plaintiff, who had served upwards of three years as house-apothecary at a public infirmary, before the passing of 55 Geo. 3. c. 194 :—Held, that such service was sufficient to qualify him to act as an apothecary, and superseded the necessity of an apprenticeship, or the production of a certificate, in conformity with the regulations of that statute. *Wogan* v. *Somerville*, 1 Moore, 102 ; 7 Taunt. 401.

To an action on a bond the defendant pleaded, that the bond was given in pursuance of a corrupt agreement, that he should serve the obligee as an apprentice to the business of a surgeon-apothecary and man midwife for two years, and that the agreement should be ante-dated, to make it appear that he had served five years, in order that, by such corrupt contrivance, he might be admitted to his examination for the business of an apothecary at the end of two years, instead of five, as required by the statute. A verdict having been found for the defendant, the court held that the bond was void, and refused to enter judgment non obstante veredicto, which was moved for on the ground that it appeared to be the object of the parties to enable the defendant to practise as a surgeon also, and that a five years' apprenticeship was not required for the business of a surgeon, and that it was not open to the defendant to object to the legality of his own bond. *Prole* v. *Wiggins*, 3 Bing. (N.C.) 230 ; 3 Scott, 607 ; 2 Hodges, 204 ; 6 L. J., C. P. 2.

**Who is.**] — A man carried on the business of a surgeon and an apothecary, and made up medicines for his patients, but did not make them up from other persons' prescriptions, or sell drugs to the public :—Held, that he was an apothecary within the phrase and meaning of s. 65 of the 12 & 13 Vict. c. 106. *Crabb*, *Ex parte*, 25 L. J., Bk. 45 ; 2 Jur. (N.S.) 628 ; 4 W. R. 501.

**Trading.**]—What selling of drugs by a surgeon-apothecary constitutes trading. Not if ancillary to business of surgeon. *Daubeny*, *Ex parte*, *Briden*, *In re*, 3 Mont. & Ayr. 16 ; 2 Deac. 72 ; 6 L. J., Bk. 49.

**What constitutes Practising.**]—Practising as an apothecary is the mixing up and preparing medicines prescribed by a physician or by any other person, or by the apothecary himself. *Woodward* v. *Ball*, 6 Car. & P. 577.

The acting as a surgeon or an accoucheur is not practising as an apothecary, nor would the party supplying medicine to a friend be so. But if the party sought his living by practising as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice. *Ib.*

In an action by an apothecary, to prove practising, he ought to shew instances of compounding and making up prescriptions ; merely attending local complaints is not enough. *Thompson* v. *Lewis*, M. & M. 255 ; 3 Car. & P. 483.

Where a person was sued for a penalty, and insisted that he was within the exemption, as having actually practised as an apothecary prior to the passing of the 55 Geo. 3, c. 194 :—Held, that in summing up to the jury, the judge acted properly in referring them to s. 5, which described the duty of an apothecary to be to make up prescriptions of physicians ; and it appearing that the defendant had never done so prior to the passing of the act, through incapacity and ignorance, that it was strong evidence to be left to the jury, and that they were warranted in finding that he had never practised as an apothecary, although he had occasionally administered medicines to different patients prior to that period. *Apothecaries' Co.* v. *Warburton*, 3 B. & Ald. 40.

An apothecary being freeman of London attended a patient, and made up and administered proper medicines to him, but without having a licence from the faculty, or the direction of a physician, or demanding or taking any fee for his advice :—Held, that this did not amount to a practising of physic within 14 & 15 Hen. 8, c. 5. *Rose* v. *Physicians' College*, 5 Bro. P. C. 553.

Customers went to the shop of a chemist and asked him what was good for their ailments, and not being a certificated apothecary, he was accustomed to suggest medicine, make it up, and sell it to them :—Held, that in so doing he was acting and practising as an apothecary, and was liable to a penalty under 55 Geo. 3, c. 194, s. 20. *Apothecaries' Co.* v. *Nottingham*, 34 L. T. 76.

—— **Apothecary's Assistant.**] — Where an apothecary's assistant attended patients as an apothecary :—Held, that he could not be considered as practising as such, although the patients paid him for the medicines administered to them. *Brown* v. *Robinson*, 1 C. & P. 264.

A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients :—Held, that this was a practising by A. as an apothecary, within 55 Geo. 3, c. 194, s. 20. *Apothecaries' Co.* v. *Greenwood*, 2 B. & Ad. 709 ; 9 L. J. (O.S.) K. B. 331.

**Liability to Penalties—Unqualified Person.**]—An unqualified person dispensing medicine of his own advice is within the penalties of 55 Geo. 3, c. 194. *Apothecaries' Co.* v. *Allen*, 1 N. & M. 413 ; 4 B. & Ad. 625.

A diploma of M.D. from the university of St. Andrew's, in Scotland, is no defence to an action for penalties, for practising as an apothecary without having obtained a certificate from the Apothecaries' Company. *Apothecaries' Co.* v. *Collins*, 5 Car. & P. 519 ; 1 N. & M. 401 ; 4 B. & Ad. 604 ; 2 L. J., K. B. 149.

A chemist and druggist practising as an apothecary, in attending the sick, and giving them medicines, is liable to penalties. *Apothecaries' Co.* v. *Greenough*, 1 G. & D. 378 ; 1 Q. B. 799 ; 11 L. J., Q. B. 156.

—— **Whether Penalty cumulative.**]—Section 20 of the Apothecaries Act, 1815, provides that, if any person "shall act or practise as an apothecary" without having obtained the requisite certificate, "every person so offending shall for every such offence forfeit 20*l.*" A defendant had given advice and had prescribed and supplied medicine to three separate persons on different occasions on the same day, without a certificate, and was sued for three separate penalties :—Held, that only one offence had been committed, and that only one penalty was therefore recoverable, for the statute contemplated an habitual course of conduct on the part of the defendant, and not an isolated act. *Apothecaries' Co.* v. *Jones*, [1893] 1 Q. B. 89 ; 5 R. 101 ; 67 L. T. 667 ; 41 W. R. 267 ; 17 Cox, C. C. 588 ; 57 J. P. 56.

By a plaint in a county court, a defendant was summoned for a debt of 20*l.*, for illegally practising as an apothecary. The particulars stated that the action was brought to recover 20*l.*, for that the defendant, on divers days, acted as an apothecary, without a certificate, at four places named, by attending and supplying medicine to four persons mentioned, whereby he had forfeited 20*l.* By 55 Geo. 3, c. 194, s. 20, any person who shall practise as an apothecary without a certificate shall forfeit for every such offence 20*l.* :—Held, that whether the facts stated in the particulars amounted to four offences or one offence only, the sum recoverable was limited by the summons and particulars to 20*l.*, and therefore the county court had jurisdiction. *Apothecaries' Co.* v. *Burt*, 5 Ex. 363 ; 1 L. M. & P. 405 ; 19 L. J., Ex. 334.

**Surgeons in Army or Navy.**]—Action for work done as an apothecary. Plea, that the plaintiff was not an apothecary prior to the 1st of August, 1815 ; nor had he, at any time, obtained a certificate to practise as an apothecary from the master, wardens, and society of the art and mystery of apothecaries. Replication, that before the work was done, and before the 1st of August, 1826, the plaintiff held a warrant as assistant-surgeon in the navy, and that the work was done after the passing of the 6 Geo. 4, c. 133 :—Held, that the replication was good. *Steavenson* v. *Oliver*, 8 M. & W. 234 ; 10 L. J., Ex. 338 ; 5 Jur. 1064.

In an action to recover charges claimed by an apothecary, he relied on the 6 Geo. 4, c. 133, s. 4, which enacts, that no person who held a commission or warrant as surgeon or assistant-surgeon in his majesty's army should be obliged to prove that he was in practice as an apothecary on the 1st August, 1815, otherwise than as holding such commission or warrant :—Held, that the evidence of the paymaster of the regiment, that he paid the plaintiff his salary as assistant-surgeon during a period of several years, and that he should not have so done without the production of his warrant, was sufficient to entitle him to the right conferred by the statute. *Milbank* v. *Bryant*, 3 Q. B. 690 ; 3 G. & D. 31 ; 12 L. J., Q. B. 81 ; 6 Jur. 931.

2. Recovery of Charges.

**Medicines and Attendances.**]—In an action by a payee on a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker" :—Held, that evidence was admissible to shew the consideration to have been medicines furnished, and services performed as an apothecary, and, if that was proved, that he could not recover without bringing himself within 55 Geo. 3, c. 194, s. 21. *Blogg* v. *Prickers*, R. & M. 125.

A surgeon and apothecary may, besides his charge for medicine, recover such charges for attendances as the jury consider fair and reasonable. *Handley* v. *Henson*, 4 Car. & P. 110.

Where an arbitrator awarded to an apothecary in London charges for attendances the court refused to refer back the award to him for reconsideration. *Gensham* v. *Germain*, 11 Moore, 1 ; 4 L. J. (o.s.) C. P. 37.

There is no rule of law to preclude an apothecary from recovering both for medicines and attendance, where the united charges do not exceed a reasonable remuneration, and it is a question for the jury what is reasonable. *Morgan* v. *Hallen*, 3 N. & P. 489 ; 8 A. & E. 489 ; 1 W. W. & H. 370 ; 7 L. J., Q. B. 212 ; 2 Jur. 591.

The fact of an apothecary having, in a former bill left a blank for the price of his attendances, is evidence upon which a jury may say whether or not there was a contract to make no charge for attendance. *Ib.*

If a surgeon, in a bill to his patient, leaves a blank for his charge for attendances, and the patient pays a sum on account, the former is bound by the bill, and cannot recover more than the sum paid into court by the latter. *Tuson* v. *Batting*, 3 Esp. 192.

The right of an apothecary to charge for attendances is not matter of law, but of contract, either express or to be applied from the usage of the place. *Smith* v. *Chambers*, 2 Ph. 221 ; 11 Jur. 359.

**Bottles.**]—An apothecary who furnishes medicines, not being in a capacity to recover, cannot recover even for the phials in which the medicines were contained. *Steel* v. *Henley*, 1 Car. & P. 574.

**Must have Certificate at the Time of the Services rendered.**]—Under the Medical Act, 1858, ss. 31 and 32, and the Apothecaries Act (55 Geo. 3, c. 194), s. 21, in order to recover for medicines and attendance as an apothecary it is necessary that the practitioner should have been qualified and registered at the time of the services rendered ; and it is not sufficient that he produce at the trial a certificate of registration obtained after action brought. *Leman* v. *Houseley*, 44 L. J., Q. B. 22 ; L. R. 10 Q. B. 66 ; 31 L. T. 833 ; 23 W. R. 235. Contra, see *Turner* v. *Reynall*, post, col. 1003.

Action for goods sold and delivered, work done, and materials provided, and on an account

stated: the particulars of demand consisted of items "for medicines and attendances." At the trial, the plaintiff's assistant proved that they were surgeons, and that he had visited and dispensed medicines to the defendant, and that on one occasion he had bled the defendant:—Held, that primâ facie the charges were charges in a medical case, and that the plaintiffs were therefore bound to prove that they were certificated as apothecaries, or that they had been in practice previously to the 1st August, 1815. *Proud* v. *Mayall*, 3 D. & L. 531. S. P., *Walmsley* v. *Abbott*, 1 Car. & P. 309; 5 D. & R. 62; 3 B. & C. 218; 2 L. J. (O.S.) K. B. 223.

**Agreement to Cure within a specified Time—Fraudulent Professions.**]—A person who professes to cure certain disorders within a specific time, and induces another person to employ him by false and fraudulent professions of his skill, cannot recover either for his medicines or attendance. *Hupe* v. *Phelps*, 2 Stark. 480; 20 R. R. 726.

**Country Certificate—Nonpayment of Extra Fee to Apothecaries' Company.**]—In an action by an apothecary for charges incurred in London, he produced at the trial a certificate of qualification entitling him to practise in the country, and he had not paid the extra fee of 4*l.* 4*s.* to the Apothecaries' Company, which was necessary by 55 Geo. 3, c. 194, s. 19, to entitle him to practise in London:—Held, that he was not prevented from recovering by s. 21. *Young* v. *Geiger*, 6 C. B. 541; 6 D. & L. 337; 18 L. J., C. P. 40; 12 Jur. 983.

An apothecary is entitled to recover for business done in London, if he has a general certificate from the Apothecaries' Company of his fitness to practise, although he paid but 6*l.* 6*s.* on his obtaining it. *Chadwick* v. *Bunning*, 2 Car. & P. 106; R. & M. 306.

**Not necessary to prove every Item.**]—In an action for an apothecary's bill, consisting of a great number of items, where the jury gives a verdict for the whole sum due, the court will not grant a new trial because every item was not proved, if evidence was given as to some of them. *Wheeler* v. *Sims*, 5 Jur. 151.

**Pleading want of Qualification.**]—It is not necessary to plead as a defence to an action on an apothecary's bill, that he has not a certificate to practise from the society of apothecaries, as that is part of the plaintiff's case. *Morgan* v. *Ruddock*, 4 D. P. C. 311; 1 H. & W. 505.

In an action brought by a party for work and labour as an apothecary, and for medicines, he must either prove his certificate, or that he was in practice as an apothecary before the 1st of August, 1815, pursuant to 55 Geo. 3, c. 194, s. 21, although the defendant has only pleaded nunquam indebitatus. *Sharpe* v. *Wagstaffe*, 3 M. & W. 521; 6 D. P. C. 566; 1 H. & H. 164; 7 L. J., Ex. 167. S. P., *Shearwood* v. *Hay*, 5 A. & E. 383; 6 N. & M. 831; 2 H. & W. 249; 5 L. J., K. B. 246.

So, although he has pleaded as to part that he never was indebted, and as to the residue, a tender. *Ib.* S. P., *Wadsworth* v. *Collins*, 3 Car. & K. 53.

### 3. Proof of Certificate.

In an action for medicines supplied as an apothecary, he, after proof of the delivery of the medicines, put in evidence a licence from the Apothecaries' Company (the seal to which was proved to be genuine), to practise as such, granted to a person bearing his christian and surname:—Held, that it was unnecessary for him in the first instance, to give any additional evidence of his identity with the person named in the licence. *Simpson* v. *Dismore*, 9 M. & W. 47; 1 D. (N.S.) 357; 11 L. J., Ex. 137; 5 Jur. 1012.

Before 14 & 15 Vict. c. 99, s. 8, in an action for an apothecary's bill, it was necessary to prove that the seal affixed to the certificate to practise as an apothecary was the common seal of the Apothecaries' Company. *Chadwick* v. *Bunning*, 2 Car. & P. 106; R. & M. 306.

In order to prove that a person has passed his examination at Apothecaries' Hall, it is sufficient to produce the certificate of examination (which is given to every person who has been approved of by the examiners), and prove the signature of one of the examiners to such certificate. *Walmsley* v. *Abbott*, 5 D. & R. 62; 3 B. & C. 218; 1 Car. & P. 309; 2 L. J. (O.S.) K. B. 223.

The certificate required by 55 Geo. 3, c. 194, was a certificate from the court of examiners, and not from the master, wardens, and society of the art and mystery of apothecaries. *Steavenson* v. *Oliver*, 8 M. & W. 234; 10 L. J., Ex. 338; 5 Jur. 1064.

**Onus of Proof.**]—In an action for a penalty for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company, it is not necessary, on the part of the company, to prove that the party has not obtained his certificate, the onus being laid on him to shew that he has. It must, however, be averred in the declaration that he has not. *Apothecaries' Co.* v. *Bentley*, 1 Car. & P. 538; R. & M. 159.

## B. Medical Practitioners.

### 1. General Medical Council.

**Election of Members.**]—Under the existing charter of the university of London, the right to elect its member of the general medical council under 21 & 22 Vict. c. 90, is vested in its senate, consisting of the chancellor, vice-chancellor, and fellows for the time being; not in the whole body incorporated as the university by the charter, namely, the chancellor, vice-chancellor, fellows, and graduates. *Reg.* v. *Storrar*, 2 El. & El. 133; 28 L. J., Q. B. 326; 5 Jur. (N.S.) 1304; 7 W. R. 612.

**Registration—Royal College of Physicians—Right to grant Diplomas.**]—The Royal College of Physicians of London was, at the date of the passing of the Medical Act, 1886, "a medical corporation legally qualified to grant diplomas in respect of medicine and surgery," within the meaning of s. 3, sub-s. 1 (*a*) of that act, and therefore the independent diploma of that corporation confers the right of registration under the medical acts. *Royal College of Physicians* v. *General Medical Council*, 62 L. J., Q. B. 329; 5 R. 323; 68 L. T. 496; 57 J. P. 519.

**Removal of Name—Power of Court to review Decision.**]—By the Medical Act (21 & 22 Vict. c. 90), the General Council of Medical Education and Registration were established, one of their

duties being to keep a register of medical practitioners.—By s. 29, "if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register":—Held, that if the council, acting bonâ fide and after due inquiry, have adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the court has no jurisdiction to review their decision. *La Mert, Ex parte* (4 B. & S. 582), approved and followed. *Allbutt* v. *General Medical Council*, 58 L. J., Q. B. 606; 23 Q. B. D. 400; 61 L. T. 585; 37 W. R. 771; 54 J. P. 36—C. A.

Under 21 & 22 Vict. c. 90, s. 29, the General Council of Medical Education and Registration are sole judges of whether a registered medical practitioner has been guilty of infamous conduct in a professional respect; and the council having after due inquiry adjudged, and ordered the name of the medical practitioner to be removed from the register accordingly, the court cannot interfere. *La Mert, Ex parte*, 4 B. & S. 582; 33 L. J., Q. B. 69; 9 L. T. 410; 12 W. R. 201.

The plaintiff was a duly registered dentist. He had advertised his name in connection with a dental institution. The general council considered such conduct amounted to "disgraceful conduct in a professional respect" within the meaning of the act, and erased his name from the register. In an action for a mandamus to have the name reinstated:—Held, that there were facts before the general council on which they might come to the determination to erase the plaintiff's name from the register, and therefore this court would not interfere. *Partridge* v. *General Medical Council*, 57 J. P. 4—C. A.

By 21 & 22 Vict. c. 90, s. 26, any entry which shall be proved to the satisfaction of the general or branch council to have been fraudulently or incorrectly made, may be erased from the register by order in writing of the council:—Held, that the council might make such an order, where the registration had been made under the dispensing power given to them by s. 46, as well as where it had been made by the registrar under s. 15. *Reg.* v. *General Medical Council*, 3 El. & El. 525; 30 L. J., Q. B. 201; 7 Jur. (N.S.) 798; 3 L. T. 692; 9 W. R. 413.

When the registrar of the branch medical council inserts in, and afterwards, by order of such branch council, and without notice to the party registered, strikes out of the registry the description of a qualification which the evidence produced to the registrar by the claimant did not shew that he had obtained, the court will not by mandamus compel the registrar to reinsert such description. *Reg.* v. *Steele*, 13 Ir. C. L. R. 398.

—— **Infamous Conduct.**]—One test of whether a person has been guilty of "infamous conduct in any professional respect" is whether he has, in the pursuit of his profession, done something with regard to it which is reasonably regarded by his professional brethren of repute and competency as disgraceful and dishonourable. *Allinson* v. *General Medical Council*, infra.

**Judicial Inquiry—Personal Interest of Member of Tribunal.**] — The General Council of Medical Education and Registration, acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, and directed the registrar to erase his name from the register. The inquiry was impugned on the ground of the disqualification of one of the members on the ground of interest:—Held, that, in the absence of a pecuniary interest, the true question is whether the relation of the impugned member to the inquiry is such that he can be reasonably suspected of bias. *Allinson* v. *General Medical Council*, 63 L. J., Q. B. 534; [1894] 1 Q. B. 750; 9 R. 217; 70 L. T. 471; 42 W. R. 289; 58 J. P. 542—C. A.

The General Council of Medical Education and Registration, acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, and removed his name from the register of medical practitioners. The proceedings were instituted by the managing body of a company called the Medical Defence Union, whose object was to protect the characters of medical practitioners and to suppress and prosecute unauthorised practitioners. Two out of twenty-nine persons who held the inquiry were members of the Medical Defence Union, but not of the managing body of the union:—Held (Fry, L.J., dissenting), that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry; and the court refused to interfere with the decision of the council. *Leeson* v. *General Medical Council*, 59 L. J., Ch. 233; 43 Ch. D. 366; 61 L. T. 849; 38 W. R. 303—C. A.

**Erasure of Name—Erroneous Exercise of Discretion—Liability—Absence of Malice.**]—The act of the General Council of Medical Education and Registration, under ss. 11 or 13 of the Dentists Act, 1878, in erasing from the dentists' register the name of a person registered in respect of a qualification as licentiate of a medical authority referred to in the act, is not a merely ministerial, but a discretionary act, in respect of which no action is maintainable against the council, in the absence of malice on their part, even though the discretion were erroneously exercised. *Partridge* v. *General Medical Council*, 59 L. J., Q. B. 475; 25 Q. B. D. 90; 62 L. T. 787; 38 W. R. 729; 55 J. P. 4—C. A.

**Dentist—Registration of.**]—Where a person has been registered under the Dentists Act, 1878, as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the dentists' register under the act. *Partridge, Ex parte*, or *Reg.* v. *General Medical Council*, 19 Q. B. D. 467; 36 W. R. 442—C. A. Affirming, 56 L. J., Q. B. 609; 52 J. P. 40.

A person articled as a pupil to a dental practitioner at the date of the passing of the Dentists Act, 1878, cannot claim to be registered under s. 37 of the act unless he has complied with the requirements of s. 7, which provides that a person shall not be registered under the act "as having been at the passing thereof engaged in the practice of dentistry unless he produces or transmits to the registrar, before the 1st day of August, 1879, information of his name and

address, and a declaration signed by him in the form in the schedule" to the act, "or to the like effect." *Reg.* v. *General Medical Council*, 66 L. J., Q. B. 588; [1897] 2 Q. B. 203; 76 L. T. 706; 46 W. R. 2—C. A. Affirming, 61 J. P. 344.

**Publication of Minutes—Libel—Privilege.**]—The publication of the minutes of the council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, and published bonâ fide and without malice, privileged, and the medical practitioner, cannot maintain an action of libel against the council in respect of the publication. *Allbutt* v. *General Medical Council*, supra.

### 2. Physicians.

**College.**]—The 14 & 15 Hen. 8, c. 5, appointing and regulating the College of Physicians, is a public act. *Physicians' College* v. *Harrison*, M. & M. 191; 4 M. & Ry. 404.

A doctor, who is not a member, has no right to inspect the books of the College of Physicians. *West* v. *Physicians' College*, 1 Wils. 240; 5 Mod. 395.

A doctor of physic, who has been licensed by the college to practise physic in London and within seven miles, cannot claim, as a matter of right, to be examined by the college, in order to his being admitted a fellow of the college. *Rex* v. *Physicians' College*, 7 Term Rep. 282.

A mandamus will not lie to the College of Physicians, commanding them to examine a doctor of physic, who has been licensed, in order to his being admitted a fellow of the college. *Ib.*

A person created a doctor of medicine by a Scotch university could not practise as a physician in England, unless licensed by the College of Physicians, before the Medical Act. *Collins* v. *Carnegie*, 3 N. & M. 703; 1 A. & E. 695; 3 L. J., K. B. 196.

Candidates to be admitted of the college are to be examined by the comitia minora, then proposed to the comitia majora, and elected by them before they can claim to be admitted. *Rex* v. *Askew*, 4 Burr. 2186.

Under 21 & 22 Vict. c. 90, the Royal College of Physicians has power to grant licences without restricting their licentiates from compounding and supplying for gain the medicines which they prescribe; and for such licentiates so to compound and supply medicines is not an invasion of the privileges of the Apothecaries' Company. If such practice by licentiates of the college would have been an invasion of the privileges of the Apothecaries' Company, the proper remedy would have been by proceedings at law against the offender, and not by information and bill in equity against the college. *Att.-Gen.* v. *Royal College of Physicians*, 1 Johns. & H. 561; 30 L. J., Ch. 757; 7 Jur. (N.S.) 511; 4 L. T. 356; 9 W. R. 590.

**Recovery of Charges.**]—*See* infra.

### 3. Surgeons.

**Before the Medical Act.**]—The separated companies of surgeons and barbers were under the same regulations as before their separation. *Sharpe* v. *Law*, 4 Burr. 2133.

Understanding the Latin tongue was a previous qualification necessary to being even apprenticed to a London surgeon. *Rex* v. *Surgeons' Co.*, 2 Burr. 892.

To an action for work and operations performed as a surgeon, a plea that he had not been examined or approved, or admitted to exercise or occupy himself as a physician or a surgeon, as required by the statute, is bad for not shewing that the work and operations were done in a place within the operation of the 3 Hen. 8, c. 11, which imposed a penalty on persons practising as physicians or surgeons in London, or within seven miles thereof, or in any diocese within the realm, without being examined. *D'Allax* v. *Jones*, 26 L. J., Ex. 79; 2 Jur. (N.S.) 979.

**Penalties under 55 Geo. 3, c. 194.**]—A surgeon may administer medicines in the cure of a surgical case without being subject to the penalties of 55 Geo. 3, c. 194; but he has no right to do so in a case of internal diseases not requiring surgical treatment, such as fever or consumption. *Apothecaries' Co.* v. *Lotinga*, 2 M. & Rob. 495.

**District Medical Officer—Tenure of Office.**]—A district medical officer appointed under the Medical Appointments Order, 1857, of the poor law board, holds his office durante bene placito. *Donahoo* v. *Local Government Board*, 46 L. T. 300; 30 W. R. 334.

**Recovery of Charges.**]—*See* infra.

### 4. Dentists.

**Registration.**]—*See* supra, col. 998.

**Artificial Teeth—Sale of Goods.**]—A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted she died:—Held, a contract for the sale of goods within the Statute of Frauds (29 Car. 2, c. 3, s. 17); and that B. could not sue her executor for work and labour done and materials provided for. *Lee* v. *Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; 7 Jur. (N.S.) 1302; 4 L. T. 546; 9 W. R. 702.

### 5. Recovery of Charges.

**Physician.**]—A physician registered under 21 & 22 Vict. c. 90, who attends a patient professionally, and is not prohibited from suing by any by-law of the College of Physicians, can recover his fees without an express contract. *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L. J., Ex. 182; 9 Jur. (N.S.) 525; 8 L. T. 321; 11 W. R. 626.

The presumption is not as formerly, that he attends the patient for an honorarium, but for fees, the right to which can be enforced by action. *Ib.*

Semble, the rule that a physician shall not maintain an action for his charges is founded upon the general custom of the profession not to charge, and there is nothing to prevent him from making a special contract that he shall be paid for his services, and recovering under the contract. *Att.-Gen.* v. *Royal College of Physicians*, 1 John. & H. 561; 30 L. J., Ch. 757; 7 Jur. (N.S.) 511; 4 L. T. 356; 9 W. R. 590.

—— **Before the Medical Act.**]—A physician could not maintain an action for his fees. *Chorley* v. *Bolcot*, 4 Term Rep. 317; 2 R. R. 395.

A physician might recover on an express contract to remunerate him for his attendance. *Veitch* v. *Russell*, 3 G. & D. 198; Car. & M. 362; 3 Q. B. 928; 12 L. J., Q. B. 13; 7 Jur. 60.

But, as the ordinary understanding was, that such attendance was given without legal title to remuneration, subsequent promises to pay were, in general, to be referred to the usual honorary claim of the physician, and would not amount to proof of an express contract, unless it was clear that the attendance was not given on the ordinary understanding. *Ib.*

—— **Expenses out of Pocket.**]—When no special agreement had been made to remunerate a physician, he could not recover expenses out of pocket, in travelling to attend his patient, for such expenses were incidental to the attendance, and to be considered as money paid to the physician's own use in the ordinary exercise of his profession. *Veitch* v. *Russell*, 3 G. & D. 198; Car. & M. 362; 3 Q. B. 928; 12 L. J., Q. B., 13; 7 Jur. 60.

—— **Promise subsequent to Attendance.**]—A contract to pay a physician could not be implied from the mere fact of his attendance on a patient, but a promise at the end of his attendance to pay him a fixed sum or a reasonable compensation, would raise such a contract as would support an action. *Ib.*

—— **Acting as Surgeon.**]—A physician could not sue for his fees for anything he had done as a physician, either in attending or in prescribing medicine for a patient; but if he acted as a surgeon, or in any other capacity than that of a physician, he might maintain an action for a compensation for what he had done, provided he could shew that it was not done by him as a physician; and the fact that he was not paid fees at the time when he was consulted, went to shew that he was not acting as a physician. *Little* v. *Oldacre*, Car. & M. 370.

B. practised as a physician and a surgeon. On a case occurring in which the advice of a physician was considered necessary, as well as the aid of a surgeon, he was called in. It appeared that he had performed for his patient some services which usually are in the province of a surgeon. He sent his bill to the executors of his patient:—Held, that if the jury considered that he had done any work as surgeon, they should find a verdict for him to the amount of the value of that service. *Battersby* v. *Lawrence*, Car. & M. 277.

If a medical practitioner wrote prescriptions, and passed himself off as a physician, although he had no diploma, and no right to assume that character, he could not maintain an action for fees as a surgeon. *Lipscombe* v. *Holmes*, 2 Camp. 441.

**Surgeon.**]—A. had several of his children residing in a house distant from his own in the charge of a servant:—Held, that if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant. *Cooper* v. *Phillips*, 4 Car. & P. 581.

Under the Apothecaries Act (55 Geo. 3 c. 194), s. 21, which is not repealed by the Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31, 32, a member of the College of Surgeons, registered as a surgeon only under the later act and having no other qualification, cannot recover for medicines administered by him in a case not requiring surgical treatment. *Leman* v. *Fletcher*, 42 L. J., Q. B. 214; L. R. 8 Q. B. 319; 28 L. T. 499; 21 W. R. 738.

A person having a certificate as a surgeon from the College of Surgeons cannot charge for attending a patient in a fever, unless he has also a certificate from the Apothecaries' Company. *Allison* v. *Haydon*, 4 Bing. 619; 1 M. & P. 588; 3 Car. & P. 246; 6 L. J. (O.S.) C. P. 144; 29 R. R. 653.

But a surgeon may charge for medicine administered in a surgical case, when the medicine is subservient and subordinate to the discharge of his duty as a surgeon. *Ib.*

When a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 Geo. 3, c. 194:—Held, that he might recover for his surgical advice. *Simpson* v. *Ralfe*, 4 Tyr. 325.

**Gratuitous Services.**] — Attendance by a medical man on the deceased:—Held, under the circumstances, to have been gratuitous, and his demand as a debt against the assets was rejected. *Packman* v. *Vivian*, 24 Beav. 290.

—— **Promise or Expectation of Legacy.**]—A physician attended a testator for many years, without having obtained any remuneration. He stated, "that the testator had promised to pay him for his services or leave him an equivalent." He did neither:—Held, that he had no claim against the estate, and a payment made to him by the executor was disallowed. *Shallcross* v. *Wright*, 12 Beav. 558; 19 L. J., Ch. 443; 14 Jur. 1037.

A surgeon for several years bestowed medical attendance upon a lady, but, expecting that she would amply compensate him by a legacy, sent in no bill. She died and left him nothing; whereupon he sued her executors, claiming 500*l.* The jury awarded him 250*l.*:—The court refused to disturb the verdict. *Baxter* v. *Gray*, 4 Scott (N.R.) 374; 3 Man. & G. 771; 11 L. J., C. P. 63.

In such a case, to disentitle the party to sue, there must be something more than the mere expectation of a legacy. *Ib.*

**Bankruptcy—Personal Labour.** — Action for work and labour as a surgeon and for medicines. Plea, his bankruptcy before the debt accrued, and that his assignees claimed the debt from the defendant before action. Replication, that the work was the personal labour of the bankrupt, and necessary for the present support of the bankrupt and his family; that the materials were purchased with the proceeds of his personal labour, and increased in value thereby, and necessary for the performance of the work. On the trial it appeared that the plaintiff was a surgeon and an apothecary, and in substance carrying on a trade as such with medicines obtained on credit:—Held, that the assignees were entitled to the proceeds of a trade thus carried on, and that the replication was not proved. *Elliot* v. *Clayton*, 16 Q. B. 581; 20 L. J., Q. B. 217; 15 Jur. 293.

**21 & 22 Vict. c. 90.**]—The enactment has not a retrospective operation. *Wright* v. *Greenroyd*, 1 B. & S. 758; 31 L. J., Q. B. 4; 8 Jur. (N.S.) 98; 5 L. T. 347. S. P., *Thistleton* v. *Frewer*, 31 L. J., Ex. 230.

The 21 & 22 Vict. c. 90, s. 32, is not confined to cases in which the patient is sued. *De la Rosa* v. *Prieto*, 16 C. B. (N.S.) 578; 33 L. J., C. P. 262; 10 Jur. (N.S.) 851; 10 L. T. 757; 12 W. R. 1029

**Unregistered Assistant—Right of Registered Practitioner to recover for Services of.**]—A qualified medical practitioner duly registered under the Medical Act, 1858, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecary's certificate under 55 Geo. 3, c. 194. In an action by the assignee of the qualified practitioner to recover charges for medical aid and advice rendered, and the costs of medicines supplied, to the defendant by the brother alone, without consulting the qualified practitioner:—Held, that under ss. 31 and 32 of the Medical Act, 1858, the plaintiff was not entitled to recover. *Howarth* v. *Brearley*, 56 L. J., Q. B. 543; 19 Q. B. D. 303; 56 L. T. 743; 36 W. R. 302; 51 J. P. 440.

**Unregistered Practitioners.**] — Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a registered practitioner for medicines supplied to, or attendance upon the patients of the latter at his request. *De la Rosa* v. *Prieto*, 16 C. B. (N.S.) 578; 33 L. J., C. P. 262; 10 Jur. (N.S.) 851; 10 L. T. 757; 12 W. R. 1029.

Where medicine is supplied or attendance given by an unregistered practitioner to a patient, under a guarantee for payment given by a third person, the Medical Act, 1858, will afford a defence either to the principal debtor, or to the surety; for the patient does not the less require protection because the paymaster is a third person. *Ib.*

A medical officer of a Peruvian vessel of war lying in the Thames, engaged an unregistered practitioner to attend the crew and troops (partly on board the vessel, and partly on shore) during his temporary absence. In an action against the Peruvian officer for the services thus rendered:—Held, that s. 32 of the Medical Act precluded the unregistered practitioner from recovering; for, by whatever law the contract was to be interpreted, the remedy must be governed by the lex fori. *Ib.*

A medical practitioner is entitled to maintain an action for attendances and medicines, though not registered at the time of such attendances; it is enough if he appears to be duly registered at the time of the trial. *Turner* v. *Reynall*, 14 C. B. (N.S.) 328; 32 L. J., C. P. 164; 9 Jur. (N.S.) 1077; 8 L. T. 281; 11 W. R. 700. But see *Leman* v. *Houseley*, ante, col. 994.

Where a business is carried on by two partners, one of whom is registered as a surgeon and an apothecary, and the other as a surgeon only; this is no answer to a joint claim for attendances given and medicines supplied in both capacities. *Ib.*

### 6. Proof of Registration.

Semble, that a book, purporting to be a copy of the Medical Register pursuant to 20 & 21 Vict. c. 90, and professing to be "published and sold at the office of the general council of medical education and registration," is admissible under s. 27. *Pedgrift* v. *Chevallier*, 8 C. B. (N.S.) 246; 29 L. J., M. C. 225; 6 Jur. (N.S.) 1341; 2 L. T. 360; 8 W. R. 500.

### 7. Diplomas.

**Effect of Bankruptcy.**]—Diplomas conferring degrees and honours and certificates from medical institutions or practitioners did not pass to the provisional assignee by the vesting order of the Insolvent Debtors' Court under 1 & 2 Vict. c. 110, s. 37. *Kernot* v. *Cattlin*, 2 El. & Bl. 790.

**Proof of.**]—The mere production in court of a diploma of a doctor of physic, under the seal of one of the universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree. *Moises* v. *Thornton*, 8 Term Rep. 303; 3 Esp. 4.

But when a person, previously a stranger to a place, went to a town which was the seat of a university, and was told that a certain building was the college, that a certain person whom he saw in it was the librarian, and this person shewed him a seal in his custody, which he stated to be the seal of the university, and produced a book which he stated to be the Book of Acts (statute book) of the university, and such person compared such seal with the seal upon a diploma, the genuineness of which was in question, and made a copy (which was duly examined) from the Book of Acts of an entry of an act conferring the degree of M.D.:—Held, that the diploma was authenticated, and the act conferring the degree properly proved. *Collins* v. *Carnegie*, 3 N. & M. 703; 1 A. & E. 695; 3 L. J., K. B. 196.

**By whom Granted.**]—Where the university of G., having from an ancient period exercised the power of conferring degrees in medicine on persons educated therein, in 1599 King James by charter granted to certain professors of medicine there, and their successors, the power of summoning and examining all persons practising, within certain limits, the art of surgery, and to admit or reject them, with power to fine for contumacy, &c., and the grantees assuming the name of "the Faculty of Physicians, &c., of G.," the university having afterwards founded a professorship of surgery, proceeded to confer degrees in surgery as well as medicine:—Held, that the "Faculty, &c.," was entitled to the supervision over persons so graduating and practising within the limits, and might impose the penalty, &c., or proceed against them at law. *Glasgow University* v. *Faculty of Physicians*, 7 Cl. & F. 958.

**Prosecution for Forging.**] — A person was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that he forged the document with the general intent to induce the belief that it was genuine, and that he was a member of the college, and that he shewed it to persons with intent to induce such belief in them; but that he had no intent in forging, or in uttering, to commit any particular fraud or specific wrong to any individual whatever:—Held, that the conviction was not sustainable, on the ground that no particular person was defrauded. *Reg.* v. *Hodgson*, Dears. & B. 3;

25 L. J., M. C. 78; 2 Jur. (N.S.) 453; 4 W. R. 509; 7 Cox, C. C. 122.

8. Pretending to be Qualified.

**Evidence to justify Conviction.**]—To warrant a conviction for acting as or pretending to be a surgeon, there must be unequivocal evidence that the party has so acted or pretended; it is not enough that he is so called by persons whom he has attended professionally, in the absence of evidence to shew that he has done so on his own account and for his own profit. *Pedgrift* v. *Cherallier*, 8 C. B. (N.S.) 240; 29 L. J., M. C. 225; 6 Jur. (N.S.) 1341; 8 W. R. 500.

H. kept a shop, where he dispensed medicines and gave advice; he had a diploma in the window, in which he was described as "John Hamilton, doctor of medicine of the Metropolitan Medical College of New York," and he so held himself out to the world; and the magistrate reported that it was not satisfactorily proved that he was not entitled so to describe himself. He was not registered, and held no qualifications which would entitle him to be registered under the Medical Act. The magistrate having dismissed a complaint brought against him under the Medical Act (21 & 22 Vict. c. 90), s. 40:—Held, that the decision of the magistrate was right, as the only evidence of any false pretence was, that the person pretended to be what he really was; and also that it was a question of fact for the magistrate's decision rather than one of law for the court. *Carpenter* v. *Hamilton*, 37 L. T. 157.

K., who was legally qualified as a surgeon and apothecary, and registered as such under the 21 & 22 Vict. c. 90, was, before the time of passing of that act, possessed of a German medical diploma, and called himself Dr. K.; he continued to use that description after the passing of the act, though not registered as doctor of medicine:—Held, no evidence that he had wilfully and falsely pretended to be, or taken or used the name and title of, a doctor of medicine, so as to render him liable to a penalty under s. 40. *Ellis* v. *Kelly*, 6 H. & N. 222; 30 L. J., M. C. 35; 6 Jur. (N.S.) 1113; 3 L. T. 331; 9 W. R. 56.

A medical practitioner registered as Licentiate of Soc. Apoth. Lond. 1885, but not qualified to be registered as M.D., physician, or surgeon, under the Medical Act, 1858, placed "M.D." after his name on vaccination certificates, and in other ways described himself to the public as M.D., and as "physician" and "surgeon," in some cases with the further addition of "legally registered practitioner":—Held, that he could be convicted of wilfully and falsely pretending to be a doctor of medicine, physician, and surgeon, contrary to s. 40 of the Medical Act, 1858. *Reg.* v. *Baker*, 66 L. T. 416; 17 Cox, C. C. 575; 56 J. P. 406.

Where the defendant signed a medical certificate as J. H., "botanic surgeon, Boston, U.S.," and had over his door, in large legible characters, his name, with the word "surgeon" after it, and in very small letters underneath, "Boston, U.S., not registered in England," and on a glass panel of his door his name, with the words "anti-registered surgeon" after it, the word "anti-registered" being in small letters and illegible except on close inspection:—Held, that there was no evidence to convict him under 21 & 22 Vict. c. 90, s. 40. *Steele* v. *Hamilton*, 3 L. T. 322.

A druggist had attended a patient in the capacity of a medical man, and had sent in to him a bill for such attendances, headed, "Mr. P. to Thomas Andrews, M.D.," setting out a variety of charges for attendance and medicine. He subsequently wrote a letter, signed "Thomas Andrews, M.D.," threatening legal proceedings unless the bill were paid, and he gave a receipt for the bill when paid, signing it in the same way. There was a coloured lamp over his shop door, on three sides of which the words and letters "Thomas Andrews, M.D." were painted. He had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States, but he had never been in America, or studied, or passed any examination for such degree, and he was not registered under the Medical Act (21 & 22 Vict. c. 90). On appeal, from a conviction by justices under s. 40 of that act, for having unlawfully, wilfully, and falsely taken and used the name, title, description, and addition of M.D., and thereby implying that he was then registered under the Medical Act, whereas he was not so registered:—Held, that the conviction was right, and must be affirmed. *Andrews* v. *Styrap*, 26 L. T. 704.

**Non-registrable Medical Title.**] — Quære, whether a person having a non-registrable medical title, and knowing that such title is non-registrable, uses the title "M.D.," commits an offence against s. 40 of the Medical Act, 1858. *Reg.* v. *Lewis*, 60 J. P. 392.

9. Agreements as to Medical Practice.

**Specific Performance.**]—Whether the court can enforce specific performance of a contract to sell a medical practice, where the practice is non-dispensing, quære:—Semble, that there would be power to do so, if it were a dispensing practice. *May* v. *Thomson*, 51 L. J., Ch. 917; 20 Ch. D. 705; 47 L. T. 295—C. A.

**Illegal Agreement—Serving Unqualified Person as Assistant.**]—The act 55 Geo. 3, c. 194, prohibiting medical practice by unqualified persons, is not repealed by implication by the Medical Act, 1858. The defendant, a duly qualified medical practitioner, agreed with the plaintiff, a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve the plaintiff as assistant in his profession as a medical practitioner, and not to practise at R. within five years after the close of the engagement. The plaintiff applied for an injunction to prevent the defendant from practising at R. in breach of this agreement:—Held, by Pearson, J., that the Medical Act of 1858 does not prohibit unqualified persons from practising medicine, its object being only to enable the public to distinguish between qualified and unqualified practitioners—that the use, by an unqualified person in a private agreement with another medical man, of any of the titles for the wilful use of which by an unqualified person for the purpose of deceiving the public, penalties are imposed by s. 40 of the act, is not an offence within that section; that the agreement therefore was not illegal, and that the plaintiff could enforce its terms, and was entitled to an injunction. The defendant appealed, and on appeal shewed that the plaintiff had given various certificates of cause of death, which

shewed that the plaintiff had attended the deceased persons during their last illness, and from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attends, and in fact personally acted as an apothecary:—Held, that his doing so was made illegal by the act 55 Geo. 3, c. 194, s. 14, that the agreement therefore was to assist the plaintiff in carrying on a business which he could not lawfully carry on, and that the agreement was illegal and could not be enforced. *Davies* v. *Makuna*, 54 L. J., Ch. 1148; 29 Ch. D. 596; 53 L. T. 314; 33 W. R. 668; 50 J. P. 5—C. A.

Semble, if the plaintiff had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal. *Ib.*

**Contracts in Restraint of Trade.**]—*See* CONTRACT.

**Penalties in Contracts.**]—*See* PENALTY.

10. PROCEEDINGS AGAINST, FOR NEGLIGENCE.

**a. By Action.**

**Parties to Sue.**]—In an action against a surgeon for unskilfulness and misconduct, issue being taken on the fact of the employment of the defendant by the plaintiff, the mere circumstance of the defendant's attendance is evidence in support of the issue, though the plaintiff is an infant, and the defendant is sent for and paid by the plaintiff's father. *Gladwell* v. *Steggall*, 5 Bing. (N.C.) 733; 8 Scott, 60; 8 L. J., C. P. 361; 3 Jur. 535.

It is not a ground of demurrer to a declaration in an action by a man and his wife against a surgeon for an injury to the wife by reason of his improper and unskilful treatment, that it is not stated that he was retained and employed as a surgeon for reward to be to him paid, by whom he was so retained, or by whom he was to be paid. *Peppin* v. *Shepherd*, 11 Price, 400.

It is sufficient to aver that he was retained as a surgeon, and entered upon the cure. *Ib.*

**Surgeon—Grounds of Liability.**]—An action lies against a surgeon for gross negligence and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient. *Seare* v. *Prentice*, 8 East, 352.

So, for want of skill in disuniting the callus of the leg after it was set. *Slater* v. *Baker*, 2 Wils. 359.

A surgeon is responsible for an injury done to a patient, through the want of proper skill in his apprentice, but in an action against him the plaintiff must shew that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop, and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation; if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result. *Hancke* v. *Hooper*, 7 Car. & P. 81.

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill: he does not, if he is an attorney, undertake at all events to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and, in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not. *Lanphier* v. *Phipos*, 8 Car. & P. 475.

A surgeon having been employed by a railway company to examine a passenger who had sustained an injury in a collision on their line, and he having so far as he could see or judge, on his own statement of his injuries, told him that they were so slight that he accepted a small sum in compensation:—Held, even assuming that his injuries were greater, there was no ground of action. *Pimm* v. *Roper*, 2 F. & F. 783.

In an action by a person who had been a patient at a hospital, for maltreatment there by two of the surgeons, it appeared that the alleged maltreatment was in the administration of a hot bath which they had ordered, but which it was no part of their ordinary duty personally to direct and superintend, and at the actual administration of which they were not present:—Held, that he was not entitled to expect more than the usual and ordinary degree of care and attention at the hands of the surgeons, and that if they were not personally cognizant of the alleged ill-usage, they were not liable. *Perionowsky* v. *Freeman*, 4 F. & F. 977.

**Medical Practitioner.**]—To render a medical man liable for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shewn, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. *Rich* v. *Pierpont*, 3 F. & F. 35.

**Persons not fully Qualified.**]—A person not qualified, as being a regular medical practitioner, but assuming to be or to practise as such, and undertaking to treat another for a disease, is liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicines. *Ruddock* v. *Lowe*, 4 F. & F. 519.

In an action against a chemist and druggist upon an alleged retainer (as a surgeon and an apothecary) to treat the plaintiff for a certain disorder (for which mercurial treatment was improper), the breach being negligent treatment (by mercury):—Held, that if the defendant assumed to act as a surgeon or an apothecary, he was liable as such; but that those words were immaterial and might be rejected, the substance of the declaration being, that he undertook to treat the plaintiff for his disorder, and did so negligently or ignorantly; and that mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain the action. *Jones* v. *Fay*, 4 F. & F. 525.

**Apothecary.**]—It is a good defence to an action by an apothecary, that he treated the patient

ignorantly or improperly. *Kannen* v. *M'Mullen*. Peake, 59.

Aliter, if the medicines were administered under the direction of a physician. *Ib.*

### C. VETERINARY SURGEONS.

**Use of words "Veterinary Forge"—False Representation.**]—A farrier who is not on the Register of Veterinary Surgeons, and who did not, at the time of the passing of the Act 44 & 45 Vict. c. 62, hold the veterinary certificate of the Highland and Agricultural Society of Scotland, commits an offence under the 17th section of that act if he uses the words "veterinary forge" on his business premises or bill-heads. *Royal College of Veterinary Surgeons* v. *Robinson*, 61 L. J., M. C. 146 : [1892] 1 Q. B. 557 ; 66 L. T. 263 ; 40 W. R. 412 ; 17 Cox, C. C. 477 ; 56 J. P. 313.

**Veterinary Surgeon—Unlawfully using Name—Veterinary Chemist.**]—G., a chemist, published a book dealing with diseases of horses, recommending medicines which he kept, and advising people in some cases to consult a veterinary surgeon. He described himself in the book as "pharmaceutical and veterinary chemist" :—Held, the justices were right in holding that this was not unlawfully using a description implying that he was a veterinary surgeon, contrary to 44 & 45 Vict. c. 52, s. 17. *Royal College of Veterinary Surgeons* v. *Groves*, 57 J. P. 505.

**Attendance—Custom.**]—If there is a general usage applicable to a particular trade or profession, persons employing one in such trade or profession will be taken to have dealt with him according to that usage, but a usage for a veterinary surgeon to charge for his attendance, when there was not much medicine required, is too uncertain. *Sewell* v. *Corp*, 1 Car. & P. 392.

A count for work, labour, and materials, will enable a plaintiff to recover for attendances as a farrier, and for medicines administered. *Clark* v. *Mumford*, 3 Camp. 37.

Where it was agreed between A. and B. that B. should take A.'s mare to graze, and have her blistered :—Held, that A. could maintain an action against a chemist for selling ointment to B., which, upon being applied, injured the mare. *Phillips* v. *Wood*, 1 N. & M. 434 ; 2 L. J., K. B. 100.

### D. PHARMACY ACT.

#### 1. CHEMISTS.

**Register.**]—Under 15 & 16 Vict. c. 56, persons who have become members of the Pharmaceutical Society since the passing of the act, according to its by-laws and charter are entitled to be put upon the register of pharmaceutical chemists, which is to be kept according to the act, although they have been admitted as members of the society without being examined according to the provisions of the act. *Reg.* v. *Pharmaceutical Society*, 24 L. J., Q. B. 177 ; 1 Jur. (N.S.) 698 ; 3 W. R. 485—Ex. Ch.

**Charges.**]—In an action to recover the amount of a chemist's bill, it being suggested that the items are properly within the scope of an apothecary's profession, the proper question for the jury is, under 55 Geo. 3, c. 194, ss. 14, 28, whether he has acted as an apothecary, and not whether he has charged as a chemist or an apothecary. *Richmond* v. *Coles*, 1 D. (N.S.) 560 ; 11 L. J., Q. B. 155 ; 6 Jur. 238.

**Sale.**]—An injunction to prevent a chemist from selling a quack medicine under a false and colourable representation that it was a medicine of the plaintiff, an eminent physician, was refused. *Clark* v. *Freeman*, 11 Beav. 112 ; 17 L. J., Ch. 142 ; 12 Jur. 149.

**Liability of "Corporation" to Penalty as a "Person."**]—Whether the word "person" in a statute can be treated as including a corporation must depend on a consideration of the object of the statute, and of the enactments passed with a view to carry that object into effect. The 31 & 32 Vict. c. 121, was passed to protect the public against the sale by incompetent persons of poisonous drugs, and in the 1st section enacts that "it shall be unlawful for any person to sell, or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of chemist and druggist, &c., or pharmacist, &c., unless such person shall be a pharmaceutical chemist, &c., within the meaning of this act, and be registered under the act." By s. 15, any person who shall offend in this respect (the words of s. 1 being almost repeated) shall be liable to pay a penalty of 5*l.*, to be sued for as therein directed. A small body of persons had obtained a registration under the Companies Acts, 1862—1867. One only of these persons was a qualified, certified, and registered chemist. His share in the company was very small ; he was the person who appeared in the shop and conducted the sales, and he received a salary for his labour in dispensing the drugs, which were sold for the profit of the company :—Held, that, under these circumstances, the word "person" in the 1st and 15th sections of the statute did not apply so as to make this incorporated company liable to the penalty. But the actual seller must be a qualified person. *Pharmaceutical Society* v. *London and Provincial Supply Association*, 49 L. J., Q. B. 736 ; 5 App. Cas. 857 ; 43 L. T. 389 ; 28 W. R. 957 ; 45 J. P. 20—H. L. (E.)

Semble, a corporation employing an unqualified manager would be liable. *Ib.*

#### 2. POISONS.

**Sale by Unqualified Person — Mixture containing Scheduled Poison.**]—The prohibition in the Pharmacy Act, 1868, as to the sale of poisons does not apply to a mixture containing an infinitesimal quantity of poison. *Pharmaceutical Society* v. *Delve*, 63 L. J., Q. B. 360 ; [1894] 1 Q. B. 71 ; 10 R. 25 ; 70 L. T. 139 ; 42 W. R. 192 ; 58 J. P. 152.

A person, not being a registered chemist, who sells an article containing a considerable amount though not consisting solely of the poisons mentioned in sched. 2 of the Pharmacy Act, 1868, is subject to the penalty imposed by s. 15. *Pharmaceutical Society* v. *Piper*, 62 L. J., Q. B. 305 ; [1893] 1 Q. B. 686 ; 5 R. 296 ; 68 L. T. 490 ; 41 W. R. 447 ; 57 J. P. 502.

The prohibition against the sale of poisons by unqualified persons, which is contained in ss. 1 and 15 of the Pharmacy Act, 1868, extends to the sale of proprietary medicines containing one of the scheduled poisons as an ingredient in such

quantity as to be hurtful to man or child. *Pharmaceutical Society* v. *Piper* (5 R. 296) approved. *Pharmaceutical Society* v. *Armson*, 64 L. J., Q. B. 32 ; [1894] 2 Q. B. 720 ; 9 R. 587 ; 71 L. T. 315 ; 42 W. R. 662 ; 59 J. P. 52—C. A.

—— **"Patent Medicine," meaning of.**]—The exemption contained in s. 17 in favour of patent medicines is restricted to medicines which are protected by letters patent under the great seal, and does not apply to proprietary medicines. *Ib.*

The exemption of patent medicines in s. 16 from the above penalty only applies to medicines protected by letters patent. *Pharmaceutical Society* v. *Piper*, supra.

**Sale of—Dispensing Prescription by Chemist—Bonâ fide Belief.**]—A duly registered chemist was convicted under the Pharmacy Act, 1868, s. 17, for selling poison to a person unknown to him. It was proved that Y., who was unknown to the chemist, came into his shop and produced a prescription written in the abbreviated form usual among chemists. At the foot of it were the initials "R. M. L.," and the words "Mrs. Newton, Aug. 11, 1869." There was a legally qualified medical practitioner having the initials R. M. L. The chemist's assistant dispensed the prescription by putting a small quantity of prussic acid into a bottle and filling up the bottle with rose water according to the meaning of the prescription. The chemist made an entry in his prescription book, "Newton, Mrs. (copying the prescription), Aug. 11, R. M. L." He also indexed the entry by inserting the name "Newton," and the page in the index contained in the book. The bottle was labelled with the name and address of the chemist, but not with the word "poison." The prescription was one which might be ordered for a lotion. No evidence was given as to whether there was such a person as Mrs. Newton or not. The chemist was also convicted in respect to the same sale, for selling poison in a bottle not labelled with the word "poison" :—Held, first, that, assuming that he bonâ fide believed that he was dispensing a prescription given by a medical man to Mrs. Newton, he could not be convicted for selling poison to a person unknown to him, but must be taken to have dispensed a medicine according to the requirements of the proviso to s. 17. *Berry* v. *Henderson*, 39 L. J., M. C. 77 ; L. R. 5 Q. B. 296 ; 22 L. T. 331.

Held, secondly, that he could not be twice convicted under the same section in respect of the same sale. *Ib.*

—— **Name and Address of "Seller."**]—By the Pharmacy Act, 1868, s. 17, it is unlawful to sell poisons unless the box or wrapper containing the poison be labelled with (amongst other things) the name and address of "the seller." P. was a duly qualified chemist, and kept a shop in one street in a town. He also rented a window in the shop of T. in another street and supplied T. with poisons, which T. sold on commission. The poisons sold by T. were contained in a wrapper bearing the name and address of P. :—Held, that the provisions of the act had not been complied with, for that T. was "the seller" within the meaning of s. 17, and the poisons should have borne his name and address on the label. *Templeman* v. *Trafford*, 51 L. J., M. C. 4 ; 8 Q. B. D. 397 ; 45 L. T. 684 ; 30 W. R. 78 ; 46 J. P. 325.

**Unregistered Assistant of Registered Chemist—Liability to Penalty.**]—By s. 15 of the Pharmacy Act, 1868, it is provided that "any person who shall sell . . . poisons . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . shall for every such offence be liable to pay a penalty or sum of 5*l.*" :—Held, that an unregistered chemist's assistant who, in the absence of his master, sells any poison or preparation containing poison as in that act defined, is liable to a penalty under the above section, notwithstanding that he effects such sale on behalf of his master, and that his master is duly registered. *Pharmaceutical Society* v. *Wheeldon*, 59 L. J., Q. B. 400 ; 24 Q. B. D. 683 ; 62 L. T. 727 ; 54 J. P. 407.

**Injuries by—To Dog.**]—The defendant, a confectioner, had a shop in which there was a counter, from behind which the customers were served by the defendant and his assistants, the space behind the counter being used exclusively by the latter for that purpose, the space in front of it being the part of the shop reserved for the accommodation of the customers. Inside the counter the defendant placed some bread and cheese covered with a poison for the purpose of destroying rats and mice. The plaintiff went to the shop to make some purchases, accompanied by a dog which passed behind the counter and ate a portion of the poisoned bread and cheese and was thereby killed :—Held, that the defendant was not liable for damages for the loss of the dog. *Stansfield* v. *Bolling*, 22 L. T. 709.

**Criminal Law relating to.**]—*See* CRIMINAL LAW.

E. MEDICINES.

**Stamp Duty on.**]—*See* REVENUE.

**Adulteration of Drugs.**]—*See* LOCAL GOVERNMENT.

J. M.

# MERCHANDISE MARKS.

*See* TRADE.

# MERCHANT SHIPPING.

*See* SHIPPING.

# MERGER.

1. *General Principles*, 1013.
2. *By Judgment*, 1013.
3. *In Documents under Seal*, 1017.
4. *Of Equitable, in Legal Estate*, 1020.
5. *Of Other Estates*, 1021.
6. *Charges and Incumbrances.*
   *a.* General Principles, 1022.
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   *c.* On Acquisition or Payment off of Charge, 1027.
7. *Terms.*
   *a.* In General, 1034.
   *b.* Attendant and Satisfied Terms, 1037.

1. General Principles.

**Party must be entitled in the same Right.**]—A term of years and a freehold may subsist in the same person without merger if held in different rights. *Jones* v. *Davies*, 7 H. & N. 507; 31 L. J., Ex. 116; 8 Jur. (N.S.) 592; 6 L. T. 442; 10 W. R. 464—Ex. Ch.

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights without having acquired the freehold by his own act, and consequently there is no merger. *Ib.*

A fund was limited in trust for a husband and wife successively for life, and then upon trust for the children of the marriage as the husband and wife jointly or as the survivor of them should appoint, and in default of appointment in equal shares, to be vested at twenty-one. There were two children of the marriage who attained twenty-one, one of whom afterwards died. No joint appointment was made. The husband, after the death of the wife, released the power, so as to vest a moiety of the fund in himself as administrator of the deceased child, and claimed to have such moiety transferred to himself:—Held, that he was entitled to a transfer upon surrendering his life interest in the moiety; but that he was not entitled so long as he retained his life interest, inasmuch as there could be no merger of two interests held in different rights. *Radcliffe, In re, Radcliffe* v. *Bewes*, 61 L. J., Ch. 186; [1892] 1 Ch. 227; 66 L. T. 363; 40 W. R. 323—C. A.

**In Equity.**]—A court of equity will not establish a merger by analogy to law, where the effect would be to defeat its own rules and practice, e.g. in the protection of married women from the marital control. *Whittle* v. *Henning*, 2 Ph. 731; 18 L. J., Ch. 51; 12 Jur. 1079. S. P., *Thorn* v. *Newman*, 3 Swanst. 603.

Where if the estates were legal, there would be a legal merger, there will be an equitable merger if the estates are equitable. But in a case of merger of equitable interests a court of equity will regulate the rights, so as not to hold that there is a merger, if there are equitable reasons why there ought not to be one, and will deal with a legal merger on equitable grounds. *Brandon* v. *Brandon*, 31 L. J., Ch. 47; 5 L. T. 339; 9 W. R. 825.

Where there is primâ facie a legal merger, but the complication of circumstances, and the effect of holding that there is a merger is such as to induce the court to say that it was never intended by the parties to produce a partial merger, it will hold that there is not a merger. *Ib.*

On a question of merger the acts of trustees will not bind those beneficially interested. *Ib.*

2. By Judgment.

**Bond.**]—Where judgment has been entered up on a bond debt, the debt is merged in the judgment, and mere delivery of the bond will not be a valid donatio inter vivos. *Patterson* v. *Williams*, Ll. & G. t. Plunk. 95.

**Joint Demands.**]—A judgment (without satisfaction) recovered against one of two joint debtors, is a bar to an action against the other. *King* v. *Hoare*, 13 M. & W. 494; 2 D. & L. 382; 14 L. J., Ex. 29; 8 Jur. 1127.

**Joint and Several Demands.**]—A judgment (without satisfaction) recovered of two persons jointly and severally bound is no bar to an action against the other. *Ib.*

**In Partnership Cases.**]—There is no settled rule of equity that a contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several. *Kendall* v. *Hamilton*, 48 L. J., C. P. 705; 4 App. Cas. 504; 48 L. T. 418; 28 W. R. 97—H. L. (E.)

An action and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as partner, with the two debtors in the business for the purpose of which the money had been borrowed. *King* v. *Hoare*, supra, adopted. *Ib.* S. P., *Higgins, Ex parte, Tyler, In re*, 3 De G. & J. 33; 27 L. J., Bk. 27; 4 Jur. (N.S.) 595; 6 W. R. 406.

A creditor of a firm of three, two of whom resided in America, recovered judgment against the third alone, who resided in England, and who afterwards became bankrupt, his partners remaining solvent:—Held, that the creditor might (notwithstanding the separate judgment) prove against the joint estate. *Waterfall, Ex parte*, or *Jones, Ex parte, Morrison, In re*, 4 De G. & Sm. 199; 20 L. J., Bk. 5; 15 Jur. 214.

In 1846 A. and B., to secure a debt due from them as partners to C., gave C. their joint and several bond and warrant of attorney, upon which C. entered up a joint judgment. In 1849 the partnership was dissolved, and from that time A. alone carried on the business. In 1858 A. became bankrupt:—Held, that C. could not prove for the amount secured by the bond and upon A.'s estate, the several as well as the joint bond and warrant having been merged in the joint judgment. *Gallie, In re*, 9 Ir. Ch. R. 188.

The firm of D. having been employed by the executors of B. to sell certain crops, &c., paid over a part of the proceeds, but were adjudicated bankrupt on the petition of the executors of B. in 1880 upon a judgment for the balance. The executors of B. proved as creditors of the joint estate. Subsequently H. S. D., one of the partners in the bankrupt firm, became entitled to a legacy and to other moneys, and the executors of B. attempted to withdraw the proof against the joint estate and prove against the separate estate of H. S. D. The trustee rejected the proof on the ground that the creditors were bound by their election, and his decision was reversed by the county court judge. On an appeal from his decision:—Held, that the ground upon which the trustee had rejected the proof was wrong, but that, in order to entitle them to prove against the separate estate of H. S. D., the respondents must prove that they had a separate cause of action against him. Held, also, upon an argument that the separate cause of action was merged in the joint judgment, that it was not so merged. *Chandler, Ex parte, Davison, In re*, 13 Q. B. D. 50; 50 L. T. 635.

**Interest subsequent to Judgment.**]—A defendant, jointly and severally with A., undertook, if a bill of exchange drawn by the defendant in favour of the plaintiff was not paid at maturity, to pay as interest thereon 20*l.* for each month afterwards. The bill not being paid at maturity, the plaintiff sued the defendant for the bill and interest as per agreement, but declared in such action on the bill only, and recovered judgment by default for the amount of such bill only. He afterwards brought an action against the defendant on the agreement for interest:—Held, that he was entitled to maintain such action for the interest which accrued prior to the judgment in the former action, but not for the interest subsequently to such judgment, as the right to interest under the agreement ceased when judgment was obtained. *Florence* v. *Jenings*, 2 C. B. (N.S.) 454; 26 L. J., C. P. 274; 3 Jur. (N.S.) 772.

A railway company, in 1864, issued debentures by which they bound themselves to pay a principal sum one year after the date of issue, with interest at 6 per cent., and charged the railway and undertaking with the payment of the principal sum and interest. Soon after the expiration of the year a debenture-holder brought an action against the company, and recovered judgment for the principal debt, interest, and costs. The company was ordered to be wound up in 1868, and the debenture-holder was admitted to prove for the judgment debt and interest at 4 per cent. The debenture-holder claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment:—Held, that the original debt was merged in the judgment, and that the claimant was only entitled to interest on the judgment at 4 per cent. *European Central Ry., In re, Oriental Financial Corporation, Ex parte*, 46 L. J., Ch. 57; 4 Ch. D. 33; 35 L. T. 583; 25 W. R. 92—C. A.

By an indenture of mortgage A., a beneficed clergyman, assigned to B. certain policies of assurance subject to a proviso for redemption thereof on payment by A., on the 30th of January, 1865, to B. of the sum of 3,000*l.*, with interest at the rate of 7*l.* per cent. per annum, and A. thereby covenanted that he would pay to B. the said sum of 3,000*l.*, with interest at the rate aforesaid, on the day before mentioned, and that in case the said sum of 3,000*l.* should not be paid on the day before mentioned, A. covenanted that he would, so long as the said sum of 3,000*l.* remained due on that security, pay to B. interest at the rate aforesaid. A. made default in payment, and B. after obtaining a judgment against A., issued a sequestration against his benefice. The sequestrator paid to B. the principal sum, together with interest thereon at the rate of 4*l.* per cent. per annum. B. claimed the difference between the principal sum due on his security with interest at the rate of 7*l.* per cent. per annum, and the amount paid to him by the sequestrator. B. brought an action to recover that difference, and A. demurred, on the ground that the security of the mortgage deed was merged in the judgment:—Held, overruling the demurrer, that part of the security was extinguished and part remained; that the debt due to B. in respect of the principal moneys was merged in the judgment, and therefore extinguished, but that the debt due to B. in respect of the interest was not merged in the judgment, and therefore remained. *European Central Ry., In re* (4 Ch. D. 33), distinguished. *Popple* v. *Sylvester*, 52 L. J., Ch. 54; 22 Ch. D. 98; 47 L. T. 329; 31 W. R. 116.

A mortgage deed contained a covenant for payment of a principal sum and interest at 5 per cent. on a certain day; and there was a further covenant by the mortgagor that if the said principal sum should remain unpaid after the date fixed for payment, he would, so long as the same or any part thereof should remain unpaid, pay interest thereon at 5 per cent. The mortgagee recovered judgment for principal, interest to date, and costs:—Held, that the covenant to pay the principal sum was merged in the judgment, that the true construction of the separate covenant was only to pay interest so long as any part of the principal sum remained due under the covenant, and that therefore the mortgagee was, as from the date of the judgment, entitled to interest on the judgment debt at 4 per cent. only, and not to interest at 5 per cent. on the principal sum. *Popple* v. *Sylvester* (22 Ch. D. 98), distinguished. *Fewings, Ex parte, Sneyd, In re*, 53 L. J., Ch. 545; 25 Ch. D. 338; 50 L. T. 109; 32 W. R. 352—C. A.

Semble, a covenant to pay interest may be so worded as not to merge in a judgment for the principal. *Ib.*

By a deed, 1,400*l.* was advanced to one Gye on the security of three life policies, whereby Gye covenanted to keep up the premiums and pay interest at 3 per cent. on the loan. By a covenant in the deed, which was made between M. of the one part, G. and L., sureties, of the second part, and Gye, of the third part, G. and L. covenanted with M. "that they or one of them will, during the continuance of the present security, in the event of the premiums on the said policies . . . and the interest in respect of the said principal sum of 1,400*l.* not being paid, as to the premium within three days, and as to the interest within thirty days, of their falling due by Gye . . . duly pay the premiums . . . and also pay the interest on the said sum of 1,400*l.* Judgment was recovered for the 1,400*l.* against Gye:—Held, that it operated as a merger with regard to the liability to pay future interest, and that the surety was released. But semble, there could be no merger of interest accrued before the judgment. *Faber* v. *Lathom (Earl)*, 77 L. T. 168.

**Double Securities.**]—Where a covenant was given for payment of an annuity, and also a warrant of attorney, upon which a memorandum was written that it was to be as a "collateral security":—Held, that the covenant was not merged in the judgment which was entered up under the warrant. *Pennell, Ex parte, Kearsley, In re*, 2 Mont. D. & D. 273; 10 L. J., Bk. 77; 5 Jur. 899.

B. and C., being indebted to A., give a joint and several bond. A. takes (as part of the same security) a joint warrant of attorney, and enters up a joint judgment. B. and C. become bankrupts:—Held, that the bond is merged in the judgment, and that A. can only prove against the joint estate of B. and C. *Christie, Ex parte, Barrow, In re*, 2 Deac. & C. 155; 1 Mont. & B. 352; 1 L. J., Bk. 103. And see *Gallie, In re*, 9 Ir. Ch. R. 188, supra.

A., B. and C., together with D. (deceased), and two sureties, gave their joint and several bond, with warrant of attorney, to the Provincial Bank, as security for the balance of an account

current, not to exceed 1,000*l*. Under the warrant of attorney the bank entered six several judgments against the obligors. A., B. and C. became bankrupts. The bank now sought to prove on the joint estate for the balance of the account current due at the time of the bankruptcy :—Held, that the bank was precluded from proof of the debt, as simple contract ; that the bond was merged in the separate judgments ; and that the proof could only be against the separate estates of the bankrupts. *Clarke, In re*, 7 Ir. Eq. R. 39.

**On Assignment of Judgment.**]—A judgment creditor, who had executed a deed whereby the real and personal estate of the debtor were conveyed to trustees for the benefit of such of his creditors as should execute the deed, assigned his judgment to such trustees :—Held, that the trustees could not be considered as owners of the trust estate, so that the assignment by the judgment creditor would have the effect of merging the judgment. *Squire* v. *Ford*, 9 Hare, 47 ; 20 L. J., Ch. 308 ; 15 Jur. 619.

**In other Cases.**]—A testator indebted on bond devises his real estate to the bankrupt and two other trustees for payment of his debts. The bond creditor, after the testator's death, brings an action against the bankrupt and the other devisees, and recovers a joint judgment against them :—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Pearce, Ex parte, Foxwell, In re*, 2 Deac. & C. 451 ; 1 L. J., Bk. 109.

Judgment having been obtained against an attorney in an action brought to recover a sum of money received by him on behalf of his client, the court held that the debt owing from him as attorney was merged in the judgment debt, and refused to grant a rule calling upon him to pay over the money. *Corbet Davies, In re*, 15 L. T. 161 ; 15 W. R. 46.

### 3. In Documents under Seal.

**Parties.**]—A mortgage executed by two (and the wife of a third) of three persons indebted to the mortgagee in a simple contract debt does not operate as a merger of the claim on the simple contract in the specialty. *Sharpe* v. *Gibbs*, 16 C. B. (N.S.) 527 ; 12 W. R. 711.

To operate a merger of a simple contract debt in a specialty, the specialty must be co-extensive with the simple contract debt, and between the same parties. *Boaler* v. *Mayor*, 19 C. B. (N.S.) 76 ; 34 L. J., C. P. 230 ; 11 Jur. (N.S.) 565 ; 12 L. T. 457 ; 13 W. R. 775.

A bond given by an executor to a simple contract creditor of his testator is an extinguishment of testator's debt. *Martin* v. *Ditchfield*, Ridgw. t. Hardw. 209.

A servant who has contracted with a married woman by deed, and performed the stipulated services, may maintain an action of assumpsit against the husband. *White* v. *Cuyler*, 6 Term Rep. 176 ; 1 Esp. 200 ; 3 R. R. 147.

Where parties contract by deed, but the defendant does not execute it, the plaintiff might sue in assumpsit, notwithstanding the deed. *Sutherland* v. *Lishman*, 3 Esp. 42.

Where the master of the plaintiff's ship entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the house of M. & Co., for the delivery of goods upon a stipulated freight, and the goods were delivered to M. & Co., who were the consignees named in the bill of lading :—Held, that the plaintiffs could not maintain assumpsit against the defendant for the freight. *Schack* v. *Anthony*, 1 M. & S. 573.

**When Remedies Co-extensive.**]—If one of two makers of a joint and several promissory note gives the holder a deed of mortgage to secure the amount with a covenant to pay it, the other maker is not thereby discharged, for the remedy on the specialty is not co-extensive with the remedy on the note. *Ansell* v. *Baker*, 15 Q. B. 20. S. P., *Boaler* v. *Mayor*, 15 C. B. (N.S.) 76 ; 34 L. J., C. P. 230 ; 11 Jur. (N.S.) 565 ; 12 L. T. 457 ; 13 W. R. 775.

The plaintiffs having contracted by charter-party sealed to let a ship, then in the Thames, to freight to the defendants for eight months, to commence from the day of her sailing from Gravesend on the voyage there stated, and having covenanted that she should sail from the Thames to any British port in the English Channel, there to load such goods as the freighters should tender and sail to the West Indies, and bring back a return cargo to London, afterwards agreed by parol with the defendants that the ship, instead of loading at some port in the Channel, should load in the Thames, and that the freight should commence from her entry outwards at the custom-house :—Held, that the subsequent parol contract, relating to a time anterior to that when the covenants in the deed came into operation, was distinct from and not inconsistent with the contract by deed, and might therefore be enforced by action of assumpsit. *White* v. *Parkin*, 12 East, 578 ; 11 R. R. 488.

**Where Additional Security.**]—To 3,000*l*., parcel of a money claim, the defendant pleaded a subsequent agreement to deliver to the plaintiff an indenture to pay the 3,000*l*. on a certain day, and that the defendant, in pursuance of such agreement, did, with the consent and at the request of the plaintiff, execute and deliver to the plaintiff such indenture, and did thereby covenant to pay the 3,000*l*. Replication, that the indenture was made by way of security for the payment of the 3,000*l*., and that it was always expressed by the indenture that it was made as such security :—Held, that the plea was a good plea of merger as to so much of the debt to which it was pleaded, and that the replication was no answer to it. *Price* v. *Moulton*, 10 C. B. 561 ; 20 L. J., C. P. 102 ; 15 Jur. 228.

Where a deed contained an express covenant to retire and pay promissory notes, and a proviso that the simple contract should not merge in the specialty :—Held, that even if the remedies by simple contract to a certain extent were preserved, still there was but one debt, and that had become a debt by specialty. *Price* v. *Moulton* (10 C. B. 561) considered. *Stamps Commissioners* v. *Hope*, 60 L. J., P. C. 44 ; [1891] A. C. 476 ; 65 L. T. 268—P. C.

To an action for money lent, the defendant pleaded, that the causes of action arose out of disbursements made for and on account of a vessel belonging to the defendant, and that the master made and sealed a bottomry bond, which was accepted and received by the plaintiff in satisfaction of the promises in the declaration. The plaintiff replied that he did not accept or

receive the bond in satisfaction of the promises. At the trial it appeared that the bond was given by the master the day after the transaction as to the advances on the ship's account was closed, and by way of collateral security only :—Held, that the plaintiff's right to sue the owner in respect of the implied contract was not destroyed by the taking such additional security. *Weston* v. *Foster*, 3 Scott, 155 ; 2 Bing. (N.C.) 693 ; 2 Hodges, 59 ; 5 L. J., C. P. 242.

A defendant, being indebted to the plaintiff, executed with sureties a bond in the penal sum of 2,000*l*., whereby, after reciting that the plaintiff had agreed to give the defendant time for the payment of the debt owing, and of such further sums as might afterwards become due, the condition was, that if the defendant should pay the plaintiff the sum due and such further sums as might become due, or in case he should make default, and the sureties should, within one month after notice, pay the plaintiff the sums due, not exceeding 1,000*l*., or, if no notice should be given, the bond to be void :—Held, no merger, and the plaintiff might, notwithstanding the giving of the bond, recover the amount of the original debt. *Norfolk Ry.* v. *Macnamara*, 3 Ex. 628.

A banker takes from his customer and his surety a bond conditioned for the payment of all sums already advanced or thereafter to be advanced to the customer. This does not amount to a merger, and the customer may be sued for the balance of his account as upon a debt by simple contract. *Holmes* v. *Bell*, 3 Man. & G. 213 ; 3 Scott (N.R.) 479.

A. and B. were both domiciled in England. A. lent B. money on an English bond, payable to him and his executors. Afterwards B. gave A. a heritable bond, charging lands in Scotland, as an additional security, and made payable to him and his heirs at a different time and with a different rate of interest. On the death of A. :—Held, that the English bond was the primary security ; that it did not merge in the Scotch heritable bond as the jus nobilius ; and that the debt passed under A.'s will, executed according to the English, but not according to the Scotch solemnities, under the general term "securities for money." *Cust* v. *Goring*, 18 Beav. 383 ; 24 L. J., Ch. 308 ; 18 Jur. 884 ; 2 W. R. 379.

The bankrupts gave a joint and several promissory note for 2,000*l*. to secure advances made by their bankers ; and when they were indebted to the bankers in 1,957*l*., one of the bankrupts mortgaged certain property to them to secure that sum, and all such further sums as might be advanced to the extent of 3,000*l*., including the said sum of 1,957*l*. At the time of the bankruptcy, the amount of the debt due to the bankers was 4,365*l*., of which sum they realised the 3,000*l*. under the mortgage :—Held, that the mortgage deed did not operate as a merger of the promissory note, and that the bankers could prove on the note for the balance of their debt. *Bate, Ex parte, Rishton, In re*, 3 Deac. 358.

In the case of a bond given by one of several joint debtors the legal effect of which is to merge the simple contract debt, can this effect be controlled by the parties agreeing by a separate instrument that such bond shall be deemed a collateral security only, and that all remedies shall remain for the simple contract debt as if the bond had not been taken, quære. *Owen* v. *Homan*, 3 Mac. & G. 378 ; 20 L. J., Ch. 314 ; 15 Jur. 339.

A. sells goods to B. in the course of trade, and afterwards takes an usurious bond. B. becomes bankrupt ; quære, whether the bond extinguishes the precedent book debts, or whether A. can prove either of them under the commission. *Davy, Ex parte*, Ridgw. 289. Semble, not. See *Christy, Ex parte*, 2 Deac. & C. 155 ; Mont. & B. 352 ; 1 L. J., Bk. 103.

### 4. Of Equitable in Legal Estate.

**In General.**]—Where legal and equitable estates meet in the same person, the equitable merge in the legal. *Wade* v. *Paget*, 1 Bro. C. C. 364 ; 1 Cox, 74. S. P., *Conolly* v. *Conolly*, Ir. R. 1 Eq. 376 ; 15 W. R. 944—Ch. App.

To create a merger of the equitable in the legal estate by their union, the interest in each must be the same, and equitable recovery, therefore, barred an equitable remainder in tail in the person who had whole legal fee. *Brydges* v. *Brydges*, 3 Ves. 121.

Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges ; therefore, where the former descends ex parte paternâ, the latter ex parte maternâ, upon their union the paternal heir has no equity. *Selby* v. *Alston*, 3 Ves. 339 ; 4 R. R. 10. S. P., *Goodright* d. *Alston* v. *Wells*, 2 Dougl. 771.

Where an equitable estate in fee by purchase and a legal estate in fee by descent meet in the same person, the equitable estate will merge in the legal, and the descent will be according to the legal title. *Douglas, In re, Wood* v. *Douglas*, 54 L. J., Ch. 421 ; 28 Ch. D. 327 ; 52 L. T. 131 ; 33 W. R. 390.

Semble, where a person takes an equitable estate by election, and a legal estate by descent, he is not a purchaser within the act 3 & 4 Will. 4, c. 106. *Ib.*

A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for the payment of the fund to the son was refused, on the ground that this court will not establish an equitable merger by analogy to law where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. *Whittle* v. *Henning*, 2 Ph. 731 ; 18 L. J., Ch. 51 ; 12 Jur. 1079.

—— **Copyholds.**]—In two manors in Durham, there is no custom of surrendering to the uses of the will, but the tenant devests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator R. N., being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But, with regard to the tenements in the manor of H., they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator R. N. in fee. The widow being alive at the time the testator R. N. made his will and died, it was held that the copyhold in the manor of Houghton passed by his will ; with respect to the tenements which were in the other manor,

the testator's maternal grandfather, who held the beneficial interest in them, devised them unto trustees upon trust for the testator R. N. :—Held, that, there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor :—Held, that his widow was entitled to free bench, and the heir subject thereto to the inheritance; but they, taking benefits under the will, were bound to elect. *Nicholson* v. *Nicholson*, Taml. 319.

**Estate Tail.**]—Tenant in tail of an equitable estate taking a conveyance of the legal estate to himself and his heirs, the equitable estate tail is not merged in the legal fee. *Stoney* v. *Saunders*, Hay. & J. 519. S. P., *Browne* v. *Blake*, 1 Moll. 368.

—— **Copyholds.**] — Equitable estate tail in copyhold does not merge by accession of the legal fee. *Merest* v. *James*, 6 Madd. 118; 22 R. R. 253.

### 5. Of other Estates.

**On Acquisition of Prior Estate.**]—A tenant for life of a settled estate agreed to sell and convey a piece of land part thereof to a company, and then, before the conveyance was completed, by deed, in consideration of the release by his son, who was the tenant for life next in remainder of the settled estate, of a rent-charge charged thereon payable to him, and of a covenant by the son to pay and keep down certain charges thereon in exoneration of the father and of such part of the settled estate as was retained by the father, conveyed part of the settled estate, including the land agreed to be conveyed to the company, to a trustee for a term of ninety-nine years upon trusts for further securing the payment of the charges covenanted to be paid by the son, and subject to such term and to the trusts thereof to the use of the son, his heirs and assigns :—Held, on a summons taken out under the Vendor and Purchaser Act, 1874, that, having regard to the provisions of s. 25, sub-s. 4, of the Judicature Act, 1873, and to the fact that it was for the benefit of the son that the father's life estate should be kept alive, the father's life estate was not merged and extinguished, and that the father had the power with consent of the son to execute a valid conveyance under the Settled Land Acts to the company of the land agreed to be conveyed to them. *Barry Ry. and Wimborne (Lord)*, 76 L. T. 489.

A tenant for life in possession of certain real estate conveyed to B., the next tenant for life under the same will, the said real estate, to the use that she should receive a rent-charge during her life, and, subject thereto, to the use of B., his heirs and assigns. Upon B.'s death, it was contended by the tenant in tail in remainder that the effect of the conveyance was to merge the estate pur autre vie thereby conveyed in B.'s life estate, and that the remainderman had become entitled to the real estate in possession free from the rent-charge :—Held, that the Judicature Act, 1873, s. 25, sub-s. 4, applies to all cases where there would not have been a merger both at law and in equity, and that, it being apparent that no merger was intended, the conveyance to B. did not operate so as to cause a merger. *Snow* v. *Boycott*, 61 L. J., Ch. 591; [1892] 3 Ch. 110; 66 L. T. 762; 40 W. R. 603.

**On Purchase of Equity of Redemption.**]—Mortgagee purchasing an equity of redemption preserves his mortgage unmerged by taking a conveyance to a trustee, with a declaration of his intention to that effect. *Bailey* v. *Richardson*, 9 Hare, 736.

**Estate pur Autre Vie.**]—The estate of a tenant for life in lands held pur autre vie cannot merge in the possible estate therein of his heir or executor; the latter being an independent estate, less in value than the former, and not taken by the heir or executor as a remainder upon the previous estate, but as a special occupancy upon the death of the tenant for life. *Pickersgill* v. *Grey*, 30 Beav. 352; 31 L. J., Ch. 394; 8 Jur. (N.S.) 632; 5 L. T. 706; 10 W. R. 14.

### 6. Charges and Incumbrances.

#### a. General Principles.

**In what Cases.**] — Where a purchaser of a property pays off a mortgage on it without shewing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. But the opportunity of making a very doubtful claim against third parties is not such a benefit as is meant in this enunciation of the doctrine; and if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the property was assigned to the purchaser, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive. *Liquidation Estates Purchase Co.* v. *Willoughby*, 65 L. J., Ch. 486; [1896] 1 Ch. 726; 74 L. T. 228; 44 W. R. 612—C. A.

Mortgage not merged by union with the fee; the actual intention not established by the acts of the party, presumed from the greater advantage against merger, in favour of the personal representative. *Forbes* v. *Moffatt*, 18 Ves. 384; 11 R. R. 222.

A person becoming entitled to an estate subject to a charge, for his own benefit, may keep up the charge. Distinction upon this subject in law and equity : the latter sometimes holding a charge extinguished where it would subsist at law, and sometimes preserving it where at law it would be merged, depending on the intention, actual or presumed, of the person in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot. *Ib.*

Owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate; his election is not to take the charge or the estate, but whether, taking the estate, he means the charge to sink or continue distinct. *Ib.* And see *Clarendon (Earl)* v. *Barham*, 1 Y. & C. C. C. 688; 12 L. J., Ch. 215; 6 Jur. 963.

Merger of a charge in the inheritance is not to be assumed, if it would be contrary to the interest of the owner of the estate and charge. *Davis* v. *Barnett*, 14 Beav. 542.

Where a charge on an estate becomes vested absolutely in the owner of the inheritance of the

estate, the three tests usually applied for ascertaining whether the charge has merged are:—first, whether there has been an actual expression of intention to that effect; secondly, whether the acts done by the owner of the estate are only consistent with the charge being kept on foot; and thirdly, whether it is for the interest of the owner that the charge should not merge in the inheritance. *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244; 1 N. R. 458; 32 L. J., Ch. 553; 9 Jur. (N.S.) 346; 8 L. T. 140; 11 W. R. 409.

When the owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that without some special act no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but where the intermediate estate is created by the act of the owner himself, this reasoning has no application. *Johnson* v. *Webster*, 4 De G. M. & G. 474; 3 Eq. R. 101; 24 L. J., Ch. 300; 1 Jur. (N.S.) 145; 3 W. R. 84.

At law and equity, where there is a confusion of rights, there is an immediate merger; that is prevented in equity by the intention, either express or implied, as in the case of an infant entitled to an estate, and also to a charge upon it, the rights remain distinct, because more beneficial. *Compton* (*Lord*) v. *Oxenden*, 2 Ves. J. 263; 4 Bro. C. C. 397. S. P., *Alsop* v. *Bell*, 24 Beav. 451.

Where the same person becomes absolutely entitled to an estate, and a sum of money charged upon it, the charge will be deemed extinguished unless it appears that the owner intended otherwise. *Hood* v. *Phillips*, 3 Beav. 513.

For the purpose of shewing the intention, evidence direct and presumptive may be resorted to. A transfer to a trustee must be considered as one of the grounds rebutting the presumption of merger, but does not amount to decisive evidence against the presumption. *Ib.*

The legal estate of a property being vested in A., for the benefit of himself and B. in equal moieties, he mortgaged it unknown to B. B. afterwards paid off the mortgage, and had the legal estate conveyed to him subject to such equity of redemption as the lands were subject to:—Held, that there was not such a perfect union of the legal and equitable estates in B.'s moiety of the estate as to give his widow a title to dower. *Knight* v. *Frampton*, 4 Beav. 10; 10 L. J., Ch. 247.

Where an equitable mortgagee, after notice of an act of bankruptcy, took a conveyance of the legal estate:—Held, that his equitable mortgage was not thereby merged, but remained good, notwithstanding the invalidity of such conveyance. *Harvey, Ex parte, Emery, In re*, 3 Deac. 547; 1 Mont. & C. 261.

A testator, being the absolute beneficial owner of a trust fund, subject to his wife's interest therein if she should survive him, borrowed part of the fund from the trustees on the security of a mortgage of an estate of which he was seised in fee. He afterwards made his will, whereby he devised the real estate to his wife for life, with remainder to the plaintiff in fee; and bequeathed "all and every the shares and sums of money in the public funds, or upon government or real securities," which he should die possessed of, or in anywise entitled to, in trust for his wife for life, with remainder to the plaintiff for life, remainder to the plaintiff's children absolutely. The testator's wife survived:—Held, that there was no merger of the mortgage debt in the real estate. *Wilkes* v. *Collin*, L. R. 8 Eq. 338; 17 W. R. 878.

Held, also, that the testator's interest in the trust fund passed by the specific bequest. *Ib.*

**At what Date.**]—A mortgage affecting the fee of settled lands having been bequeathed to the tenant for life, he, while in solvent circumstances, evidenced an intention to merge the mortgage debt in the inheritance. There was no evidence of any contrary intention during the remainder of his life. At his death he was insolvent:—Held, that a merger of the charge took place as of the earliest date to which, upon the evidence, the intention to merge was referable. *Godley's Estate, In re*, [1896] 1 Ir. R. 45.

### b. On Acquisition of Estate.

**Tenant in Tail—Disentail.**]—Guardians of an infant redeemed the land-tax on estates of which he was tenant in tail, and paid all the instalments of the redemption money during the infancy. On the infant attaining his majority he suffered a recovery, and afterwards, on his marriage, conveyed the estates to the uses of his settlement, but no mention was made in the settlement of the land-tax. During his life, in the rental accounts, the rent-charges in lieu of the land-tax were kept distinct from the rents paid by the tenants. The owner (the settlor) by his will devised these rent-charges:—Held, that the rent-charges were not merged either by the effect of the settlement or the course pursued, and that the devisees under the will of the owner (the settlor) were entitled against the persons claiming under his settlement. *Blundell* v. *Stanley*, 3 De G. & Sm. 433; 18 L. J., Ch. 300; 13 Jur. 998.

A tenant in tail in 1841 executed a disentailing deed with respect to estates the land-tax on which had been redeemed during the minority of a previous tenant for life by his guardians, who were also trustees for the purpose of receiving and applying the rents. The tenant in tail, after enlarging his estate, executed certain mortgages, and conveyed the estates to trustees upon trust for sale, subject to the several charges and incumbrances affecting the same. The property was put up for sale, and described in the conditions as "subject to land-tax if any":—Held, that, the land-tax under the circumstances, and in accordance with *Ware* v. *Polhill* (11 Ves. 257; 8 R. R. 144), having become extinguished, the rent-charge in lieu thereof to which the tenant for life was equitably entitled merged by conveyance to the trustees for sale, who took the legal fee, and that a purchaser for them took the estate free from land-tax or any yearly charge in respect or by reason of the redemption. *Bulkeley* v. *Hope*, 1 K. & J. 482; 24 L. J., Ch. 356; 3 W. R. 360.

A testator was possessed of considerable property as owner in fee simple consequent upon his execution of a disentailing deed, by which he converted an estate in tail into an estate in fee. Prior to the execution of the disentailing deed he had paid off charges upon the property, and had caused an assignment of the charges to be made to trustees to keep the charges on foot for his benefit, or had caused a memorandum of the

facts to be indorsed on the receipts. Subsequently to the disentailing deed he paid off other charges, but only took simple receipts for them. By his will he left all his property in the county R., and situate in certain parishes, to his brothers, free from all charges. The testator was possessed of other property in the county R. not in the parishes mentioned: — Held, that only the property in the parishes named by the will passed by the devise, and that it being for the benefit of the testator to have kept the charges alive, he must be presumed to have intended to keep them on foot, and they continued a charge on the undevised portion of the estate. *Keogh* v. *Keogh*, Ir. R. 8 Eq. 179; 22 W. R. 508. Affirmed, Ir. R. 8 Eq. 449.—C. A.

**On Failure of preceding Limitations.**]—Tenant in tail in remainder (after estates to A. for life, remainder to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself on the mortgage term, and afterwards comes into possession of the estate, and dies without issue; the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to shew a contrary intention. *Wigsell* v. *Wigsell*, 2 Sim. & S. 364; 4 L. J. (o.s.) Ch. 84; 25 R. R. 224.

A person having a partial interest in an estate brought up charges thereon, and had them transferred to trustees for him; he afterwards became absolutely entitled to the estate:—Held, under the circumstances, that the charges had merged in the inheritance. *Selsey* (*Lord*) v. *Lake* (*Lord*), 1 Beav. 146; 8 L. J., Ch. 233.

A life estate and an annuity charged on the same estate and devised to the same person held not to have merged. *Byam* v. *Sutton*, 19 Beav. 556; 18 Jur. 847; 2 W. R. 684.

A testatrix devised to the defendant, a married woman, a reversionary life interest in an estate, and she bequeathed to the defendant, for life and for her separate use, an annuity charged on the same estate, and to commence immediately. At the death of the testatrix, the prior limitation having failed, the defendant became tenant for life in possession:—Held, that a merger of the defendant's annuity in her life estate, by operation of law, would not be presumed. *Ib.*

Tenant in tail in remainder expectant upon a preceding estate tail purchased a mortgage on the estate, and took an assignment to himself of the mortgage debt and of the term by which it was secured. He subsequently became entitled to the estate as tenant in tail in possession, and as such continued for six years in receipt of the rents, after which he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge:—Held, that the charge was kept alive for the benefit of his personal representative. *Horton* v. *Smith*, 4 K. & J. 624; 27 L. J., Ch. 773; 6 W. R. 783.

Distinction in this respect where the tenant in tail becomes entitled to the charge without any act on his part. *Ib.*

**By Conveyance.**]—A mortgage was made for a term of years, and subsequently the reversion was conveyed to a trustee for sale to secure a further advance and the prior advances:—Held, that the terms were not merged, though portions had been sold by the trustee with the concurrence of the mortgagee. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113.

**By purchase.**]—A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee; he next purchases the ultimate remainder, and has it conveyed to him, subject to the subsisting charges; he then devises the estate subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death. The charges so purchased are merged, and parol evidence is admissible to prove that the testator so intended. *Astley* v. *Milles*, 1 Sim. 298; 27 R. R. 190.

**By Devise.**]—A. devised his real estate to B., in fee, charged with 1,000*l.*, which he gave to B. in trust, to be laid out for the separate use of C., his sister, for her life; and after her decease, as she should by her will appoint, and in default of appointment to be retained by B. B. devised the estates to trustees in trust for C. and D., as tenants in common in fee, subject to his debts, &c.; and by a codicil he directed his personal estate to be first applied in payment of his debts, legacies, &c. After B.'s death, the trustees conveyed the estates to C. and D., as tenants in common in fee, subject to the 1,000*l.* and other incumbrances. C. and D. having agreed to make partition, one moiety of the estates was conveyed to C. in fee, subject to a term for indemnifying D. for the 1,000*l.*, and the other moiety was conveyed to D. in fee. C. afterwards mortgaged her moiety in fee, and by her will, without referring to the 1,000*l.*, disposed of her personal estate in general terms:—Held, that the 1,000*l.* was merged. *Tyler* v. *Lake*, 4 Sim. 351.

S. being seised in fee of two-thirds of certain real estate charged with a mortgage debt in favour of A., and being also seised of the other third of the same estate not so charged, devises all her real and personal estate to A. charged with her debts, and she appoints A. her executor. A. pays all the debts except his own mortgage debt, and in his residuary account of S.'s estate he states that he appropriates the clear residue of her estate towards satisfaction of his mortgage debt, but the sum so set apart is insufficient to pay the whole debt. A. devised the property possessed by him under the will of S. to certain persons as tenants in common, provided they undertook to receive the same with all the liabilities attaching thereto:—Held, that A. intended to keep the charge alive; that the mortgage did not merge in the fee; and that A.'s devisees took the property charged with the balance of the mortgage debt. *Hatch* v. *Skelton*, 20 Beav. 453.

H. S., by his marriage settlement, assigned a sum of 7,500*l.* to trustees, in trust for himself for life, and after the deaths of both in trust for all the children of the marriage, in such shares, &c., as H. S. should by deed or will appoint; and he charged the 7,500*l.* on an estate to which he was absolutely entitled. There were three children of the marriage, J. G. S., and two daughters. H. S., by his will, in 1851, appointed 5,000*l.* of the fund to J. G. S., and devised to him and the heirs of his body the lands on which it was charged. In 1858, by codicil, he revoked the devise of the lands in the will, and devised them to J. G. S. for life, remainder to such uses as J. G. S. should by deed or will appoint. In 1872 by his marriage settlement, reciting the devises of the land by the will and codicil, J. G. S. in exercise of his power appointed the lands, after his death, to trustees for 200 years,

to secure a jointure for his wife, remainder in strict settlement to the sons and daughters successively of the intended or any subsequent marriage, with an ultimate remainder to himself in fee. No mention or allusion to the charge of 5,000*l.* was made in the settlement:—Held, that there was no merger of the charge, and that the 5,000*l.* continued personal estate of J. G. S. *Smith* v. *Smith*, 19 L. R., Ir. 514.

A testator devised his real estates to his wife and his three daughters, A., B. and C., in equal shares; and by a codicil bequeathed 1,000*l.* to his daughter A., charged on all his real and personal estate. A. married, and her husband joined her in conveying her undivided fourth of the real estate to trustees free from incumbrances, &c., by a post-nuptial settlement, which was held not binding on the wife, no fine having been levied by her:—Held, that the fourth part of the legacy was not merged in the estate devised to A. by the will, but that the husband, by the settlement, released A.'s fourth of the real estate from the legacy. *Walpole* v. *M'Clintock*, 7 Ir. Eq. R. 353.

**By Descent.**]—Merger of a charge in the inheritance is not to be assumed if it would be contrary to the interest of the owner of the estate and charge. *Davis* v. *Barrett*, 14 Beav. 542.

By an ante-nuptial settlement in 1812, the settlor conveyed lands to trustees to the use of himself for life with remainder to the use of trustees for 500 years, to secure a jointure and to raise 6,000*l.* for the benefit of the wife and the younger children of the marriage, and subject to these prior charges, to raise 20,000*l.* for the eldest son. Subject to these trusts the lands stood limited to the settlor in fee. The settlor mortgaged his reversion in fee, and died prior to the Inheritance Act (3 & 4 Will. 4, c. 106), having devised the estate, subject to the payment of debts and legacies, to his eldest son and heir-at-law:—Held, that it was to the interest of the eldest son to keep the charge alive as against the subsequent incumbrancers on the estate, and that the 20,000*l.* had not merged in the reversion in fee. *Ib.* S. P., *Clarendon* (*Earl*) v. *Barham*, 1 Y. & C. C. C. 688; 12 L. J., Ch. 215; 6 Jur. 963; *Sing* v. *Leslie*, 2 H. & M. 68; 4 N. R. 17; 33 L. J., Ch. 549; 10 Jur. (N.S.) 794; 10 L. T. 332.

A., on her father's death, became seised of real estates as his heir, and entitled under his marriage settlement to a sum which the trustees of the settlement had lent him on mortgage of the estates. The testatrix, by a deed executed shortly before her will, charged the estates and the sum secured on them with an annuity, and otherwise showed that she intended the mortgage to be kept on foot for the purpose at least of securing the annuity. By her will she devised the estates, after the payment of her own debts and after her father's affairs should have been settled, to B., and died intestate as to her residuary personal estate:—Held, that as against her next of kin the incumbrance created on the estate by her father must be considered to have merged in it. *Swabey* v. *Swabey*, 15 Sim. 106.

If the inheritance of an estate comes to one having an equitable charge upon it, the charge is merged, except in certain cases. *Chester* v. *Willes*, Ambl. 246.

**c. On Acquisition or Payment off of Charge.**

**By Tenant in Fee.**]—The transfer to a trustee of a charge paid off is not conclusive evidence of an intention to keep it alive. Accordingly, where A. B., the owner in fee of an estate, paid off a mortgage in fee existing on it, which in 1807 was transferred to a trustee, in trust for A. B., her "heirs, executors, administrators, and assigns respectively," and the trustee covenanted to convey to A. B., her heirs or assigns, or unto such other person or persons, and in such manner and form as A. B., her heirs, executors, administrators, or assigns should direct. A. B. devised the estate to a trustee to pay certain specified legacies, and subject thereto, she devised it to C. D. in fee, "and upon or for no other use, trust, intent, or purpose whatsoever." A. B. died in 1832:—Held, that the mortgage had merged. *Hood* v. *Phillips*, 3 Beav. 513.

Where a tenant in fee becomes entitled to a charge upon the same land, the fact that a merger of the charge would give priority to other charges affords sufficient presumption to rebut merger; and it is not, in general, necessary to inquire into the relative value of the estate and the charges which would be so let in. *Richards* v. *Richards*, 1 Johns. 754. S. P., *Grice* v. *Shaw*, 10 Hare, 76; *Johnson* v. *Webster*, 4 De G. M. & G. 474; 3 Eq. R. 101; 24 L. J., Ch. 300; 1 Jur. (N.S.) 145; 3 W. R. 84.

But, semble, it is essential that the charges on which the presumption against merger is founded should be substantial charges. *Ib.*

Application of the rule, that where an owner of an estate in fee-simple becomes entitled to a charge upon that estate, primâ facie the charge, in equity at least, merges in the inheritance, unless the owner of the estate does some act to keep it alive, or it is for his interest that the charge should continue to be a subsisting charge upon the estate. *Swinfen* v. *Swinfen*, 29 Beav. 199; 7 Jur. (N.S.) 89; 4 L. T. 194; 9 W. R. 175.

Where a person is owner of an estate, and of a charge upon it, the presumption of merger arises upon his death. *Ib.*

Devise by an owner in fee, without mentioning a charge on it, to which he was absolutely entitled:—Held, to be some indication of his intention to merge it. *Ib.*

A. was owner in fee of an estate on which there was a charge to which he was absolutely entitled, and a subsequent charge of a jointure in favour of B. A. devised the estate in fee to B.:—Held, that B. took discharge of the mortgage. *Ib.*

A., the owner of a freehold estate, subject to a mortgage in fee to secure 1,300*l.*, devised and bequeathed his real and personal estate to B., the mortgagee. B., in his residuary account, stated that he had retained 467*l.* out of the personal estate towards payment of his mortgage debt. Afterwards B. devised the property to three relatives of A., "provided they undertake to receive the same with all the liabilities attaching thereunto":—Held, first, under the circumstances, that the mortgage had not merged in the fee; and secondly, that the three took the estate subject to the payment of the balance of the mortgage debt. *Hatch* v. *Skelton*, 20 Beav. 453.

An infant, tenant in tail in possession, subject to charges amounting to 26,461*l.*, secured by a term of 500 years, was made a ward of court, and during his minority 12,165*l.* of the charges were paid off and assigned to a trustee for him. After coming of age, in 1842, he barred the entail, and subsequently paid off a further charge of 923*l.*, taking an absolute assignment of it to himself. In 1851 he mortgaged the estate for 4,300*l.*

making no mention of his charges. In 1861 he paid off the remaining charges, amounting to 13,846*l.*, partly out of his own moneys and partly by a mortgage of the estate for 12,000*l.*, with a collateral assignment of his charges and of the term of 500 years. In 1876 he paid off the 4,300*l.* mortgage, partly out of his own moneys and partly by means of a trust fund of 3,133*l.*, to which he was absolutely entitled, subject to the payment of a life annuity of 100*l.*, and subject to it the 4,300*l.* was assigned to a trustee for him absolutely. By his will, made in 1877, he devised the estate upon trust "to and for the several uses, intents, and purposes, and subject to the annuities, charges, provisoes, and limitations hereinafter mentioned, expressed and declared, of and concerning the same respectively, and to none other." The will charged the estate with 35,000*l.* for five of his younger children (excluding his son R. in the event that happened), and, subject thereto, devised it to his son R. for life, with remainders over in favour of the other five younger children, and bequeathed the residue of his personal estate to whichever of his sons should, under the will, become entitled, at the testator's death, to a life estate in the lands. The testator died in 1881, and was succeeded by his son, R.:—Held, that the sums of 26,461*l.* and 4,300*l.* only subsisted as charges on the estate for the purpose of securing the mortgage of 12,000*l.* (with interest thereon) and the annuity of 100*l.* respectively. *Nunn's Estate, In re*, 23 L. R., Ir. 286—C. A.

**By Tenant in Tail.**]—Tenant in tail restrained as to alienation, but with powers of leasing and jointuring, as in case of tenant for life, considered as tenant for life; and therefore his personal representative is a creditor for a charge on the estate paid by him (intent to the contrary not appearing), though the subsequent remainders were exactly of the same nature, and the term having been very short, little more than forty years remained. *Shrewsbury (Countess)* v. *Shrewsbury (Earl)*, 1 Ves. J. 227; 3 Bro. C. C. 120; 2 R. R. 101.

A charge not extinguished for the benefit of the estate, though satisfied by the tenant in tail, with the intention of extinguishing it, under the erroneous supposition that he was tenant in fee simple. *Buckinghamshire (Earl)* v. *Hobart*, 3 Swanst. 186; 19 R. R. 197.

If tenant for life pays off charge on estate, primâ facie he is entitled to that charge for his own benefit, with the qualification of having no interest during his life. If tenant in tail or in fee pay off charge, that payment is primâ facie presumed to be in favour of estate; but presumption may be rebutted by evidence, as by calling for assignment, or by a declaration. *Id.* 199.

—— **In remainder.**]—Tenant n tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue; the mortgage is a subsisting charge for benefit of his personal estate, there being no act to show a contrary intention. *Wigsell* v. *Wigsell*, 2 Sim. & S. 364; 4 L. J. (O.S.) Ch. 84; 25 R. R. 224.

Tenant in tail in remainder expectant upon a preceding estate in tail purchased a mortgage on the estate, and took an assignment to himself of the mortgage debt and of the term by which it was secured. He subsequently became entitled to the estate as tenant in tail in possession, and as such continued for six years in receipt of the rents, after which he died without barring the entail or doing any other act indicative of an intention as to whether the charge should merge:—Held, that the charge was kept alive for the benefit of his personal representative. *Horton* v. *Smith*, 4 Kay & J. 624; 27 L. J., Ch. 773; 6 W. R. 783.

Distinction in this respect where the tenant in tail becomes entitled to the charge without any act on his part. *Ib.*

An estate, vested in A. for life, with remainder to his eldest son B. in tail, was subject to considerable family mortgages. B. being possessed of other large property, granted an annuity of 2,500*l.* a year to A., to cease upon his death, or upon B.'s "paying off, satisfying, and discharging" the several mortgages:—Held, on the whole, that the intention was to merge the mortgages. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

**Renewable Leaseholds.**]—C., the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under 38 Geo. 3, c. 60, and transferred to the commissioners a sum of consols for that purpose, but did not exercise the option of keeping the charge on foot under s. 17 of the act. After the death of C., T. D. and M. D., who were entitled in equal shares to the leaseholds under his will (which contained no reference to the land tax), and also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds, and all their "estate and interest" therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land tax. T. D. died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of M. D., the personal representative of T. D. and M. D. claimed, as against those entitled under the settlement, a charge in respect of the land tax:—Held, that C., on redeeming the land tax, became entitled to the interest on the consols transferred by him as a rent-charge on the leaseholds for his own benefit; that it did not pass under the general words of the settlement of 1818, but remained as a separate property in the settlors, as residuary legatees of C.; that their representative was now entitled to it as a charge on the leaseholds; and that the fact of T. D. not having made any claim was no bar. *Neame* v. *Moorsom*, 36 L. J., Ch. 274; L. R. 3 Eq. 91; 12 Jur. (N.S.) 913; 15 W. R. 51.

**By Tenant for Life.**]—Where tenant for life pays off an incumbrance upon the estate, he shall be considered as a creditor for the money so paid; but where tenant in tail pays, it is in exoneration of the estate of which he may make himself absolute owner. *Jones* v. *Morgan*, 1 Bro C. C. 206.

When a tenant for life pays off a mortgage on the estate, the fact that he is the parent of those entitled in remainder is not of itself sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit. *Harvey, In re, Harvey* v. *Hobday*, 65 L. J., Ch. 370; [1896] 1 Ch. 137; 73 L. T. 613; 44 W. R. 242—C. A.

A tenant for life of an estate, with an ultimate remainder to himself in fee, paid off a charge

upon the estate, and conveyed the debt and a term to a trustee, who executed a declaration of trust :—Held, in the absence of intention to the contrary, that the charge was kept alive. *Pitt* v. *Pitt*, 22 Beav. 294 ; 2 Jur. (N.S.) 1010. S. P., *Wyndham* v. *Egremont* (*Earl*), Amb. 753.

Tenant for life in possession, subject to be disseised on executory devise taking effect, paying off incumbrance on estate is entitled to repayment if so disseised. *Drinkwater* v. *Combe*, 2 Sim. & S. 340 ; 3 L. J. (O.S.) Ch. 178 ; 25 R. R. 210.

Charges paid off by the tenant for life primâ facie kept alive, and not merged in the inheritance. *Faulkner* v. *Daniel*, 3 Hare, 217 ; 10 L. J., Ch. 33. S. P., *Reddington* v. *Reddington*, 1 Ball & B. 131.

The owner of an estate voluntarily charged it with his own simple contract debt, and by the same deed, settled the estate, subject thereto, on himself for life, with remainder to his daughter. He afterwards paid off the debt, but declared that the charge should continue for the benefit of his personal estate. After his death :—Held, that the charge still subsisted, and must be raised and paid. *Jameson* v. *Stein*, 21 Beav. 5 ; 25 L. J., Ch. 41.

If a tenant for life pays off a charge on the inheritance, he is primâ facie entitled to that charge for his own benefit ; but he may, if he think proper, exonerate the estate. A tenant for life paying off a charge upon the estate, and in the same transaction merging the security by taking an assignment connecting it with the legal estate of inheritance, primâ facie puts an end to the charge ; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention ; the burden of proof is upon those who allege that in paying off the charge he intended to exonerate the estate. *Burrell* v. *Egremont* (*Earl*), 7 Beav. 205 ; 13 L. J., Ch. 309 ; 8 Jur. 587.

Where the testator devised real estate to his wife for life, remainder to his children by a former marriage, and he also gave specific legacies to his wife, and appointed her, with two others, executors, the personal estate being insufficient to pay off the mortgage, which was called in, the specific legacies were, with her consent, sold and applied to redeem the estate, and the mortgage term assigned to attend the inheritance :—Held, that in the absence of fraud or ignorance of facts, the payment was primâ facie a gift for the benefit of the remainderman, and that the wife could not claim a lien on the estate. *Toplis* v. *Von der Heyde*, 4 Y. & C. 173 ; 9 L. J., Ex. Eq. 27.

T. was beneficially entitled for his life to renewable leaseholds for three lives held on trust to renew and subject to certain charges. All the cestuis que vie having died, and T.'s right to renew being disputed by the reversioner, the trustee of the leaseholds, with the consent of the persons entitled to the charges, in order to facilitate the obtaining of a renewal, transferred the legal estate to T. by a deed which recited (though contrary to the fact) that the charges had been paid by T. Thereupon T. obtained a renewal (without prejudice to the question in dispute), and to avoid litigation, purchased the reversion in fee. He subsequently paid off the charges and mortgaged the premises in fee. By his will, reciting that the charges were subsisting, he devised his interest in the premises to T. T. subject to the charges :—Held, that T. T. took the fee subject to the charges. *Trumper* v. *Trumper*, 42 L. J., Ch. 641 ; L. R. 8 Ch. 870 ; 29 L. T. 86 ; 21 W. R. 692.

By a settlement dated in 1821, copyhold lands, which had been conditionally surrendered for securing certain mortgages, were settled by the testator, subject to the mortgages, he at the same time convenanting to pay off the same, and there was a proviso, that as between the testator, his heirs, executors and administrators, and the persons entitled under the settlement, the lands were to be the primary fund for payment of the same mortgage debts. In 1826, the testator paid off the debts out of his own moneys, and satisfaction was duly entered on the court rolls of the conditional surrender. In 1831, the lands were, under a power in the first settlement resettled by the testator and his wife, but no notice was taken of the fact of repayment of the mortgages. By his will the testator directed all his debts, &c., to be paid out of the personalty only :—Held, that the amount of the mortgage debts was to be considered as kept on foot as part of the testator's personal estate. *Pears* v. *Weightman*, 2 Jur. (N.S.) 586.

By indenture of 7th September, 1812, certain lands were subject to certain outstanding incumbrances, settled upon A. for life, with remainder to his first and other sons in tail. In 1816, A. granted annuities to B. charged upon his life estate. In 1818, A. paid off some of the prior incumbrances, and had them assigned to a trustee for his own benefit ; and in 1820, A. and his trustee joined in assigning to C. for valuable consideration, the incumbrances so paid off :—Held, that the arrears of the interest of the charges so paid off in 1818 and assigned in 1822, were incumbrances on the life estate prior to the annuitant, and that as against the annuitant, the interest payable on the said charges out of the life estate had not been merged by the dealings of the owner of the life estate therewith. *Harman* v. *Forster*, 1 Dr. & Wal. 637.

**Other Partial Interests.**]—Feme sole makes a mortgage, and afterwards marries ; the mortgage is then transferred, and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband, by gradual payments out of his own property, reduces the money due upon the mortgage. By his will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife. Upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage, the redemption was decreed upon the terms that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property in reduction of the mortgage debt. *Pitt* v. *Pitt*, Turn. & R. 180 ; 24 R. R. 15.

In all cases where money is paid off by individuals, not having an absolute permanent interest in the premises, the court looks at the intention. *Id.*

**Creditors.**]—A., seised of the lands of G., subject to a charge for B., gave a judgment to secure a further charge for B. By a post-nuptial instrument, A. settled G., subject to the charge for B., but misstating its amount, upon himself for life,

remainder to his eldest son for life, remainder over in strict settlement. On the marriage of A.'s eldest son the post-nuptial settlement was adopted. B.'s judgment was paid out of A.'s life estate:—Held, that the judgment creditors of A. after the settlement had no equity to raise for their benefit, out of the inheritance, the amount paid out of A.'s life estate on foot of B's. judgment. *Stock* v. *Aylward*, 8 Ir. Ch. R. 429—L. C.

**Lunatic.**]—Where a charge on a lunatic's estate is paid off out of her personal property by order of the court, the securities are to be assigned without prejudice to the conflicting claims of the real and personal representatives of the lunatic to the benefits of the payment. *Digby (Earl), Ex parte, Norfolk (Countess), In re*, 1 Jac. & Walk. 640.

**By Infant.**]—At law and equity, where there is a confusion of rights, there is an immediate merger; that is prevented in equity by the intention, either express or implied, as in the case of an infant entitled to an estate, and also to a charge upon it, the rights remain distinct because more beneficial. *Compton (Lord)* v. *Oxenden*, 2 Ves. J. 263; 4 Bro. C. C. 397.

Debt charged upon an estate paid out of the estate of the first-taker, an infant; the infant's estate reimbursed by a charge, though the security had been cancelled. *Ware* v. *Polhill*, 11 Ves. 283; 8 R. R. 144.

Where debts of a testator had been paid out of the income of the estate of an infant in tail under his will, by the direction of the court, after decree in an administration suit, and the tenant in tail subsequently died an infant, and his administrators, more than six years after taking out administration to him, filed a bill to revive the administration suit, for the purpose of having such payments recouped out of the corpus of the estate, and for payment of the costs of the administration suit:—Held, first, that the payment on behalf of the infant having been made by the court, a merger of the charge could not be presumed; and, secondly, that the pendency of the suit prevented such claim being barred by lapse of time. *Alsop* v. *Bell*, 24 Beav. 451. And see *Nunn's Estate, In re*, 23 L. R., Ir. 286—C. A., col. 1029, supra.

**As Next of Kin.**]—Where a person becomes entitled to a sum of money charged upon an estate, and secured by a term of years, being entitled to the fee-simple of the estate, a court of equity extinguishes the equitable lien, except in the case of creditors or of infancy. *Donisthorpe* v. *Porter*, 2 Eden, 162; Ambl. 600.

**By Heir-apparent.**]—A son paid off a mortgage upon an estate belonging to his father, the son being at the time expectant devisee of the absolute interest in the estate, though afterwards, by an alteration in the father's will, he became only tenant for life of the estate:—Held, that from the dealings between the parties an agreement was to be inferred that the son paid off the mortgage debt in settlement of pecuniary transactions between himself and his father, and that consequently the presumption that the son paid it off for his own benefit was rebutted, and that he was not entitled to any lien upon the estate for what he so paid off. *Crow* v. *Pettingell*, 20 L. T. 342; 17 W. R. 562—L.JJ. Reversing 38 L. J., Ch. 186.

**By Bequest.**]—A. devises certain premises (subject to a mortgage of 3,500*l.*) to his three daughters, to be divided equally; one dies; mortgagee bequeaths to the two survivors all the money due on the mortgage and the interest, so that it do not altogether exceed 4,000*l.*, and if it do not amount to 4,000*l.*, then to be made up; the other daughter dies, leaving all her real and personal estate to the third:—Held, that the charge is merged in the inheritance. *Price* v. *Gibson*, 2 Eden, 115.

**Declaration of Trust.**]—In 1824 A. purchased an estate, and he mortgaged it to raise part of the purchase-money. In 1840 the mortgage was paid off and transferred to B., who afterwards executed a declaration of trust in favour of A. A. died in 1848:—Held, that the charge had merged. *Pitt* v. *Pitt*, 22 Beav. 294; 2 Jur. (N.S.) 1010.

**Other Matters.**]—Where an act of parliament enabled a railway company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land tax upon other parts of the property unsold:—Held, that a tenant for life, who had redeemed the land tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company. The costs of an application to the court, under such an act of parliament, to have the purchase-money applied in the redemption of the land tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands, to be settled to the like uses. *Northwick, Ex parte. London and Birmingham Ry., In re*, 1 Y. & C. 166.

### 7. Of Terms.

#### a. In General.

**Of Term in Fee.**]—A lease was granted in 1759 for ninety-nine years, if certain parties should so long live; the lessees in 1818 demised the premises to P. for sixty-two years, from the 25th of March, 1821, if their interest should so long continue, subject to a rent of 42*l.*, and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release, executed in 1820, to which the mortgagee was a party, P., in consideration of a sum of money (part of which went to discharge the mortgage) conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 300*l.* of the purchase-money upon trust, that if P. should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him 300*l.* at the expiration of the term, or extinguishment of the lease of 1759, and interest in the meantime:—Held, that the deed of 1818 was an assignment of all the interest of the then lessees to P., and that by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and the mortgage being at the same time put an end to, the term became merged in the inheritance, and consequently, that as soon as the terms became vested in the purchaser, P. was discharged from the rents and covenants and

entitled to the 300*l.* *Thorn* v. *Woolcombe*, 3 B. & Ad. 586.

The owner of a leasehold for years mortgaged it, and afterwards, in 1820, confessed judgments. He, in 1824, acquired a freehold estate in the same lands. In a suit pending after the statute 3 & 4 Vict. c. 105 :—Held, that the freehold being acquired prior to the act, the judgment creditor had no equity to prevent the term, though an equity of redemption, being merged as against him. *Smith* v. *Chichester*, 12 Ir. Eq. R. 519—L. C.

Valid lease of charity property which had merged in the fee by an invalid absolute conveyance to the lessee, sustained on setting aside the latter on an information by the attorney-general. *Att.-Gen.* v. *Kerr*, 2 Beav. 420 ; 9 L. J., Ch. 190 ; 4 Jur. 406.

A man shall not be made occupant against his will so as to drown a previous estate which he had in the lands. *Lewis Bowles's Case* (11 Rep. 79) and *Williams* v. *Williams* (15 Ves. 419) considered and explained. *Creagh* v. *Blood*, 3 Jo. & Lat. 133 ; 8 Ir. Eq. R. 688.

A., lessee for the life of X., reversion to C. in fee, B. demises the lands to C. and his heirs for the life of X., C. dies leaving A. his heir-at-law. The estate which A. has in possession shall not merge in the estate in reversion which he derives from C., both estates being equal in quantity. *Ib.*

**Trust Terms.**]—A. and B. are co-heiresses of estate ; A. being married, her moiety is settled on husband, C., for life, remainder to A. for life, remainder to B. for life, remainder to trustees for 1,000 years, remainder to right heirs of survivor of B. and C. The trusts of term were to raise 1,000*l.* to be paid to such relations of A. as the survivor of B. and C. should appoint, and in default of appointment to next heir or co-heirs of B. A. and husband died in life of B., and B., by will, devised the whole estate to trustees, for certain purposes, but made no appointment of the 1,000*l.* It was decreed that heirs-at-law of B. were entitled to have the 1,000*l.* raised, and that the term of 1,000 years, created by the settlement, was merged in the inheritance of the moiety to which B. became entitled. *Morris* v. *Cantle*, 6 Bro. P. C. 418—H. L. (E.)

On marriage, lands are settled on A. for life, remainder to the first, &c., sons of the marriage in tail male, remainder to trustees for 500 years, to raise 5,000*l.* portions for daughter, payable at eighteen or marriage ; remainder to A. in fee. After the marriage A. settles other lands, and a term is created for raising the like sum of 5,000*l.* for daughters on failure of issue male, payable at sixteen or marriage ; A. dies, leaving a daughter his heir-at-law, who attains eighteen, and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disposable by her will, but there shall be but one 5,000*l.* raised. *Thomas* v. *Kemeys*, 2 Vern. 348 ; Freem. Ch. 207 ; 1 Eq. Cas. Ab. 269.

A daughter's portion secured by a trust term, not extinguished by a devise of the lands to the daughter in tail. *Laurence* v. *Blatchford*, 2 Vern. 457.

By a marriage settlement lands are limited to the husband and wife, with remainder to their first, &c., sons, and then a term for years to secure portions for daughters. The husband dies, leaving only a daughter, upon whom the inheritance descends. The daughter dies an infant, and indebted, and disposes of her portion by her will. Equity relieves against the merger of the portion. *Powell* v. *Morgan*, 2 Vern. 90 ; 1 Eq. Cas. Ab. 269.

A testator devised freehold estates to trustees upon trust on B.'s coming of age, to raise 2,000*l.* to be then paid to him ; and subject to this and other charges in trust for A. for life, remainder to his first and other sons in tail ; and in default of such issue, to B. for life, remainder to his first and other sons in tail. A. died without issue before B. had attained twenty-one years :—Held, that the charge of 2,000*l.* had not merged, and that B. was entitled to have it raised. In such cases there is no merger where the rights to the land and to the money are not equal, or where the portion is given to the party by name. *Sterne* v. *Wolfe*, Wall. Lyn. 167.

**Of Interesse termini in Freehold Reversion.**]—A. was lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809. In December, 1799, A. took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809. The lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life. By lease and release A., in 1806, conveyed his life estate to B. :—Held, that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111 ; 7 D. & R. 487 ; 4 L. J. (o.s.) K. B. 93 ; 29 R. R. 184.

**Of Term in a Term.**]—Where there is mortgage term of 1,000 years, and mortgagee takes assignment of another term of 500 years of the same premises :—Held, the term of 1,000 years is merged in the reversionary term of 500 years. *Stephens* v. *Bridges*, 6 Madd. 66 ; 22 R. R. 242.

The bankrupt, being the lessee under a lease for forty-six years, subject to a former lease for twenty years, deposits it by way of equitable mortgage. He afterwards purchases the remainder of the term granted by the first lease, and deposits that lease also with the same party for securing a further sum :—Held, that the first lease was not, under these circumstances, merged in the second, and that the depositaries were good equitable mortgagees under both deposits. *Whitbread, Ex parte, Dix, In re*, 2 Mont. D. & D. 415.

A., administrator, entitled for a term of years in land as part of the estate of his intestate, demised the land for a shorter term, which was shortly afterwards assigned to the administrator in his own right, and under whom the plaintiffs claimed :—Held, that there was in equity no merger, and that the plaintiffs who would be entitled to the land if the term was in existence, could maintain an action to establish their title to the land for the term, and for mesne profits. *Chambers* v. *Kingham*, 48 L. J., Ch. 169 ; 10 Ch. D. 743 ; 39 L. T. 472 ; 27 W. R. 289.

—— **Parties.**]—A. and B. were owners in fee as tenants in common of freehold property. On the death of B., a building lease of a portion of the freehold property was granted by A. and the devisees of B. to a person who afterwards assigned all his interest under that lease to A. alone. On the death of A., his devisees and the devisees of B., granted a building lease of another portion of the freehold property to a person who assigned his interest under the lease to A.'s

trustees alone. The legal estate in all the property was outstanding in a mortgagee, who, subsequently to the above transactions, reconveyed the mortgaged premises to the trustees of A. and B. :—Held, that there was no merger of the leasehold interests in the reversion in fee of A., and that the leases were consequently still existing. *Brandon* v. *Brandon*, 31 L. J., Ch. 47 ; 5 L. T. 339 ; 9 W. R. 825.

An owner in fee bought up an existing building lease of the property, and had it assigned to a trustee, in trust for him, "his executors, administrators and assigns" :—Held, that the presumption was that the lease had not, in equity, merged in the inheritance, but that it passed as part of his personal estate :—Held, also, that the burden of proof was on those who asserted the contrary. *Gunter* v. *Gunter*, 23 Beav. 571 ; 3 Jur. (N.S.) 1013 ; 5 W. R. 485.

A mortgage was made for a term of years, and subsequently the reversion was conveyed to a trustee for sale to secure a further advance and the prior advances :—Held, that the terms were not merged, though portions had been sold by the trustee with the concurrence of the mortgagee. *Locking* v. *Parker*, 42 L. J., Ch. 257 ; L. R. 8 Ch. 30 ; 27 L. T. 635 ; 21 W. R. 113.

**Of Legal Term in Equitable Reversion.**]—Where a term would merge by its union with the inheritance in the same person, if he has in the one the legal, in the other the equitable, estate, the term will attend the inheritance. Therefore, where tenant for years subsequently to his will contracted to purchase the inheritance, and died before conveyance, the residuary legatees have no claim under the term against the heir. *Capel* v. *Girdler*, 9 Ves. 509 ; 7 R. R. 289.

A testator, being possessed of the residue of a term of ninety-nine years, purchased the freehold reversion, and, by a deed reciting that he was desirous that the term should not merge, the reversion in fee was conveyed to a trustee, subject to the term, in trust for the testator, his heirs, or assigns, and to be conveyed and disposed of as he or they should direct :—Held, that the term was a term in gross, and passed by the will as personal estate. *Belaney* v. *Belaney*, 36 L. J., Ch. 265 ; L. R. 2 Ch. 138 ; 16 L. T. 269 ; 15 W. R. 369.

**Extinction of Covenant.**]—If a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants incident to that reversionary interest were thereby extinguished. *Webb* v. *Russell*, 3 Term Rep. 393 ; 1 R. R. 725.

### b. Attendant and Satisfied Terms.

**Since 8 & 9 Vict. c. 112.**]—In 1829, A. died seised in fee of lands, of which his eldest son, B., was tenant. B., supposing him to have died intestate, entered on the lands claiming them as heir-at-law ; and in 1830, mortgaged them in fee, and levied a fine to confirm the mortgage ; and at the same time, an outstanding term of 500 years was, by his direction, assigned to a trustee for the mortgagee. In 1835, B. sold the estate to the defendant, who paid off the mortgage. The legal estate in the fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him to attend the inheritance. In 1845, it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee to whom the term was assigned in 1835 :—Held, that, by the operation of 8 & 9 Vict. c. 112, the term had absolutely determined ; and the plaintiff could not recover upon the demise laid in the name of the trustee. *Doe* d. *Cadwalader* v. *Price*, 16 M. & W. 603 ; 16 L. J., Ex. 159 ; 11 Jur. 131.

In 1838, H. mortgaged premises for 1,000 years to D., and in 1839 conveyed the fee, subject to the mortgage term to her daughter, the wife of the defendant ; this conveyance was unknown to the parties to the subsequent deeds. In 1842, H. mortgaged the premises in fee to M., and in October, 1844, conveyed the equity of redemption to C. In October, 1844, M. assigned the mortgage of the fee to R. T., and the representatives of D. assigned the term of 1,000 to a trustee, to secure the money to, and afterwards to be reconveyed as C. should direct. In September, 1847, part of the premises being required for a railway company, C. received the purchase-money from the company, and therewith paid off the mortgagees :—Held, that the term had not become attendant upon the inheritance by construction of law, so as to be determined by 8 & 9 Vict. c. 112, s. 2, and therefore C. was entitled to recover upon the demise of the trustees. *Doe* d. *Clay* v. *Jones*, 13 Q. B. 774 ; 18 L. J., Q. B. 260 ; 13 Jur. 824.

A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. *Shaw* v. *Johnson*, 1 Dr. & Sm. 124 ; 30 L. J., Ch. 646 ; 7 Jur. (N.S.) 1005 ; 4 L. T. 461 ; 9 W. R. 629.

A term attendant on the inheritance cannot be disannexed, except by one who has power to create a term, or deal with the inheritance, and therefore where such a term was, prior to the 31st December, 1845, assigned at the instance of a tenant for life to secure repayment of money advanced upon a pretended mortgage of the fee, and afterwards for the benefit of the tenant for life, and persons to whom he affected to grant the fee, the term continued to attend the inheritance of the rightful owners, and was either extinguished by 8 & 9 Vict. c. 112, s. 1, or at any rate could not be set up against them. *Plant* v. *Taylor*, 7 H. & N. 211 ; 31 L. J., Ex. 289 ; 8 Jur. (N.S.) 140 ; 5 L. T. 318.

The mortgagees of a term, their mortgage debt being unpaid, and the mortgagor insolvent, took a conveyance from the assignees in bankruptcy of the reversion in fee, releasing the assignees from all claims in respect of their debt. The widow of the mortgagor was joined as a party to this deed, for the purpose of releasing her dower, but she refused to execute it, and filed a bill to have her right to dower declared :—Held, that as she had not executed the deed, the debt was not gone, and the term not satisfied. *Anderson* v. *Pignett*, 42 L. J., Ch. 310 ; L. R. 8 Ch. 180 ; 27 L. T. 740 ; 21 W. R. 150.

A term does not become satisfied within 8 & 9 Vict. c. 112, unless the beneficial interest in the whole charge secured by the term and in the whole estate are united, and merged in one person. *Ib.*

A term was created in 1813, to secure repay-

of a loan, which was repaid in 1837. In 1840 the land was demised for lives by the heir-at-law of the creator of the term. In 1843 the term was re-assigned by the satisfied creditor to a new incumbrancer, by direction of the heir-at-law of the creator of the term :—Held, that the term was not satisfied under 8 & 9 Vict. c. 112, so as to enure to the benefit of the lessee for lives. *Owen* v. *Owen*, 3 H. & C. 88 ; 33 L. J., Ex. 237 ; 10 Jur. (N.S.) 884 ; 11 L. T. 137.

**Before 8 & 9 Vict. c. 112.**]—Where term would merge by its union with the inheritance in the same person, if he has in the one the legal, and in the other the equitable estate, the term will attend the inheritance. *Capel* v. *Girdler*, 9 Ves. 509 ; 7 R. R. 289. S. P., *Kelly* v. *Power*, 2 Ball & B. 253 ; *Tiffin* v. *Tiffin*, 1 Vern. 1 ; 2 Ch. Cas. 49, 55 ; *Douse* v. *Percival*, 1 Vern. 104 ; *Best* v. *Stamford*, 2 Vern. 520 ; Prec. Ch. 252 ; 1 Salk. 154 ; Freem. Ch. 288.

Purchase of the fee-simple in the name of the purchaser, and of terms in the name of a trustee, with an intervening reversion of eleven days, and a reservation of rent, &c., to the vendors : the terms are terms in gross, not attendant upon the inheritance. *Scott* v. *Fenhoullet*, 1 Bro. C. C. 69.

Where a term was created, but no trusts of it declared, but the estate devised to tenants for life with remainders over, the court decided that there was no resulting trust as to the term, but that it attended the inheritance. *Sidney* v. *Miller*, or *Shelley*, G. Coop. 206 ; 19 Ves. 352 ; 14 R. R. 247.

Wherever land, or any interest in land, which would descend to the heir-at-law is devised for purposes which the law will not permit to take effect, the heir shall have the benefit of the interest so devised as undisposed of. *Tregonwell* v. *Sydenham*, 3 Dow. 194 ; 15 R. R. 40—H. L. (E.)

Heir held entitled to a term, by way of resulting trust, the trusts of which were to raise moneys and apply them for a purpose void as infringing the rule against perpetuities. *Ib.*

A., by will, gives lands to trustees for terms, remainder to T. Lord Foley and E. Foley for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to T. Lord Foley and E. Foley. The debts being stated to be paid, a trust results to the tenants for life. A demurrer by the trustees to a bill by creditors for an account, as having no interest, therefore overruled. *Davidson* v. *Foley*, 2 Bro. C. C. 203.

An equity of redemption in a term might be attendant on the inheritance. *Scott* v. *Knox*, Longf. & T. 381 ; 4 Ir. Eq. R. 397.

Assignment of an interesse termini, on the circumstances of the case, considered as an assignment to attend the inheritance. *Saltern* v. *Melhuish*, Ambl. 249.

Mortgagee may protect himself against a claim of dower by taking an assignment of an old mortgage term, prior to the right of dower. *Wynn* v. *Williams*, 5 Ves. 130.

A purchaser, to avail himself of an outstanding term against dower, must have procured an assignment, or at least a declaration of trust ; or have got possession of the deed creating the term. *Maundrell* v. *Maundrell*, 10 Ves. 246 ; 7 R. R. 393.

Two terms were created in the same manner, one of 500 years, in 1712, the other of 600 years, in 1768. In 1791 the latter was assigned to A., to secure a mortgage debt ; and, by a deed of even date, the former was assigned to B., as a trustee for A. A. died, having appointed B., C. and D. his executors. In 1801, by a deed endorsed on the first assignment of 1791, and "made between B., C. and D., executors of A., of the one part, and E. of the other part," B., C. and D. assigned the premises, "and all the estate, right, title, and interest" to E. for the residue of the term of 600 years, subject to the equity of redemption :—Held, that the term of 1712, being held by B. in what must be deemed his own right, did not pass by force of the words "and all the estate, right, title, and interest," and was not merged. *Rooper* v. *Harrison*, 2 K. & J. 86.

Real estates were devised to a trustee upon trust, on a given event, to convey them to certain parties, upon one of them electing which he would take. A party, in whom, as satisfied mortgagee at the date of the will and death of the testator, a satisfied mortgage term in one of the estates was, was held bound to execute a deed of surrender of the term to the trustee, and the cestuis que trustent were held not to be necessary parties thereto. *Poole* v. *Pass*, 1 Beav. 600 ; 8 L. J., Ch. 325.

—— **Trustee.**]—A mere trustee of an outstanding term cannot avail himself of it for the purpose of establishing a priority. *Shaw* v. *Neale*, 6 H. L. Cas. 581 ; 27 L. J., Ch. 444 ; 4 Jur. (N.S.) 695 ; 6 W. R. 635.

An attendant term having been vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies :—Held, that the widow was not entitled to dower ; that she was to assign the terms of the purchaser ; and that he was bound to accept the title. *Mole* v. *Smith*, Jac. 498.

A. E. R.

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## MERSEY.

*See* SHIPPING.

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## MESNE PROFITS.

*See* EJECTMENT.

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## METROPOLIS.

[By J. RITCHIE.]

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## A. AUTHORITIES.

### 1. LONDON COUNTY COUNCIL, FORMERLY METROPOLITAN BOARD OF WORKS.

**Appeal to, from District Board.**]—The services of a clerk of the works to paving commissioners were discontinued, and he ceased to act as their clerk. The powers of the commissioners having been determined in 1856 by 18 & 19 Vict. c. 120, he applied for compensation for the loss of his office to the district board of works, who rejected his application, on the ground that he was not an officer of the commissioners at the time of the act coming into force. He appealed to the metropolitan board of works, who made an order awarding compensation for the loss of the emoluments, as such officer, arising from the passing of the act :—Held, that the question whether he was an officer or not was necessarily within the jurisdiction of the metropolitan board of works as a court of appeal. *Reg.* v. *Metropolitan Board of Works*, 8 El. & Bl. 529 ; 27 L. J., Q. B. 5 ; 4 Jur. (N.S.) 25 ; 6 W. R. 57.

**Music and Dancing Licence—Appearance by Member in Opposition to Application — Invalidity of Proceedings.**]—The county council in determining applications for music and dancing licences are acting judicially, and are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision. — The London county council delegated to a committee of their body the hearing of applications for music and dancing licences. The committee by a majority recommended that a licence which had been applied for should not be granted. The applicant thereupon applied to the county council for a licence. At the hearing before the county council certain members of that body, who were also members of the committee and had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them before the county council and oppose the application for a licence. The councillors so instructing counsel were present at the hearing, but did not vote. The council by a majority refused the application for a licence. Held :—that the presence at the hearing of those members of the county council who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a mandamus to hear and determine the application according to law was accordingly made absolute. *Reg.* v. *London County Council, Akkersdyk, Ex parte*, 61 L. J., M. C. 75 ; [1892] 1 Q. B. 190 ; 66 L. T. 168 ; 40 W. R. 285 ; 56 J. P. 8.

**—— Association of Member with Objectors—Bias — Disqualification.**] — A member of the London county council sat and voted at the hearing of an application for a music and dancing licence, which was refused. Several weeks previously he had attended a meeting of persons who afterwards served notices upon the council of their intention to oppose the application. At this meeting the witnesses it was proposed to call at the hearing were present and their evidence was

discussed. He took no part in this discussion, but on being requested to do so explained the procedure before the licensing committee, and also said that, assuming the facts to be as stated, the matter should be placed before the committee, but he declined to give any opinion as to what importance the committee or council would attach to them. He took no further part in the meeting and the terms of the notices of opposition were not settled there, and he did not at any time take part in assisting to settle them or in advising thereon :—Held, that the facts did not furnish sufficient grounds for inferring such bias in favour of the promoters as to disqualify the member from voting on the application and thereby to invalidate the council's decision. Per Wright, J. : That the strict rule as to interest, other than pecuniary, is not applicable without qualification to bodies really exercising administrative functions, even though these involve something of a judicial character. *Reg.* v. *London County Council, Edwardes, Ex parte*, 15 R. 66 ; 71 L. T. 638.

—— **Meeting for granting—Slander—Absolute Privilege—Notice of Action.**]—At a meeting of the London county council held for the purpose of hearing applications for music and dancing licences, upon the plaintiffs applying for a renewal of such a licence for a place of entertainment belonging to them, the defendant, a member of the council, stated that he had been to the place in question, and had witnessed a most indecent performance there, and gave that as his reason for voting against the renewal. In an action of slander brought by the plaintiffs in respect of such statement, the jury found a verdict for the plaintiffs :—Held, that the defendant was not entitled to absolute immunity from liability for the words spoken, the duties of the county council in dealing with music and dancing licences being administrative and not judicial :—Held, also, that the defendant was not entitled to notice of action under 11 & 12 Vict. c 44, ss. 8 and 9, words spoken not being "anything done" within the meaning of those sections. *Royal Aquarium* v. *Parkinson*, 61 L. J., Q. B. 409 ; [1892] 1 Q. B. 431 ; 66 L. T. 513 ; 40 W. R. 450 ; 56 J. P. 404—C. A.

**Order for Transfer of Part of Parish—Power to Amend "Local and Personal Act."**]—The statute 9 Anne, c. 22, created a tax upon coals coming into the port of London, and provided for the appointment of commissioners for the purpose of building fifty new churches in and about London and finishing Westminster Abbey and Greenwich Hospital. By 10 Anne, c. 11, the commissioners were empowered to purchase land for cemeteries to be used in connection with the new parish churches ; and by s. 4 it was provided that, wherever they should purchase for the cemetery of a new parish a piece of ground outside the bounds of the parish the ground so purchased should henceforth be deemed to be part of the parish :—Held, that whether the above statutes, regard being had to the whole scope of them, were "general" acts, or "local and personal" acts, s. 4 of the latter statute was a "local and personal" enactment within s. 59, sub-s. 6, of the Local Government Act, 1888, and that therefore a county council could under s. 57 amend s. 4 of 10 Anne, c. 11, by ordering the retransfer of a cemetery to the parish of which it originally formed a part. *Reg.* v. *London County Council*, 63 L. J., Q. B. 4 ; [1893] 2 Q. B. 454 ; 4 R. 531 ; 69 L. T. 580 ; 42 W. R. 1 ; 58 J. P. 21—C. A.

**Prohibition to County Council.**]—Whether prohibition lies to a county council to prevent them from making such an order, quære. *Ib.*

**Consent how, given.**]—Where a new street was allowed by the metropolitan board of works to be made of twenty feet in width, it was held that the consent did not require to be under the seal of the board. *Paddington Vestry* v. *Bramwell*, 44 J. P. 815.

**Costs of Returning Officer—Borough transferred from Kent to London.**]—The London county council is the proper authority to certify under 6 Vict. c. 18, s. 55, for the costs of the returning officer who prepares the registry of parliamentary voters for the borough of Deptford (transferred by s. 40 of the Local Government Act, 1888, to London), notwithstanding s. 92 of the latter act, which retains it in the county of Kent for county parliamentary purposes. "Occupation voters," in sub-s. 2 of s. 92, means county occupation voters, and not those for a parliamentary borough. *Weller* v. *Collins*, 54 J. P. 441.

2. District Boards of Works.

**Powers—Rates.**]—The effect of the 18 & 19 Vict. c. 120, is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation, and expenditure ; not for purposes of management only. The rates leviable in the component parishes, under the order of a district board, are raised for the benefit of the whole district, though apportioned between the parishes. Primâ facie, the rates ought be apportioned between the parishes according to their respective ratable value, and not according to the outlay in them respectively ; subject to allowances, at the discretion of the board, in cases falling within s. 159. An order of a district board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good under s. 158, and is final, if made by the board after an impartial exercise of the discretion given to it by s. 159 ; the decision of the board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive. *St. Botolph, Aldgate*, v. *Whitechapel Board of Works*, 3 El. & El. 89 ; 29 L. J., M. C. 228 ; 6 Jur. (N. S.) 1073 ; 2 L. T. 504 ; 8 W. R. 691.

—— **"Tower, District of."**]—At the time of the passing of the 18 & 19 Vict. c. 120, there was an ancient parish called the precinct of the Old Tower Without, adjacent to the Tower of London, and between that parish and certain parishes in the city of London, an extra-parochial place called Great Tower Hill, in the county of Middlesex, and partly in the city of London. Great Tower Hill, for paving and lighting purposes, was vested in trustees under a local act, who had power to make rates. By 18 & 19 Vict. c. 120, s. 90, all the powers of trustees under local acts in relation to paving, lighting, &c., any parish in schedule B. are to cease to be so vested, and to become vested in the board of works for the district. In schedule B., part 1, the Whitechapel district of works is to include "Tower, district of." There was no known district of that name :—Held, that it was intended to include

within the description "Tower, district of," as well the area of Great Tower Hill as the parish of the precinct of the Old Tower Without; and that since the 18 & 19 Vict. c. 120, the power of trustees under the local act had ceased. *Reg.* v. *Great Tower Hill (Trustees)*, 14 L. T. 792.

**Compensation to "Officer" for Loss of Office.**]—By s. 11 of the Metropolis Management (Plumstead and Hackney) Act, 1893, every officer in the service of the district boards therein mentioned who comes within the scope of the Superannuation (Metropolis) Act, 1866, and who has suffered pecuniary loss by abolition of office or by diminution or loss of salary, fees, or emoluments in consequence of the act of 1893, shall be entitled to pecuniary compensation:—Held, that the section must be construed to mean that compensation shall be paid to any of the servants of the district boards who have suffered loss in consequence of the act. *Legg* v. *Stoke Newington Vestry*, 59 J. P. 696.

### 3. Vestries.

#### a. Qualification of Members.

*See* Local Government Act, 1894 (56 & 57 Vict. c. 73).

**Rating—Occupation.**]—By s. 6 of the Metropolis Local Management Act, 1855 (as amended by s. 8 of the Metropolis Local Management Act, 1856), no person shall be capable of acting or being elected as a vestryman for any parish unless he occupies premises in the parish of a ratable value of not less than 40*l*. The defendant was the tenant of premises which appeared in the rate-book as of the ratable value of 125*l*. He sub-let a portion of such premises and occupied the remainder. The portion which he retained in his own occupation was found by the jury to be of a ratable value of not less than 40*l*., but was not separately assessed in the rate-book. The defendant occupied no other premises in the parish. In an action to recover penalties from the defendant for acting as a vestryman without being duly qualified:—Held, that the defendant was qualified by rating and occupation to act as a vestryman. *Gordon* v. *Williamson*, 61 L. J., Q. B. 820; [1892] 2 Q. B. 459; 67 L. T. 214; 40 W. R. 692; 57 J. P. 166—C. A.

By 18 & 19 Vict. c. 120 (Metropolis Local Management Act, 1855), s. 6, "the vestry elected under this act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l*. per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—Held, that to be qualified as a vestryman under the act, a person must be the occupier of real property in the parish, and be himself rated or assessed in respect of such occupation to the required amount. *Mogg* v. *Clark*, 55 L. J., Q. B. 69; 16 Q. B. D. 79; 53 L. T. 890; 34 W. R. 66; 50 J. P. 342—C. A.

By the Metropolis Management Act, 1855, s. 6, "the vestry elected under this act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l*. per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish, unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish":—Held, that a person is not qualified under this section unless he occupies the premises in respect of which he is rated. *Mogg* v. *Clark* (15 Q. B. D. 82) followed. *Reg.* v. *Soutter*, 60 L. J., Q. B. 71; [1891] 1 Q. B. 57; 64 L. T. 40; 39 W. R. 65; 55 J. P. 229—C. A.

—— **Joint Occupation.**]—A son was joint occupier with his father and brother of hereditaments in a metropolitan parish of sufficient value to entitle him to be elected vestryman; a rate was made in April, 1876, upon the father only; in May the son was elected vestryman; an objection was raised to his return, but the inspectors of votes declared him to be duly qualified and elected; in June the son sat and voted as vestryman; in July he required the demand-note of the rate made in April to be altered so as to extend to himself as well as to his father, and in October he jointly with his father paid the rate:—Held, that the son in May was neither rated nor assessed within the meaning of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 6, and was not qualified for election as vestryman; that the decision of the inspectors of votes as to his election was not conclusive; that by sitting and voting as vestryman in June he had incurred the penalty imposed by s. 54 for acting without qualification; and that his liability to the penalty was not taken away, upon the subsequent payment of the rate, by the Metropolis Management Amendment Act, 1856, s. 4. *Goodhew* v. *Williams*, 47 L. J., C. P. 313; 3 C. P. D. 382; 37 L. T. 454; 26 W. R. 107—C. A.

—— **Occupation not Personal.**]—Where a person is rated as the occupier of premises of the requisite value for qualifying for the office of vestryman, he is not disqualified from election to and acting in such office merely because his personal occupation is reduced below the qualifying value by reason of his having sub-let portions of the premises. *Hilton* v. *Haynes*, 15 R. 41.

**Loss of Qualification during Office.**]—By s. 6 of the Metropolis Local Management Act, 1855, rating and occupying are necessary qualifications for election to the office of vestryman. By s. 54, a person who acts as a member of any board or vestry without being qualified by rating and occupation is liable to a penalty:—Held, that a vestryman who was properly qualified at the time of his election did not cease to be a member of the vestry before the expiration of his term of office because he had ceased to occupy a house in the parish. *Reg.* v. *Williams, Visger, Ex parte*, 64 L. J., M. C. 34; 43 W. R. 140.

—— **Quo Warranto.**]—The writ of quo warranto will not lie against a vestryman, who has ceased to be qualified, unless he has acted as vestryman since disqualification. *Ib.*

**Member "interested in Contract"—Penalty—Evidence.**]—The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the contract. Afterwards the defendant was elected a member

of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant and the minute-book of the vestry containing his name as a member in attendance were put in as evidence at the trial:—Held, that s. 54 of the Metropolis Management Act, 1855, applied to contracts made as well before as after the election of a member, and that the defendant was "interested" in the contract in question within the meaning of that section; that there was evidence under s. 60 that the defendant had acted as member of the vestry; and that he was liable to penalties for having acted after he had "ceased" to be a member. *Hunnings* v. *Williamson*, 52 L. J., Q. B. 416; 11 Q. B. D. 533; 49 L. T. 361; 32 W. R. 267; 48 J. P. 135—C. A.

**Bankruptcy.**]—A churchwarden of a parish named in schedule B. of the Metropolis Local Management Act, 1855, is a member of the vestry of that parish within the meaning of s. 54, and is liable to a penalty if, after becoming bankrupt, he acts as a member of such vestry. *Leftly* v. *Mannington*, 48 L. J., Ex. 543; 4 Ex. D. 307; 40 L. T. 850; 27 W. R. 787.

### b. Election and Mode of Proceedings.

*See* Local Government Act, 1894 (56 & 57 Vict. c. 73).

**Parishioner, who is.**]—Under a charity scheme sanctioned by the court, by which a parish was empowered to elect children for Christ's Hospital, it was provided that no child should be eligible unless born in the parish, or unless his parents or one of them should be or should have been parishioners or a parishioner of the parish:—Held, that the word "parishioner" must be taken in its ordinary sense of a person occupying premises which are liable to be rated in the parish. *Etherington* v. *Wilson*, 45 L. J., Ch. 153; 1 Ch. D. 160; 33 L. T. 652; 24 W. R. 303.

Therefore, when a man took a house temporarily, before the election, for the purpose of obtaining a qualification for his son, for which he paid rent and rates, and his son was elected by the parishioners:—Held, that the qualification was good, and the election valid. *Ib.*

*See also* ECCLESIASTICAL LAW (VESTRY).

**Election—Qualification of Elector—Nonpayment of Illegal Rate.**]—By 18 & 19 Vict. c. 120, s. 16, no person shall be entitled to vote in any election of vestrymen unless he has paid all parochial rates due from him at the time of so voting. A declaration alleged that the defendant, knowing that plaintiff was a parishioner entitled to vote, fraudulently and maliciously prevented him from exercising his franchise. Plea shewed a rate good on the face of it, and alleged that when the plaintiff offered to vote the same was due from him, by reason whereof he was not entitled to vote. Replication, that the rate was for defraying expenses for which a rate could not legally be made, so that the rate was illegal and void. Rejoinder, that the rate was valid on the face thereof, and had not been adjudged illegal, nor had the validity of it been questioned in any ecclesiastical court:—Held, that a parishioner at the election of vestrymen, when his vote was challenged for nonpayment of a church rate, might shew that the rate was not due from him, being illegal and void; and therefore the replication was good, and the rejoinder bad. *Tozer* v. *Child*, 7 El. & Bl. 377; 26 L. J., Q. B. 151; 3 Jur. (N.S.) 774; 5 W. R. 287—Ex. Ch.

—— **Inspectors of Votes.**]—Inspectors of votes for the election of vestrymen have authority to inquire into the qualification of candidates, and are not to return as elected any person who, although he may have a majority of votes, was not qualified at the time of the election. *Ross, Ex parte*, 7 El. & Bl. 954; 26 L. J., Q. B. 312; 3 Jur. (N.S.) 1302.

—— **Refusal of Vote.**]—An action does not lie against a churchwarden presiding under 18 & 19 Vict. c. 120, at the election of vestrymen and auditors, for refusing the vote of a party entitled to vote for vestrymen and auditors, or for refusing to allow as a candidate a party entitled to be candidate, unless malice is alleged and proved. *Tozer* v. *Child*, 7 El. & Bl. 377; 26 L. J., Q. B. 151; 3 Jur. (N.S.) 774; 5 W. R. 287—Ex. Ch.

—— **Obstruction of Voting.**]—By 18 & 19 Vict. c. 120, s. 21, "if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or by any contrivance attempt to obstruct or prevent the purposes of such election, the person so offending shall, upon conviction, be liable," &c.:—Held, that an intentional obstructing of the voting by actual violence is an offence within the act. *Buckmaster* v. *Reynolds*, 13 C. B. (N.S.) 63.

—— **Validity—Quo Warranto.**]—The procedure by quo warranto is applicable to question the validity of the election of a vestryman elected under the provisions of the Metropolis Management Act, 1855. *Reg.* v. *Soutter*, 60 L. J., Q. B. 71; [1891] 1 Q. B. 57; 63 L. T. 279; 39 W. R. 8; 55 J. P. 229.

**Vestry Meeting—Shew of Hands.**]—By 18 & 19 Vict. c. 120, s. 28, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to s. 202, it was provided that all questions shall be determined by a shew of hands, or by a division, if demanded, with the names recorded:—Held, that the division or poll might take place after a shew of hands. *Tear* v. *Freebody*, 4 C. B. (N.S.) 228.

—— **Mode of taking Vote.**]—A burial board appointed under the 15 & 16 Vict. c. 85, laid before the vestry of the parish a proposal that the board should be authorised to borrow any sums of money not exceeding 20,000*l.* for their purposes. This proposal was not put to the vote by a shew of hands, but was met by an amendment, that the matter should be referred back to the board to be reconsidered; and a shew of hands being taken upon this amendment, it was carried by a majority. A division was then demanded, whereupon the chairman said that there should be a poll upon the original proposal and the amendment together, and that the votes must be affirmatively for one or the other, and not negatively as to either, and that

no further amendment could afterwards be received. A majority of affirmative votes were given for the original resolution:—Held, that the proceeding was too informal to authorise the burial board to borrow the money; for that no shew of hands having been taken upon the original resolution, it could not properly be put to the poll, having regard to the provisions of the special act regulating the proceedings of this particular vestry. Held, also, that the manner of putting the resolution and amendment to the poll, and requiring only affirmative votes on each, was informal, because the majority of votes being given for the original proposition did not prove that it was preferred to any other, but merely to that particular proposition which had been put as an amendment, and which was not a direct negative of it. *Elt* v. *St. Mary's, Islington, Burial Board*, 1 Kay, 449.

A "division" of a vestry, "to be taken in the manner prescribed by the 58 Geo. 3, c. 69," may be taken by a poll of all the ratepayers, such poll being an adjournment of the vestry. At such poll, the original proposition and an amendment inconsistent with it, being the only one proposed, may be put to the vote, and affirmative and negative votes may be taken upon each, and in that way the sense of the voters may be ascertained. *Ib.*

Observations upon the best mode of taking the opinion of a meeting upon a resolution and amendment. *Ib.*

The proper way of taking the vote at a vestry is by a poll, the meeting being adjourned for that purpose, if necessary or convenient. *Egham Burial Board, In re*, 3 Jur. (N.S.) 956.

### c. Powers.

**Election of Minister.**]—Where the right of electing the minister of a parish had been by deed vested in trustees for the parishioners:—Held, that it was not transferred to the vestry, or otherwise affected by 18 & 19 Vict. c. 120, or by 19 & 20 Vict. c. 112. *Carter* v. *Cropley*, 8 De G. M. & G. 680; 26 L. J., Ch. 246; 3 Jur. (N.S.) 171; 5 W. R. 248.

**Appointment of Governors and Directors of the Poor.**]—A parish was previously to 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112, governed by local acts by which it was provided that the vestrymen should appoint governors and directors of the poor, who should make out the poor-rates for the parish:—Held, that since the passing of these acts, the old vestry had no longer the power of appointing the governors and directors, but that the power of doing so was vested in the new vestry by virtue of 18 & 19 Vict. c. 120, s. 11, or 19 & 20 Vict. c. 112, s. 3. *Reg.* v. *Rendle*, 1 B. & S. 54; 30 L. J., M. C. 135; 7 Jur. (N.S.) 1072; 9 W. R. 666.

**Election of Almspeople.**]—Under a deed for the foundation of a charity, the right of electing almspeople was vested "in the minister, churchwardens, overseers of the poor, and such of the parishioners as should pay taxations to the poor, and should not keep inmates or poor lodgers":—Held, that this was not "a duty, power, or privilege relating to the management and relief of the poor, or the administration of any money or other property applicable to the relief of the poor," within 19 & 20 Vict. c. 112, s. 3, and that the right of electing almspeople was not transferred to the new vestry appointed under that act. *Att.-Gen.* v. *Drapers' Co.*, 4 Drew. 299; 27 L. J., Ch. 542; 6 W. R. 357.

**Election of Trustees to a Charity.**]—When a decree of the court of chancery and a scheme framed thereunder gave the parishioners and inhabitants of a metropolitan parish in vestry assembled the power to elect new trustees of a charity:—Held, to be exercisable by a vestry appointed under 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112. *Hayle, In re*, 31 L. J., Ch. 612; 8 Jur. (N.S.) 810; 7 L. T. 18; 10 W. R. 577.

**Superannuation Allowance to Officer—Discretion of Vestry.**]—A metropolitan vestry has a discretion under 29 Vict. c. 31, s. 1, to grant or to refuse a superannuation allowance to a retiring officer; but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in s. 4. *Reg.* v. *St. George's, Southwark*, 56 L. J., Q. B. 652; 19 Q. B. D. 533; 35 W. R. 841; 52 J. P. 6.

A metropolitan vestry has a discretion under 29 & 30 Vict. c. 31, s. 1, not merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in s. 4. *Reg.* v. *St. George's, Southwark* (19 Q. B. D. 533), overruled. A vestry in declining to grant a superannuation allowance to a retiring officer were influenced by the idea that they had no discretion as to the amount:—Held, that the vestry had not properly exercised their discretion, and that a mandamus should go to them to consider and determine the application. *Reg.* v. *St. Pancras Vestry*, 59 L. J., Q. B. 244; 24 Q. B. D. 371; 62 L. T. 440; 38 W. R. 311; 54 J. P. 389—C. A.

**—— Refusal of—Majority of Vestry pledged to vote against Pensions.**]—The majority of the members of a metropolitan vestry had been elected on a programme, part of which included the voting against granting pensions to salaried officials of the vestry. On an application by a salaried official for a pension the vestry appointed a committee to consider and report on the claim, which report set out various grounds why a pension should not be granted. The vestry adopted this report and refused the application, whereupon the applicant obtained a rule calling upon the vestry to hear and determine the matter on the ground that, in view of the pledges of the majority of the vestry, the discretion of that body had not been lawfully exercised:—Held, that the rule should be discharged, as the question had been properly considered. *Reg.* v. *Bromley St. Leonard Vestry*, 60 J. P. 725.

**Special Payment to Vestry Clerk.**]—A special payment made by the vestry of a metropolitan parish to the vestry clerk, and ordered to be charged upon the poor-rate, for preparing the valuation list required by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), was disallowed by the poor-law auditor, on the ground that the preparation of the list was among the statutory duties of the vestry clerk, for which he was remunerated by salary, and because the charge was excessive, there being nothing to shew the payment to any person of any part of

that sum :—Held, that the disallowance must be quashed, for there was nothing in the Vestry Clerks Act (13 & 14 Vict. c. 57) to shew that the preparation of the valuation list was among the general duties of the vestry clerk, and that, with regard to the alleged excess in the charge, the claim of the vestry clerk was not limited to his expenses, and it did not appear that the amount paid was not a reasonable allowance for his work and outlay. *Reg.* v. *Cumberlege*, 46 L. J., M. C. 214 ; 2 Q. B. D. 366 ; 36 L. T. 700 ; 25 W. R. 605.

## B. JURISDICTION.

### 1. STREETS.

#### a. What are.

**"Street."**]—Though the word "street" may include the houses abutting or fronting upon a public thoroughfare, as well as the actual roadway or footways, yet the strict and primâ facie meaning of the word "street" is confined to the roadway and footways. See on the construction of the Holborn Valley Improvement Act, 1864. *London Corporation* v. *Galloway*, 2 De G. J. & S. 213. *S. C.* in H. L. 35 L. J., Ch. 477 ; L. R. 1 H. L. 34 ; 12 Jur. (N.S.) 747 ; 14 L. T. 865.

—— **In Proviso to s. 6 of Act of 1878.**]—In the proviso to s. 6 of the act of 1878 "street" has the meaning given to it in the interpretation clause (s. 250) of the act of 1855, and to come within the exemption of the proviso it must have been actually formed or laid out for the purpose of building at the time when the act of 1878 was passed. *London County Council* v. *Mitchell*, 63 L. J., M. C. 104 ; 10 R. 308.

—— **Unfinished Road—Liability to Light.**]—An unfinished road (in a parish mentioned in schedule (A) of 18 & 19 Vict. c. 120), containing inhabited houses along part of it, communicated at one end only with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property, and the road itself had not been dedicated to the public. The vestry of the parish refused to light the road under s. 130 :—Held, that the vestry was not bound to treat the road as a street under ss. 130, 250. *Reg.* v. *St. Mary, Islington, Vestry*, El. Bl. & El. 743.

—— **Mews—Dedication to the Public.**]—A vestry proposed to erect a public urinal in a mews, not a thoroughfare, the freehold of which was in the plaintiffs as trustees. The mews had for seventy years or more been open to the public at all times ; no barrier had ever been put across the entrance. The mews had been lighted, cleansed, and paved by the vestry ; nothing had ever been paid by the trustees for lighting, cleansing, or paving. The land adjoining the mews, the occupants of which had the use of the mews, was in lease during the whole period. The lessees had applied to the vestry for leave to make erections upon and interfere with the soil of the mews, but such applications were made without the knowledge of the trustees :—Held, that the soil of the mews had been dedicated to the public, and it was a "street," being a highway within the meaning of 18 & 19 Vict. c. 120, s. 88. *Vernon* v. *St. James' Vestry*, 49 L. J., Ch. 130 ; 42 L. T. 82. Affirmed, 29 W. R. 222—C. A.

—— **Open Space in Front of House.**]—A. occupied a public-house in a contiguous line of houses, in a district within 18 & 19 Vict. c. 120. Immediately in front of these houses was a public footway, then an intermediate space, then a public carriage way, then an intermediate space, then a public footway immediately in front of another line of houses, facing the first-mentioned line. The intermediate spaces had always been made use of by the owners of the houses opposite, in such manner as suited their respective occupations ; in some instances they had erected permanent structures, and A., whose house was a public-house, had, before the act came into operation, placed in the intermediate space opposite to his house a permanent horse-trough, and the carts of his customers stood on that space while the drivers and horses were resting ; he had also put there movable seats, and in summer a movable shed, and had fixed sockets into the ground. The footway was always left clear. A. paid the owner of the soil for permission to use the intermediate space. The public passed over the intermediate space as of right, subject to the user of it by the owners of the houses. Persons wishing to get from the footway to the carriage road did so without objection. The vestry elected under the act having removed A.'s shed and seats, as obstructions within s. 120 :—Held, that the act did not justify them, first, because the intermediate space was not part of a street within the meaning of the act ; and, secondly, because the shed and seats were not projections or obstructions against, or in front of, any house within the meaning of the act. *Le Neve* v. *Mile End Old Town Vestry*, 8 El. & Bl. 1054 ; 27 L. J., Q. 208 ; 4 Jur. (N.S.) 660 ; 6 W. R. 338.

—— **Meaning of—Statement of Case.**]—The G. Road was a lane 340 feet long ; there were no buildings on either side of it, except four houses at one part of it, and the lane was bounded on the north and south by back gardens and the backs and sides of houses. In proceedings taken by the Fulham board of works for the paving of the lane as a "new street" within the meaning of the metropolis management acts, the magistrate held that the lane was not a "street," and refused to state a case, as he considered the question one of fact :—Held, that the question whether the lane was a "street" or not was a question of fact and not of law, and that the magistrate could not be compelled to state a case. *Reg.* v. *Sheil*, 50 L. T. 590 ; 49 J. P. 68.

—— **Includes New Street.**]—The word street in the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 53, includes new streets as defined by s. 112, as well as old streets. *Sheffield* v. *Fulham Board of Works*, 1 Ex. D. 395.

The words "a street" in s. 53 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), include "new streets" as defined by s. 112, as well as old streets. *St. John's, Hampstead* v. *Cotton*, 56 L. J., Q. B. 225 ; 12 App. Cas. 1 ; 56 L. T. 1 ; 35 W. R. 505 ; 51 J. P. 340—H. L. (E.)

**"New Street."**]—The words "new street," as used in the Metropolis Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, include a new street in the ordinary and popular sense of the term. *Pound* v.

*Plumstead Board of Works*, 41 L. J., M. C. 51; L. R. 7 Q. B. 183; 25 L. T. 461; 20 W. R. 177.

Therefore, a country lane which was bounded by hedges and fields and was repaired by the parish time out of mind becomes a new street within the meaning of those statutes when houses are built along the sides of the lane. *Ib.*

The definition of the expression "new street" in s. 112 of the Metropolis Management Act, 1862, includes only such places as are streets in the ordinary sense of the term, and does not include all places coming within the definition of the word "street" in s. 250 of the Metropolis Management Act, 1855. The two definitions cannot be incorporated for the purpose of determining whether a particular place is or is not a "new street." *Arter* v. *Hammersmith Vestry*, 66 L. J., Q. B. 460; [1897] 1 Q. B. 646; 76 L. T. 390; 45 W. R. 398; 61 J. P. 279.

—— **Country Lane.**]—Prior to the Metropolis Management Act, 1855, an ancient highway, which was a country lane and had been repaired by the parish from time out of mind, existed in a district within the act; after the passing of that statute, and before the passing of the Metropolis Management Amendment Act, 1862, twenty-one houses were built along the side of the lane, several of which belonged to P.; afterwards ninety houses were built along the side of the lane. N. was the owner of the soil and freehold of five new private roads leading out of the lane; but he had no exclusive occupation or possession of them:—Held, that the lane after the erection of the houses became a new street within the meaning of the acts; that P. and N. were the owners of land abounding or abutting thereon, and that they were liable to contribute to the expense of paving the same. *Pound* v. *Plumstead Board of Works*, supra.

—— **Ancient Road newly built on.**]—The Harrow road is an ancient road, and was formerly under the management of turnpike trustees and commissioners until 1864, when the vestry of the parish took charge of it for the first time. The part of the Harrow road eastward of Elgin road had been built over for many years. In 1866 a person built a row of houses called Frankfort Terrace on the side of the Harrow road on the part westward of Elgin road. There was no sewer on that part of the road, but sewer rates had been levied and paid in respect of the land adjoining for more than five years prior to 1856. When Frankfort Terrace was built the parish constructed a sewer in that part of the road, and, upon its completion, the vestry apportioned the whole of the expense of it upon the owners of the adjoining land under 25 & 26 Vict. c. 102, s. 52:—Held, that the vestry was right, and that the road built upon was a "new street" within that section; and that the owners of the adjoining land were liable to be assessed for their respective portions of the whole expense. *Sawyer* v. *Paddington Vestry*, 40 L. J., M. C. 8; L. R. 6 Q. B. 164; 23 L. T. 662; 19 W. R. 96.

Held, also, that the word "street" in s. 53, did not apply to a new street within s. 52. *Ib.* But see *St. John's, Hampstead*, v. *Cotton*, 56 L. J., Q. B. 225; 12 App. Cas. 1; 56 L. T. 1; 34 W. R. 505; 51 J. P. 340—H. L. (E.) (supra).

—— **Highway substantially bounded by Land—Not built on within Twenty Years.**]—A road which substantially has land only bounding or abutting upon it, and upon which no houses have been built within twenty years, is not a new street within the meaning of s. 105 of the Metropolis Management Act, 1855, or s. 77 of the Metropolis Management Amendment Act, 1862. The owners of such land are therefore not liable to contribute to the expenses of paving the road. *Battersea Vestry* v. *Palmer*, 66 L. J., Q. B. 77; [1897] 1 Q. B. 220; 75 L. T. 362; 45 W. R. 110; 60 J. P. 774.

—— **Carriage Way not dedicated to the Public.**]—In the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 112, the expression "new street" is not confined to streets dedicated to the public. *St. Mary, Islington, Vestry* v. *Barrett*, 43 L. J., M. C. 85; L. R. 9 Q. B. 278; 30 L. T. 11; 22 W. R. 402.

There were houses on both sides of a road, the footpaths of which on each side had been paved by the vestry of the parish, and were used by the public. The carriage way had never been dedicated to the public; the vestry paved the carriage way, and sought to recover the expense from the owner of the houses under 18 & 19 Vict. c. 120, s. 105, on the ground that the carriage way was a new street:—Held, that although the carriage way had not been dedicated to the public, it was a new street within 25 & 26 Vict. c. 102, s. 112; and that the owner was liable to pay the expense of paving it under 18 & 19 Vict. c. 120, s. 105. *Ib.*

—— **Way over a Bridge.**]—A railway company agreed by articles dated 12th June, 1868, with a water company, to build a bridge to be devoted to the use of the public, in which bridge the water company might lay its pipes. The bridge was built and used by the public for eighteen months. By an indenture of 28th December, 1871, the railway company covenanted with the water company to retain the possession of the bridge (subject to the user thereof by the public) under its control. The vestry of the district paved the road of which the district formed part:—Held, that the dedication of the bridge to the use of the public might be inferred; that the roadway over it was a new street within the 18 & 19 Vict. c. 120, and that the railway company was liable to contribute to the paving of the road. *North London Ry.* v. *St. Mary, Islington, Vestry*, 27 L. T. 672; 21 W. R. 226.

—— **Jurisdiction of Magistrate—Power to review Decision.**]—A metropolitan police magistrate, on a summons for an order, under 18 & 19 Vict. c. 120, ss. 105, 226, upon the proprietor of houses in D., alleged to be a new street within the metropolis, for his share of the expenses of paving it, after hearing the parties and their evidence, dismissed the summons on the ground that D. was not a new street within the meaning of the enactment, because it was an old highway. A rule, calling on him to hear and adjudicate on the complaint, was obtained, with a view of obtaining the decision of the court, that D. might be a new street within 18 & 19 Vict. c. 120, s. 105, though it was an old highway:—Held, by Lord Campbell, C.J., Wightman and Crompton, JJ., that the court could not inquire whether the magistrate came to a right conclusion or not, but only whether he had adjudicated; and, they being of opinion that he had done so, the rule

was discharged without any expression of opinion as to whether he was right or wrong in his construction of the act. Erle, J., dissentiente, and holding that, as the magistrate could not safely proceed unless D. was a new street, his decision, that it was not, was such as to give the court jurisdiction to determine whether he was right or wrong in that decision. *Reg.* v. *Dayman*, 7 El. & Bl. 672; 26 L. J., M. C. 128; 3 Jur. (N.S.) 744; 5 W. R. 578.

A magistrate having, upon the construction of the 5th rule of s. 26 of 18 & 19 Vict. c. 122, decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street, the court declined to interfere with his decision. *Newman* v. *Baker*, 8 C. B. (N.S.) 200.

—— **Roadway closed by Gate.**]—The line of houses adjoining the road terminated at the east end of the bridge, while after crossing the bridge there was but one cottage, and the roadway ceased to be a public thoroughfare, being closed by a private gate. A small portion of the slope of the cutting abutted on the road, between the west end of the bridge and the private gate:—Held, that the railway company were not liable to contribute to the paving of the road, as it ceased at the eastern extremity of the bridge to be a "new street" within the meaning of the act. *L. B. & S. C. Ry.* v. *St. Giles, Camberwell, Vestry*, 48 L. J., M. C. 184; 4 Ex. D. 239; 41 L. T. 162.

—— **Road and Footway.**]—A footway adjoining a road has been paved by the public authorities and the expenses charged to the ratepayers generally. In 1890 the public authorities declared the whole roadway a "new street" and proceeded to pave the same and apportion the expense to the adjoining frontages. The appellant, one of the frontagers, objected to pay on the ground that the footway having been taken over and repaired at the public expense before the Metropolis Management Amendment Act, 1862, was not a "new street" within s. 112 of that act. The magistrate found the tar-paving to be temporary work:—Held, that the footway so taken into charge with the roadway was a "new street" within s. 112, and that the public authorities were entitled to treat the footway and roadway as a whole. *Wilson* v. *St. Giles, Camberwell*, 61 L. J., M. C. 3; [1892] 1 Q. B. 1; 65 L. T. 790; 40 W. R. 41; 56 J. P. 167.

—— **Old Highway—Erection of Buildings—Paving Expenses.**] — The expression "new street" in s. 105 of the Metropolis Management Act, 1855, is not limited by the definition of "new street" in s. 112 of the Metropolis Management Amendment Act, 1862, and includes a new street in the popular sense of the term; therefore, an ancient country highway may become a new street in the popular sense where buildings have been erected on the frontage either shortly before or after the Metropolis Management Act, 1855, came into operation, and, being a "new street" within s. 105, the expenses of paving such new street are chargeable upon the owners. *Pound* v. *Plumstead Board of Works* (L. R. 7 Q. B. 183) followed. *St. Giles, Camberwell* v. *Crystal Palace Co.*, 61 L. J., Q. B. 802; [1892] 2 Q. B. 33; 66 L. T. 840; 40 W. R. 648; 57 J. P. 5—C. A.

A road, formerly a turnpike road, which after the turnpike trust has expired becomes by the erection of houses on its side a new street within the ordinary meaning of the words, is not prevented from being a new street within the metropolis management acts, by the mere fact that repairs to the footway of a temporary character have been undertaken by the vestry. *Davis* v. *Greenwich Board of Works*, 64 L. J., M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517—C. A.

**"Street for Foot Traffic only."**] — See *Metropolitan Board of Works* v. *Nathan* and *London County Council* v. *Davis*, post, col. 1059.

**"Street for Carriage or Foot Traffic."**]—See *Wood* v. *London County Council*, post, col. 1059.

**"Existing Street"—Projecting Fence.**]—The appellant was the owner of a house and garden abutting upon an old public carriage way. The house of the appellant as well as several others were erected on either side of the road prior to the passing of the Metropolis Management Act, 1878. In 1889 the appellant pulled down the wall that separated his garden from the road and erected a new fence a few feet further back from the road; he subsequently commenced to build shops upon the site of the garden, and extended his boundary fence to its original position, which was less than the prescribed distance from the centre of the roadway within the meaning of s. 6 of the above act:—Held, that the road was an "existing street" within that section, and therefore that the appellant could not be required to set back his boundary fence. *Ellis* v. *London County Council*, 67 L. T. 558; 57 J. P. 24.

**Closing of Passage—"Receptacle for Filth."**] —At a special session of justices held under s. 79 of 57 Geo. 3, c. 29 (local and personal), an application for an order to close a certain passage was refused solely on the ground that there was no jurisdiction to make the order, because it did not appear that the passage was in fact "a harbour or receptacle for filth and rubbish" within the meaning of the preamble to the said section:—Held, that the construction put upon the section by the justices was erroneous, for its meaning was to give them jurisdiction if the passage was likely to, or might possibly become, a harbour or receptacle for filth and rubbish. *Reg.* v. *Cloete*, 64 L. T. 90; 55 J. P. 310.

**"Pavement"—Tramway.**]—A tramway is not a pavement of a street, and consequently not within the powers conferred on vestries by 18 & 19 Vict. c. 120, s. 98. *Reg.* v. *Train*, 2 B. & S. 640; 3 F. & F. 22; 31 L. J., M. C. 169; 8 Jur. (N.S.) 1151; 10 W. R. 539; 9 Cox C. C. 180.

### b. Property in.

**Paramount Rights reserved by Owners.**]—The provisions of the highway acts and the metropolis local management act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. *St. Mary, Newington, Vestry* v. *Jacobs*, 41 L. J., M. C. 72; L. R. 7 Q. B. 47; 25 L. T. 800; 20 W. R. 249.

**Street vesting in Board—Disused Street.**]—The 96th section of the Metropolis Local

Management Act, 1855, provides that "all streets being highways, and the pavements, stones and other materials thereof shall vest in and be under the management of the vestry or district board of the parish or district in which such highways are situate":—Held, that what "vests" in the board or vestry is a "street being a highway," that is, the street if and so long as it is a highway; and accordingly when a street ceases to be a highway by being stopped up or diverted or turned, and another substituted in lieu thereof, the original limit for which the street vested having arrived, the street ceases to be vested in the board or vestry, and no words of defeasance or divesting are necessary. Although there is an estate or interest in the material thing—some portion, including the surface of the soil over which the street extends—that estate or interest is limited by reference to the period for which it is used in a particular way. The duration or period of the estate is that during which the street is used as a highway; and as future streets when they become highways will be vested in the board or vestry, so existing streets when they cease to be highways cease to be vested, the period of the estate vested in the public body having ceased when the purpose for which the streets were so vested has ceased. The 96th section gives to these public bodies, over and above the easement of passage which the public possess and the powers of control and management of the roads which the surveyor of highways possessed under the Highways Act, such right of property and such possessory right in the streets as to enable these bodies to maintain actions in respect of that property or possessory right. *Coverdale* v. *Charlton* (4 Q. B. D. 104) explained. *Rolls* v. *St. George, Southwark Vestry*, 49 L. J., Ch. 691; 14 Ch. D. 785; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680—C. A.

**Dedication — Roadway over a Bridge.**]—A railway company agreed by articles dated 12th June, 1868, with a water company, to build a bridge to be devoted to the use of the public, in which bridge the water company might lay its pipes. The bridge was built and used by the public for eighteen months. By an indenture of 28th December, 1871, the railway company covenanted with the water company to retain the possession of the bridge (subject to the user thereof by the public) under its control. The vestry of the district paved the road of which the district formed part:—Held, that the dedication of the bridge to the use of the public might be inferred; that the roadway over it was a new street within the 18 & 19 Vict. c. 120, and that the railway company was liable to contribute to the paving of the road. *North London Ry.* v. *St. Mary, Islington*, 27 L. T. 672; 21 W. R. 226.

**Overhead Wires.**]—By the Metropolis Management Act, 1855, s. 96, "all streets, being highways, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire:—Held, that what was vested in plaintiffs was the property in the surface of the ground, together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction:—Held, also, that defendants did not require plaintiffs' consent under 26 & 27 Vict. c. 112, s. 12, to entitle them to place the wire across the street. *Wandsworth Board of Works* v. *United Telephone Co.*, 53 L. J., Q. B. 449; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—C. A.

**Vauxhall Bridge—Street Lamps.**]—By a local lighting and paving act, the property in the lamps along the road and on half of Vauxhall Bridge is vested in commissioners; and the obligation to light the road and half the bridge is transferred from the bridge company to the commissioners; and by 18 & 19 Vict. c. 120, ss. 90, 93, the property in such lamps and the obligation to light the bridge are transferred from the commissioners to the vestry of Lambeth. *Reg.* v. *Lambeth Vestry*, 3 B. & S. 1; 31 L. J., Q. B. 252; 9 Jur. (N.S.) 48; 6 L. T. 644.

### c. Formation and Alteration of.

**Laying out — Through Communication.**]—A private act (53 & 54 Vict. c. ccxliii.), s. 35, provides as follows: "No road, passage, or way, which will not directly communicate at both ends with a public carriageway, shall be formed or laid out as a public carriageway without the consent in writing of the council," that is, the London County Council, and the section goes on to say that, "in giving their consent the council may prescribe all such conditions as they may think fit, provided always that, in case any person . . . considers that any conditions of the council are unreasonable, such person may serve notice of appeal . . . and such appeal shall stand referred to an arbitrator . . . whose decision shall be final." The new road in question purported not to communicate between two different streets, but it did not purport to lead out of one street, and after going round some distance to come back again into the same street:—Held, that the appellants should have been satisfied if the new road in question was shown to be about to come back again into the same street, there being no evidence that the new road was not going to return to the same street; that, as to the consent of the council to allow respondents to continue their road being required, such construction of the section would make it almost impossible to develop a building estate. *London County Council* v. *Edmundson*, 66 L. T. 200; 56 J. P. 343. *And see cases*, infra, col. 1060.

—— **Consent of District Board to Excavations.**]—A landowner having obtained the consent of the London County Council to lay out a new street for building, and the consent of the district board of works to construct a sewer running down and below it with gullies and house-drains, sent sections to the district board of works showing the excavations he proposed to make, with a request that the board would inform him of the conditions they deemed it necessary to impose upon him in excavating. The board replied that they had resolved to refuse their approval of the excavation of any

gravel or subsoil beyond what was necessary to level or form a foundation for paving the street:—Held, that upon the true construction of the 2nd clause of s. 6 of the Metropolis Management Amendment Act, 1890, the only power given to a district board of works, where a street had been laid out, was to impose conditions, and that the board had no power to place their veto upon excavation. *Wandsworth Board of Works* v. *Bird*, 61 L. J., M. C. 97; [1892] 1 Q. B. 481; 66 L. T. 376; 40 W. R. 464; 56 J. P. 280.

—— **"For Foot Traffic only."**]—Artizans' dwellings, comprising twenty-six tenements, accommodating about 250 persons, were built, opening on an approach 100 feet long and sixteen feet wide, entered from a public street through a gateway ten feet wide, over which one of the buildings was carried. A roadway had previously existed on the site, with warehouses abutting thereon, and the gateway included the site of a former gateway, which had been pulled down and altered to a greater width. The approach did not afford communication with any other public street, and was for the sole use and convenience of the tenants of the dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large:—Held, that the approach had not been laid out as "a street for foot traffic only" within the meaning of s. 8 of the Metropolis Management and Building Acts (Amendment) Act, 1882 (45 Vict. c. 14), so as to require the sanction of the Metropolitan Board of Works to the laying out thereof. *Metropolitan Board of Works* v. *Nathan*, 54 L. T. 423; 34 W. R. 164; 50 J. P. 502.

Where a space or passage is formed for the sole purpose of giving access to artizans' dwellings from a public street, such space or passage is not necessarily "a street for foot traffic only" within the meaning of ss. 7 & 8 of the Metropolis Management and Building Acts (Amendment) Act, 1882. *London County Council* v. *Davis*, 64 L. J., M. C. 212; 15 R. 509; 43 W. R. 574; 59 J. P. 583.

—— **"For Carriage or Foot Traffic."**]—The appellant was erecting mansions (containing flats) in the form of a quadrangle. There was only one entrance to the quadrangle, which was, in fact, the courtyard of the mansions. This entrance was closed by means of iron gates, and was for the convenience of the tenants of the flats and those visiting them, with or without carriages. The public at large were entirely excluded:—Held, that the appellant had not commenced to form or lay out a "street for carriage or foot traffic" within the meaning of ss. 7 and 8 of the London Building Act, 1894. *Wood* v. *London County Council*, 64 L. J., M. C. 276; 15 R. 569; 73 L. T. 313; 44 W. R. 144; 59 J. P. 615.

**Width of Roads to be Laid out for Building.**]—By 25 & 26 Vict. c. 102, s. 98, no existing road, passage, or way, being of a less width than forty feet shall be hereafter formed or laid out for building as a street for the purposes of carriage traffic, unless such road, passage, or way be widened to the full width of forty feet; the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any:—Held, that this provision did not apply where the buildings abutted in the rear upon an old lane of less width than forty feet. *Metropolitan Board of Works* v. *Cox*, 19 C. B. (N.S.) 445.

—— **"Open at both Ends."**]—By the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 98, no road being of less width than forty feet shall hereafter be formed or laid out for building as a street for the purposes of carriage traffic unless such road be widened to the full width of forty feet, or for the purposes of foot traffic only unless such road be widened to the full width of twenty feet, "or" unless such streets respectively shall be open at both ends:—Held, that such street must be of the width prescribed and be also open at both ends. *Metropolitan Board of Works* v. *Steed*, 51 L. J., M. C. 22; 8 Q. B. D. 445; 45 L. T. 611; 30 W. R. 891; 46 J. P. 199.

The appellants being owners of a plot of land abutting on the thoroughfare in the metropolis, laid out a road for building as a new street for carriage traffic, and erected, at the junction thereof with the thoroughfare, certain piers with the intention of hanging gates thereon for the purpose of excluding the public, without the consent of the Metropolitan Board of Works or their successors. The road in question had never been dedicated to or used by the public. The appellants were summoned before a magistrate, and convicted for having laid out a new street, with an entrance thereto not of the full width of such street nor open from the ground upwards, contrary to 18 & 19 Vict. c. 120, and a by-law made thereunder, and to s. 98 of 25 & 26 Vict. c. 102. Subsequently, the appellants were summoned before a magistrate and convicted for permitting the said road to be continued, formed and laid out for a certain number of days, not being open at both ends from the ground upwards as directed by the said statute and by-law:—Held, that this conviction was right. *Daw* v. *London County Council*, 59 L. J., M. C. 112; 62 L. T. 937; 54 J. P. 502.

—— **Consent of Board—How given.**]—B. was the owner of a house, which had its front and only entrance in F. street, and behind it a garden with a dead wall at the further end. A new street was made parallel to F. street, of which the dead wall at the end of B.'s garden was part of the line of street. This new street was a mews, which the Metropolitan Board allowed to be made of twenty feet in width:—Held, that the consent of the Metropolitan Board to the mews, being of twenty feet in width, did not require to be under the seal of the board. *Paddington Vestry* v. *Bramwell*, 44 J. P. 815.

—— **Notice to District Surveyor—Complaint more than Six Months after.**]—L. was summoned by the Metropolitan Board of Works for laying out a new street of less than the required width, contrary to 25 & 26 Vict. c. 102, s. 98. L. gave notice of his intended building in May, 1883, to the district surveyor, and paid his fees, but no notice was given by the surveyor to the board till November, 1883. The complaint was made in March, 1884:—Held, that notice to the district surveyor was the date of the discovery by the board, and, therefore, the complaint was too late, being more than six months after the discovery, and so contrary to 25 & 26 Vict. c. 102,

c. 107. *Metropolitan Board of Works* v. *Lathey*, 49 J. P. 245.

—— **Penalties for Breach of Regulation.**]—In 1864, several plots of land abutting on one side of a lane were sold for building purposes; the lane was an ancient carriage way, and had buildings at intervals, on both sides, erected before 1862; the lane varied in width from forty-one feet to twenty-eight feet, which was the width opposite the plots, and on the other side of the road was a permanent enclosure belonging to a church and other buildings erected before 1862. In July, 1865, A. bought the plots, houses having been built on two of them, the front walls of the houses being twenty-seven feet from the old wooden boundary fence of the lane. On the 26th of September, 1865, A. began to remove this fence, which had been left untouched, and to substitute a permanent wall and railing, and the work was completed on the 14th of October. On the 6th of October the board of works was informed of what A. was doing, and in March, 1866, they laid an information against him to recover penalties for contravening the 25 & 26 Vict. c. 102, ss. 98, 107. At the hearing the magistrate found that A., by taking down the old fence and erecting the permanent fence, did begin to form and lay out the road for building as a street on the 26th of September, and completed such forming on the 14th of October; that the road was not required by s. 98 to be widened to forty feet from the opposite fence, but only to the width of twenty feet from the centre of the roadway to the boundary fence of A.'s ground; and he convicted A. in certain penalties:—Held that the conviction was right. *Taylor* v. *Metropolitan Board of Works*, 36 L. J., M. C. 53; L. R. 2 Q. B. 213; 15 W. R. 765.

By 25 & 26 Vict. c. 102, s. 98, no existing roadway of a width less than forty feet shall be laid out for building as a street for carriage traffic unless such road be widened to the width of forty feet, taken half on either side of the centre of the roadway. An owner of land had in 1866 erected some houses thereon, the gardens in the rear of which abutted upon an ancient lane, and some of the owners of land adjoining this lane had in 1867 begun to form it into a street for carriage traffic. He, however, himself had done no act towards forming or laying out the lane as a street for the purposes of carriage traffic, otherwise than by the removal in 1866 of an old bank and thorn fence, and the substitution of an oak fence three feet within his own land, nor had he any intention of doing any such act, or of putting up any building fronting towards the lane:—Held, that he had not committed any offence against the statute, and was not bound to set back his oak fence, so as to leave a space of twenty feet between it and the centre of the lane. *Metropolitan Board of Works* v. *Clever*, 37 L. J., M. C. 126; L. R. 3 C. P. 531; 18 L. T. 723; 16 W. R. 1016.

**Widening — Power to take Land.**] — Two houses adjoining Wood-street, in the city of London, having been destroyed by fire, the outer walls being left standing, the commissioners of sewers adjudicated that it was desirable to widen Wood-street, and that the two houses, and the land on which they stood, projected into and prevented them from widening the street, and that the possession and purchase of those houses was necessary for that purpose, and they directed their solicitor to treat for the purchase. Notice to treat was accordingly given for the whole of the houses. The owners brought their action for an injunction to restrain the commissioners from proceeding on this notice. It was admitted by the commissioners that they only meant to use a strip of five-and-a-half feet in breadth for widening the street, and intended to sell the rest without giving the plaintiffs any option of pre-emption:—Held, that the plaintiffs were entitled to an injunction, for that the adjudication was ultra vires, the commissioners having no power to adjudicate that the possession of the whole of the piece of land is necessary for the purpose of improvements when they only intend to use a small part of it for that purpose, though if they made such an adjudication in the belief that they should require the whole for the improvements, the correctness of the adjudication could not be questioned. *Gard* v. *Sewers Commissioners*, 54 L. J., Ch. 698; 28 Ch. D. 486; 52 L. T. 827—C. A.

If part of a piece of land prevents an improvement, the commissioners have power to take part compulsorily, their power of proceeding compulsorily not being limited to taking the whole. Whether the commissioners, if they only want a part of the site of an existing house for the purpose of an improvement, can adjudicate that the possession and purchase of the whole house are necessary, quære. *Ib.*

Semble, that the right of pre-emption given by 57 Geo. III. c. xxix., s. 96, is not taken away by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.) s. 54. *Ib.*

A metropolitan vestry required, for the purpose of widening a street, a part of the buildings and site of an orphanage that would leave a substantial portion of the premises:—Held, that (the owners wishing to sell the part required only) the vestry could not take the whole. *Teuliere* v. *St. Mary Abbott's Vestry*, 55 L. J., Ch. 23; 30 Ch. D. 642; 53 L. T. 422; 50 J. P. 53.

Where part only of a house obstructs the proposed alteration of a street, the local authority having control of such street has, by ss. 80 & 82 of Michael Angelo Taylor's Act, power to take such part only, and cannot be compelled to take the whole house, provided the removal of such part does not involve a substantial alteration in the character and condition of the house, so that it can no longer be used as the same kind of building or for the same kind of business as before. *Gordon* v. *St. Mary Abbott's Vestry*, 63 L. J., M. C. 193; [1894] 2 Q. B. 742; 10 R. 539; 71 L. T. 196; 58 J. P. 463.

—— **Failure to carry out — Expiration of Time—Penalties.**]—By a local act certain persons were nominated directors of a company to establish a certain public market, for which purpose the company had compulsory powers to take the land needed for the market, such powers to expire within three years of the passing of the act. It was also provided that certain streets in the immediate neighbourhood of the market, acting as approaches to the same, should be widened within a stated period under certain penalties, for which purpose of widening the company might acquire land by agreement with the owners of the adjoining property, but not by compulsion. The company never had any real existence, and the whole scheme proved abortive. The time within which the company

could exercise its compulsory powers had expired:—Held, that the company having failed to widen the aforesaid streets, the vestry was entitled to the penalties under the statute. *St. Mary, Newington* v. *South London Fish Market Co.*, 52 J. P. 92.

—— **Compulsory Purchase—Petition for Payment out of Purchase-money—Jurisdiction.**]—The Court of Chancery has jurisdiction, under s. 89 of the General Metropolitan Paving Act, 57 Geo. 3, c. xxix., to order payment of the amount of the costs of a petition for payment out of court, and to separate accounts, of the purchase-moneys of houses taken by a vestry under the powers of the act for the purpose of widening a street. *Saunders, In re*, L. R. 8 Eq. 681.

—— **Compulsory Purchase—Costs of Claimant when no Offer made—Jurisdiction to Tax.**]—Where land is compulsorily taken for street improvements there is no power to order taxation of the costs of a successful claimant in proceedings under s. 82 of Michael Angelo Taylor's Act, when no offer has been made on behalf of the street authority. *Reg.* v. *London JJ., Phelps, Ex parte*, 64 L. J., M. C. 186; [1895] 1 Q. B. 881; 15 R. 401; 72 L. T. 564; 43 W. R. 590; 59 J. P. 311.

**Naming Streets and Numbering Houses.**]—The Metropolitan Board of Works had authority, under 18 & 19 Vict. c. 120, s. 141, to name the streets and number the houses within the city of London, that enactment superseding in that respect a former and inconsistent local act, 11 & 12 Vict. c. 163 (the Sewer Act). *Daw* v. *Metropolitan Boad of Works*, 12 C. B. (N.S.) 161; 31 L. J., C. P. 223; 8 Jur. (N.S.) 1040; 6 L. T. 353.

### d. Obstructions.

**Barrows and Stalls.**]—The statute 25 & 26 Vict. c. 102, s. 73, extends to the metropolis the powers of improving and regulating streets, and for suppressing nuisances, contained in 57 Geo. 3, c. xxix. S. kept a barrow of chestnuts several hours standing in a street in the F. district, which was outside the area of the Metropolitan Traffic Act, 30 & 31 Vict. c. 135, but within the metropolis, and an officer of the local board desired him to remove, but he refused:—Held, that S. was liable to be convicted of an offence contrary to 57 Geo. 3, c. 29, s. 65. *Fulham Board of Works* v. *Smith*, 48 J. P. 375.

—— **Power to Seize without Conviction.**]—The power given by s. 65 of 57 Geo. 3, c. xxix., to the authority having control of pavements in districts within the act, to seize wares, merchandise and other matters placed on footways or carriageways and not removed when required by the authority, is not dependent upon the existence of a conviction under that section, but may be exercised although there has not been such a conviction. *Brackley* v. *St. Mary, Battersea*, 58 L. J., Q. B. 589; 23 Q. B. D. 486; 38 W. R. 28; 54 J. P. 165—C. A.

—— **Concurrent Jurisdiction of Vestries and of Police.**]—Sect. 65 of Michael Angelo Taylor's Act is still in force. Where costermongers, &c., carry on business in conformity with the police regulations, they do not commit any offence, and the above section has no application. But where they disobey the police regulations, and also the directions of the vestry having jurisdiction over them, the section does apply, and they can be proceeded against either under the Police Acts or under Michael Angelo Taylor's Act, but they cannot be punished under both acts for the same offence. *Keep* v. *St. Mary, Newington*, 63 L. J., Q. B. 369; [1894] 2 Q. B. 524; 9 R. 346; 70 L. T. 509; 58 J. P. 748—C. A.

—— **Implied Repeal—Michael Angelo Taylor's Act—Metropolitan Streets Act, 1867.**]—The powers given to the metropolitan local authorities by s. 65 of Michael Angelo Taylor's Act to order the removal of goods, barrows, &c., from carriage or footways are inconsistent with and therefore impliedly repealed so far as they affect costermongers, by s. 6 of the Metropolitan Streets Act, 1867, and s. 1 of the Metropolitan Streets Act Amendment Act, 1868. *Summers* v. *Holborn Board of Works*, 62 L. J., M. C. 81; [1893] 1 Q. B. 612; 5 R. 284; 68 L. T. 226; 41 W. R. 445; 57 J. P. 326.

**Unloading Coke across Footway.**]—Coke is not coal within the meaning of s. 15 of the Metropolitan Streets Act, 1867, and a conviction under that section for unloading coke between the hours of 10 a.m. and 6 p.m. cannot be sustained. *Fletcher* v. *Field*, 60 L. J., M. C. 102; [1891] 1 Q. B. 790; 64 L. T. 472; 39 W. R. 655; 55 J. P. 502.

**Collecting Crowd—Power to Prosecute.**]—A person, by singing hymns, occasioned a crowd to assemble, and thereby obstructed a certain highway within the metropolitan police district. An information was accordingly preferred against him by an inspector of police, under s. 72 of the Highway Act:—Held, that the provisions of s. 72 of the Highway Act were applicable to highways within the metropolitan area:—Held, also, that a prosecution under s. 72 of the act might be initiated by anyone, and therefore that the proceedings taken by the police were valid. *Back* v. *Holmes*, 57 L. J., M. C. 37; 56 L. T. 713; 16 Cox, C. C. 263; 51 J. P. 693.

**Hanging out Articles in front of Shop**—Sect. 119 of the Metropolis Local Management Act, 1855, does not impliedly repeal the provisions contained in s. 54 of Michael Angelo Taylor's Act, which impose a penalty upon the hanging out of articles in front of any houses within the metropolis; such provisions are, therefore, still in force. To constitute an offence in such a case under s. 65 of the earlier act it is not necessary that there should be any danger to the highways; it is sufficient if articles are hung out in front of houses, whether over highways or not. *Wyatt* v. *Gems*, 62 L. J., M. C. 158; [1893] 2 Q. B. 225; 5 R. 507; 69 L. T. 456; 42 W. R. 28; 17 Cox, C. C. 679; 57 J. P. 665.

**Erection of Posts—Power of District Board—Interference with Market.**]—A district board of works, under the statutory powers conferred by 57 Geo. 3, c. xxix., s. 58, and 18 & 19 Vict. c. 120, s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of Spitalfields Market, in order to preserve the rights of the public and to insure the safety of foot passengers. It was proved that this would seriously interfere with the access to the market, which had been recently

enlarged by throwing into it the site of houses which had been pulled down belonging to the plaintiff:—Held, that such an exercise of the board's powers would be an interference with the "rights and privileges vested in the plaintiff in reference to a market" within the exception contained in 18 & 19 Vict. c. 120, s. 91, and an injunction was granted restraining the proposed action of the board. *Horner* v. *Whitechapel Board of Works*, 55 L. J., Ch. 289; 53 L. T. 842—C. A.

**Leaving Package on Footway—Power to state case—Person aggrieved.**]—A tenant of D. left a package on the pavement of a court (in the city) 141 feet long and twenty-five feet wide, with two foot pavements, and was charged, under 30 and 31 Vict. c. 134, s. 6, with leaving the package longer than necessary. D., the freeholder, contended that the court was private property for the sole use of the tenants, and was not a street. On the tenant being convicted:—Held, that D. was not "a person aggrieved," and was not entitled to have a special case stated under 42 & 43 Vict. c. 49, s. 33. *Drapers' Co.* v. *Hadden*, 57 J. P. 200.

**Pilasters.**]—*See* post, cols. 1072—1074.

**Bow Window.**]—*See* post, col. 1074.

**Right of Vestry to Proceed in their own Name.**]—A vestry was empowered, by act of parliament, to indict any person who should stop or impede rights of way in the parish, and to take such other proceedings for opening thereof as should appear expedient:—Held, that the vestry must indict in the name of the Queen, and sue in equity in name of the attorney-general, and that they could not proceed in their own name. *Bermondsey Vestry* v. *Brown*, 35 Beav. 226.

**Right to Sue in Name of Clerk.**] — Commissioner under a local paving act in the metropolis, may sue in the name of their clerk under 57 Geo. 3, c. xxix., s. 120, although the local act may direct them to sue in the name of another person. *Frost* v. *Bolland*, 5 B. & C. 611; 8 D. & R. 384; 4 L. J. (O.S.) K. B. 277. S. P., *Dougan* v. *Bolland*, 5 B. & C. 622; 8 D. & R. 435; 4 L. J. (O.S.) K. B. 278.

**Open Space in front of House—Structures erected by Occupier.**]—*Le Neve* v. *Mile End Old Town Vestry*, 8 El. & Bl. 1054; 27 L. J., Q. B. 208; 4 Jur. (N.S.) 660; 6 W. R. 338—Ante, col. 1052.

**Power of Commissioners under 57 Geo. 3, c. xxix, s. 72.**]—The power of the commissioners under 57 Geo. 3, c. xxix, s. 72, is confined to the removing of such things affixed to houses as project over the public way. *Bouverie* v. *Miles*, 1 B. & Ad. 38; 8 L. J. (O.S.) K. B. 338.

### e. Other Offences.

**Damage to Street Lamp.**]—A person is liable under s. 207 of the Metropolis Local Management Act, 1855, to make good the damage done by his breaking a street lamp, even when the damage has been caused without any negligence on his part. *Burgess* v. *Morris*, 77 L. T. 97; 61 J. P. 553.

—— **Liability of Master.**]—A master is not liable under s. 207 of the Metropolis Local Management Act for the accidental breaking by his servant of a street lamp, the top of which projected over the kerb, such accident having been caused by some goods on a van which the servant was driving coming into contact with and breaking the top of the lamp. *Harding* v. *Barker*, 37 W. R. 78; 53 J. P. 308.

**Street Music—Penalty—Imprisonment in Default of Payment.**] — Sect. 1 of the Street Music Act, 1864, does not by implication repeal s. 77 of the Metropolitan Police Act, 1839, and, therefore, a street musician who under s. 1 of the Street Music Act, 1864, is convicted and fined forty shillings, may in default of payment of the fine be committed to prison for one month under s. 77 of the Metropolitan Police Act, 1839, although the punishment by imprisonment provided by s. 1 of the Street Music Act, 1864, cannot exceed three days. *Reg.* v. *Hopkins*, 62 L. J., M. C. 57; [1893] 1 Q. B. 621; 5 R. 315; 68 L. T. 292; 41 W. R. 431; 57 J. P. 152.

—— **Householder requiring Musician to Depart.**]—A householder who under s. 1 of the Metropolitan Police Act, 1864, requires a street musician to depart from the neighbourhood of his house, must give the street musician a reason for requiring him so to depart. *Shields* v. *Howard*, 66 L. J., Q. B. 105; [1897] 1 Q. B. 84; 45 W. R. 138; 60 J. P. 727.

**Keeping Swine within Forty Yards of Streets.**] —The powers conferred upon the commissioners under Michael Angelo Taylor's Act, 57 Geo. 3, c. xxix., absolutely to prevent the keeping of swine in any house, building, yard, or garden in or within forty yards of any street or public place within the district comprised in that act, is not extended by 25 & 26 Vict. c. 102, s. 73, to the larger district comprised within such last-mentioned act. *Chelsea Vestry* v. *King*, 17 C. B. (N.S.) 625; 34 L. J., M. C. 9; 10 Jur. (N.S.) 1150; 11 L. T. 419; 13 W. R. 157.

**Turning Cattle into the Streets.**]—The owner of land on both sides of a highway, who claimed the grass and herbage growing on such parts of it as were not gravelled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it:—Held, that they were not turned loose within the meaning of 2 & 3 Vict. c. 47, s. 54, clause 2. *Sherborn* v. *Wells*, 3 B. & S. 784; 32 L. J., M. C. 179; 9 Jur. (N.S.) 1104; 8 L. T. 274; 11 W. R. 594.

### f. Right of Public Meeting in.

**Trafalgar Square.**] — Semble, there is no right on the part of the public to occupy Trafalgar square for the purpose of holding public meetings, but the commissioners of works and public buildings (in whom the care, control, management, and regulation of the square is vested by 7 & 8 Vict. c. 60, s. 2, and 14 & 15 Vict. c. 42 s. 22) have power to prohibit the holding of such meetings there. *Lewis, Ex parte*, 57 L. J., M. C. 108; 21 Q. B. D. 191; 59 L. T. 338; 37 W. R. 13; 16 Cox, C. C. 449; 52 J. P. 773. S. P., *Reg.* v. *Graham*, 16 Cox, C. C. 420

### g. Subways.

**Right to Use—"Water Company"—Reduced Charge.**]—A company constituted for the purpose of supplying hydraulic power, and not empowered to sell water, is not a "water company" within the meaning of s. 5 of the London County Council (Subways) Act, 1893; such a company is therefore not entitled to claim to pay only on the reduced scale of charges applicable to "water companies" for the use of the London County Council's subways. *London County Council* v. *London Hydraulic Co.*, 61 J. P. 760.

### 2. Buildings.

*See* London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

### a. What are.

**Building, what is—Structure of Wood.**]—A structure of wood of considerable size (sixteen feet by thirteen), and intended to be permanently used as a shop, is a building, although not let into the ground, but merely laid upon timbers upon the surface. *Sterens* v. *Gourley*, 7 C. B. (N.S.) 99; 1 F. & F. 498; 29 L. J., C. P. 1; 6 Jur. (N.S.) 147; 1 L. T. 33; 8 W. R. 85.

**New Building—Old Site.**]—See *Worley* v. *St. Mary Abbot, Kensington*, post, col. 1075.

—— **"Warehouse or other Building used wholly or in part for the purposes of trade."**]—Where a building to be occupied with adjoining premises is erected on the site of old houses which had previously been so occupied, the whole premises constitute a new building to which the Metropolitan Building Act, 1855, applies. *Holland* v. *Wallen*, 10 R. 583; 70 L. T. 376.

The words of r. 4, s. 27, "Every warehouse or other building used either wholly or in part for the purposes of trade," are not confined to buildings ejusdem generis with warehouses. *Ib.*

**"Old Building."**]—A building is not an old building within 18 & 19 Vict. c. 120, and 18 & 19 Vict. c. 122, s. 8, unless the inclosing walls (which expression is not satisfied by two mere boundary walls at either side of the ground) were carried higher than the footings before the 1st of January, 1856. *Tear* v. *Freebody*, 4 C. B. (N.S.) 228; 6 W. R. 520.

**"Public Building"—Ambulance Station—Deposit of Plans.**]—An ambulance station structurally disconnected with any building, and from which the public is rigorously excluded, is not of itself a public building within s. 3 of the Metropolitan Building Act, 1855, so as to require the builder to deposit plans and sections of the building with the notice of its erection to the district surveyor under by-law 5, made under s. 16 of the Metropolitan Management and Building Acts (Amendment Act), 1878. *Josolyne* v. *Meeson*, 53 L. T. 319; 49 J. P. 805.

**"Wooden Structure of a Moveable Character"—Steam Roundabout—Shooting-gallery—Caravans.**]—A steam roundabout, shooting-gallery, and caravans are not "wooden structures or erections of a moveable or temporary character," within the meaning of the Metropolis Management and Building Acts Amendment Act, 1882, and may, therefore, be set up without obtaining from the London County Council the licence in writing prescribed by that section. *Hall* v. *Smallpiece*, 59 L. J., M. C. 97; 54 J. P. 710.

—— **Builder's Pay-office on Wheels.**]—A builder's office, constructed of wood and roofed with zinc, and placed upon iron wheels for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, was, when not required at any such place, kept in the builder's own yard and used as a pay-office for his men:—Held, that it was not a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882 and did not require a licence in writing from the London County Council for its erection. *London County Council* v. *Pearce*, [1892] 2 Q. B. 109; 66 L. T. 685; 40 W. R. 543; 56 J. P. 790.

—— **Bungalow Exhibited for Sale—Licence to Erect.**]—A wooden structure or erection of a moveable character intended for sale, and which upon sale will be removed for actual use and occupation elsewhere, may be erected and set up, for the purpose of exhibition to customers, without the licence of the London County Council, under s. 13 of the Metropolis Management and Buildings Acts Amendment Act, 1882. *London County Council* v. *Humphreys*, 63 L. J., M. C. 215; [1894] 2 Q. B. 755; 10 R. 533; 71 L. T. 201; 43 W. R. 13; 58 J. P. 734.

—— **Structure for carrying on Business during alterations.**]—The proviso attached to s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882, allowing a temporary wooden structure to be "erected by a builder for use during the alteration or repair of any building" without a licence, is limited in its application to structures erected by a builder for his use, and does not apply to a structure erected for the purpose of carrying on during the progress of the works the business usually carried on in the premises undergoing alteration or repair. *London County Council* v. *Candler*, 60 L. J., M. C. 114; 55 J. P. 679.

—— **Erection without Licence—Penalty.**]—See *Reg.* v. *Cluer, London County Council, Ex parte*, post, col. 1093.

**"Structure or Work"—Temporary Seating in Completed Building—Building Notice.**]—The erection of temporary seating in a completed building is not a "structure or work" within the meaning of ss. 78 and 145 of the London Building Act, 1894, and therefore the building notice required by s. 145 need not be given in respect of such erection. The words "structure or work" in s. 145 of the act mean something in the nature of a building; but the question whether an erection is a structure or not within the meaning of any particular section of the act depends upon the facts of and enactments sought to be applied to each particular case. *Venner* v. *McDonnell*, 66 L. J., Q. B. 273; [1897] 1 Q. B. 421; 76 L. T. 152; 45 W. R. 267; 61 J. P. 181.

**Building "used for the purposes of" a Canal—Notice to District Surveyor.**]—A canal company, under their statutory powers, erected a building upon one of their wharves, and let it to tenants, who used it in the course of their business. The

company were not carriers, but received tolls in respect of the passage of barges over their canal; and it was arranged between them and the tenants that all the materials required by the tenants should be carried to the wharves in barges along the canal:—Held, that the building was not "used for the purposes of the canal" within the meaning of s. 6 of the Metropolitan Building Act, 1855, and that it was the duty of the builder to give notice to the district surveyor before commencing to build. *Coole* v. *Lovegrove*, 62 L. J., M. C. 153; [1893] 2 Q. B. 44; 5 R. 418; 69 L. T. 19; 41 W. R. 570; 57 J. P. 647.

**Buildings for Her Majesty's service.**]—See *Jay* v. *Hammon*, post, col. 1076.

### b. In Regular and General Line.

*See* London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 22—31 &c.

**"Regular Line," what is.**]—By 18 & 19 Vict. c. 120, s. 143, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate":—Held, that this does not mean a strict mathematical line, but a substantially regular line. *Tear* v. *Freebody*, 4 C. B. (N.S.) 228; 6 W. R. 520.

**"General Line"—Architect's Certificate.**]—The general line of buildings referred to in 25 & 26 Vict. c. 102, s. 75, exists independently of the certificate of the architect. That certificate does not create the general line of building, it merely points it out for the guidance of the magistrate. *Wandsworth Board of Works* v. *Hall*, 38 L. J., M. C. 69; L. R. 4 C. P. 85; 19 L. T. 641; 17 W. R. 256.

The "general line of buildings" referred to in the Metropolis Management Amendment Act, 1862, s. 75, exists independently of the certificate of the architect, which merely points it out for the guidance of the magistrate. *Wandsworth Board of Works* v. *Hall*, (L. R. 4 C. P. 85), followed. *Paddington Vestry* v. *Snow*, 45 L. T. 475; 30 W. R. 46; 46 J. P. 87. And see *London County Council* v. *Cross*, and *Lavy* v. *London County Council*, post, cols. 1092, 1093.

—— **Determination of.**]—In determining the general line of buildings of a street the architect of the Metropolitan Board of Works ought to have regard to the frontage of houses previously existing, and which may be rebuilt as well as to those still standing. *Auckland (Lord)* v. *Westminster Board of Works*, 41 L. J., Ch. 723; L. R. 7 Ch. 97; 26 L. T. 961; 20 W. R. 845.

Observations on the matters to be taken into consideration by the London County Council in fixing the building line with respect to a street. *Worley* v. *St. Mary Abbot, Kensington*, 61 L. J., Ch. 601; [1892] 2 Ch. 404; 66 L. T. 747; 40 W. R. 566.

—— **Jurisdiction of Magistrate—Architect's Decision.**]—The certificate of the superintending architect of the Metropolitan Board of Works made under the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75, and fixing the "general line of buildings" in a road, is conclusive as to a building erected before the certificate is made; and on the hearing of a summons (issued after the making of the certificate) for an offence under s. 75 alleged to have been committed in respect of such building, the justice has no jurisdiction to review the architect's decision, or decide for himself whether the line fixed by the certificate is the true general line. *Simpson* v. *Smith*, (L. R. 6 C. P. 87) overruled. *Spackman* v. *Plumstead Board of Works*, 54 L. J., M. C. 81; 10 App. Cas. 229; 53 L. T. 157; 33 W. R. 661; 49 J. P. 420—H. L. (E.)

—— **Line Determined on Day previous to Hearing of Summons—Demolition.**]—Where B. applied to the Metropolitan Board of Works for consent to build a house which was granted, but without procuring the conditions upon which the consent was granted, he built higher than those conditions permitted:—Held, that a magistrate, upon a summons charging him with having erected a building beyond the general line of buildings in the street, and contrary to the conditions on which the consent of the board was obtained, might order him under 25 & 26 Vict. c. 102, s. 75, to demolish so much of the house as was beyond the general line, although this line had only been decided by the superintending architect on the day previous to the hearing of the summons. *Bauman* v. *St. Pancras Vestry*, 36 L. J., M. C. 127; L. R. 2 Q. B. 528; 15 W. R. 904.

**House at Corner of two Streets—Architect's Certificate—Jurisdiction of Magistrate.**]—The appellant's house was built at the corner of the K. road and a new street called D. gardens. The side of the house abutting on the eastern side of D. gardens projected beyond a row of houses on that side of D. gardens. Under s. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), the superintending architect to the Metropolitan Board of Works gave a certificate that the main fronts of that row of houses was the general line of buildings, on the eastern side of D. gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which the appellant's house was situate:—Held, that no offence under s. 75 had been committed by the building of the appellant's house, and that there was no jurisdiction for a magistrate's order under that section directing the demolition of the projecting part of the house. *Barlow* v. *St. Mary Abbot, Kensington*, 55 L. J., Ch. 680; 11 App. Cas. 257; 55 L. T. 221; 34 W. R. 521; 50 J. P. 691—H. L. (E.)

The duty of the superintending architect to the County Council is to find by his certificate not only what is the general line of buildings for a particular street, but also whether the building complained of as projecting beyond the general line is in fact in that street; and his finding on the latter (as well as on the former) question is conclusive, and cannot be reviewed either by a court of summary jurisdiction or on appeal therefrom. *Barlow* v. *St. Mary Abbot, Kensington* (11 App. Cas. 257), applied and followed. *Allen* v. *London County Council*, 64 L. J., M. C. 228; [1895] 2 Q. B. 587; 14 R. 749; 73 L. T. 101; 43 W. R. 674; 59 J. P. 644—C. A.

The appellant's house was built at the corner of S. road and C. road. The superintending architect of the Metropolitan Board of Works gave his certificate under the 75th section of the Metropolis Management Amendment Act, 1862,

that the building line in the C. road exceeded fifty feet from the highway. At the date of this certificate all the houses on the west side of the S. road, including the appellant's house, had a uniform line of frontage to that road only, and there was no access to the appellant's house from any other road. The appellant's house was within fifty feet of the C. road, and it was found as a fact that the site on which the appellant's house was built was in the C. road:—Held, that, although the appellant's house faced the S. road, as it was within the building line of the C. road, it was bound to follow the building line in C. road, and that the magistrate had power to order the removal of the house, or so much of it as projected beyond the building line in the C. road. *Gilbart* v. *Wandsworth Board of Works*, 60 L. T. 149; 53 J. P. 229.

**Addition to Old Buildings — Distance from Centre of Road — "Existing Street."**] — The appellant was the owner of a house and garden abutting upon an old public carriage-way. The house of the appellant as well as several others were erected on either side of the road prior to the passing of the Metropolis Management Act, 1878. In 1889, the appellant pulled down the wall that separated his garden from the road and erected a new fence a few feet further back from the road; he subsequently commenced to build shops upon the site of the garden, and extended his boundary fence to its original position, which was less than the prescribed distance from the centre of the roadway within the meaning of s. 6 of the above act:—Held, that the road was an "existing street" within that section, and therefore that the appellant could not be required to set back his boundary fence. *Ellis* v. *London County Council*, 67 L. T. 558; 57 J. P. 24.

**Forecourt—Notice to Set Back.**]—Sect. 14 of the London Building Act, 1894, does not apply to all the offences created by s. 13, sub-s. 1, and where the external boundary of a "forecourt" is within the prescribed distance from the centre of a roadway the county council has no power under s. 14 to serve a notice upon the owner or occupier requiring him to set back the forecourt so that every part of the external boundary thereof shall be at a distance from the centre of the roadway not less than the distance permitted by the act. *London County Council* v. *Aylesbury Dairy Co.*, 67 L. J., Q. B. 24; [1898] 1 Q. B. 106; 77 L. T. 440; 61 J. P. 759.

**"Building, Structure, or Erection"—Boundary-wall or Fence.**]—Sect. 75 of the Metropolis Management Act, 1862, is not intended, under the conditions specified in the section, to prevent an owner from erecting beyond the "building line" such a wall or fence as would be a reasonable ascertainment of, and protection to, his property; it must be left to the magistrate to say whether a wall or fence is made for that purpose, or whether, by not being bonâ fide confined to that object, it becomes a "building, structure, or erection" within the meaning of the section. *Ellis* v. *Plumstead Board of Works*, 5 R. 237; 68 L. T. 291; 41 W. R. 496; 57 J. P. 359.

—— **Wall intended as Screen for Advertisements.**]—It is not a condition precedent to the issue of a summons under s. 75 of the Metropolis Management Amendment Act, 1862, for building beyond the general line, that the architect should have decided a line. *London County Council* v. *Cross* (61 L. J., M. C. 160) followed. It is a question of fact whether a particular wall is a "building, structure, or erection," within the section. A wall eighteen inches thick and eleven feet high, intended, inter alia, as a screen for advertisements, and built in the place of a dwarf boundary wall nine inches thick and between two and three feet high with iron railings of about five feet high on the top which, semble, was not a "building, structure, or erection":—Held, to be a "building, structure, or erection." *Lacy* v. *London County Council*, 64 L. J., M. C. 262; [1895] 2 Q. B. 577; 14 R. 634; 73 L. T. 106; 43 W. R. 677; 59 J. P. 630—C. A.

—— **Conservatories.**] — By 25 & 26 Vict. c. 102, s. 75, no building, structure, or erection, shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, such general line of buildings to be decided by the superintending architect of the Metropolitan Board of Works for the time being. A magistrate having decided that a small conservatory, consisting of an iron frame (glazed) projecting beyond the wall of the house, but not beyond the shop-front, was not an erection within the statute, and that it was not beyond the general line of buildings in the street, the court upheld his decision. *St. George's, Hanover Square, Vestry* v. *Sparrow*, 16 C. B. (N.S.) 209; 33 L. J., M. C. 118; 10 Jur. (N.S.) 771; 10 L. T. 504; 12 W. R. 832.

—— **Rights of Owner as affected by General Line of Buildings.**]—A "building, structure, or erection" within s. 75 of the Metropolis Local Management Act, 1862, existing at the time when a "general line of buildings" is made manifest, can be continued, completed, or altered after the general line of buildings becomes manifest, and is not within the mischief of the section. But if what has been already put up is not a "building, structure or erection," then if it is in advance of the general line of buildings subsequently determined, any completion will be a "building, structure or erection" in advance of the general line of buildings, and so liable to demolition pursuant to the section. *Wendon* v. *London County Council*, 63 L. J., M. C. 117; [1894] 1 Q. B. 812; 9 R. 292; 70 L. T. 440; 42 W. R. 370; 58 J. P. 606—C. A.

**Projections—Pilaster encroaching on Public Footway.**]—By 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), s. 72, power is given to the persons having the control of the pavements of streets of the metropolis to regulate and remove (inter alia) all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways; and a penalty is imposed upon any owner or occupier who refuses or neglects to remove any such projection after notice.—By s. 26 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), "The following rules shall be observed as to projections. . . . (2) In any street or alley of a greater width than thirty feet any shop front may project ten inches and no more. (5) Except in so far as is permitted by this section in the case of shop fronts, and with the exception of. . . .

window dressings and other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works. . . ." The respondent built upon one side of a public street four houses or shops upon four plots of ground of which he was lessee, and erected against the fronts of them five stone pilasters, forming parts of shop fronts, the bases of which pilasters encroached upon the public footway to the extent of six inches in depth. The appellants, having passed a resolution declaring the pilasters to be inconvenient and incommodious to passengers along the footway, served the respondent with a notice to remove them, and upon his default took out a summons against him, under s. 72 of Michael Angelo Taylor's Act, for not removing them. The magistrate dismissed the summons:—Held, that s. 26 of the Metropolitan Building Act, 1855, did not amount to a repeal pro tanto of s. 72 of Michael Angelo Taylor's Act; that it only authorised projections in cases where, but for a statutory prohibition, they would be lawful, and did not authorise projections which would interfere with the user by the public of a public footway; and that the decision of the magistrate was wrong. *St. Mary, Islington*, v. *Goodman*, 58 L. J., M. C. 122; 23 Q. B. D. 154; 61 L. T. 44; 54 J. P. 52.

By 57 Geo. 3, c. 29, s. 72, the commissioners or trustees having the control of the pavements of the streets in the metropolis are empowered to regulate or remove, in such manner as they shall from time to time judge proper, any projections from the fronts or sides of any house in any street which, in their judgment, are inconvenient or incommodious to the passengers along the carriage or footways of the streets, and a penalty of not less than 40*s.* nor exceeding 5*l.* is imposed upon any owner or occupier refusing or neglecting "immediately" to remove any such projections, on being required to do so by a notice from the commissioners or trustees. By the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120, s. 119), it is provided that if any projection or obstruction placed against or in front of any house shall be an annoyance in consequence of the same projecting into any street, it shall be lawful for the vestry to give notice in writing to the owner or occupier of such house to remove the projection or obstruction; and if the owner or occupier "neglect or refuse within fourteen days after such notice" to remove the projection or obstruction, he is made liable to a penalty not exceeding 5*l.*, and a further sum not exceeding 40*s.* for every day during which the projection or obstruction continues after the time when he may be convicted. By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 26, "The following rules shall be observed as to projections; (2) in any street or alley of a width greater than thirty feet, any shop-front may project ten inches and no more. . . . (5) Except in so far as is permitted by this section in the case of shop-fronts, . . . no projection from any building shall extend beyond the general line of fronts in any street," except with the permission of the Metropolitan Board of Works. The appellant having obtained a lease of certain surplus land which had been acquired by the metropolitan board for the purpose of widening a public street, proceeded to erect thereon seven shops, and, as part of the fronts of such shops, erected six pilasters which projected beyond the general line of buildings to the extent of nine inches of the footway. Upon a complaint by the respondents against the appellant under s. 72 of 57 Geo. 3, c. 29, the magistrate convicted the appellant:—Held, that the section had been impliedly repealed by s. 119 of the Metropolis Local Management Act, 1855, that any proceedings should therefore have been taken under the latter section, and that the conviction must, upon this ground, be quashed:—But held further, that the projections erected by the appellant were expressly authorised by s. 26 of the Metropolitan Building Act, 1855, and that proceedings could not therefore be successfully taken against him under the latter enactment. *St. Mary, Islington*, v. *Goodman* (23 Q. B. D. 154) dissented from. *Fortescue* v. *St. Matthew, Bethnal Green*, 60 L. J., M. C. 172; [1891] 2 Q. B. 170; 65 L. T. 256; 55 J. P. 758.

—— **Bow Windows—Violation of Local but not of General Act—Implied Repeal.**]—A defendant was convicted under a local act of 35 Geo. 3, for having added to his house a bow window extending beyond the general line of the fronts of the houses in the street; but it appeared that the projection did not overhang the ground of any other owner, nor in any other respect violate any requirement of the general Metropolitan Building Act, 7 & 8 Vict. c. 84:—Held, that the conviction could not be sustained, as the general act must be considered to have repealed pro tanto the local act. *Reg.* v. *Pratt*, 3 C. L. R. 826.

—— **What are—Shed and Seats.**]—See *Le Nere* v. *Mile End Old Town Vestry*, ante, col. 1052.

**Rebuilding on Old Site.**]—The 25 & 26 Vict. c. 102, s. 75, does not apply to ground formerly covered with buildings, unless the owner has relinquished his right of rebuilding on the same site. *Auckland* (*Lord*) v. *Westminster Board of Works*, 41 L. J., Ch. 723; L. R. 7 Ch. 597; 26 L. T. 961; 20 W. R. 845.

If, therefore, the district board of works threatens to proceed under s. 75 to demolish houses which are being rebuilt on an old site, on the ground that they are beyond the general line of buildings, it is acting ultra vires, and may be restrained by the court of chancery. In such a case the metropolitan board ought to proceed under s. 74, which provides for compensation to the landowners. *Ib.*

A railway company took land covered with houses, and pulled down houses for the purpose of constructing their railway, and then sold the land as building ground:—Held, that the purchaser had not lost the right to rebuild the houses on the same site as that occupied by the houses before they were pulled down; and that for this purpose the yard of a house was held to be equivalent to a house. *Ib.*

—— **Abandonment of Intention — Vacant Land.**]—G. owned two houses in Kensington and land therewith. Colby House came up to, and in part projected beyond, the building line of Kensington Road. Kensington House stood farther back. In 1873 G. pulled down the two houses, and erected a mansion on part of the land, farther back from the road than the original house, throwing into the street the site of the projection of Colby House, and leaving

the rest of the site of Colby House and of part of Kensington House to be laid out as a garden, except that a small lodge was built upon part thereof. The mansion and lodge were in 1880 pulled down, and the premises turned into a building estate. In 1891 the plaintiff took a lease of part of the site of the two original houses, and began to build up to what was formerly the frontage of Colby House (except so far as it formerly projected). The London County Council fixed the building-line of the plaintiff's land farther back than the former frontage. The plaintiff brought an action to restrain the defendants from taking steps, under s. 75 of the act above named, to compel him to set back his building, on the ground that he was building on an old site, and that therefore, on the authority of *Auckland* v. *Westminster Board of Works* (L. R. 7 Ch. 597), s. 75 did not apply:—Held, that the plaintiff's building was a new building erected on a vacant space, and not a restoration of an old building or an erection on land upon which it had always been intended to build, and that the case was within s. 75, and the court could not interfere. *Worley* v. *St. Mary Abbot, Kensington*, 61 L. J., Ch. 601; [1892] 2 Ch. 404; 66 L. T. 747; 40 W. R. 566.

A forecourt forty feet long, and a back garden seventy feet long, formerly belonging to an old building, but subsequently forming part of a new street, in respect of which a building-line has been duly certified, cannot, where such building has been pulled down, and the owner has shown an intention to abandon his right to rebuild on the actual site of the old building, be treated either as part of the curtilage of the building, and in that sense as part of the building itself, within the meaning of s. 74 of the Metropolis Management Act, 1862, but must be treated as "vacant land" within the meaning of s. 75; and the owner is not entitled, after the old building has been pulled down, to erect another building which will cover the old site and also the "vacant land" on each side of it, if by so doing such building will go beyond the building-line which has been certified. *Auckland* (*Lord*) v. *Westminster District Board of Works* (41 L. J., Ch. 723; L. R. 7 Ch. 597) distinguished. *London County Council* v. *Pryor*, 65 L. J., M. C. 89; [1896] 1 Q. B. 465; 74 L. T. 234; 60 J. P. 292—C. A.

**Effect of Special Act—Railway Station.**]—A company was empowered by their special act to widen a branch of their railway passing through London, and to build additional stations. In conformity with the powers so given, the company proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings and highways in London by the Metropolis Management Act, which had passed shortly after the special act of the company:—Held, that the powers conferred on the company by their special act were not controlled by the latter statute, and that the company was authorised so to build their station. *London and Blackwall Ry.* v. *Limehouse Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164; 5 W. R. 64.

By a statute passed prior to the railway act, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—Held, that the trustees of the road must be taken to have been present at the passing of the railway act, as well as of the metropolis act, and therefore the powers given by the railway act must prevail. *Ib.*

A railway company were empowered by a special act passed in 1887 to make a subway in the metropolis, with all necessary approaches, and to use such of the lands delineated on the deposited plans as might be required for that purpose:—Held, that the act empowered the company to erect on land compulsorily acquired within the limits of deviation a station beyond the general line of buildings of the street in which the same was situate, notwithstanding s. 75 of the Metropolis Management Amendment Act, 1862. *City and South London Ry.* v. *London County Council*, 60 L. J., M. C. 149; [1891] 2 Q. B. 513; 65 L. T. 362; 40 W. R. 166; 56 J. P. 6—C. A.

—— **School Board Site.**]—The provisions of s. 6 of the Metropolis Management Act, 1878, by which building within twenty feet of the centre of the highway is prohibited, are inconsistent with a special act empowering the London School Board to acquire compulsorily a particular site, defined by metes and bounds, for the purpose of providing school accommodation. Consequently the school board take such site, or so much of it as is necessary for school accommodation, free from the restriction imposed by the general act. *City and South London Ry.* v. *London County Council* ([1891] 2 Q. B. 513) followed. *London County Council* v. *London School Board*, 62 L. J., M. C. 30; [1892] 2 Q. B. 606; 5 R. 1; 40 W. R. 604; 56 J. P. 791.

**Exemptions—Government Buildings.**]—Buildings erected by the commissioners of lieutenancy of the city of London, under 1 Geo. 4, c. 100, s. 39, and 17 & 18 Vict. c. 105, s. 2, for the custody of the arms and stores of the militia, are within the exemption in 18 & 19 Vict. c. 122, s. 6, as employed for her Majesty's use or service; and it is not necessary to give notice to the district surveyor before commencing the buildings. *Jay* v. *Hammon*, 8 El. & Bl. 469; 27 L. J., M. C. 25; 4 Jur. (N.S.) 407.

—— **Chancel of a Church.**]—The ecclesiastical commissioners have no power, by virtue of the exceptions contained in 19 & 20 Vict. c. 112, s. 3, to contravene the provisions of 14 Geo. 3, c. 78, or of 18 & 19 Vict. c. 120, s. 143, by erecting the chancel of a church, part of which projects beyond the general line of buildings in a street, without the sanction of the board of works, as required by the 18 & 19 Vict. c. 120, s. 143. *Ecclesiastical Commissioners* v. *Clerkenwell Vestry*, 3 De G. F. & J. 688; 30 L. J., Ch. 454; 7 Jur. (N.S.) 810; 4 L. T. 599; 9 W. R. 681.

**Demolition—"Order in Writing."**]—A magistrate made a verbal order under s. 75 directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge:—Held, that the order was not "an order in writing made on" the builder within the meaning of s. 75, and was

therefore invalid. *Barlow* v. *St. Mary Abbot Vestry*, 55 L. J., Ch. 680; 11 App. Cas. 257; 55 L. T. 221; 34 W. R. 521; 50 J. P. 691—H. L. (E.)

**Erection beyond Line—Time at which Matter of Complaint arises.**] — See *London County Council* v. *Cross*, and *Lary* v. *London County Council*, post, cols. 1092, 1093.

### c. Construction.

*See* London Building Act, 1894 (57 & 58 Vict. c. ccxiii., ss. 53—81, &c.)

**Building Contracts anterior to London Building Act, 1894.**]—Contracts to erect and complete houses at certain dates year by year for several years, entered into before the passing of the London Building Act, 1894, are, by s. 212, preserved from the operation of the provisions of that act. The application of s. 212 is not to be narrowed down to specific structural works in progress at the date of the passing of the act. *Tanner* v. *Oldham*, 65 L. J., M. C. 10; [1896] 1 Q. B. 60; 15 R. 603; 73 L. T. 404; 44 W. R. 63.

**Union of Two Buildings.**]—The alteration of an old building by an addition is not an uniting of two buildings within r. 2 of s. 28 of 18 & 19 Vict. c. 122, unless the addition was at some time a separate building in itself. *Scott* v. *Legg*, 46 L. J., M. C. 267; 10 Q. B. D. 236; 36 L. T. 456; 25 W. R. 594—C. A.

Sect. 9 confines the operation of r. 4 of s. 27 to cases where an addition to an old building, taken by itself, contains more than the statutory number of cubic feet. *Ib.*

For many years before the 18 & 19 Vict. c. 122 came into operation, the houses Nos. 66 and 67 in A. had been united by means of an opening in the party-wall between them. In June, 1862, B., being the occupier of these two houses, and of No. 6 in a lane, made two openings in the wall dividing No. 6 and No. 66. The three houses together contained more than 216,000 cubic feet, but Nos. 6 and 66 taken alone did not contain so much:—Held, that the two houses Nos. 66 and 67 must be considered as one building, and that the openings between Nos. 6 and 66 must be made in accordance with the requirements of the 18 & 19 Vict. c. 122, s. 28. *Ashby* v. *Woodthorpe*, 33 L. J., M. C. 68; 9 L. T. 409; 12 W. R. 209.

**Public Buildings.**]—The rules of construction contained in the first schedule of the 18 & 19 Vict. c. 122, have no reference to public buildings, which class of buildings are to be constructed as may be approved by the district surveyor, with an appeal, in case of disagreement between him and the builder, to the Metropolitan Board of Works. *Reg.* v. *Carruthers*, 4 B. & S. 804; 33 L. J., M. C. 107; 10 Jur. (N.S.) 767; 9 L. T. 825; 12 W. R. 372.

**Height—"Erected on the Side of any new Street."**]—A building erected at the corner of two streets, one being a new street, is a building "erected on the side of" the new street within s. 85 of the Metropolis Management Act Amendment Act, 1862, and consequently such building must not be higher than the width of the new street. *London County Council* v. *Lawrence*, 62 L. J., M. C. 176; [1893] 2 Q. B. 228; 5 R. 494; 69 L. T. 344; 41 W. R. 688; 57 J. P. 617.

**Incombustible Material — Construction of Walls.**]—By 18 & 19 Vict. c. 122, s. 12, and schedule 1, "every building shall be inclosed with walls constructed of brick, stone or other hard and incombustible substance": — Held, that these words amount to a prohibition against building the walls of wood or other combustible substance. *Stevens* v. *Gourley*, 7 C. B. (N.S.) 99; 1 F. & F. 498; 29 L. J., C. P. 1; 6 Jur. (N.S.) 147; 1 L. T. 33; 8 W. R. 85.

—— **Construction of Roofs—"Duroline"—Woven Iron Wire with Oleaginous Coating.**]—Sect. 19 of the Metropolitan Building Act, 1855, provides that the roof of every building in the metropolis shall be externally covered with slates, tiles, metal, or other incombustible materials:—Held, that a roof covered with a material composed of woven iron wire, with a coating which, on the application of a hot coal or a lighted stick, ignited and burnt away, leaving the wirework foundation bare, was not covered with an incombustible material within the meaning of the act. *Payne* v. *Wright* 61 L. J., M. C. 7; [1892] 1 Q. B. 104; 65 L. T. 612; 40 W. R. 191; 56 J. P. 120.

**Thickness of Walls.**]—See *Foot* v. *Hodgson*, 59 L. J., Q. B. 343; 25 Q. B. D. 160; 55 J. P. 116 (infra, col. 1080).

**By-Law—Removal of Animal Matter from "Site" underneath Foundations.**] — By the Metropolis Management and Building Acts Amendment Act, 1878, s. 16, the Metropolitan Board of Works were empowered to make by-laws with respect to "the foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health." By s. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." The Metropolitan Board of Works made the following by-law: "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site":—Held, that the meaning of the word "site" in the by-law was governed by the interpretation of that word in the act, so that the by-law did not authorise the Metropolitan Board of Works to direct the removal of fæcal, animal or vegetable matter in the soil below the level of the bottom of the foundations. *Blashill* v *Chambers*, 14 Q. B. D. 479; 53 L. T. 38; 49 J. P. 388.

**Grant of Licences for Hoardings.**]—B. having contracted to erect a building (the new post-

office), which would take two years in its erection, applied to the commissioners of sewers of the city for a licence to erect a hoarding to inclose the space, under the City of London Sewers Act, 1848, which hoarding would run into four streets. The commissioners refused to grant a licence, except upon the terms that there should be a distinct licence for the hoarding in each of the four streets, that it should continue for two months, that a fee of 10*l.* should be paid for each licence, and that no placards or other materials for advertising should be placed against the hoarding:—Held, first, that the commissioners ought not to have required four licences for the hoarding, but only one licence. *Reg.* v. *Sewers Commissioners, Brass, Ex parte*, 22 L. T. 582.

Held, secondly, that they ought not to have limited the duration of the licence to two months, but should have granted the licence for such a length of time as would be reasonably requisite for the erection of the building. *Ib.*

Held, thirdly, that they had no right to impose the condition that no placards, or other materials, should be placed against the hoarding. *Ib.*

### d. Party-Walls.

*See* London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), ss. 87—101, &c.

#### i. *Generally.*

**Classification of.**]—The word "party-wall" may be used in four different senses: (1) A wall of which the two adjoining owners are tenants in common—this is the most common and the primary meaning of the term; (2) A wall divided longitudinally into two strips, one belonging to each of the adjoining owners; (3) A wall which belongs entirely to one of the adjoining owners, but is subject to an easement in the other to have it maintained as a dividing wall between the two tenements; (4) A wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety. *Watson* v. *Gray*, 49 L. J., Ch. 243; 14 Ch. D. 192; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537.

**Wall Extending above adjoining Building.**]—A wall may be a party-wall as to a portion of its height, and cease to be a party-wall for the rest of its height; and s. 75 of the London Building Act, 1894, does not make it a party-wall above the line where it ceases to divide buildings. *Drury* v. *Army and Navy Stores*, 65 L. J., M. C. 169; [1896] 2 Q. B. 271; 74 L. T. 621; 44 W. R. 560; 60 J. P. 421.

**United Buildings—Appeal.**]—By s. 9 of the Metropolitan Buildings Act, 1855, an addition to an old building is subject to the regulations of the act; by s. 27, r. 4, certain buildings containing more than 216,000 cubic feet are to be divided by party-walls; and by s. 28, r. 2, no buildings shall be united, if when so united they will be in contravention of the act. A new building was added to an old building, the united building containing more than 216,000 cubic feet:—Held, that the united building was not within the words of the act, and need not be divided by a party-wall. An appeal from the decision of a magistrate will lie under s. 106 of the act, although there has not been a conviction. *Scott* v. *Legg*, 46 L. J., M. C. 267; 10 Q. B. D. 236; 36 L. T. 456; 25 W. R. 594—C. A.

**Adjoining Properties.**]—The builder of a house on a new foundation may not erect half his flank or side wall on his neighbour's vacant ground. *Barlow* v. *Norman*, 2 W. Bl. 959.

The 14 Geo. 3, c. 78, did not make party-walls common property; and if one proprietor added to the height of such a party-wall, and the other pulled down the addition, the first might maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil: the property in a wall erected at a joint expense follows the property of the land whereon it stands. *Matts* v. *Hawkins*, 5 Taunt. 20; 14 R. R. 695.

**Measurement of Height of Wall—Storey.**]—By schedule 1 of the Metropolitan Building Act, 1855, the thickness of the external and party walls of dwelling-houses and warehouses throughout the different storeys is regulated in accordance with rules there laid down, the necessary thickness varying with the height and width of the wall; by r. 5, provision is made for the mode of measuring the height of every topmost storey, and by r. 6, "the height of every wall is to be measured from the base of the wall to the level of the top of the topmost storey":—Held, that a "topmost storey" need not necessarily be contained within four vertical walls, and that floors or rooms enclosed on three sides by vertical walls and in front by the sloping roof of the house were storeys within the meaning of the schedule and rules. *Foot* v. *Hodgson*, 59 L. J., Q. B. 343; 25 Q. B. D. 160; 55 J. P. 116.

**Must be Vertical.**]—A party-wall must be a vertical and not a horizontal division. *Holland* v. *Wallen*, 10 R. 583; 70 L. T. 376.

**7 & 8 Vict. c. 84.**]—The 7 & 8 Vict. c. 84, is an act of a local and personal nature. *Richards* v. *Easto*, 3 D. & L. 515; 15 M. & W. 244; 15 L. J., Ex. 163; 10 Jur. 695.

*See also* BOUNDARIES.

#### ii. *Liability for Expenses.*

**Where Wall Insufficient for all Purposes.**]—Where a party-wall is defective for all purposes, the expense of pulling down and rebuilding, &c., must be borne by the building and adjoining owners. *Seawell* v. *Webster*, 29 L. J., Ch. 71; 7 W. R. 691.

**Where Wall Insufficient for New Building Only.**]—Where a party-wall, sufficient for all other purposes, is incapable of bearing the structure to be placed upon it by the building owner, he has a right, under s. 83 of the Metropolitan Building Act, 1855, upon notice to the adjoining owner, to pull down the same compulsorily, bearing the expense. *Ib.*

**Owner of Improved Rent.**]—The owner of the improved rent, not of the ground rent, was liable to pay the expenses of a party-wall, under 14 Geo. 3, c. 78. *Peck* v. *Wood*, 5 Term Rep. 130.

The assignee of the lessee of premises, at a fixed rent, which he considerably improved, and thereby rendered of greater annual value, was not the owner of the improved rent within that statute. *Lambe* v. *Hemans*, 2 B. & Ald. 467.

An executor or an administrator might be liable, as the owner of the improved rent, for the expenses of pulling down and rebuilding a party-wall under 14 Geo. 3, c. 78, s, 41, even though he had no other assets than the improved rent. *Thackar* v. *Wilson*, 4 N. & M. 659; 3 A. & E. 142; 1 H. & W. 131; 4 L. J., K. B. 149.

The lessor of a house at rack-rent (there being no other person entitled to any kind of rent) was liable to contribute to the expenses of a party-wall, under 14 Geo. 3, c. 78, though the lessee had improved the house demised. *Beardmore* v. *Fox*, 8 Term Rep. 214.

**As between Landlord and Tenant.**]—If a landlord declared on a general covenant to repair a messuage, and assigned a breach, per quod he was put to expense, it was sufficient for the tenant to plead performance of all, except as to the repairs of a party-wall, and that those repairs were rendered necessary, and were done under 14 Geo. 3, c. 78. *Moore* v. *Clark*, 5 Taunt. 90.

A lessee for twenty-one years, at a peppercorn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and convenated to pay the land-tax, and all other taxes, rates, assessments and impositions, having assigned his term for a small sum in gross, was not liable to pay the expense of a party-wall, either by the 14 Geo. 3, c. 78, or by the covenant; but that charge must in such case be borne by the original landlord. *Southall* v. *Ledbetter*, 3 Term Rep. 458.

The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing and amending all party-walls, and to pay all taxes, duties, assessments, and impositions, parliamentary and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money, without any deduction whatever." During the lease the proprietor of the adjoining house built a party-wall between that house and the house demised, under the statute:—Held, that the tenant (not the landlord) was bound to pay the moiety of the expense of the party-wall. *Barrett* v. *Bedford* (*Duke*), 8 Term Rep. 602.

A tenant under covenant to repair could not maintain an action under the statute, against his landlord, for a moiety of the expense of rebuilding a party-wall, which, being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority. *Pizey* v. *Rogers*, R. & M. 357.

**Under Building Agreement.**]—A lessee of land from N. entered into an agreement with G., who was to build houses and pay him 20*l.* a year, and G. then employed the lessee to build the houses:—Held, that the lessee was liable to contribute to a party-wall to which the houses were attached. *Collins* v. *Wilson*, 4 Bing. 551; 1 M. & P. 454; 6 L. J. (O.S.) C. P. 107.

A tenant who rebuilt a house in London, without a lease or an agreement for a lease, and therein made use of the party-wall of the adjoining house, could not be sued for half the cost as owner of the improved rent; though he afterwards obtained, in consideration of the rebuilding, a beneficial lease at a low ground rent, habendum from a day before the rebuilding. *Taylor* v. *Reed*, 6 Taunt. 249.

A., a builder, proposed to B., the occupier of the adjoining house, to build a party-wall, and stated the expense; B. answered "Very well, I expect to pay what is right and fair," and the wall was built:—Held, that A. was entitled to recover from B. his share of the expense, without reference to the statute. *Stuart* v. *Smith*, 2 Marsh. 435; 7 Taunt. 158; Holt, 321.

**Sub-Tenancies.**]—A tenant of premises having built a party-wall thereon, let a portion of them upon a building agreement for 50*l.* a year. The sub-tenant built a house on his part of the ground, and in so doing made use of the party-wall; the agreement contained no stipulation in case of this being done. The sub-tenant underlet the house, when finished, at a rent exceeding 50*l.*:—Held, that the original tenant was not entitled to compensation from his lessee, under the statue, for the use of the party-wall, since he himself, and not the sub-tenant, was the owner of the improved rent within that clause. *Williams* v. *Pocklington*, 2 B. & Ad. 878; 1 L. J., K. B. 28.

If the lessee of a house at a rack-rent underlet it at an advanced rent, he was liable to contribute to the expenses of a party-wall built under the statute; nor was the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant. *Sangster* v. *Birkhead*, 1 Bos. & P. 303.

**Recovery of Money Paid.**]—A tenant who has been compelled by the building owner to pay the proportion of the expenses of a party-wall or structure which was payable, under 18 & 19 Vict. c. 122, by his landlord, "the adjoining owner," may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to deduct it from rent due or accruing due. *Earle* v. *Maugham*, 14 C. B. (N.S.) 626; 10 Jur. (N.S.) 208; 8 L. T. 637; 11 W. R. 911.

When notice of pulling down and rebuilding a party-wall was given under 14 Geo. 3, c. 78, and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house, giving notice in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same:—Held, that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect to any works to be done being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner, for such works as were authorised to be done by such other owner in respect of such adjoining house. *Robinson* v. *Lewis*, 10 East, 227.

**Amount of Expenses—Objection to.**]—A structure within the metropolis having been surveyed by the board of works under 18 & 19 Vict. c. 122, ss. 69, 73, an order was made by a magistrate for the owner to take down or otherwise secure the party-walls. Upon his default the board

themselves executed the works and took out a summons against the owner for the expenses incurred :—Held, first, that upon the hearing of such summons the owner could not object to his being made liable for expenses actually incurred, by merely showing that they included items which were in excess of the market price of labour and materials at the date of the execution of the works. Secondly, that he could not require that the other owners of the party-walls should be summoned in order that the expenses might be distributed among them. *Debenham* v. *Metropolitan Board of Works*, 50 L. J., M. C. 29 ; 6 Q. B. D. 112 ; 43 L. T. 596 ; 29 W. R. 353 ; 45 J. P. 190.

iii. *Right to Pull Down and Rebuild.*

**Party Wall, what is.**]—The plaintiff was the owner of a boundary wall built on his own land, against which he had built some closets, and the defendant, his adjoining neighbour, had recently built a substantial structure :—Held, that, so far as these buildings extended against both sides of the wall, it was a "party-wall" within the Metropolitan Buildings Act (18 & 19 Vict. c. 122), and the defendant was entitled, on giving the proper notices under the act, to take down such part as might be necessary for the purposes of necessary rebuilding. *Knight* v. *Purssell*, 48 L. J., Ch. 395 ; 11 Ch. D. 412 ; 40 L. T. 391 ; 27 W. R. 817.

**Notice to "Adjoining Owner."**]—A tenant in possession, having an equitable interest only under an agreement for a lease for a term is, in equity, an adjoining owner under 18 & 19 Vict. c. 122, and three months' notice must be given to him before any alteration affecting his premises can be commenced by his neighbour, under the powers of that act. *Cowen* v. *Phillips*, 33 Beav. 18 ; 9 Jur. (N.S.) 657 ; 8 L. T. 622 ; 11 W. R. 706.

A lessee of a house for a term of ninety-nine years, having demised some portions of the house to separate persons for terms varying from seven to twenty-one years, is the owner of the house within 18 & 19 Vict. c. 122. *Hunt* v. *Harris*, 19 C. B. (N.S.) 13 ; 34 L. J., C. P. 249 ; 11 Jur. (N.S.) 485 ; 12 L. T. 421 ; 13 W. R. 742.

**——Person in Possession under Building Agreement.**]—A person in possession of land for the purpose of building under a usual building agreement, where the grant of the lease is conditional upon the performance of the agreement, is, notwithstanding the fact that he is not an actual lessee, an "owner" within the London Building Act, 1894, s. 5, sub-s. 29, and as such entitled under s. 90 to party-wall and structure notices from a building owner of adjoining land. *List* v. *Tharp*, 66 L. J., Ch. 175 ; [1897] 1 Ch. 260 ; 76 L. T. 45 ; 45 W. R. 243 ; 61 J. P. 248.

**—— House Let in Separate Tenements.**]—A tenant in possession of part of a house for a greater interest than an interest from year to year is an "adjoining owner" within s. 82 of the Metropolitan Building Act, 1855, and is therefore entitled under s. 85, sub-s. 1, to three months' notice from the building owner in respect of any intended alteration to a party structure. *Fillingham* v. *Wood*, 60 L. J., Ch. 232 ; [1891] 1 Ch. 51 ; 64 L. T. 46 ; 39 W. R. 282.

**Landlord—Notice to Surveyor.**]—A landlord is justified, under 18 & 19 Vict. c. 122, s. 83, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and other premises belonging to him, without giving the notice required by s. 85 ; such tenant not being an owner within the interpretation clause, s. 3, and it is no objection that he has neglected to give the notice to the district surveyor required by s. 38. *Wheeler* v. *Gray*, 4 C. B. (N.S.) 584 ; 27 L. J., C. P. 267 ; 6 W. R. 676. Affirmed on appeal, 6 C. B. (N.S.) 606 ; 28 L. J., C. P. 200 ; 5 Jur. (N.S.) 916 ; 7 W. R. 325—Ex. Ch.

**Restraining from Proceeding on Notice.**]—The defendants gave notice, under 18 & 19 Vict. c. 122, s. 85, to the plaintiffs, that they intended to pull down and rebuild a wall of the plaintiffs, which they described in the notice as a party-wall. The wall was not a party-wall, but an external wall, and the notice was therefore invalid. The defendants were frequently applied to by the plaintiffs to withdraw the notice, but they refused to do so, though they said they did not intend to act upon it :—Held, that the plaintiffs were justified in filing a bill in equity to restrain the defendants from proceeding on the notice. *Sims* v. *Estate Co.*, 14 L. T. 55 ; 14 W. R. 419.

**Wall Insufficient for New Building only.**]—Where a party-wall, sufficient for all other purposes, is incapable of bearing the structure to be placed upon it by the building owner, he has a right, under s. 83 of the Metropolitan Building Act, 1855, upon notice to the adjoining owner, to pull down the same compulsorily, bearing the expense. *Seawell* v. *Webster*, 29 L. J., Ch. 71 ; 7 W. R. 691.

**Building Burnt and more than half taken down—Party Wall less than half taken down—Thickness of Party Wall on rebuilding.**]—Subsequently to the commencement of the London Building Act, 1894, a building within the administrative county of London which had been partially burnt, was taken down for more than half its cubical extent, but the party-wall between it and the adjoining building was taken down to the extent of less than one half thereof, and re-erected in conformity with the previous building acts. The district surveyor ordered the party-wall to be rebuilt from the ground upwards in accordance with the act of 1894 :—Held, that, under s. 208 of that act, the surveyor had no jurisdiction to order the remaining part at least of the party-wall to be pulled down and rebuilt in accordance with the requirements of that act. *Crow* v. *Redhouse*, 59 J. P. 663—C. A.

iv. *Liability for Damages.*

**Protection of Exposed Rooms.**]—A building owner who pulls down a party-wall under the authority of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down and rebuilt. *Thompson* v. *Hill*, 39 L. J., C. P. 264 ; L. R. 5 C. P. 564 ; 22 L. T. 820 ; 18 W. R. 1070.

**Injury to Adjoining Property.**]—By 18 & 19 Vict. c. 122, s. 88, sub-s. 2, if a party structure is pulled down and rebuilt by reason of its being so defective as to make it necessary to pull down the same, the expense of pulling down and

rebuilding shall be borne by the building and adjoining owners in due proportion :—Held, that the building owner was not liable to make good damage caused to the adjoining owner's premises by such pulling down and rebuilding. *Bryer* v. *Willis*, 23 L. T. 463 ; 19 W. R. 102.

A building owner, in pulling down and rebuilding a defective party-wall, caused considerable damage to the adjoining owner's house : —Held, that, as the damage was not caused in executing works for the sole benefit of the building owner, there was no statutable liability imposed on him to repair. *Ib.*

When a statute authorised a company to remove and erect buildings, and provided a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one which had been pulled down and rebuilt by the company was not entitled to such remedy in respect of an injury sustained by reason of the removal of a party-wall between the two houses, after a notice given under the 14 Geo. 3, c. 78, although the company might not have strictly complied with the requisitions of the act in respect of such party-wall. *Rex* v. *Hungerford Market Co.*, 2 N. & M. 340 ; 1 A. & E. 668 ; 3 L. J., K. B. 50.

—— **Liability of Builder.**]—The plaintiff, an owner in fee-simple of a house in London, brought an action against builders claiming damages on the ground that they, in the course of rebuilding an hotel, had caused injury to the plaintiff's house by cracking and displacing the wall; and also asking for an injunction. On the motion for injunction an inquiry as to damage was directed to be taken before a special referee, and the referee assessed the structural damage at 40*l.*, without prejudice to any question of liability. The defendants in their defence raised the contention that the works were executed under the provisions of the Metropolitan Building Act, and that the damage (if any) to the plaintiff's premises was "a necessary consequence of carrying out the said works," and that the plaintiff's remedy (if any) was only against the building owner by whom the defendants were employed :—Held, that the Metropolitan Building Act did not exonerate a builder from liability for damage which had arisen from his negligence and want of care and skill. The maxim "Respondeat superior" does not absolve the inferior, if by his negligence a loss has been sustained. If, in doing the act, he is guilty of negligence whereby loss and damage are occasioned to another, he is personally liable. *White* v. *Peto*, 58 L. T. 710.

**Obstruction of Ancient Lights.**]—The 18 & 19 Vict. c. 122, does not enable the owner to rebuild a party structure so as to obstruct the ancient lights of the adjoining owner. *Crofts* v. *Haldane*, 8 B. & S. 194 ; 36 L. J., Q. B. 85 ; L. R. 2 Q. B. 194 ; 16 L. T. 116 ; 15 W. R. 444.

So the 14 Geo. 3, c. 78, s. 43, which authorised the building or raising of a party-wall, did not protect a party from liability for any collateral damage resulting from the building so erected ; and an action was maintainable by the occupier of an adjoining house, for heightening and building on a party fence wall, whereby his windows were darkened. *Wells* v. *Ody*, 1 M. & W. 452 ; 7 Car. & P. 410 ; 5 D. P. C. 95 ; 2 Gale, 12 ; 1 Tyr. & G. 715 ; 5 L. J., Ex. 199.

In an action for such an injury, no notice of action was necessary, nor was it necessary to bring it within three months from the time of the building of the wall. *Ib.*

—— **Artizans' Dwellings — Right to Compensation.**]—See *Wigram* v. *Fryer*, 56 L. J., Ch. 1098 ; 36 Ch. D. 87 ; 57 L. T. 255 ; 36 W. R. 100.

v. *Proceedings.*

**Action within Three Months.**]—The Building Act, 14 Geo. 3, c. 78, s. 100, limits actions to be brought within three months. A. began to build a party-wall on B.'s land more than three months before action, but did not complete it till within that time :—Held, that B. might recover for such part of the trespass as was committed within the time limited, but that if nothing had been done within the three months, he must bring ejectment. *Trotter* v. *Simpson*, 5 Car. & P. 51.

—— **Notice of Action.**]—If a person, bonâ fide intending to pursue the authority given by 14 Geo. 3, c. 78, erected a party-wall, without, in fact, pursuing the directions of the statute, and thereby injured his neighbour, he was liable to an action ; but the action must have been brought after twenty-one days' notice, and within three months after the injury done. *Pratt* v. *Hillman*, 6 D. & R. 360 ; 4 B. & C. 269 ; 3 L. J. (o.s.) K. B. 253.

**Mandamus for Reinstatement.**]—Where a party had pulled down a party-wall, thereby destroying the internal decorations of his next neighbour's house, and rebuilt the wall without replacing the decorations :—Held, that it was not competent for the person so injured to compel by mandamus the reinstatement of his apartments under 14 Geo. 3, c. 78, s. 41, but his remedy was by action. *Reg.* v. *Ponsford*, 1 D. & L. 116 ; 12 L. J., Q. B. 313 ; 7 Jur. 767.

**Settlement of Disputes by Arbitration.**]—Although a co-owner of a party-wall could not at common law maintain an action against the other co-owner for temporarily undermining the foundation of the wall and replacing it with a new foundation when the work was unattended with danger to the security of the wall, yet when within the area of the Metropolitan Building Act (18 & 19 Vict. c. 122), such a work being a right in relation to a party structure within s. 83, sub-ss. 7, 11, cannot be carried on when a difference arises between the building owner and the adjoining owner (unless they concur in the appointment of one surveyor), except by the award of two surveyors and a third selected by them, or of any two of such surveyors, as provided by s. 85, sub-s. 7. *Standard Bank of British South America* v. *Stokes*, 47 L. J., Ch. 554 ; 9 Ch. D. 68 ; 38 L. T. 672 ; 26 W. R. 492.

But the rights and duties of adjoining owners as defined by the Metropolitan Building Act, 1855, are in substitution of those which existed at common law, and are not merely an addition thereto. *Ib.*

—— **Appointment of Umpire.**]—Where surveyors had been nominated under the Metropolitan Building Act, 1855, s. 85, to settle differences in dispute between a building owner and an adjoining owner as to the erection of a party-wall, and such surveyors had refused to appoint an umpire, the court appointed an umpire, under the Common Law Procedure Act, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an

ancient light in the party-wall. *M'Bryde, Ex parte*, 46 L. J., Ch. 153; 4 Ch. D. 200; 35 L. T. 543.

—— **Appeal from Award.**]—Where an award is made under the 85th section of the act, the only appeal from that award is to the county court, and from that court to the superior tribunals. *Seawell* v. *Webster*, 29 L. J., Ch. 71; 7 W. R. 691.

—— **Contract—Specific Performance.**]—Where building owners contract to do a work, but upon proceeding to arbitration under the Metropolitan Building Acts are compelled by the award then made to proceed in a manner different from the contract; although a bill for specific performance will lie, the court will not restrain the progress of the work until they have fulfilled the contract. *Ib.*

Semble, although the court cannot compel a party to do an act contracted for on the ground of impossibility, it will restrain him from doing something different. *Ib.*

**e. Surveyor's Fees and other Charges.**

*See* London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 154—162, and sched. 3, I. (1) and (3).

**Liability of Owner.**]—In 1866 notice was given by a builder to the district surveyor of his intention to erect three houses, under 18 & 19 Vict. c. 122, s. 38. The surveyor inspected the houses, and the roofs were covered in on the 9th of July, 1866; and on the 9th of August, 1866, the surveyor became entitled to certain fees from the "builder, owner, or occupier," under s. 51. T. first became owner in 1869; and the surveyor, after due demand, took out a summons against T. for the fees:—Held, that "owner" meant owner for the time being when the fees became due; and that T. was, therefore, not liable. *Tubb* v. *Good*, 39 L. J., M. C. 135; L. R. 5 Q. B. 443; 22 L. T. 885.

C. being seised in fee of certain building land situate within the limits of the Metropolitan Building Act, 1855, entered into an agreement with L. to grant leases of ninety-nine years of certain plots of the land, so soon as L. should have erected houses thereon, at a peppercorn rent until the 24th of June, 1870, and afterwards at 28*l.* a year. L. built houses which were roofed in about September, 1870, and C. became entitled to receive the first quarter's ground rent on the 29th of September; the houses were surveyed by the district surveyor, and he, on the 26th of October, 1870, delivered a bill for his fees to L., who afterwards became insolvent. The surveyor afterwards claimed payment of his fees from C.:—Held, that he was not liable to pay the fees, as he was not the owner of the houses within the meaning of ss. 3, 51; for that L., the lessee for ninety-five years, whether he had a legal or only an equitable title, had the power to let the houses and receive the profit, and was therefore owner. *Caudwell* or *Canwell* v. *Hanson*, 41 L. J., M. C. 8; L. R. 7 Q. B. 55; 25 L. T. 595; 20 W. R. 202.

E., the owner in fee of land, agreed to let it to S. on a building lease for eighty-one years, at a peppercorn rent for the first year, 6*l.* for the second, and 12*l.* for the remainder of the term. S. built houses upon the land, in respect of which, during the first year of the term, certain fees became payable to the district surveyor, under 18 & 19 Vict. c. 122, s. 51, from the builder, or from the owner or occupier of the building:—Held, that E. was not liable to the fees as owner within ss. 3 and 51. *Evelyn* v. *Whichcord*, El. Bl. & El. 126; 27 L. J., M. C. 211; 4 Jur. (N.S.) 808; 6 W. R. 468.

**Railway—Exemption of Buildings.**]—Where arches under a railway viaduct constructed by and on land of a company acting under a statute were enclosed by walls with gates, the enclosed space being divided into stories and used as a stable by a lessee of the company, and after the passing of the 18 & 19 Vict. c. 122, alterations were made in the walls:—Held, that the district surveyor could not claim fees in respect of such alterations, the arches being a building belonging to and used for the purposes of a railway within s. 6, and therefore exempt from part 1, and the additions not of themselves constituting a building nor, within s. 9, an alteration of or addition to an old building, that section applying only to old buildings within the act. *North Kent Ry.* v. *Badger*, 27 L. J., M. C. 106. *S. C.*, nom. *Badger, In re*, 8 El. & Bl. 728; 4 Jur. (N.S.) 454; 6 W. R. 246.

**Separate Sets of Chambers—One Building.**]—Separate sets of chambers under one roof, intended to be separately occupied, and having no communication with each other except by means of a common staircase, are not separate buildings within the Metropolitan Building Act, 1855, so as to entitle the district surveyor to charge a separate fee in respect of each of them. *Moir* v. *Williams*, 61 L. J., M. C. 33; [1892] 1 Q. B. 264; 66 L. T. 215; 40 W. R. 69; 56 J. P. 197—C. A.

**Amount of.**]—Under the Building Act (18 & 19 Vict. c. 122), s. 49, and the schedule thereto, the district surveyor is entitled to a fee of 10*s.* "for inspecting the arches or stone floors over or under public ways":—Held, that, where a builder is employed to construct a series of arches for cellars under a public street or streets surrounding a vacant piece of land which is to be let for building, the district surveyor is entitled to a fee of 10*s.* in respect of each distinct building to which any given number of the arches is intended to be appropriated—a matter of fact which is to be ascertained and determined by the magistrate before whom the fee is sought to be recovered. *Power* v. *Wigmore*, L. R. 7 C. P. 386; 27 L. T. 148.

The decision of the magistrate upon such a summons is the subject of an appeal under 20 & 21 Vict. c. 43, notwithstanding s. 106 (the appeal clause) of the Building Act. *Ib.*

**Penalty for Excessive Demand.**]—By 7 & 8 Vict. c. 84, if any surveyor demand or wilfully receive any higher fee than he shall be entitled to under this act, or if in his capacity of surveyor he receives a fee for any act or omission in respect of which he is not entitled to any remuneration, he shall be subject to fine, or to be discharged from his office:—Held, by Erle, J., that the second clause applied to cases where the demand was knowingly made without a colour of right; and by Coleridge, J., and Wightman, J., that it was confined to the case where the surveyor received a fee wholly unauthorised by the statute, even if he had done or omitted to do the act on the doing or omitting to do which he founded his claim to receive it. *Reg.* v. *Badger*, 6 El. & Bl. 137; 25 L. J., M. C. 81; 2 Jur. (N.S.) 419.

### f. Consent of Council.

**Neglect of Conditions—Order to Demolish.**]—Where B. applied to the Metropolitan Board of Works for consent to build a house, which was granted, but without procuring the conditions upon which the consent was granted, he built the house higher than those conditions permitted:—Held, that a magistrate, upon a summons charging him with having erected a building beyond the general line of buildings in the street, and contrary to the conditions on which the consent of the board of works was obtained, might order him, under 25 & 26 Vict. c. 102, s. 75, to demolish so much of the house as was beyond the general line of buildings, although this line had only been decided by the superintending architect on the day previously to the hearing of the summons. *Bauman* v. *St. Pancras Vestry*, 36 L. J., M. C. 127; L. R. 2 Q. B. 528; 15 W. R. 904.

—— **Notice.**]—The power given by 18 & 19 Vict. c. 120, s. 76, by which a district board is authorised to demolish a house, on neglect of the builder to give seven days' notice of his intention to build, does not empower the board to demolish the house without first giving the person guilty of the omission an opportunity of being heard. *Cooper* v. *Wandsworth Board of Works*, 14 C. B. (N.S.) 180; 32 L. J., C. P. 185; 9 Jur. (N.S.) 1155; 8 L. T. 278; 11 W. R. 646.

The right to sue is not taken away by s. 24, giving a right of appeal to the Metropolitan Board of Works. *Ib.*

**Application for Consent after Erection.**]—The London County Council have no power to entertain an application under s. 13, sub-s. 4, of the London Building Act, 1894, for their consent to "the erection, formation, or extension of a new building or structure within twenty feet of the centre of a carriage highway," when such new building or structure has already been erected within that distance without their consent. *Reg.* v. *London County Council*, 66 L. J., Q. B. 516; 76 L. T. 472; 45 W. R. 605; 61 J. P. 439.

**Modification of Plan—Obligation to Rebuild.**]—Where a man, under contract to build according to a specified plan, and according to the metropolitan building acts, commenced building according to the plan, which was in some particulars in contravention of the building acts, and upon being cautioned by the board stopped building, and refused to proceed:—Held, that he was bound to rebuild in conformity with the plan, modified so as to meet the requirements of the statutes. *Cubitt* v. *Smith*, 10 Jur. (N.S.) 1123; 11 L. T. 298.

**Removal of Building—Notice of Intention to Erect.**]—The 18 & 19 Vict. c. 120, ss. 83 and 85, do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the act need in such case be given. *Major* v. *Park Lane Co.*, L. R. 2 Eq. 14 L. T. 543.

—— **After Leave to Erect.**]—In 1876 T. applied to the Metropolitan Board of Works for leave to erect an iron building, called a skating rink, at the back of his premises, pursuant to 18 & 19 Vict. c. 122, s. 56, and the board granted leave on T. giving the board an undertaking to remove the building within two years. The time elapsed, and the board called on T. to remove the building, but he failed to do so:—Held, that ss. 45 and 46 applied only to a building in the course of erection, and not to this case, and there was no power given to a magistrate to enforce its removal. *Parsons* v. *Timewell*, 44 J. P. 296.

**Licence to erect Temporary Wooden Structure.**]—See *Hall* v. *Smallpiece*; *London County Council* v. *Pearce*; *London County Council* v. *Humphreys*; and *London County Council* v. *Chandler*, ante, col. 1068.

### g. Dangerous Structures.

**Delegation of Powers to Architect.**]—Where a public duty vested in a public body is not discretionary, but merely ministerial, the public body may delegate it to one of its officers. The duties of the London County Council as to dangerous structures under Part IX. of the London Building Act, 1894 (57 & 58 Vict. c. 213), are merely ministerial, and may therefore be delegated to the council's superintending architect. *London County Council* v. *Hobbis*, 75 L. T. 687; 45 W. R. 270; 61 J. P. 85.

**Service of Summons—Owner of Premises.**]—The rule to be observed in the service of a summons under s. 107 of the London Building Act, 1894, is that where the owner of the premises can by reasonable and ordinary inquiry be discovered the procedure must be under s. 1 of the Summary Jurisdiction Act, 1848; but that where, after such inquiry, the owner cannot be ascertained, the procedure under s. 188, sub.-s. 1, of the act of 1894, is applicable, and the summons may be served by affixing a copy thereof on some conspicuous part of the building to which it relates. *Reg.* v. *Mead*, 66 L. J., Q. B. 874; [1898] 1 Q. B. 110; 77 L. T. 462; 46 W. R. 61; 61 J. P. 759.

**Not adjoining Public Thoroughfare—Order to Demolish — Jurisdiction.**]—The jurisdiction of magistrates acting under the Metropolitan Building Act, 1855, to make orders for the demolition of dangerous structures, extends to cases where the premises do not adjoin upon a highway or public thoroughfare, and do not constitute a danger to the public at large. *London County Council* v. *Herring*, 63 L. J., M. C. 230; [1894] 2 Q. B. 522; 10 R. 455; 58 J. P. 721.

**Notice by County Council to Secure—Counter-notice requiring Arbitration—Time for Report.**]—If an owner upon whom a requisition to pull down a building as dangerous has been served under the London Building Act, 1894, makes a counter-requisition under s. 107 of the act, requiring the matter to be referred to arbitration, but fails to name a surveyor in such counter-requisition, the counter-requisition drops. If the owner's surveyor and the district surveyor fail to report within seven days, the matter falls to be dealt with by the arbitrator if the surveyors have appointed one before entering on the matter. If they have not appointed an arbitrator, then again the counter-requisition drops, as the owner is in default. Any difficulty arising as to the arbitrator who has been duly nominated not reporting within fourteen days, either on account of illness or other unavoidable cause, can be cured by an order of the court under the

Arbitration Act, 1889. *London County Council* v. *Bernstein*, 61 J. P. 630.

**"Expenses Incurred in Respect of"—What are.**]—A structure within the metropolis having been surveyed and reported dangerous, notice was served on the owner under 18 & 19 Vict. c. 122, ss. 69, 73; and not having repaired it, he was summoned by the Metropolitan Board of Works before a magistrate; the summons was adjourned from time to time, and ultimately withdrawn, the owner having in the meantime duly repaired the structure. The board sought to charge against the owner, under s. 73, as "expenses incurred in respect of a dangerous structure," in addition to the surveyor's fees allowed by ss. 77, 79, the following items, which, by resolution of the board, had been resolved should be charged against owners in respect of dangerous structures, viz., 3*s.* 6*d.* for preparation of notices and forms; 2*s.* 6*d.* for clerk's time in service of notices; and 2*s.* 6*d.* for general office expenses:—Held, that the board was not entitled to charge the last item, but was entitled to charge the other two. *Metropolitan Board of Works* v. *Flight*, 43 L. J., M. C. 46; L. R. 9 Q. B. 58; 29 L. T. 608.

**Expenses of Demolition.**] — See *Tubbs* v. *Wynne*, 66 L. J., Q. B. 116; [1897] 1 Q. B. 74.

### h. Proceedings.

**Remedy for Building beyond Line.**]—L. erected a brewery in a new street in the metropolis. At the time of commencing the building, and up to the completion of it so as to prepare it for being roofed in, the general line of frontage of the buildings intended to be erected in the street had not been fixed on and indicated by the surveyor to the local board of works under 25 & 26 Vict. c. 102, s. 75. When the building was so ready to be roofed in the surveyor fixed upon and indicated the line of frontage, of which L. had notice, but continued nevertheless constructing such edifice so as to cause it to project beyond the line, until the building was nearly completed, without having obtained the permission of the Metropolitan Board of Works for such protection, as required by 25 & 26 Vict. c. 102. For this offence in contravention of the provisions of the statutes he was indicted:—Held, that the statute creating the offence pointed out the remedy whereby the buildings complained of might be demolished by order of a justice, and that that was the only remedy that could be pursued, and an indictment therefore would not lie. *Reg.* v. *Lovibond*, 24 L. T. 357; 19 W. R. 753.

**Against whom.**]—When there is a known owner or occupier, the proper person to proceed against for an infringement of the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), s. 75, is such owner or occupier, and not the builder, and a summons upon the builder is only valid whilst he is engaged in the work. *Bruton* v. *St. George, Hanover Square, Vestry*, 41 L. J., Ch. 134; L. R. 13 Eq. 339; 25 L. T. 552; 20 W. R. 84.

**Time for—Under s. 107 of Metropolis Management Act, 1862.**]—The offence, six months after the commission or discovery of which complaint is, under s. 107, to be made, is committed when first an intrusion is made upon the general line of building, and the time begins to run from the day such intrusion is discovered. *Ib.*

Where, therefore, a vestry having on the 25th of August discovered that an owner of a house had on the 24th of August put up the framework of a conservatory which intruded on the space beyond the general line, and was finished on the 23rd of September, but such vestry, not having received the certificate of the superintending architect until the 2nd of March, took no step till the 4th of March, when they issued a summons against the builder, who had in the meantime been paid, and had gone abroad:—Held, first, that the summons was issued against the wrong person. *Ib.*

Held, secondly, that it was out of time. *Ib.*

The limitation clause in 25 & 26 Vict. c. 102, s. 107, imposing a limit of six months for making a complaint for the payment of any penalty or forfeiture for an offence against that act, does not apply to a complaint for the erection of a building beyond the general line of buildings of a street without the consent of the Metropolitan Board of Works, contrary to s. 75, which provides the means of obtaining an order for the demolition of such buildings. *Bermondsey Vestry* v. *Johnson*, 42 L. J., M. C. 67; L. R. 8 C. P. 441; 28 L. T. 665; 21 W. R. 626.

—— **Under s. 75 of Metropolis Management Act of 1862.**]—Although there is nothing in the Metropolis Management Act, 1862, to limit the time within which proceedings under s. 75 must be taken, yet s. 11 of 11 & 12 Vict. c. 43 applies, and they must therefore be taken within six calendar months. *Morant* v. *Taylor* (1 Ex. D. 188) followed. *Paddington Vestry* v. *Snow*, 45 L. T. 475; 30 W. R. 46; 46 J. P. 87.

When a building is erected beyond the general line of buildings the matter of complaint arises as soon as the building is erected above the level of the ground so as to project beyond the building line, even though at that time the superintending architect has not certified as to the general line of buildings. C. began to erect a house before the 27th April, 1891, and at that date the building was erected as far as the joists of the first floor; the certificate of the superintending architect of the London County Council as to the general line of building was given on the 6th August, 1891, and on the 28th October, 1891, the London County Council took out a summons before a magistrate, complaining that C. had unlawfully erected the building beyond the general line of buildings, contrary to the 25 & 26 Vict. c. 102, s. 75. By s. 11 of 11 & 12 Vict. c. 43, it is provided that in all cases where no time is specially limited for making a complaint such complaint shall be made within six calendar months from the time when the matter of such complaint arises:—Held, that the matter of complaint had arisen more than six months before the 28th October, 1891, when the complaint was made, and the summons must be dismissed. *London County Council* v. *Cross*, 66 L. T. 731—C. A. Reversing 61 L. J., M. C. 160; 56 J. P. 550.

It is not a condition precedent to the issue of a summons under s. 75 of the Metropolis Management Amendment Act, 1862, for building beyond the general line, that the architect should have decided a line. *London County Council* v. *Cross* (61 L. J., M. C. 160) followed. *Lavy* v. *London*

*County Council*, 64 L. J., M. C. 262; [1895] 2 Q. B. 577; 14 R. 634; 73 L. T. 106; 43 W. R. 677; 59 J. P. 630—C. A.

—— **Continuing Offence.**] — A conviction under the Metropolis Management Amendment Act, 1862, for a continuing offence under s. 85 of that act (relating to the height of buildings), is valid, although a complaint in respect of the original offence has not been preferred and a conviction obtained within the six months limited by s. 107 of the act. *London County Council* v. *Worley*, 63 L. J., M. C. 218; [1894] 2 Q. B. 826; 10 R. 510; 71 L. T. 487; 43 W. R. 11; 18 Cox, C. C. 37; 59 J. P. 263.

Where a temporary structure had been erected within the metropolitan district without the licence of the Metropolitan Board of Works, but no complaint of such erection was made until after the expiration of six months from its completion:—Held, that the offence was a continuous one as long as the structure remained existent, and that proceedings for the recovery of the penalties might be taken within six months of the time within which it continued to exist. *Metropolitan Board of Works* v. *Anthony*, 54 L. J., M. C. 39; 33 W. R. 166; 49 J. P. 229.

—— **Non-compliance with Notice.**]—G., the builder of a new house in the metropolis, on 1st April sent notice to B., the district surveyor, with plans. On 4th August, B. served a forty-eight hours' notice on G. to amend the work and have sufficient area space pursuant to 45 Vict. c. 14, s. 14. The house was then covered in, and nothing was done under the notice. On 1st February following, information of an offence was laid by B.:—Held, that the offence was the refusal to do the work ordered on 4th August, and the information was within the six months' limitation. *Bovill* v. *Gibbs*, 51 J. P. 485.

—— **Wooden Structure erected and continued without Licence.**]—A liability to penalties for erecting a wooden structure without licence under s. 13 of the Metropolitan Building Act, 1882, which existed on January 1, 1895, when the London Building Act, 1894, came into operation, is saved by s. 215 of the latter act; but proceedings which have been delayed for more than six months after January 1, 1895, cannot be taken for the recovery of such penalties owing to the operation of s. 11 of the Summary Jurisdiction Act, 1848. *Reg.* v. *Cluer; London County Council, Ex parte*, 67 L. J., Q. B. 36; 77 L. T. 439.

**Jurisdiction of Justices.**]—In a proceeding before a magistrate for erecting a building, without the consent of the Metropolitan Board of Works, beyond the general line of buildings in a street, the certificate of the superintending architect of the board is not absolutely conclusive, but the magistrate is entitled to judge for himself whether the line fixed by such certificate is in fact the general line of buildings in the street. *Simpson* v. *Smith*, 40 L. J., M. C. 89; L. R. 6 C. P. 87; 24 L. T. 100; 19 W. R. 355.

An order by a justice under 18 & 19 Vict. c. 122, s. 73, after reciting that a complaint had been made by the assistant commissioner that he had caused notice in writing to be given to F., the owner of a structure, requiring him to repair it, and that he had failed so to do, ordered F. to repair the same. On a summons before a second justice to recover from F. the expenses incurred by the commissioner in repairing the structure, on F. having failed to repair, the justice dismissed the summons, on the ground that the order, which was put in in evidence, was defective for not containing any averment that F. had been summoned to answer the complaint, or any adjudication that the complaint was true:—Held, that such second justice had jurisdiction, upon the hearing of the summons, to enter into the question of the sufficiency of the order; and that the order was insufficient and bad upon the face of it, on the above grounds. *Labalmondiere* v. *Frost*, 1 El. & El. 527; 28 L. J., M. C. 155; 5 Jur. (N.S.) 789; 7 W. R. 205. *And see* ante, cols. 1069, 1070.

**Notice by Surveyor after Building completed.**]—Sects. 45 and 105 of the Metropolitan Building Act, 1855, do not empower a district surveyor to give notice, after a building is completed, requiring the builder to make alterations in the work. *Smith* v. *Legg*, [1893] 1 Q. B. 398; 5 R. 233; 68 L. T. 347; 41 W. R. 464; 57 J. P. 295.

A magistrate has no jurisdiction under s. 46 of the Metropolitan Building Act, 1855, to make an order on a builder to do certain works required by the district surveyor under s. 45 after the builder has ceased to be engaged in erecting the building. *Wallen* v. *Lister*, 63 L. J., M. C. 51; [1894] 1 Q. B. 312; 10 R. 127; 70 L. T. 348; 42 W. R. 318; 58 J. P. 283.

Even if the magistrate had jurisdiction to make the order under s. 46, he has a discretion under s. 47 to refuse to enforce the order or inflict a penalty for non-compliance where such order is made inadvertently through ignorance of the facts. *Ib.*

**Appeal to Quarter Sessions from Order for Demolition.**]—An appeal to quarter sessions will not lie against the order of a justice directing the demolition of buildings under s. 75 of the Metropolis Local Management Amendment Act, 1862. By s. 231 of the Metropolis Local Management Act, 1855, any person aggrieved by any adjudication of a justice "with respect to any penalty or forfeiture under the provisions of the act" may appeal to quarter sessions. By s. 75 of the Metropolis Local Management Amendment Act, 1862 (which, by s. 110, is to be construed as one act with the act of 1855), where a building is erected beyond the general line of buildings in a street without the consent of the Metropolitan Board of Works, a justice of the peace is empowered, upon complaint made and after inquiry held as the act directs, to order the owner or occupier to demolish the building, and in default of compliance with the order the vestry of the parish or board of works for the district shall demolish the building, and may remove and sell the materials, and recover the expenses of so doing from the owner or occupier:—Held, that the order of a justice directing the demolition of a building under s. 75 of the act of 1862 was not an adjudication "with respect to a penalty or forfeiture" within s. 231 of the act of 1855, and therefore that no appeal to quarter sessions would lie against the order. *Reg.* v. *Middlesex JJ., Elsdon, Ex parte*, 51 L. J., M. C. 94; 9 Q. B. D. 41; 30 W. R. 657; 46 J. P. 551.

**Appeal to Court of Appeal on Case stated.**]—No appeal lies to the court of appeal from a

decision of the queen's bench division on a case stated by a magistrate upon a summons taken out under s. 46 of the Metropolitan Building Act, 1855, for a contravention of the provisions of s. 19 of that act; for the decision of the queen's bench division is a decision in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873. *Payne* v. *Wright*, 61 L. J., M. C. 114; 66 L. T. 148; 17 Cox, C. C. 460; 56 J. P. 564.

### 3. Sewers.

#### a. What are.

**Sewer — Demolition.**]—A marsh wall or an embankment which keeps back the river Thames at high tide from inundating the Isle of Dogs is a sewer within 18 & 19 Vict. c. 120, s. 204, which prohibits the erection of any building "in, over, or under any sewer vested in the Metropolitan Board of Works, or in any district board, without their consent," and empowers the board in whom such sewer is vested to demolish the same. *Poplar Board of Works* v. *Knight*, El., Bl. & El. 408; 28 L. J., M. C. 37; 5 Jur. (N.S.) 196.

**"Drain" or "Sewer"—Approval of Metropolitan Board of Works.**]—Although the proviso of s. 69 of the Metropolis Management Act, 1855, enacts that "no new sewer shall be made without the previous approval of the Metropolitan Board of Works," the mere fact that the requisite consent was not obtained to the construction of a sewer since that date does not prevent it from being a sewer when made, and as such repairable by the vestry. *Reg.* v. *St. Matthew, Bethnal Green, Vestry*, 65 L. J., M. C. 129; [1896] 2 Q. B. 95; 74 L. T. 701; 44 W. R. 559; 60 J. P. 442. See *S. C.* in C. A., infra, col. 1098.

—— **Drainage by Combined Operation.**]—The owner of a plot of ground within the metropolitan district, on which he was about to build fifteen contiguous houses, sent to the local board notice of his intention to lay down upon it a pipe drain running parallel to the houses, through which the houses would be drained into the main sewer belonging to the Metropolitan Board. The local board signed their approval of the scheme by letter, and entered their approval in their books, but made no formal order. The owner completed the drain:—Held, by North, J., that s. 74 of the Metropolis Local Management Act, 1855, which enables a district board to order a group or block of contiguous houses to be drained by a "combined operation," is supplemental to s. 73, and, like that section, applies only to existing houses; that the local board had therefore no power to make an order for draining by a "combined operation" a set of houses in course of erection, and that, if they had, their approval of a scheme proposed by the owner did not amount to an order; that the drain in question was therefore not a "drain for draining any group or block of houses by a combined operation under the order of any vestry or district board," and was a "sewer," and not a "drain," within the meaning of s. 250, and by virtue of s. 68 vested in the local board:—Held, on appeal, by Cotton and Lindley, L.JJ. (diss. Lopes, L.J.), that although s. 74 did not give the board power to order drainage by a combined operation except in the case of existing houses, the general words of s. 76 gave them this power in the case of houses about to be built; that their approval of the scheme was an order, and that the drain in question was therefore a "drain," and not a "sewer," within the meaning of s. 250, and did not vest in the local board. *Bateman* v. *Poplar Board of Works*, 56 L. J., Ch. 149; 33 Ch. D. 360; 55 L. T. 374—C. A.

A drain for draining a group or block of houses by combined operation laid and constructed in 1838 is, in the absence of evidence that it had been constructed by the order or direction or with the sanction or approval of the metropolitan commissioners of sewers, or, since January 1, 1856, of the vestry, a "sewer" repairable by the vestry, and does not fall within the definition of "drain" in s. 250 of the Metropolis Management Act, 1855, as extended by s. 112 of the Amendment Act, 1862, so as to be repairable by the private owner. *Appleyard* v. *Lambeth Vestry*, 66 L. J., Q. B. 27; 45 W. R. 173; 60 J. P. 807. See *S. C.* in C. A., infra.

A drain was constructed in the metropolis in 1839 for draining a group of houses by combined operation, and was a "sewer" within the meaning of s. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and so repairable by the vestry of the parish, unless constructed before January 1, 1856, "with the sanction or approval of the metropolitan commissioners of sewers" within the meaning of s. 112 of the Metropolis Management Act, 1862:—Held, that the expression "metropolitan commissioners of sewers" in the latter act refers to the metropolitan commissioners of sewers created in 1848 by 11 & 12 Vict. c. 112, and does not include commissioners of sewers having authority in the metropolis previously to that act, and that the drain was therefore a "sewer" within the meaning of the act of 1855, and repairable by the vestry. *Appleyard* v. *Lambeth Vestry*, 66 L. J., Q. B. 347; 76 L. T. 442; 45 W. R. 370; 61 J. P. 276—C. A.

Plans of six semi-detached houses were deposited with the local authority, showing a separate drain for each pair of houses. The plans were passed subject to the execution of the drainage works to the satisfaction of the board's surveyor. The houses were then built, and one of them afterwards became the property of the defendant. A nuisance arose from the defective condition of the drain of the defendant's house, and on opening up the drain it was found that three others of the houses drained into it:—Held, that from the injunction the drain was a sewer, vested in and repairable by the local authority, and that the defendant was not estopped from saying so on account of the circumstances connected with the original making of the drain, to which he was not a party. *Kershaw* v. *Taylor*, 64 L. J., M. C. 245; [1895] 2 Q. B. 471; 14 R. 698; 73 L. T. 274; 44 W. R. 28; 59 J. P. 726—C. A.

A drain for the drainage of four houses by combined operation was constructed under the order of a vestry. A pipe which carried off rainwater from the roof of a fifth house was, without the sanction of the vestry, turned into and connected with this drain:—Held, that the rainwater pipe was a drain within s. 250 of the Metropolis Management Act, 1855, and that its unauthorised connection with the drain belonging to the four houses converted the latter from the point of junction and onwards into a sewer. *Holland* v. *Lazarus*, 66 L. J., Q. B. 285; 61 J. P. 262.

Evidence of an order by the vestry, or of some action equivalent to an order, must be shown to

bring the construction within the description of "drainage by a combined operation under the order of any vestry" in s. 250 of the same act. *Reg.* v. *St. Matthew, Bethnal Green, Vestry*, 65 L. J., M. C. 129; [1896] 2 Q. B. 95; 74 L. T. 701; 44 W. R. 559; 60 J. P. 442. See *S. C.* in C. A., infra, col. 1098.

—— **Change in Use—Approval of Local Authority.**]—The mere fact that a pipe which once carried the drainage of two or more houses has ceased to carry the drainage of more than one house is not sufficient to change the character of that pipe from a "sewer" to a "drain." *St. Leonard, Shoreditch, Vestry* v. *Phelan*, 65 L. J., M. C. 111; [1896] 1 Q. B. 533; 74 L. T. 285; 44 W. R. 427; 60 J. P. 244.

Semble, the absence of any evidence that an ancient pipe conveying the sewage of two or more houses was so constructed under the sanction of the local authority, does not raise any presumption in favour of its having been so constructed. *Ib.*

—— **Drainage of "Premises within the same Curtilage."**]—The drainage of a double row of houses and shops on each side of a passage passed from each house into a brick drain which ran down the centre of the passage. The passage, and the houses on each side of it, belonged to one owner, and were arched over by a common roof; and the only access to the houses was by passing along the passage. There were gates at each end of the passage, which were closed to the public at night and on Sundays, but open to the tenants of the houses at any time:—Held, that the drain under the passage was not a drain used for the drainage of one building only, or of premises within the same curtilage, within the definition in s. 250 of the Metropolis Local Management Act, 1855, and was, therefore, a sewer, and repairable by the vestry, and not by the owner of the houses. *St. Martin's-in-the-Fields Vestry* v. *Bird*, 64 L. J., Q. B. 230; [1895] 1 Q. B. 428; 14 R. 146; 71 L. T. 868; 43 W. R. 194; 60 J. P. 52—C. A.

Two blocks of buildings, belonging to one owner, who let them out in forty-six sets of apartments, were separated by a causeway or yard twenty feet wide. On one side the causeway opened into the street; otherwise it was enclosed by the buildings and a wall or railing. One of these blocks had doors opening into the causeway; there was no access to the causeway from the buildings in the other block. Twelve branch drains ran from the buildings on each side of the causeway into a main drain which ran underneath the causeway between the two blocks into the sewer in the adjoining street:—Held (Rigby, L.J., dissenting), that the main drain in question was a drain repairable by the owner, and not a sewer repairable by the vestry, the two blocks being premises within the same curtilage within s. 250 of the Metropolis Management Act, 1855. Per Rigby, L.J.: The curtilage of a building may have other subsidiary premises within it, but the same piece of ground cannot be the curtilage of more than one building. *Pilbrow* v. *St. Leonard, Shoreditch, Vestry*, 64 L. J., M. C. 130; [1895] 1 Q. B. 433; 14 R. 181; 72 L. T. 135; 43 W. R. 342; 59 J. P. 68—C. A.

### b. General Powers.

**New Sewers — Approval of Metropolitan Board.**]—By 18 & 19 Vict. c. 120, s. 69, the vestry of every parish mentioned in schedule (A.) shall make such sewers as may be necessary for effectually draining their parish, provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. A mandamus to a vestry of a parish commanding them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf, is defective, first, because it does not show a duty to make the sewers; and, secondly, because it ordered the vestry to make them without showing that the approval of the metropolitan board had been obtained. *Reg.* v. *St. Luke's Vestry, Chelsea*, 1 B. & S. 903; 31 L. J., Q. B. 50; 8 Jur. (N.S.) 308; 5 L. T. 744; 10 W. R. 293.

The proviso in s. 69 of the Metropolis Management Act, 1855, that "no new sewer shall be made without the previous approval of the Metropolitan Board of Works," does not apply to a sewer made by a private person. *Reg.* v. *St. Matthew, Bethnal Green, Vestry*, 65 L. J., M. C. 215; [1896] 2 Q. B. 319; 75 L. T. 60; 44 W. R. 697; 60 J. P. 582—C. A.

A new sewer made by a private person within the district of a vestry in the metropolis, branching into a sewer belonging to the vestry, vests in the vestry by virtue of s. 68 of the Metropolis Management Act, 1855, and they are liable to maintain it, although their sanction to its construction had not been obtained as required by s. 47 of the Metropolis Management Amendment Act, 1862, if they knew that the sewer had been made and assented to it. *Ib.*

—— **Power of County Council to order Vestry to make.**]—Sect. 138 of the Metropolis Local Management Act, 1855, does not empower the London County Council to make an order directing a metropolitan vestry to make a new sewer. The section merely enables the council to make orders regulating the mode of construction and arrangement of local sewers, and does not take from vestries the initiative in deciding whether or not a new sewer should be made. *Reg.* v. *St. George's, Hanover Square, Vestry*, 64 L. J., Q. B. 715; [1895] 2 Q. B. 275; 15 R. 504; 73 L. T. 62; 44 W. R. 16; 59 J. P. 535.

—— **Mandamus to submit Plans to Metropolitan Board of Works.**]—The making and branching of sewers within the district of a vestry or district board is by s. 47 of the Metropolis Management Act, 1862, made subject to the sanction in writing of the vestry or district board being first obtained. But a vestry or district board cannot give such sanction by the provisions of s. 48, without the approval of the Metropolitan Board of Works:—Held, that it is no answer to a mandamus requiring a district board to submit to the Metropolitan Board of Works plans and sections of sewers laid before them in pursuance of s. 47, to aver that the board has refused to sanction the making of the roads in which the proposed sewers are intended to be made; and that therefore, the district board having no other objection, it was their duty under s. 48 to submit the plans and sections to the Metropolitan Board of Works. *Reg.* v. *Wandsworth Board of Works*, 49 J. P. 806.

**Compensation — Without Purchase.**] — The powers conferred on the Metropolitan Board of Works by 18 & 19 Vict. c. 120, s. 135, are uncontrolled by ss. 150 to 153, and the board is

empowered under the former section to make such sewers as they shall think fit, on compensating the owners of property for the damage occasioned thereby, without being required, under the latter sections, to buy the land under which they carry their works, or easements therein, from the owner. *Hughes* v. *Metropolitan Board of Works*, 7 Jur. (N.S.) 986; 4 L. T. 318; 9 W. R. 517.

The metropolitan board may execute any works comprised within the terms of 18 & 19 Vict c. 120, s. 135, making compensation for damage, without first acquiring the land under ss. 150—153, and the Lands Clauses Act, 8 & 9 Vict. c. 18, notwithstanding that the works may be of such a character as to involve an actual taking of land, and may be within the powers of ss. 150 and 153. *North London Ry.* v. *Metropolitan Board of Works*, 1 Johnson, 405; 28 L. J., Ch. 909; 5 Jur. (N.S.) 1121; 7 W. R. 640.

**Right to Lateral Support.**]—A sewer made by the metropolitan commissioners of sewers under the powers vested in them by 11 & 12 Vict. c. 112, was transferred to the Metropolitan Board of Works by 18 & 19 Vict. c. 120:—Held, that these acts gave the board no right to any lateral support for the sewer by the land of the adjacent owners. *Metropolitan Board of Works* v. *Metropolitan Ry.*, 37 L. J., C. P. 281; L. R. 3 C. P. 612; 19 L. T. 10; 16 W. R. 1117. Affirmed on appeal, 38 L. J., C. P. 172; L. R. 4 C. P. 192; 19 L. T. 744; 17 W. R. 416—Ex. Ch.

**Approval of—Costs of Inspection.**]—A district board of works has no power under the Metropolis Management Act, 1862, if it approve of the plans and sections of sewers proposed to be constructed by a private landowner and branched into the main system, to withhold their sanction in writing to the construction of the same until such private landowner shall pay a sum of money to the board to cover the expenses of the board in supervising such works. *Reg.* v. *Greenwich Board of Works*, 1 Cab. & E. 236.

**Improper Construction—Committee—Resolution to serve Notice of Necessary Work—Subsequent Approval of Vestry.**]—The previous approval of a metropolitan vestry to a resolution of its public health committee (duly appointed under the provisions of s. 58 of the Metropolis Management Act, 1855), whereby notice is served on the owner or occupier of premises to put a drain into proper condition, under s. 85 of the Metropolis Management Act, 1855, is not necessary for the authorisation of such notice, provided that the action taken by the committee be one which can properly be ratified by the vestry. *Firth* v. *Staines*, 66 L. J., Q. B. 510; [1897] 2 Q. B. 70; 76 L. T. 496; 45 W. R. 575; 61 J. P. 452.

**Connecting Houses with—Right of Vestry to do Work.**]—A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made and coated with gravel and ballasted. The footpaths were made with gravel and kerbed with granite. The houses on either side of the road were not completed and inhabited, but the road was open for carriages and foot-passengers. It was lighted by the parish, but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them and ran along the centre of the road, and for that purpose they opened the road and footway. The builder declined to repay to the vestry the expenses incurred thereby:—Held, (1) that the road was not the less a street within the definition in s. 250 of the Metropolis Management Act, 1855, and s. 112 of the Metropolis Management Act, 1862, because it came within the definition of a new street in the last-mentioned section; (2) that s. 78 of the Metropolis Management Act, 1855, which authorises the opening of the pavement of any street for the purpose of branching private drains into a sewer, applies equally to streets and to new streets; (3) that, looking to the definition of the word "pave" in s. 112 of the Metropolis Management Act, 1862, the road was paved:—That, consequently, the vestry had opened a part of the pavement of a street, and were entitled under s. 78 of the Metropolis Management Act, 1855, to recover the expenses incurred by them. *St. John's, Hampstead*, v. *Hoopel*, 54 L. J., M. C. 147; 15 Q. B. D. 652; 33 W. R. 903; 49 J. P. 471.

**Sweeping Mud into.**]—By s. 205 of the Metropolis Local Management Act, 1855, it is provided that no scavenger or other person shall sweep, rake, or place any soil, rubbish, or filth, or any other thing into or in any sewer or drain, or use any grate communicating with any sewer or drain . . . and every scavenger who shall so offend shall . . . forfeit and pay any sum not exceeding 5*l*. Scavengers having swept mud to the side of a street, and forced it by means of water through a grating into a sewer, were convicted of an offence against the act:—Held, that "mud" came within the meaning of the words in the above section, and that the conviction was right. *Metropolitan Board of Works* v. *Eaton*, 50 L. T. 634; 48 J. P. 611.

**Drain—Choice of Materials—Contravention of Notice.**]—A vestry, in exercise of the powers given by 19 & 20 Vict. c. 120, s. 76, served the plaintiff with a notice, requiring him, in the construction of the drainage to certain houses which were being erected by him in their district, to use stoneware pipes of the best quality. The plaintiff used pipes of the Aylesford manufacture, as coming within the description of stoneware mentioned in the notice; but to them the vestry, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, objected; and they refused, unless their requisitions were complied with, to make an opening into the main sewer for his drainage. The plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes:—Held, that the act gave the vestry the right to determine which of the two materials should be used; and it appearing that the evidence of scientific men as to the comparative merits of the two manufactures was conflicting, refused to grant an injunction, but dismissed the bill with costs. *Austin* v. *St. Mary, Lambeth, Vestry*, 27 L. J., Ch. 677; 4 Jur. (N.S.) 274, 1032.

—— **Notice to Repair by Inspector.**]—A., the sanitary inspector of S., a metropolitan parish, gave a notice in his own name as inspector to H., an owner of a house, to reconstruct drains, &c., in three days, and afterwards, on default,

A. did the work, and the S. vestry took out a summons against H. to recover the expenditure. No resolution of the vestry or of any committee thereof to give the notice was proved, but only a meeting of three members of a sub-committee, who were proved to have met and resolved that the inspector should enter and execute the works himself:—Held, that the notice given by the inspector was bad, and the statute not being complied with, the summons against H. was properly dismissed. *St. Leonard's Vestry* v. *Holmes*, 50 J. P. 132.

—— **Drainage into "nearest Common Sewer."**]—In s. 61 of the City of London Sewers Act, 1848, the words "nearest common sewer" mean the nearest which the house-owner can, by exercising his ordinary proprietary rights, get at, and not necessarily that literally nearest. Where, therefore, an insufficient drain ran under a neighbour's house to the sewer that was literally nearest:—Held, that the commissioners of sewers were entitled to require the owner to construct a drain communicating with a sewer which, though further off, had no house or other private property intervening. *Bathard* v. *Sewers Commissioners*, 54 J. P. 135.

**Mandamus to Vestry.**]—The owner of premises alleged that a defective drainage pipe on his premises was a sewer within the Metropolis Management Act, 1855, and therefore repairable by the vestry. The vestry denied that the pipe was a sewer:—Held, that a prerogative writ of mandamus ought not to be issued to the vestry directing them to repair the pipe. The proper proceeding was for the owner of the premises to bring an action against the vestry for a declaration of right and for a mandamus. *Reg.* v. *St. Giles, Camberwell Vestry*, 66 L. J., Q. B. 337; 45 W. R. 335; 61 J. P. 217.

### c. Liability for Nuisance.

**No Authority to Create a Nuisance.**]—The Metropolitan Board of Works is not authorised by 18 & 19 Vict. c. 120, s. 135, to turn into a navigable river or stream the sewage of an entire district (which has not previously been drained into such river or stream), so as to create a nuisance. *Att.-Gen.* v. *Metropolitan Board of Works*, 1 H. & M. 298; 9 L. T. 139; 11 W. R. 820.

**Pollution of Private Stream.**]—A local board of works, in executing drainage works in its district, polluted a stream, which in its onward course flowed through the plaintiff's land, out of the district, and by such pollution caused an injury to the plaintiff:—Held, that his remedy was by action, and not under the compensation clauses of the 18 & 19 Vict. c. 120, the local board not having any power to foul a stream belonging to other persons. *Cutor* v. *Lewisham Board of Works*, 5 B. & S. 115; 34 L. J., Q. B. 74; 11 Jur. (N.S.) 340; 13 L. T. 212; 13 W. R. 254—Ex. Ch.

**Right of Local Board to Drain into Metropolitan Sewers.**]—The Metropolitan Board of Works took into their drainage system a natural brook, called the Stamford Brook. That brook was the natural means of drainage for the Acton district, which was outside the metropolitan area, and the inhabitants of that district and the defendant board, on becoming the sanitary authority of the district, had used for that purpose that part of the brook which was in their district. By this means, as the Acton district increased, the sewers of the metropolitan board, as they said, became overburdened with sewage coming from outside their area, and they requested the defendant board to send their sewage some other way. They, however, refused to do so, and claimed a right to drain into the metropolitan board's sewers. These proceedings then were instituted by the metropolitan board:—Held, that the defendant board, although they had a statutory duty to compel the drainage of their district, were in no different position as regards the plaintiff board than an ordinary riparian owner was as regards another riparian owner lower down on the same stream, and that, apart from the sewage of such persons as had acquired a prescriptive right to drain into the sewers of the plaintiff board, they could not be made to receive the sewage of the Acton district; and that an injunction must be granted to restrain the defendant board from draining into the plaintiff board's sewers in the future. As to existing drains, as to those which were made before the defendant board came into existence, they could not be interfered with; and as to those made since, under the circumstances of the case, they would not be interfered with. *Att.-Gen.* v. *Acton Local Board*, 52 L. J., Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.

**Right to Drain into Main Sewer.**]—The Metropolis Management Act, 1855, vested in the plaintiffs an open sewer, called the Stamford Brook. The Metropolis Management Amendment Act, 1862, s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the plaintiffs, without their previous consent in writing; provided that any person might, with such consent, at his own expense, make or branch any drain into any such sewer in such manner as the plaintiffs should direct. After the passing of the act of 1855, the plaintiffs allowed four old cottages belonging to the defendants, on land just outside the metropolitan area and bounded by the Stamford Brook, to continue to drain through an eighteen inch brick drain into Stamford Brook. They subsequently, at the request of the defendants, who paid half the cost, covered in the brook and converted it into a main sewer. When they did this, they made a drain eye in the newly covered in sewer as a communication for the eighteen inch drain. The defendants afterwards built other cottages on the same land, and claimed the right to use the eighteen inch drain for the purpose of draining the new cottages through the communication into the sewer:—Held, 1. That as the defendants had not proved any prescriptive right to use the eighteen inch drain for the sewage of the new cottages, nor obtained the written consent of the plaintiffs for that purpose under s. 61 of the act of 1862, they were not entitled to use the eighteen inch drain for any other purposes than those for which they used it when the brook was covered in. 2. That, therefore, the plaintiffs were entitled to an injunction to restrain the defendants from permitting their additional cottages, or any buildings other than the four old cottages, to drain into the Stamford Brook. *Metropolitan Board of Works* v. *L. &*

*N. W. Ry.*, 50 L. J., Ch. 409; 17 Ch. D. 246; 44 L. T. 270; 29 W. R. 693—C. A.

Semble, that if the plaintiffs had given their written consent and fixed the size of the communication under s. 61 of the act of 1862, the defendants could then have used the eighteen inch drain to the full extent of its capacity for all purposes. *Ib.*

Held, by the vice-chancellor, that the words, "any person" in s. 61 of the act of 1862 must be construed as meaning "any person" entitled to the benefits of the act, and accordingly as limited to owners or occupiers within the metropolitan area. *S. C.*, 49 L. J., Ch. 355; 14 Ch. D. 521; 42 L. T. 830.

Held, also, that the drainage from each additional cottage or building was a separate making or branching of a drain within the meaning of the section. *Ib.*

**Interference with Drain—Threatened Trespass and Proceedings — Injunction.**]—A dispute having arisen between the defendants, a local authority, and the plaintiff, about a drain which the plaintiff had interfered with, the defendants gave notice to the plaintiff that they would enter on his land and reinstate the drain; but they afterwards abandoned their intention, and instead took proceedings against him before the magistrates. The plaintiff then brought an action against the defendants, claiming an injunction to restrain defendants from trespassing and proceeding before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land:—Held, that as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for an injunction against the trespass; and that being so, the court had no jurisdiction to restrain the proceedings before the magistrate. *Stannard* v. *St. Giles, Camberwell, Vestry*, 51 L. J., Ch. 629; 20 Ch. D. 190; 46 L. T. 243; 30 W. R. 693—C. A.

**Vesting of Sewers in Board—Connection with Drain illegally made.**]—The duty imposed by s. 72 of the Metropolis Local Management Act, 1855, on a district board, to keep the sewers which are by the act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition. If, therefore, a drain which was originally a private drain, has, by reason of another drain being connected with it, become a "sewer," and therefore by the act vested in the district board, the board will not be liable for a nuisance caused by the drain, if it is shown that the connection was made illegally without the knowledge of the board, and that before action brought they did not know, and could not by the exercise of reasonable care have discovered, that the drain was a "sewer." *Hammond* v. *St. Pancras* (L. R. 9 C. P. 316, post, col. 1152) followed. *Bateman* v. *Poplar Board of Works*, 57 L. J., Ch. 579; 37 Ch. D. 272; 58 L. T. 720; 36 W. R. 501.

**Allowing Sewage to cause Nuisance in adjoining District—Stopping Existing Drains.**]—A detached portion of the parish of C. had no separate main drainage system, but certain houses therein were drained by means of pipes carrying the sewage into cesspools, the overflow pipes from which communicated with main pipes within such detached portion. The drainage of the houses, including such communications, was constructed with the sanction of the C. vestry, as the local authority under the Metropolis Local Management Act, 1855. The main pipes communicated with watercourses, within the adjoining district of the F. local board, and the sewage from the cesspools passed through the main pipes into the watercourses, and caused a nuisance in such adjoining district. The F. local board brought an information and action (to which the owners and occupiers of the houses were not parties) against the C. vestry, for an injunction to restrain them from permitting, authorising, or directing any sewage to pass from the detached portion of C. into the watercourses so as to cause a nuisance:—Held, that, inasmuch as the cesspools and drains were acting properly quâ cesspools and drains, no proceedings could be successfully taken by the C. vestry against the owners or occupiers of the houses under s. 85 of the Metropolis Local Management Act, 1855; and that, as the cause and effect of the nuisance were not both within the area of the jurisdiction of the C. vestry, it was doubtful whether proceedings could be taken by them against the owners or occupiers of the houses under the Nuisances Removal Act, 1855; and that, assuming the C. vestry could take proceedings under the Metropolis Local Management Act, 1855, or the Nuisances Removal Act, 1855, the case of *Att.-Gen.* v. *Dorking* (20 Ch. D. 595, 609) was an authority that the vestry could not be compelled by injunction to take such proceedings. *Att.-Gen.* v. *Clerkenwell Vestry*, 60 L. J., Ch. 788; [1891] 3 Ch. 527; 65 L. T. 312; 40 W. R. 185.

**Drain repaired so as to be a Nuisance—Liability of Builder.**]—A builder who is employed by the owner of a dwelling-house to repair a drain, and who repairs it so as to be a nuisance and injurious to health, is "the person who undertook or executed such repair" within s. 42 of the Public Health (London) Act, 1891, and may be proceeded against under that section, although the owner is not summoned. *Young* v. *Foster*, 5 R. 430; 69 L. T. 147; 41 W. R. 589; 58 J. P. 8.

**Public Sewer.**]—The provisions of the Public Health (London) Act, 1891, for the abatement of nuisances do not apply to a nuisance alleged to arise from a public sewer vested in the London County Council, and a court of summary jurisdiction has no power to entertain a complaint based upon such an alleged nuisance. *Fulham Vestry* v. *London County Council*, 66 L. J., Q. B. 515; [1897] 2 Q. B. 76; 76 L. T. 691; 45 W. R. 620; 61 J. P. 440.

**Abatement—Covenant by Lessee—Liability.**]—See *Smith* v. *Robinson*, post, col. 1143.

4. URINALS.

**Power of Vestry to provide—Nuisance—Injunction.**]—Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 88, the vestry has power to provide and maintain urinals in situations where they deem such accommodation to be required:—Held, by Malins, V.-C., that any question whether one place or another was more fit for the erection of a urinal must be left to the decision of the vestry; but that the vestry would

be controlled by the court if they acted in an unreasonable manner and occasioned a nuisance to the owners of adjoining property. But held, by the court of appeal, that as the erection of a urinal was not necessarily a nuisance, the provision of the act authorising the vestry to erect urinals did not empower them to erect one where it would be a nuisance to the owners of adjoining property, there being no words in the act which expressly or by necessary implication authorised them to create a nuisance. *Vernon* v. *St. James, Westminster, Vestry*, 50 L. J., Ch. 81; 16 Ch. D. 449; 44 L. T. 229; 29 W. R. 222—C. A.

A vestry, acting under the powers of 18 & 19 Vict. c. 120, s. 88, resolved to erect a urinal in a situation where the vestry deemed such accommodation was required by the public, but where B. and other occupiers of houses considered that it would be a private nuisance; and the court granted an injunction, on the grounds that the act conferred no power to enable the vestry to erect that which would be a nuisance to anyone; that the vestry had no power to suppress nuisances; and that the act conferred no arbitrary power, which appeared to have been exercised, on the metropolitan vestries. *Biddulph* v. *St. George's, Hanover-square, Vestry*, 3 De G. J. & S. 493; 33 L. J., Ch. 411; 9 Jur. (N.S.) 434; 8 L. T. 44; 11 W. R. 524.

But, on appeal, the court, being satisfied upon the evidence that the urinal intended would not of necessity be a public nuisance, and also that it was neither certain nor probable that the vestry was exceeding nor would exceed its powers, and that the vestry was not influenced by any improper motive, dissolved the injunction. *S. C.*, 3 De G. J. & S. 493; 33 L. J., Ch. 411; 9 Jur. (N.S.) 953; 8 L. T. 558; 11 W. R. 739.

The intended erection by a vestry, acting under the powers given by s. 88 of 19 & 20 Vict. c. 120, of a urinal in a mews (which, in the opinion of the court, was a highway within s. 96 of the act) at a distance of eight feet from the back door of the plaintiff A. and the cellar entrance of the plaintiff B., and quite close to a narrow passage down which several young females had to pass daily on their way to the show-rooms of the plaintiff C.:—Held, to be such a nuisance as to afford ground for a perpetual injunction. *Vernon* v. *St. James, Westminster, Vestry*, supra.

**Power of Vestry to order Alterations—Public-house.**]—The vestry of Paddington, having served notice under s. 73 of 5 Geo. 4, c. cxxvi., upon the appellant, the occupier of a public-house within the parish of Paddington, to effect certain alterations in a urinal forming part of and constructed in the outside flank wall of the house, and accessible only from the side street, preferred a complaint under the said section against him, on his refusing to carry out such order and direction, before one of the metropolitan police magistrates, who inflicted a penalty upon him. On the application of the appellant the magistrate stated a case for the opinion of the high court:—Held, that the decision of the magistrate was wrong; that the urinal formed part of the house, and was not in front thereof and abutting on the street within the meaning of s. 73 of the act 5 Geo. 4, c. cxxvi. The section applies to a structure that does not form part of the house, but is an adjunct thereto. The vestry cannot, under s. 73, order the occupier of a public-house to erect a urinal inside, but only outside the house. *Wellstead* v. *Paddington Vestry*, 66 L. T. 194; 40 W. R. 254; 56 J. P. 295.

### 5. WATER-CLOSETS.

**Power to Order.**]—Under 18 & 19 Vict. c. 120, s. 81, the vestry or district board of a parish is empowered, in the case of an insufficient privy, to direct its conversion into a water-closet. *St. Luke, Middlesex, Vestry* v. *Lewis*, 1 B. & S. 865; 31 L. J., M. C. 73; 8 Jur. (N.S.) 432; 5 L. T. 608; 10 W. R. 249.

**Power to make General Rules.**]—A metropolitan district board of works has not authority under 18 & 19 Vict. c. 120, to lay down any general or arbitrary rule requiring owners or occupiers of houses situate within its district to convert privies into water-closets. *Tinkler* v. *Wandsworth Board of Works*, 2 De G. & J. 261; 27 L. J., Ch. 342; 4 Jur. (N.S.) 293; 6 W. R. 390.

A district board of works made an ex parte order on a party to turn into water-closets the privies attached to cottages belonging to him, and on his failing to do so, they proceeded to enter upon the premises for the purpose of doing it themselves. The order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district:—Held, that the board was exceeding its statutory powers, and ought to be restrained from entering on the property for the purpose of making the alteration. *Ib.*

**Notice by Sanitary Authority—Jurisdiction of Magistrate.**]—A vestry gave notice to the owner of a house under s. 81 of the Metropolis Management Act, 1855, to furnish a water-closet on his premises with sufficient doors and coverings, and, on his neglect to comply therewith, summoned him before a magistrate under s. 64 of the Metropolis Management Amendment Act, 1862. The magistrate, being of opinion that the water-closet was already provided with sufficient doors and coverings, held that the vestry had no jurisdiction to order further doors and coverings, and that he was not bound by the decision of the vestry, and dismissed the summons:—Held, that the vestry had jurisdiction to make the order, and that the magistrate had only jurisdiction to inquire whether the order had in fact been made and obeyed. *St. James' Vestry, Clerkenwell* v. *Feary*, 59 L. J., M. C. 82; 24 Q. B. D. 703; 62 L. T. 697; 54 J. P. 676.

Upon the hearing of a summons under s. 37 of the Public Health (London) Act, 1891, against the owner of premises for failing to comply with a notice served upon him by the sanitary authority in respect of the water-closet accommodation upon the premises, the magistrate is bound by the decision of the sanitary authority that the accommodation is insufficient, and has no jurisdiction to inquire as to its sufficiency or otherwise. *St. John's, Hackney, Vestry* v. *Hutton*, 66 L. J., Q. B. 74; [1897] 1 Q. B. 210; 75 L. T. 686; 45 W. R. 92; 61 J. P. 54.

—— **Notice not in accordance with By-Laws of County Council.**]—Upon a summons taken out against a house-owner for non-compliance with directions purporting to be given by a sanitary

authority under the provisions of s. 41 of the Public Health Act, 1891, the magistrate has jurisdiction to inquire into the validity of such directions. Such directions, if relating to a closet in existence at the time of the passing of the said act, cannot be justified under a by-law which is prospective only, and must, under s. 39, sub-s. 3, of the act, be held to be void as "not being in accordance with the by-laws" authorised under the act. *Fulham Vestry* v. *Solomon*, 65 L. J., M. C. 33; [1896] 1 Q. B. 198; 60 J. P. 72.

Quære, whether the words "cleansing, alteration, or amendment," in s. 41, sub-s. 2, would in any event authorise a requisition for structural improvements. *Ib.*

### 6. Removal of Dust, &c.

**Obligation to Remove—Right of Contractor to "Tots."**]—By the Metropolis Management Act, 1855, s. 127, a duty is imposed on a vestry of collecting and removing all dirt, ashes, rubbish, and filth in or under houses and places within their parish. Plaintiff contracted with defendants for the purchase of the dust, filth, and refuse which should be collected by their servants from the houses, &c., in the parish of P. In each house there was a receptacle called a dust-bin, the contents of which were put into baskets by the scavengers, and thence into carts by the vestry, and conducted to the brickfields of the plaintiff. The dust-bins contained, in addition to dust, a number of articles known as "tots," of more or less value, thrown away by the occupiers of the houses or their tenants, for the purpose of being taken away by the dust-carts and got rid of:—Held, that the plaintiff was not entitled to these "tots" under the terms of his contract with the vestry, inasmuch as there was no obligation on the part of the latter, under 18 & 19 Vict. c. 120, s. 125, to remove them, and the contract must be construed to include only such things as the vestry were compelled by the statute to take away. *Collins* v. *Paddington Vestry*, 48 L. J., Q. B. 345; 40 L. T. 843; 27 W. R. 504.

**"Refuse of a Trade," what is.**]—Ashes arising from coals burnt in the furnace of a steam-engine used for the purpose of sawing and lifting timber and other material for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 128. *Gay* v. *Cadby*, 46 L. J., M. C. 260; 2 C. P. D. 391; 36 L. T. 410.

Semble, that the ashes of coals consumed in an hotel or a bakery are refuse within the meaning of the same section. *Ib.*

—— **Clinkers Produced in Hotel Furnaces.**]—Clinkers produced in the furnaces of boilers in an hotel used to generate steam for supplying power for the electric lighting of the hotel, for heating the public rooms and passages, for cooking, and for working the lift and pumping water to the top of the hotel, are not "refuse of any trade, manufacture, or business" within the meaning of s. 128 of the Metropolis Local Management Act, 1855; and, therefore, the vestry within whose district the hotel is situated are not entitled to be paid for the removal of them. *Gay* v. *Cadby* (2 C. P. D. 391) considered. *St. Martin's Vestry* v. *Gordon*, 60 L. J., M. C. 37; [1891] 1 Q. B. 61; 64 L. T. 243; 39 W. R. 295; 55 J. P. 437—C. A.

**House Refuse—Liability of Local Authority—Contract with Scavenger.**]—The duty imposed on vestries and district boards by s. 125 of the Metropolis Local Management Act, 1855, as to the removal of house refuse within their parish or district is discharged by their entering into a bonâ fide contract with scavengers to execute and perform the work; and such vestries and district boards cannot, in such cases, be made liable in damages for the scavengers' neglect to properly carry out their contract. *Holborn Union* v. *St. Leonard's, Shoreditch* (2 Q. B. D. 145), distinguished. *Ellis* v. *Strand Board of Works*, 67 L. T. 307—C. A.

—— **Removal of—Refusal to allow Scavengers to enter House—"Wilful Obstruction."**]—Under the provisions of s. 16 of the Public Health (London) Act, 1891, the London County Council made a by-law that the sanitary authority should remove at least once in every week the house refuse on premises within their district, but they had made no by-law as to the duties of occupiers of houses for the purpose of facilitating the removal of such refuse, and an authority under this by-law appointed a certain day in each week for the removal of such refuse, and gave due notice of the same. The respondent objected to the weekly removal of refuse as being an unnecessary annoyance, and on a certain day he refused to allow the scavengers of the authority to enter his house for the purpose of removing the refuse:—Held, that the respondent, in so refusing, was guilty of "wilfully obstructing" the officers of the authority in the execution of the act within the meaning of s. 116 of the act, and was liable to the penalty imposed by that section. *Borrow* v. *Howland*, 74 L. T. 787; 18 Cox, C. C. 368; 60 J. P. 391.

### 7. Hospitals.

**Power of Board to erect—Nuisance.**]—The Metropolitan Poor Act, 1867 (30 Vict. c. 6), authorises the formation of districts and district asylums for the care and cure of sick and infirm poor, creates corporations for that purpose, gives authority to the Poor Law Board (now the Local Government Board) to issue directions to these corporations, enables them to purchase lands and erect buildings for the purposes of the act, and makes the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighbourhood of the place where the land is purchased, or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact:—Held, that the district board could not set up the statute, nor the orders of the Poor Law Board the under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance. *Metropolitan Asylum District* v. *Hill*, 50 L. J., Q. B. 353; 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664—H. L. (E.)

### 8. Commons and Recreation Grounds.

**Commons—Validity of By-laws for the Preservation of Order on.**]—By a scheme made under the Metropolitan Commons Act, 1866, and confirmed by the Metropolitan Commons Supple-

mental Act, 1877, it was provided that a common should be dedicated to the use and recreation of the public as an open and uninclosed space for ever, and the Metropolitan Board of Works were empowered to frame by-laws and regulations for the prevention of nuisances and the preservation of order on the common. The Metropolitan Board of Works made a by-law prohibiting the delivery of any public speech, lecture, sermon, or address of any kind, except with the written permission of the board first obtained, and upon such portions of the common and at such times as might be by such written permission directed and sanctioned by the board:—Held, that such by-law was valid. No right on the part of the general public to hold meetings on a common is known to the law. *De Morgan* v. *Metropolitan Board of Works*, 49 L. J., M. C. 51; 5 Q. B. D. 155; 42 L. T. 238; 28 W. R. 489; 44 J. P. 296.

**Recreation Grounds.**]—26 Vict. c. 13 only applies to cases where land by act of parliament or otherwise has been vested in trustees, or irrevocably set apart for the use and enjoyment of the inhabitants of a square or a street, and it gives no power to deprive the owner of his beneficial interest in property where he has not given it up. *Tulk* v. *Metropolitan Board of Works*, 37 L. J., Q. B. 272; L. R. 3 Q. B. 682; 19 L. T. 18; 16 W. R. 985—Ex. Ch.

**Parks—Conviction for Infringing Rules.**]—By the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 9, any rule made in pursuance of the first schedule to this act shall be forthwith laid before both houses of parliament, if parliament be sitting, or if not, then within three weeks after the beginning of the next ensuing session of parliament; and if any such rules shall be disapproved of by either house of parliament within one month after the same shall have been so laid before parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced:—Held, that rules made during the recess came into operation and remained in force until disapproved of by parliament; and a conviction for infringing such rules was valid. *Bailey* v. *Williamson*, 42 L. J., M. C. 49; L. R. 8 Q. B. 118; 28 L. T. 28; 21 W. R. 404.

Held, also, that there was no right in the public to hold meetings in the royal parks, and therefore there was no right interfered with within s. 11; and that the conviction was therefore right. *Ib.*

### 9. Dairies.

**"Person carrying on business of Dairyman"—Farmer.**]—A person carrying on the business of a farmer within the metropolitan police area, and keeping cows in a shed upon his premises as incidental to such a business, is not "a person carrying on the business of a dairyman" within the meaning of s. 20 as defined by s. 141 of the Public Health (London) Act, 1891, so as to require a licence. *Umfreville* v. *London County Council*, 66 L. J., Q. B. 177; 75 L. T. 550; 18 Cox, C. C. 464; 61 J. P. 84.

### 10. Slaughter-houses.

**By-Laws—Breach by Servant—Liability of Master to Penalty.**]—The Slaughter-houses, &c. (Metropolis), Act, 1874, which contains in terms no prohibition as to the manner in which the slaughter of cattle is to be performed, enacts by s. 4 that the local authority may make by-laws regulating the conduct of any business specified in the act, and the by-laws made under the act prohibit the occupier of a slaughter-house from slaughtering or permitting to be slaughtered any animal contrary to certain regulations laid down in them:—Held, that these by-laws were not repugnant to the common law, and that upon breach of them the occupier of a slaughter-house was liable for the act of his servant, although the offence of the servant was committed without the knowledge and contrary to the express order of his master. *Collman* v. *Mills*, 66 L. J., Q. B. 170; [1897] 1 Q. B. 396; 75 L. T. 590; 18 Cox, C. C. 481; 61 J. P. 102.

### 11. Unsound Food.

**Unsound Meat—Exposure for Sale.**]—The appellant, a farmer, sent to a salesman on the London Central Meat Market, meat for the purpose of being sold for human food, such meat being unwholesome and unfit for the food of man. The salesman did not expose the meat for sale, but placed it on one side, and gave notice to an inspector of nuisances, who caused the meat to be removed and condemned by a justice. The appellant was then summoned before a justice on an information under the Nuisances Removal Act, 1863, charging him with being the owner of meat "unlawfully deposited in the London Central Meat Market for the purpose of sale and intended for the food of man, the same being diseased, unsound, unwholesome and unfit for the food of man," and was convicted:—Held, that there having been no sale or exposure for sale of the meat, the appellant was wrongly convicted. *Barlow* v. *Terrett*, 60 L. J., M. C. 104; [1891] 2 Q. B. 107; 65 L. T. 148; 39 W. R. 640; 55 J. P. 632.

—— **Sale by Commission Agent to Retail Dealer—Offence.**]—The selling of unsound meat by a commission agent to a retail dealer is an offence under sub-s. 3 of s. 47 of the Public Health (London) Act, 1891, and a prosecution should be instituted under that sub-section and not under sub-s. 2. *Billing* v. *Prebble*, 66 L. J., Q. B. 180; 45 W. R. 187; 61 J. P. 86.

**Fruit unfit for Food—Sale or Exposure for Sale—"Liable to be seized"—Evidence.**]—A person cannot be convicted of the offence created by s. 47, sub-s. 3, of the Public Health (London) Act, 1891, unless at the time the articles are found in the possession of his purchaser they are intended for the food of man, and are sold or exposed for sale or deposited in some place for the purpose of sale or of preparation for sale, and are "liable to be seized" under sub-s. 1. *Reg.* v. *Dennis*, 63 L. J., M. C. 153; [1894] 2 Q. B. 458; 10 R. 316; 71 L. T. 436; 42 W. R. 586; 18 Cox, C. C. 21; 58 J. P. 622—C. C. R.

The terms of the contract of sale may be evidence to go to the jury to show that the articles sold are not intended for the food of man. *Ib.*

*See further* Local Government.

### 12. Fire.

**Fire Brigade—Power to take Possession of Property on Premises.**]—A fire broke out on premises in a part of which the plaintiff carried on the business of a licensed victualler, but the plain-

tiff's goods were not destroyed by the fire. In an action against the defendants for the wrongful conversion of the plaintiff's goods by their servants, the men of the fire brigade, the jury found that the fire brigade had custody of the premises for the purpose of extinguishing the fire; that the injury to the plaintiff's goods was caused by the felonious acts of the men of the fire brigade; that the officers were guilty of negligence in not preventing the felonious acts by the men, and they assessed the damages at 15*l.*:—Held, that under 28 & 29 Vict. c. 90, it is not the imperative duty of the fire brigade to take possession of property on premises where a fire breaks out, but the statute gives them power to do so. *Joyce* v. *Metropolitan Board of Works*, 44 L. T. 811; 45 J. P. 667.

**Application of Fire Insurance Monies.**]—Sect. 83 of the Metropolitan Building Act (14 Geo. 3, c. 83), which was not repealed by the Metropolitan Building Act (7 & 8 Vict. c. 84), extends to the whole of England and not to the metropolis only. *Gorely, Ex parte*, 4 De G. J. & S. 477; 34 L. J., Bk. 1; 10 Jur. (N.S.) 1085; 11 L. T. 319; 13 W. R. 60.

### 13. Smoke.

**Negligence of Owner or Occupier.**]—In order to support a charge against an owner or occupier of trade premises within the metropolis of negligently using a furnace employed thereon so that the smoke is not effectually consumed, contrary to 16 & 17 Vict. c. 128, s. 1, evidence must be given of negligence on his part, evidence of negligence on the part of a servant being insufficient. *Chisholm* v. *Doulton*, 58 L. J., M. C. 133; 22 Q. B. D. 736; 60 L. T. 966; 37 W. R. 749; 16 Cox, C. C. 675; 53 J. P. 550.

### 14. Music Halls.

**Protection from Fire—Certificate—Building not Licensed—Jurisdiction of Magistrate.**]—A hall within the metropolis was kept open for public music, but was not licensed under 25 Geo. 2, c. 36. The London County Council applied for a summons against the proprietor for keeping it open without a certificate, under s. 12, of the Metropolis Management, &c., Amendment Act, 1878, that the building was in accordance with their regulations in respect to protection from fire. The magistrate considered that as the hall was not licensed under 25 Geo. 2, c. 36, s. 12 of the act of 1878 had no application, and declined jurisdiction:—Held, that upon the true construction of ss. 11, 12, and 13 of the act of 1878, the words "to be kept open" in s. 12 were used in the sense of "required or authorised to be kept open," that the hall was within the purview of s. 12, and the regulations as to protection from fire were applicable. *Reg.* v. *Hannay*, 60 L. J., M. C. 167; [1891] 2 Q. B. 709; 40 W. R. 14; 56 J. P. 151.

**Unauthorised Performance—Evidence—Penalty—Liability of Agent.**]—In an action for a penalty under 10 Geo. 2, c. 28, s. 2, for performing or causing to be performed plays, &c., without letters patent:—Held, that proof that a party was acting manager of a theatre and paid the salary of, and dismissed one of, the performers, was sufficient evidence that he caused the performances, and that if he did so it was immaterial whether he acted as the agent of others or not. *Parsons* v. *Chapman*, 5 Car. & P. 33.

**Music and Dancing Licences—County Council.**]—*See* ante, cols. 1042, 1043.

### 15. Sky Signs.

A structure that is wholly or in part erected over a house for a purpose other than advertisement is not thereby taken out of the definition of "sky-sign" contained in s. 2 of the London Sky Signs Act, 1891, and therefore requires a licence from the county council. *London County Council* v. *Carwardine*, 62 L. J., M. C. 40; 5 R. 70; 68 L. T. 761; 57 J. P. 181.

The owner of a waxwork exhibition in London fixed the letters "Madame Tussaud's" to a galvanized iron trellis support on the palisade, which surmounted one of the end walls of a large building. The dome of the building was some thirty feet higher than and separated from these letters. At one small part of the street the letters were visible against the sky, but the letters were not over the building:—Held, the magistrate was wrong in finding that this was a sky sign within the meaning of the London Sky Signs Act, 1891. *Tussaud* v. *London County Council*, 57 J. P. 184.

On the 7th June, 1895, there was on the roof of the Savoy Hotel a structure composed of a board, or series of boards, to which were attached embossed glass letters in metal frames, forming the words "Savoy Hotel and Restaurant," such board, or series of boards, and each individual letter thereon, being fixed on the roof by iron supports and secured by the rods to the roofs and chimney-stack. The board, or series of boards, was visible against the sky from the street; no portion of the letters was visible against the sky, but only against the boards. The structure had been erected before the passing of the London Building Act, 1894, and no licence had been obtained from the London County Council for its retention:—Held, that it constituted a sky sign within the London Building Act, 1894. *London County Council* v. *Savoy Hotel Co.*, 60 J. P. 457.

### 16. Vehicles.

**Stage Carriage—Use of Manager's Name—Injunction.**]—The plaintiff, as manager of an omnibus company, became, under the provisions of the statutes and rules for the regulation of metropolitan stage-carriages, the licensee of their vehicles. Having ceased to be such manager:—Held, that he was entitled to an injunction to restrain the company from continuing to use his name upon the number plates affixed to their carriages. *Hodges* v. *London Tramways Omnibus Co.*, 12 Q. B. D. 105; 50 L. T. 262; 32 W. R. 616.

**Hackney Carriage—Liability of Proprietor for Negligence of Driver.**]—The effect of the Metropolitan Hackney Carriage Act (6 & 7 Vict. c. 86) is to render the registered proprietor of a hackney carriage liable to third persons for the negligence of a licensed driver of the carriage as if the latter were his servant, though the relation of master and servant does not in fact

exist. *King* v. *Spurr* (8 Q. B. D. 104) distinguished. *King* v. *London Improved Cab Co.*, 58 L. J., Q. B. 456; 23 Q. B. D. 281; 61 L. T. 34; 37 W. R. 737; 53 J. P. 788—C. A.

*And see* HACKNEY CARRIAGE.

17. WATER SUPPLY.

*See* LOCAL GOVERNMENT—WATER.

18. NUISANCES.

**Liability of Owner—Injunction.**]—It is the duty at common law of the owner of vacant land to prevent his land from being a public nuisance, although such a nuisance may be caused by the acts of other persons; and the attorney-general, on behalf of the public, is entitled to an injunction to prevent such owner from committing a breach of that duty. *Att.-Gen.* v. *Tod-Heatley*, 66 L. J., Ch. 275; [1897] 1 Ch. 560; 76 L. T. 174; 45 W. R. 394—C. A. Reversing, 61 J. P. 24.

The fact that a sanitary authority under the Public Health (London) Act, 1891, have power, or a duty, to themselves abate a nuisance, or to take proceedings to procure its abatement, does not, having regard to ss. 13 and 138 of the act, prevent them from obtaining, in an action brought by them as relators with the attorney-general, an injunction to prevent the continuance of the nuisance. The principles laid down in *Reg.* v. *Watts* (1 Salk. 357) and *Reg.* v. *Bradford Navigation Co.* (6 B. & S. 631; 34 L. J., Q. B. 191) applied. *Ib.*

—— **Sublessee — Premises not Let at Rack-rent.**]—Where premises not let at a rack-rent are sublet for the whole term, less a few days, the rent payable and the covenants and conditions being the same in the lease and sublease, the sublessee and not the lessee is the "owner" of the premises within the meaning of s. 141 of the Public Health (London) Act, 1891. *Truman* v. *Kerslake*, 63 L. J., M. C. 222; [1894] 2 Q. B. 774; 10 R. 489; 43 W. R. 111; 58 J. P. 766.

—— **Owner of Foreshore of Navigable River —Thames Conservators.**]—By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority, if satisfied of the existence of a nuisance liable to be dealt with summarily under that act, are to serve a notice requiring its abatement on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises; sub-s. 3 (*b*) contains a proviso that where the person causing the nuisance cannot be found, and it is clear that it does not arise or continue by the act, default, or sufferance of the occupier or owner of the premises, the sanitary authority may themselves abate it. The appellants were a public body having certain jurisdiction and powers over the river Thames, the bed and soil whereof and of the shores within the flux and reflux of the tides were vested in them by statute. The acts by which their duties were regulated gave them various powers for the improvement of the navigation of the river, but gave them no power of scavenging or removing nuisances in the portion of the river hereafter referred to, and their power of raising funds, and the application of the funds, when raised, were strictly limited by statute and did not include a power of raising money for the sanitary improvement of such portion of the river. A nuisance injurious and dangerous to health existed between high and low water-marks in a tidal creek running inland about 400 or 500 feet from the line of the river; it consisted of an accumulation of foul mud, which was largely composed of decomposing organic matter, and was chiefly derived from matter held in suspension in the water or floating on its surface and left when the tide receded; it was impossible to fix upon any person or persons as having caused the accumulation. An order having been made upon the appellants as owners of the premises upon which the nuisance existed for its abatement:—Held, that s. 4, sub-s. 1, must be read with the proviso in sub-s. 3 (*b*); that where the person causing the nuisance could not be found, the liability of the owner of the premises to abate it only arose where it was shown that it continued by his act, default, or sufferance, and that the order upon the appellant was therefore wrongly made:—Held, further, that under their acts of parliament the appellants were owners of the soil and foreshore of the river for certain specified purposes only, and were not owners for the purposes of s. 4 of the Public Health (London) Act, 1891. *Thames Conservators* v. *Port of London Sanitary Authority*, 63 L. J., M. C. 121; [1894] 1 Q. B. 647; 69 L. T. 803; 58 J. P. 335.

**Summons—Service.**] — A summons issued in respect of a nuisance upon complaint of the sanitary inspector of a district, under the Public Health (London) Act, 1891, comes within the words "any notice, order, or other document" of s. 128 of that act. Such a summons may, therefore, be served in any of the modes mentioned in that section, and may be addressed to the "owner" of the premises without any further description. *Reg.* v. *Mead*, 63 L. J., M. C. 128; [1894] 2 Q. B. 124; 10 R. 217; 70 L. T. 766; 42 W. R. 442; 58 J. P. 448.

**Conviction without Notice to abate—Brick Burning.**] — In proceedings under the Public Health (London) Act, 1891, to abate a nuisance, the notice provided by s. 4 is only required to be given in respect of the nuisances mentioned in s. 2, and need not be given in cases of trade nuisance provided for by s. 21. *Bird* v. *St. Mary Abbot's Vestry*, 64 L. J., M. C. 215; [1895] 1 Q. B. 912; 15 R. 438; 72 L. T. 599; 59 J. P. 391.

**Entry on Premises to Abate—Previous Complaint to Justices, whether Necessary.**]—In January, 1857, the board of works for the Wandsworth district served the plaintiff with a notice, intituled in "the Metropolis Local Management Act, 1855, and the Nuisances Removal and Diseases Prevention Act, 1855," and signed by their inspector of nuisances to the effect that the board required the plaintiff to commence, within fourteen days from the date thereof, works therein particularly specified, in abatement of a nuisance, and stated that in default of such commencement and completion forthwith, compulsory proceedings would be taken under the above acts. In June the local board of works served the plaintiff with another notice, intituled in "the Metropolis Local Management Act, 1855, and the Nuisances Removal and Diseases Prevention Act, 1855,"

and signed by their inspector of nuisances, stating that as the time mentioned in the former notice had expired without the works being completed, the board gave notice of their intention to enter the premises and adopt that course which the law provided. The workmen of the board of works accordingly, in November, entered the premises and broke the ground; and thereupon the plaintiff filed a bill for an injunction to restrain the board of works from proceeding with the works, on the ground that they had not proceeded in conformity with the provisions of the Nuisances Removal and Diseases Prevention Act. By that act it is provided, that where a nuisance is ascertained by the local authorities to exist, complaint is to be made to a justice of the peace, who is thereupon to issue a summons for the party to appear before two justices in petty sessions, with an appeal to the quarter sessions. The board of works contended that their powers were derived under the Metropolis Management Act, by which act an appeal was given from the order of a district board to the Metropolitan Board of Works, and that as the plaintiff had that statutory remedy, he had no right to an injunction. But the court held that the 211th section of the Metropolis Management Act could not be considered as imperative, or as superseding the enactments in the Nuisances Prevention Act, which gives jurisdiction to the justices of the peace; and an injunction was granted until answer or further order, the plaintiff undertaking to proceed to construct such works as should be deemed proper and sufficient by a justice or justices of the peace under the Nuisances Prevention Act. *Tinkler* v. *Wandsworth District Board of Works*, 1 Giff. 412; 3 Jur. (N.S.) 1292; 6 W. R. 50. See *S. C.*, cor. L.JJ., ante, col. 1106.

**Giving into Custody—Notice of Action for.**]—The 2 & 3 Vict. c. 47, having created several acts misdemeanors, inflicts a penalty, on summary conviction, on various other offences, and among them the laying shells in a thoroughfare. It likewise enacts that any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction by virtue of the act, may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and detained until he can be delivered to a constable; and notice in writing must be given of all actions against any person for anything done in pursuance of the act. A person employed by the owner to keep clean a thoroughfare, finding that another person was in the habit of laying oyster-shells upon it, consulted an inspector of police, and by his advice gave that party into custody:—Held, that he was entitled to notice of action, this being an act done in pursuance of the statute. *Danvers* v. *Morgan*, 1 Jur. (N.S.) 1051; 4 W. R. 21.

An owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them, within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52. *Bayley* v. *Aldred*, 10 L. T. 523.

A. had communicated to B. & Co., who were distillers, a method of rectifying spirits, and they were to pay him an annuity, and sixpence a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account and for payment; to which G., one of the firm of B. & Co., replied by letter, stating that if A. came to the distillery, and either rang or knocked he would be punished. A. went to the distillery and gently rang the gate-bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman, on a charge of having rung the bell, contrary to 2 & 3 Vict. c. 47, s. 54:—Held, that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action. *Home* v. *Grimble*, Car. & M. 17.

**Ringing Door Bells.**]—The mere fact of a man being instructed to deliver papers at the house of a third person is no answer to a complaint against him under s. 28 of the Town Police Clauses Act, 1847, charging him with having "wilfully and wantonly" disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night. *Clark* v. *Hoggins*, 11 C. B. (N.S.) 545. See also *Home* v. *Grimble*, supra.

**Overcrowded House—"Premises"—Inmates.**]—A notice directed to a person officially in charge of a night shelter that "the premises were so overcrowded as to be injurious or dangerous to the health of the inmates," and a summons and order founded upon such notice, are sufficient to convey to the recipient that the nuisance complained of related to the overcrowding of a house or part of a house, as referred to in the Public Health (London) Act, 1891, s. 2, sub-s. 1 (*e*). The temporary occupiers of such night shelters are equivalent to "inmates" of such house. *Reg.* v. *Slade*, 65 L. J., M. C. 108; 74 L. T. 656; 18 Cox, C. C. 316; 60 J. P. 358.

—— **Night Refuge—House—Superintendent of Philanthropic Association—Liability to abate Nuisance.**]—A building used during the day for religious services and at night as a refuge for the destitute poor, but which contains no sleeping accommodation, is nevertheless a house within the meaning of clause (*e*) of s. 2, sub-s. 1 of the Public Health (London) Act, 1891. The superintendent of the philanthropic work of a religious association, owners of such a building, who gives orders to the caretaker as to the admission of destitute persons at night, may, in the event of the building being so overcrowded as to be injurious to health, be summoned as the person by whose act, default, or sufferance a nuisance has arisen. *Reg.* v. *Mead, Gates, Ex parte*, 64 L. J., M. C. 169; 59 J. P. 150.

**Arising from Sewage and Drainage.**]—*See* ante, col. 1101.

## C. RATES.

57 & 58 Vict. c. 53, *is the London (Equalisation of Rates) Act*, 1894.

### 1. JURISDICTION.

**District Boards—Finality of Decision.**]—The effect of 18 & 19 Vict. c. 120, is to substitute dis-

tricts for the parishes of which they are composed, for all purposes of management, taxation and expenditure, and not for purposes of management only. The rates leviable in the component parishes under the order of a district board, are raised for the benefit of the whole district, though apportioned between the parishes; primâ facie, the rates ought to be apportioned between the parishes according to their respective rateable value and not according to the outlay in them respectively, subject to allowances, at the discretion of the board in cases falling within s. 159. An order of a district board on a parish, distinguishing between the sums required for sewerage, and for other expenses, is good under s. 158, and is final if made by the board after an impartial exercise of the discretion given to it by s. 159, the decision of the board, so arrived at, as to the amount proper to be required from a parish, being, if erroneous, conclusive. *St. Botolph. Aldgate* v. *Whitechapel Board of Works*, 3 El. & El. 89; 29 L. J., M. C. 228; 6 Jur. (N.S.) 1073; 2 L. T. 504; 8 W. R. 691.

**Transfer of Powers to New Authorities.**]—Under 18 & 19 Vict. c. 120, the powers of the trustees of the parish of Islington conferred by a local act are transferred to the vestry:—Held, that a demand of an inhabitant to be inserted in the rate-book of the poor-rate should be made upon such vestry, and not upon the overseers. *Reg.* v. *Islington Overseers*, 3 B. & S. 46; 32 L. J., M. C. 257; 9 Jur. (N.S.) 155; 8 L. T. 331; 11 W. R. 760.

By a local act, the vestrymen, governors, and directors of the poor, or any nine of them, or on their failure, the churchwardens, were to make a rate on the parish, called the composition rate, for raising a sum for payment of the rector's stipend, and for the repairs and expenses of the church. By a prior act the governors and directors of the poor were made vestrymen:—Held, that the power of making this rate was by 18 & 19 Vict. c. 120, s. 90, and 19 & 20 Vict. c. 112, s. 3, transferred to the new vestry elected under those statutes; though it might be that, if the new vestry failed to make any rate, the churchwardens might still make one under the powers of the local act. *Reg.* v. *Stretfield*, 32 L. J., M. C. 236; 11 W. R. 736.

—— **Transfer of Debt.**]—By an act the whole area of Grosvenor-square was placed under the management of trustees, and they, many years ago, in pursuance of powers contained in the act, borrowed money, which, together with interest, was charged on the rates to be levied under the act, such rates being payable one-half by the owner and the other by the occupier of each house in the square:—Held, that ss. 90, 93, 94, 180 and 239 of the 18 & 19 Vict. c. 120, though it left in the trustees the inclosed ground and footway round it, together with all duties and powers in relation to the future maintenance of such ground, and to levy rates for defraying the expenses incurred in the execution of such duties and powers, transferred the debt charged on the rates under the special act to the vestry of the parish; and the court granted a peremptory mandamus to the vestry to take the necessary steps for paying the principal and interest. *Reg.* v. *St. George's, Hanover Square*, 32 L. J., Q. B. 160; 11 W. R. 722.

—— **Collection of Arrears.**]—Under 5 & 6 Will. 4, c. 50, s. 18, a board was elected on 26th March, 1855, to serve the office of surveyors of the highways in a parish for the year ensuing. On 23rd November, 1855, they made a highway rate. In August, 1855, the 18 & 19 Vict. c. 120, passed, and, by s. 251, it came into operation on 1st January, 1856. On 28th November, 1855, under ss. 31, 32, a district board of works was elected for the district, comprehending the parish, which was included in part 1 of schedule B. After 25th March, 1856, application was made, on the part of the late highway board, to a party rated to the highway rates for payment of arrears, under 18 & 19 Vict. c. 120, s. 97. Payment not having been made, a summons was taken out against him, but the magistrate refused to issue a warrant for levying the arrears. Afterwards the party paid the arrears to the district board of works. A rule having been obtained for an order directing the magistrate to issue the warrant, the court discharged the rule, on the ground that the collection of such arrears was not to be made by the late highway board. *Reg.* v. *Ingham*, 7 El. & Bl. 5; 5 W. R. 69.

—— **Rights of Overseers.**]—By a local act, the hamlet of Spitalfields was constituted a distinct parish, and the rector, churchwardens and overseers for the poor of the parish for the time being were constituted the vestrymen for the time being of the parish. A subsequent local act authorised the churchwardens and overseers of the poor, and vestrymen of the parish, to meet together in the vestry room and make poor-rates; the same persons were to appoint thirty vestrymen as governors and directors of the poor, to make regulations for their management and relief; and the act continued in force in the parish the laws relating to the relief of the poor except where altered by the act. A subsequent act empowered the churchwardens, overseers and vestrymen of the parish to sue for rates in the name of the collector. The poor-rates were made as directed by these acts, to the passing of 18 & 19 Vict. c. 120. Under s. 2 of this statute a new vestry was duly elected for the parish of Spitalfields, and thenceforth made poor-rates for the parish, from time to time, in making which the overseers, as such, took no part:—Held, that such rates were lawfully made; that the new vestry alone had authority to make them, and that the overseers were not entitled to vote, as such, at the making of them. *Vaughan* v. *Imray*, 1 El. & El. 633; 28 L. J., M. C. 78; 5 Jur. (N.S.) 980; 7 W. R. 240.

**Parish outside Metropolis.**]—Part of a parish, A., was included in a sewerage district or level, by the metropolitan commissioners of sewers, under 11 & 12 Vict. c. 112, who pursuant thereunto borrowed, for the purposes of the act, money upon the security of the rates of the several districts, and apportioned the same amongst the different parishes therein comprised. On the passing of 18 & 19 Vict. c. 120, when the powers of the commissioners under the former act expired, the whole of the parish was excluded from the metropolis as therein defined, the sums borrowed by the commissioners, in pursuance of their act, still remaining due and unpaid. By s. 181, the board is empowered to assess rates upon parishes formerly portions of districts under 11 & 12 Vict. c. 112, but now excluded from the metropolis, for the purpose of discharging their liabilities; such

rates to be assessed and levied "in like manner as the expenses of the board in the execution of the act." The metropolitan local board having made a rate upon A., purporting on the face of it to be for "defraying the expenses of the board in the execution of the act":—Held, that the rate was void, the parish of A. for such purposes being beyond the jurisdiction of the board, and liable only to rates for the special purposes contained in s. 181. *Reg.* v. *Ingham*, 4 B. & S. 205; 32 L. J., M. C. 214; 9 Jur. (N.S.) 1288; 11 W. R. 855.

**Serjeants' Inn.**]—By the City of London Sewers Act, 11 & 12 Vict. c. 163, the city is placed under commissioners, who have the sole power to cleanse, pave and light the whole, and to deepen, alter, and manage sewers over the whole; and they are empowered to direct the alderman, or his deputy, and the major part of the common councilmen of every ward within the city, to make a sewers-rate, upon the owners and occupiers of property within the city, whether such persons be liable to be assessed to the poor-rate or not liable thereto by reason of such premises being situate in any precinct or extra-parochial place or otherwise. By the act the city of London includes all precincts and places within the city and liberties:—Held, that Serjeants' Inn, which is an extra-parochial place within the city, was liable to be rated, though not in any ward of the city; and that the commissioners might, in their warrant or precept to the officers of the adjoining ward, direct them to rate the owners and occupiers of Serjeants' Inn. *Moss* v. *London Sewers Commissioners*, 4 El. & Bl. 670; 24 L. J., M. C. 84; 1 Jur. (N.S.) 701.

**Appointment of Collector.**]—By 18 & 19 Vict. c. 120, s. 181, the Metropolitan Board of Works has power, in default of the overseers, to appoint a person to make a rate over parishes beyond the metropolis, but within the limits of the 11 & 12 Vict. c. 112, for the purpose of paying off debts due under 11 & 12 Vict. c. 112. *Reg.* v. *Glossop*, 32 L. J., M. C. 92; 11 W. R. 345.

**Lighting and Watching Turnpike Road.**]—The commissioners under 57 Geo. 3, c. 29 (the Metropolitan Paving Act), have no power to make a rate for lighting and watching the footpaths on the side of any turnpike road within the operation of the act. *Loveridge* v. *Hodsoll*, 2 B. & Ad. 602; 9 L. J. (O.S.) K. B. 285.

2. VALIDITY.

**What Rates Allowed.**]—Under 18 & 19 Vict. c. 120, s. 161, the only rates which a vestry is authorised to make are a sewers-rate, a lighting-rate, and a general rate; and no other rates but the sewerage and lighting rates can be made independently of and distinct from such general rate. *Reg.* v. *G. W. Ry.*, El. Bl. & El. 600; 28 L. J., M. C. 59; 5 Jur. (N.S.) 386; 6 W. R. 774.

**Works already done—Law Expenses.**]—The commissioners may make a rate to defray the expenses of works already done; in order to justify such a rate it is not necessary that there should have been a previous presentment by a jury of those works. It is no valid objection to such a rate that it is made to defray previous law expenses of the commissioners, bonâ fide incurred by the commissioners in the discharge of their duty. Nor that the rate is in the alternative, to defray the expenses of works done or to be done, for the word "or" must be read "and." *Rex* v. *Tower Hamlets Commissioners*, 1 B. & Ad. 22; 9 L. J. (O.S.) M. C. 30.

**Rates made by Guardians as Overseers.**]—Under 18 & 19 Vict. c. 120, a precept was directed by the Metropolitan Board of Works to the vestry of a parish to raise a sum of money, as being the proportion chargeable on the parish for the expenses of the board, and the vestry made a precept, directed to the overseers of the parish, requiring them to make a rate for that purpose. By a local act, the affairs of the poor of the parish were committed to guardians; the precept was delivered to the guardians, who made a rate in obedience to it, signed by their own names:—Held, that the guardians were overseers within the act, and the rate was not objectionable on these grounds. *Christie* v. *St. Luke's, Chelsea, Union*, 8 El. & Bl. 992; 27 L. J., M. C. 153; 4 Jur. (N.S.) 733; 6 W. R. 333.

**Evidence of Authority.**]—The rate did not state on the face of it the issuing of the precept:—Held, that the rate was sufficient, though not showing on the face of it the source of the authority of those who made it. *Ib.*

**Form of Orders.**]—By 18 & 19 Vict. c. 120, s. 158, vestries and boards of works, in ordering overseers of the poor to levy and pay sums of money, by means of rates, for expenses of lighting, shall distinguish, in their orders, sums required for defraying expenses connected with sewerage:—Held, that this enactment is to be construed as requiring that there be distinguished in the orders, the sum required for lighting the whole parish, which sum is to be ordered to be levied by a separate lighting rate made over the whole parish. *St. James, Westminster* v. *St. Mary, Battersea*, 6 C. B. (N.S.) 878; 29 L. J., M. C. 26; 6 Jur. (N.S.) 100.

**Issuing Precept.**]—By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, every vestry and district board shall from time to time "by order under their seal require" the overseers of their parish to levy the sums which such vestry or board may require for defraying the expenses of the execution of the act. By s. 161 the overseers "to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof":—Held, that such an order became effective when sealed, and service of it on the overseers was not necessary to authorise them to levy rates, but that rates made by overseers in pursuance of such order, after notice of it having been sealed, were valid. *Glen* v. *Fulham Overseers*, 54 L. J., M. C. 9; 14 Q. B. D. 328; 51 L. T. 856; 33 W. R. 165; 49 J. P. 519.

3. APPORTIONMENT.

**According to Benefit Derived.**]—Under 18 & 19 Vict. c. 120, s. 159, it is the duty of the vestry, on making a general rate, to apportion the burthen according to the benefit derived, and if the fact of inequality of benefit exists, although it has not appeared to the vestry, the party rated would, upon appeal, be entitled to have

the rate amended. *Howell* v. *London Dock Co.*, 8 El. & Bl. 212 ; 27 L. J., M. C. 177 ; 4 Jur. (N.S.) 205 ; 5 W. R. 753.

Under 18 & 19 Vict. c. 120, property is exempt from sewers rates where it derives no benefit therefrom. But ratability once established no question as to the exact amount of benefit, based upon the particular use to which the property has been applied, can arise. *Reg.* v. *Head*, 3 B. & S. 429 ; 32 L. J., M. C. 115 ; 9 Jur. (N.S.) 871 ; 7 L. T. 708 ; 11 W. R. 339.

By the Metropolis Management Act, 1855, s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums which such vestries or district boards may require for defraying the expenses of the execution of the act ; and, by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such parts, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. By s. 161, the overseers are to make equal pound rates. A precept to overseers under the above sections, for the levy of a rate stated that the expenses, in respect of which it was needed, were not required for the equal benefit of the parish, and directed the rate to be levied as regarded such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in proportion of one-fourth part only of the nett annual value of such land. The classes of land mentioned in the precept did not lie together, or form any division marked out by metes or bounds, but were scattered through the parish :—Held, that the precept was good. *Reg.* v. *L. B. & S. C. Ry.*, 49 L. J., M. C. 32 ; 5 Q. B. D. 89 ; 41 L. T. 577 ; 28 W. R. 288 —C. A.

The 18 & 19 Vict. c. 120, ss. 158, 159, enables vestries and district boards to exempt from rates parts of any parish within their district, which are not benefited by the expenditure ; but it is discretionary with the vestry or district board, whether they will make the order ; and where it appears that a board has considered a claim of exemption and refused to make the order, the court will not compel them to make the order. *Reg.* v. *Wandsworth District Board of Works*, 6 W. R. 576.

By 18 & 19 Vict. c. 120, s. 170, the metropolitan board of works is directed, in apportioning the expenses of the board amongst the different parts of the metropolis, to have regard to the annual value of the property in the several parts of the metropolis, and in the case of the expenditure on works of drainage, to the benefit derived from such expenditure by the several parts of the metropolis affected thereby. By s. 181, the money necessary to discharge the liabilities of the metropolitan commissioners of sewers is to be raised in like manner as the expenses of the board. The metropolitan commissioners of sewers had, whilst acting under 11 & 12 Vict. c. 112, borrowed 200,000*l.* out of which they had expended 67,000*l.* on drainage works for the benefit of the Surrey and Kent sewerage district, which, formed by them, comprised nineteen parishes and parts of parishes. On the passing of the 18 & 19 Vict. c. 120, the metropolitan board had to provide for the payment of the liabilities of the metropolitan commissioners of sewers, and acting under ss. 179 and 181, they apportioned the 67,000*l.* amongst the parishes in the Surrey and Kent sewerage district, according to the ratable value of the property in those parishes, and not according to the proportion of the sum expended in them, or to the benefit derived by them from the expenditure, and made a rate accordingly upon each parish :—Held, that the rate so made was valid. *Pew* v. *Metropolitan Board of Works*, 6 B. & S. 235 ; 34 L. J., M. C. 97 ; 11 Jur. (N.S.) 346 ; 12 L. T. 140 ; 13 W. R. 580.

**Road Divided into Sections.**]—A board of works passed a resolution that a road should be repaired, and having done so, divided it into four sections, making a separate estimate for each section, and apportioning the rate to pay the expenses of each section on the owners of property situate therein :—Held, this apportionment of the expenses was not warranted by 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, ss. 77, 112, and that the board, having repaired the whole of the road, should have made one general and entire apportionment on all the owners. *Whitchurch* v. *Fulham Board of Works*, 35 L. J., M. C. 145 ; L. R. 1 Q. B. 233 ; 12 Jur. (N.S.) 353 ; 13 L. T. 631 ; 14 W. R. 277.

4. ASSESSMENT.

**Exemptions—Generally.**]—The 18 & 19 Vict. c. 120, does not affect an exemption from rates which existed previously, unless it is proved that there is equality of benefit for equality of rate. *Howell* v. *London Dock Co.* 8 El. & Bl. 212 ; 27 L. J., M. C. 177 ; 4 Jur. (N.S.) 205 ; 5 W. R. 753.

—— **Metropolitan Board of Works.**] — The metropolitan board of works is not ratable to the poor rate or the general district rate in respect of the land occupied by the sewers of the metropolis ; but it is ratable in respect of land and buildings which are occupied by it in connection with the sewers, and which have an occupation value. *Reg.* v. *Metropolitan Board of Works*, 38 L. J., M. C. 24 ; L. R. 4 Q. B. 15 ; 19 L. T. 348 ; 17 W. R. 527.

**For Main Drainage—Parochial Assessment.**] —In the absence of any estimate or basis of a county rate in the city of London, the metropolitan board of works, under 21 & 22 Vict. c. 104, s. 10, may make the parochial assessment the basis or estimate of a rate for raising the necessary sums for the purpose of the main drainage rate. *Sewers Commissioners* v. *Metropolitan Board of Works*, 16 L. T. 351.

**Sewer Rate — On Property Benefited.**] — In assessing property to the sewer rate under 18 & 19 Vict. c. 120, the law of sewers must in general prevail, that if property is situate within the area benefited by the sewers, it must contribute without any reference to the amount of benefit derived ; and if the property does not fall within the classes mentioned in s. 163, or within any exemption or reduction mentioned in s. 164, it must be assessed at its full value as ascertained

by the poor rate for the time being. *Reg.* v. *Head*, 3 B. & S. 419 ; 32 L. J., M. C. 115 ; 9 Jur. (N.S.) 871 ; 7 L. T. 708 ; 11 W. R. 339.

Therefore, the mains and pipes of a gas company, laid in the ground for the purpose of supplying gas to customers, must be assessed at their full value, and are not entitled to any deduction on the ground of deriving less benefit from the sewers than house property. *Ib.*

The 11 & 12 Vict. c. 112, s. 76, has not altered the principle of rating to the sewers rate ; and in assessing property under that statute the commissioners must consider whether any benefit is derived by the property from the sewers. *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, 7 El. & Bl. 964 ; 26 L. J., Q. B. 253 ; 3 Jur. (N.S.) 1216.

—— **Separate Levels.**]—Where a district within one commission of sewers is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated. *Rex* v. *Tower Hamlets Commissioners*, 4 M. & Ry. 365 ; 9 B. & C. 517 ; 7 L. J. (O.S.) K. B. 131.

Where commissioners of sewers have effected a union of the sewers of one level with the sewers of another, which were not beneficial to the latter, though after the union it derived benefit from the sewers in the entire united level, assessing the owners and occupiers in the latter in respect of their property benefited, is valid. *St. Katherine Dock Co.* v. *Higgs*, 10 Q. B. 641 ; 16 L. J., Q. B. 377 ; 11 Jur. 991—Ex. Ch.

**Lighting Rate—Assessing Land at lower Rate than Houses.**]—By 18 & 19 Vict. c. 120, s. 165, it is enacted that in any parish in which at the time of the passing of that act, the 3 & 4 Will. 4, c. 90, is in force, "the owners and occupiers of houses, buildings, and property other than land, shall be rated to every lighting rate made under this act at a rate in the pound three times greater than that at which the occupiers of land shall be rated in such lighting rate." Part only of Fulham parish was under the latter act before the passing of the former act, and after the passing of the former act the whole of that parish was, with another parish, formed into a district, and the other part of it was assessed to a lighting rate : —Held, that such part was not entitled to have its land assessed at a lower rate than its houses ; but that all the assessable property should be assessed at the higher rate. *Reg.* v. *Fitch*, 1 L. T. 327.

—— **Water Companies.**]—By 18 & 19 Vict. c. 120, s. 165, owners and occupiers of houses, buildings and property other than land shall be rated to a lighting rate at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated in such lighting rate :—Held, that "property other than land" meant property ejusdem generis, as houses and buildings, and that a water company was ratable for its pipes laid under ground as occupiers of land, and therefore at the lower rate. *Reg.* v. *Southwark and Vauxhall Water Co.*, 6 El. & Bl. 1008 ; 3 Jur. (N.S.) 411 ; 5 W. R. 71.

Parties were rated, under 18 & 19 Vict. c. 120, s. 161, in respect of their mains and other pipes and apparatus fixed in the ground, and for the land occupied by them by means of their mains and apparatus ; they had been held not ratable to a lighting rate under a local act :—Held, that this was a case of land "wholly exempted" within s. 165, and therefore they were not liable to be rated. *East London Waterworks Co.* v. *Mile End New Town Overseers*, 2 El. & El. 447 ; 29 L. J., M. C. 66 ; 6 Jur. (N.S.) 222.

—— **Premises Unoccupied or Incomplete.**]—By a local act, all hereditaments whatsoever in a parish were made ratable upon one and the same scale to poor rates ; but in respect of paving, watching and lighting rates under the act, premises unoccupied, or in certain stages only of completion, were to be assessed respectively at certain lower rates than the rest :—Held, that under 18 & 19 Vict. c. 120, s. 161, all hereditaments in the parish were ratable upon one scale, without any exemption. *Reg.* v. *G. W. Ry.*, El. Bl. & El. 600 ; 28 L. J., M. C. 59 ; 5 Jur. (N.S.) 386 ; 6 W. R. 774.

**Separate Occupation—Sets of Rooms.**]—The Westminster chambers consist of seven blocks of buildings, having seven principal entrances. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. The blocks are structurally divided into 117 different sets of rooms, which are quite distinct from each other, like chambers in the Inns of Court, and are capable of being let and occupied separately as residences or offices. Each set has an outer door opening on to one of the internal staircases, and also an inner private hall or passage. There are no means of communication between the sets except the internal staircase. The outer or street door to each block is kept locked at night, and a porter, who is hired by the lessors, resides in a distinct set of rooms in the basement of each block, and has a key of, and access to the sets of rooms, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is employed in some cases to look after the rooms. The lessors provide gas for the staircase, halls and passages, and water for the entire buildings, and pay all rates and taxes, charging their tenants higher rents in consequence. The sets of rooms are let under an agreement, by which the lessors let for a certain time, at a certain rent, with a covenant by the lessors to pay the rates, and a covenant by the lessee to repair internally, and a power to the lessors to enter to paint outside and to inspect the state of the inside, with a proviso for re-entry on the nonpayment of rent or breach of the other covenants. The premises are taken subject to the following regulations :—The care of each entrance and the rooms connected therewith will be in charge of a resident porter appointed by the lessors. There are duplicate keys to the outer door of each set of chambers, one of which is to be always in the hands of the porter, and the other in the care of the tenant while the rooms are in use. The tenants have the right, free of charge, to the general services of the porter ; viz. he is to be constantly in attendance, to cleanse the general stairs, &c., every morning, to receive and deliver all letters and parcels, to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving at night, to attend to the regular and proper supply of coals to the several apartments. Coals are supplied by the lessors at a certain price, tenants are not allowed to have stores of coals in their rooms :—Held, that each set of rooms was separately occupied by its tenant, and was therefore a ratable hereditament, and ought to

be separately inserted and assessed in the valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). *Reg.* v. *St. George's Assessment Committee*, 41 L. J., M. C. 30; L. R. 7 Q. B. 90; 25 L. T. 696; 20 W. R. 179.

**Commutation Tithe Rent-charge.**]—A commutation tithe rent-charge is liable to the general rate and lighting rate levied under 18 & 19 Vict. c. 120, s. 161, but not to the sewers rate, being within the exemption of s. 164, when the practice, before the 18 & 19 Vict. c. 112, was to exempt the tithes of the parish from the sewers rate. *Reg.* v. *Goodchild*, El. Bl. & El. 1; 27 L. J., M. C. 251; 4 Jur. (N.S.) 1050.

**Improvement Scheme—Acquisition of Property by Local Authority—Liability for Poor Rate.**]—The local authority, under the Housing of the Working Classes Act, 1890, is liable, upon acquiring property for an improvement scheme under Parts I. and III., to make good any deficiency to the poor rate arising therefrom, as provided in the case of promoters of undertakings by s. 133 of the Lands Clauses Consolidation Act, 1845. The deficiency is to be ascertained by taking the full ratable value of the property acquired, without deduction of the commission of 25 per cent. allowed to owners who pay the rate under the Poor Rate Assessment Act, 1869, s. 3. *St. Leonard's, Shoreditch, Vestry* v. *London County Council*, 64 L. J., Q. B. 615; [1895] 2 Q. B. 104; 15 R. 516; 72 L. T. 802; 43 W. R. 598; 59 J. P. 423.

5. VALUATION LISTS.

**Delay in Making, Transmitting, &c.**]—J. and P. were the occupiers of ratable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). Upon the 27th of September, the overseers made and deposited a valuation list, in which the property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when J. and P. objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which J. and P. could have appealed, but they appealed to the assessment sessions, who confirmed the list:—Held, that delay in making, depositing, transmitting and approving the valuation list within the times prescribed by s. 42 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative. *Reg.* v. *Ingall*, 46 L. J., M. C. 113; 2 Q. B. D. 199; 35 L. T. 552; 25 W. R. 57.

**Alteration of Totals.**]—The scheme of the Valuation (Metropolis) Act, 1869, is that the total shall remain as assessed in the valuation list, although there may have been alterations in some of the individual assessments. The list cannot be reopened by shewing that the particular rating of an individual ratepayer has been altered on appeal. *Reg.* v. *Woolwich Union*, 60 L. J., Q. B. 665; [1891] 2 Q. B. 712; 65 L. T. 460; 40 W. R. 155; 55 J. P. 552.

**—— Assessment of Parishes — Compromise —Refusal to enter Judgment.**]—The London county council, objecting to the totals of the assessments of certain parishes within their jurisdiction as too low, appealed to the quarter sessions of the county of London. A compromise was, however, effected, and the magistrates were asked to enter judgment in accordance with the agreement, and to alter the totals in the valuation list to those agreed upon. This they refused to do in the absence of detailed accounts, shewing how the new totals were arrived at:—Held, that the magistrates, in regarding the incongruity between the totals and the details, which would result from the alterations agreed upon, acted upon a consideration apart from the facts which they ought not to have taken into account, and had therefore not heard and determined according to law. *Reg.* v. *Edlin*, 65 L. T. 83; 55 J. P. 790.

**Supplemental List — Alteration in Value.**]—During the first year after a quinquennial valuation list in the metropolis had come into operation, some new houses were connected by means of service pipes with a water company's mains previously existing and assessed in the quinquennial list. Such connections caused an increase of the company's gross receipts arising from the additional rentals derived from the new houses; but no alteration was made in the mains themselves, the service pipes being the property of the owners or occupiers of the houses:—Held, that the increased rental so derived constituted an alteration of the matters stated in the valuation list, within s. 46 of the Valuation of Property (Metropolis) Act, 1869, and was properly taken into account in a supplemental list made under that section, whereby the ratable value of the company's mains was assessed at a greater amount than it had stood at in the quinquennial list. *Reg.* v. *New River Co.*, 48 L. J., M. C. 123; 4 Q. B. D. 309; 40 L. T. 322; 27 W. R. 785.

On an appeal from the assessment committee as to a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), evidence of a falling off in receipts of tonnage rates on vessels coming to certain docks during the twelve months preceding the making of the supplemental list when the rates were the same, and which, as compared with former years, shews a continuous and not accidental falling off, is sufficient if not explained or rebutted to shew an alteration in the ratable value of the docks during that period within the meaning of s. 46. When such alteration has been established, and it has therefore to be entered in a supplemental list, the ratable value of the docks is to be ascertained, not by opening up the previous quinquennial or supplemental list, but by assuming the value in the list then in force to be the correct value at the commencement of the twelve months preceding, and by deducting from it the diminution in value from the alteration during that period. *Reg.* v. *East and West India Dock Co.* or *Poplar Union*, 53 L. J., M. C. 97; 13 Q. B. D. 364; 51 L. T. 97; 48 J. P. 564—C. A.

Where a requisition is made to the overseers of a parish to make and send to the assessment committee a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, containing the gross and ratable value of an hereditament, on the ground that the value has been increased or diminished during the year, the overseers are not bound to comply with the

requisition if they are of opinion that no such alteration in value has taken place, and a mandamus will not be granted to compel them to do so. *Reg.* v. *St. Mary, Bermondsey*, 54 L. J., M. C. 68; 14 Q. B. D. 351; 33 W. R. 414; 49 J. P. 38.

Sects. 46 & 47 of the Valuation of Property (Metropolis) Act, 1869, are not confined to or applicable only to structural deterioration in property. Therefore a ratepayer who can shew a primâ facie case of reduction in the ratable value of his property from other causes than of a purely structural nature is entitled to call upon the assessment committee to appoint a person to make a provisional list, shewing the gross and ratable value of his property, as reduced since the making of the valuation list in force. *Reg.* v. *St. Mary, Islington*, 56 L. J., Q. B. 597; 19 Q. B. D. 529; 57 L. T. 270; 35 W. R. 664; 51 J. P. 789.

**Contents of.**]—In making out the valuation list under the above act, the gross value and ratable value, as defined by s. 4 of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation. *Reg.* v. *Foundling Hospital Governors*, 41 L. J., M. C. 41; L. R. 7 Q. B. 83; 25 L. T. 562; 20 W. R. 92.

**Cost of Preparing.**]—The preparation of a valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), is not a duty of the vestry clerk. The vestry may appoint the vestry clerk to make a valuation list, and may pay him a lump sum to include his expenses and labour. *Reg.* v. *Cumberlege*, 46 L. J., M. C. 214; 2 Q. B. D. 366; 36 L. T. 700; 25 W. R. 605.

**Notice of Objection—Assessment Committee — Objection not Specified in Notice — Right of Appeal.**]—Where a notice of objection to a valuation list—given under the Union Assessment Committee Act, 1862, as amended by the Valuation of Property (Metropolis) Act, 1869—specifies an objection to the ratable value of the hereditaments only, the assessment committee have no power, in the absence of consent by the overseers, to hear an objection as to the gross value, and there is no appeal to quarter sessions upon the question of gross value, the objector not being a person "aggrieved by any decision of the assessment committee, on an objection made before them to which he was a party," within the meaning of s. 32 of the act of 1869. *Reg.* v. *London JJ.; East London Waterworks Co., Ex parte*, 66 L. J., Q. B. 262; [1897] 1 Q. B. 433; 45 W. R. 247; 61 J. P. 228.

### 6. Proceedings.

**Demand.**]—A rate was voted in vestry on the 25th of June, and duly signed on the 10th of July:—Held, that a written demand of payment of the sum assessed, stating a demand of the sum as for the composition rate for the current year made at Midsummer, was a sufficient demand, and that the error in the date of the rate was immaterial. *Reg.* v. *Stretfield*, 32 L. J., M. C. 236; 11 W. R. 736.

**Jurisdiction of Justices — Assessment unappealed against.**]—There is an appeal to the quarter sessions against an assessment made by assessors appointed under 19 & 20 Vict. c. 120, s. 168, in the same way as against a rate made by overseers under s. 161. Where there is a rate good upon its face, and duly allowed and published, a justice who is called upon to enforce it cannot go into any questions affecting its validity, which are matters of appeal. The question whether or not a rate has been duly published is one of fact, and if there is any evidence to support the decision of the justice, the court will not interfere. *Empson* v. *Metropolitan Board of Works*, 3 L. T. 624.

A distress warrant was granted by a metropolitan police magistrate to recover a special sewer rate made under s. 159, and issued pursuant to a precept of a district board of works, under s. 161 of the Metropolis Local Management Act, 1855, for a special district in a parish. The rate had not been appealed against:—Held, that the magistrate was right. The rate was good on the face of it, and he had no power to entertain an objection that the expenses for which it was levied were recoverable only under ss. 52 & 53 of the Metropolis Local Management Act Amendment Act, 1862, in which case the property rated would have fallen within the exemption in s. 52. Such a question could only be determined on appeal to quarter sessions. *Bates* v. *Plumstead Overseers*, 64 L. J., M. C. 127; 72 L. T. 393; 59 J. P. 118.

**Appeal—Special Sessions.**]—An appeal does not lie to special sessions from the determination of the assessment committee on an objection to a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869. *Fulham Union* v. *Wells*, 57 L. J., M. C. 112; 20 Q. B. D. 749; 59 L. T. 103; 36 W. R. 858; 52 J. P. 663.

**—— Quarter Sessions—Jurisdiction—Time.**]—The London quarter sessions, by s. 42, sub-s. 13, of the Valuation (Metropolis) Act, 1869, has jurisdiction, in cases in which the requisite formalities have been complied with, to hear and determine all appeals remaining to be heard upon 31st March in any year, if the court has been unable through press of business or other unavoidable cause to hear and determine them by that date. *Reg.* v. *County of London JJ., and London County Council*, 63 L. J., Q. B. 148; 9 R. 14; 69 L. T. 682; 58 J. P. 69—C. A. See *S. C.* in H. L., *next case*, infra.

**—— Against Totals — Evidence as to Particular Hereditaments.**]—Persons deeming themselves "aggrieved" within the meaning of s. 32 of the Valuation (Metropolis) Act, 1869, by reason of the total of the gross or ratable value of any parish being too high or too low, are not entitled to obtain an alteration of the totals by shewing that particular hereditaments have been under or over assessed. *London County Council* v. *St. George's Assessment Committee*, 64 L. J., Q. B. 48; [1894] A. C. 600; 6 R. 310; 71 L. T. 409; 59 J. P. 116—H. L. (E.)

**—— Compromise—Right of Assessment Committee to appear and consent by their Clerk.**]—Under the Valuation (Metropolis) Act, 1869, s. 62, a clerk to an assessment committee (not being of counsel nor a solicitor) is not entitled as of right to appear upon behalf of the assess-

ment committee before a court of quarter sessions and consent to a compromise between the committee and an appellant from a decision of the committee with respect to an assessment of the appellant's premises. *Reg.* v. *County of London JJ.*, 65 L. J., M. C. 120; [1896] 1 Q. B. 659; 74 L. T. 523; 44 W. R. 485; 60 J. P. 420—C. A.

**Right of Appeal as to Objection not Specified in Notice of Objection.**]—See *Reg.* v. *London JJ.; East London Waterworks, Ex parte*, ante, 1127.

**Notice of Appeal — Service on Persons other than the Appellant.**]—The assessment committee of a union appealed, under s. 32 of the Valuation (Metropolis) Act, 1869, to the general assessment sessions against the valuation list of the respondent parish, and against the total gross and rateable values appearing therein, on the ground that those values were too low, and it appeared from the case stated by the appellants in compliance with the rules made under the act that they sought to have the total values increased by shewing that the assessments in the valuation list of a large number of specified hereditaments were too low:—Held, that the appeal did not "relate to the unfairness or incorrectness of the valuation of any hereditaments occupied by any person other than the appellant" within the meaning of s. 33 of the Valuation (Metropolis) Act, 1869; that those words applied only to appeals in which it was objected that the valuation of particular hereditaments was unfair or incorrect so far as it affected the assessment of the ratepayers of a parish inter se; and therefore that the appellants need not serve notice of appeal under s. 33 upon the occupiers of the specified hereditaments. *Reg.* v. *General Assessment Sessions*, 17 Q. B. D. 394; 35 W. R. 12; 50 J. P. 724.

**Refusal of Magistrate to issue Warrant pending Appeal.**] — The ratable value of certain property having been re-assessed at a much higher sum, the owners appealed. Before the hearing of the appeal it was agreed that a special case should be stated for the opinion of the queen's bench division, and that in the meantime rates should be paid on the former valuation, and these terms were embodied in an order made by a judge on the 23rd March, 1881. In 1883 the overseers applied to the magistrate for a distress warrant for the amount of the rates according to the new assessment, but the application was refused, on the ground that as the appeal was still pending the overseers were bound by the order of the judge. The overseers then applied to the queen's bench division for a mandamus to the magistrate to issue the warrant:—Held, that in consequence of the provisions of 32 & 33 Vict. c. 67, s. 44, which enacts that pending any appeal from any new assessment, the rate shall be paid according to the new assessment, the judge had no jurisdiction to make the order, and that the consent of the assessment committee to that order did not bind the overseers. *Reg.* v. *Marsham*, 50 L. T. 142; 32 W. R. 157; 48 J. P. 308—C. A.

Held, also, that the issue of the warrants being a merely ministerial, and not a judicial, act of the magistrates, the application for a mandamus was properly made under 11 & 12 Vict. c. 44, s. 5. *Ib.*

## D. EXPENSES.

### 1. GENERALLY.

**Repair of Wall inclosing Sewer Water.**]—A wall had been erected from time immemorial on land adjacent to a tidal river, and it kept out from such land the river at high water, the land being drained into the river by drains at a considerable distance from the wall. Before 18 & 19 Vict. c. 120, the wall was within the jurisdiction of the metropolitan commissioners of sewers, and it was within a district mentioned in the schedule (B). K., the occupier of the land on which the wall stood, cut away part of the wall, and built houses thereon, without the consent and in violation of the express prohibition of the board of works of the district. The board demolished the houses, reinstated the wall, and claimed the expenses from K.:—Held, that the wall was a sewer, and that the district board was entitled to claim the expenses, under ss. 61, 204. *Poplar Board of Works* v. *Knight*, El. Bl. & El. 408; 28 L. J., M. C. 37; 5 Jur. (N.S.) 196.

Held, also, that the board might recover these expenses under s. 76, although no foundation for the houses had been dug out, but they were simply erected on the surface of the ground. *Ib.*

—— **Acknowledgment of Jurisdiction.**]—K. had applied for permission to the district board of works, and had in his correspondence with them treated the matter as exclusively within their jurisdiction, and the metropolitan board of works had not interfered or exercised any jurisdiction over the wall:—Held, that it was not competent to K. to resist the claim of the district board, on the supposed ground that the statute vested the wall in the metropolitan board of works. *Ib.*

**New Sewer—Fresh Drains.**]—The vestry of a parish, contained in schedule (A) of 18 & 19 Vict. c. 120, passed a resolution, that certain premises not being drained by sufficient drains communicating with a sewer, notice to be given to the owners to drain by separate drains into a new sewer, and to discontinue the old sewer. The owners made default, whereupon the vestry executed the work and summoned the owners to pay the expense:—Held, that the drains were required by reason of the new sewer, and that the drains were constructed under s. 69, and not under s. 73, and that the owners of the houses were not liable. *Marylebone Vestry* v. *Viret*, 19 C. B. (N.S.) 423; 34 L. J., M. C. 214; 11 Jur. (N.S.) 907; 12 L. T. 673; 13 W. R. 1064.

A metropolitan vestry, in pursuance of a resolution to alter the public sewers in their district, under s. 69 of the Metropolis Management Act, 1855, constructed a new sewer in substitution for one which was to be discontinued. They then sought to recover from the owner of a house which was drained into the old sewer the cost of constructing a new drain connecting his house with the new sewer, under s. 73 of the act, on the ground that his old drain was insufficient:—Held, that the work was in fact done as part of a scheme for the improvement of the drainage system of the whole district under s. 69, and not because the vestry had arrived at the conclusion that the old drain was insufficient; and therefore that, even assuming the old drain to have been insufficient, the cost of replacing it must be borne by the vestry. *St. Martin-in-the-Fields*

*Vestry* v. *Ward*, 66 L. J., Q. B. 97; [1897] 1 Q. B. 40; 75 L. T. 349; 45 W. R. 81; 61 J. P. 19—C. A.

**Repair of Streets after Construction—Liability of Board.**]—Under 18 & 19 Vict. c. 120, s. 105, the vestry of a district board of a parish or district, after having once compelled the owners of the houses forming a new street, to pay the cost of providing and laying the pavement, is bound for the future to keep it in repair, and this obligation may be enforced by mandamus. *Reg.* v. *Hackney Board of Works*, 42 L. J., M. C. 151; L. R. 8 Q. B. 528.

A board of works, acting under the powers of the 18 & 19 Vict. c. 120, s. 105, paved and flagged a new street, charging the expense on the adjoining owners. The board afterwards neglected to repair the road on the ground that a barrier had been erected upon it by the owner of the soil:—Held, that the board, having exercised their power to pave a new street at the expense of the adjoining owners, was bound to keep it in repair, and that the obstruction by the owner of the soil did not exonerate the board from the performance of such duty. *Ib.*

In front of a house situate in a London square was an area and a cellar. The cellar was formed of brick walls, one forming the outer wall of the area, and another running parallel to such outer wall. The covering to the cellar was formed of large flagstones, the ends of which rested on the walls. From 1830, when the houses were built and the flagstones were laid down, the flagstones were used by the public as a footway, and became by reason of the traffic worn down, cracked and dangerous. The vestry called upon the owner to repair the cellar and its covering. He refused to do so, whereupon the vestry did the work, and proceeded against him to recover the expenses:—Held, that the vestry was bound to keep the flagstones in repair, and could not recover from the owner any part of the expenses of doing so. *Hamilton* v. *St. George's, Hanover Square, Vestry*, 43 L. J., M. C. 41; L. R. 9 Q. B. 42; 29 L. T. 428; 22 W. R. 86.

**How Recoverable—Charge on Individuals or General Rates.**]—When within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the costs upon the general rate, under ss. 96, 98; they are bound to charge the expense of laying the pavement upon the owners of the adjoining houses and land, under s. 105, as varied by 25 & 26 Vict. c. 102, s. 77. *Dryden* v. *Putney Overseers*, 1 Ex. D. 223; 34 L. T. 69.

In 1855 a road within the metropolis as defined by 18 & 19 Vict. c. 120, s. 250, ran between an irregular line of houses and market gardens upon the south side, and market gardens upon the north. Between that year and 1874, a continuous line of houses was built along the north side, and several houses along the south. The district board, within whose jurisdiction the road lay, in 1874 paved a footpath by the side of the road, and paid for the cost of the work under 18 & 19 Vict. c. 120, ss. 96, 98, out of the general rate levied upon the inhabitants:—Held, first, that between 1855 and 1874 the road had become a new street within 18 & 19 Vict. c. 120, s. 105. Held, secondly, that the district board had no power to charge the cost of paving the footpath upon the general rate, but that it was compulsory upon them to obtain payment from the owners of the adjoining houses and land, under that section, as varied by 25 & 26 Vict. c. 102, s. 77. *Ib.*

—— **Effect of Charging General Rate.**]—When within the metropolis a road has become a new street within the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, and the district board has improperly charged the cost of paving the footpath of such new street upon the general rate of the parish in which it is situated, the court will order the district board to restore to the general rate the amount so expended, and to levy the same upon the owners of the adjoining houses and land, as provided by that section as varied by s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102). *Att.-Gen.* v. *Wandsworth District Board of Works*, 46 L. J., Ch. 771; 6 Ch. D. 539.

**Expenses not incurred for equal benefit of whole Parish.**]—By the Metropolis Management Act, 1855, s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums which such vestries or district boards may require for defraying the expenses of the execution of the act; and by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. By s. 161 the overseers are to make equal pound rates. A precept to overseers under the above sections for the levy of a rate stated that the expenses, in respect of which it was needed, were not required for the equal benefit of the parish, and directed the rate to be levied as regarded such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in proportion of one-fourth part only of the net annual value of such land. The classes of land mentioned in the precept did not lie together, or form any division marked out by metes or bounds, but were scattered through the parish:—Held, that the precept was good. *Howell* v. *London Dock Co.* (8 El. & Bl. 212) commented upon. *Reg.* v. *L. B. & S. C. Ry.*, 49 L. J., M. C. 32; 5 Q. B. D. 89; 41 L. T. 577; 28 W. R. 288; 44 J. P. 136—C. A. *See cases* ante, cols. 1121, 1122.

### 2. Persons Liable.

#### a. Position of Premises.

**"Bounding or Abutting"—Railway—Line and Slopes.**]—A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under s. 77 of the

Metropolis Management Amendment Act, 1862, against the railway company for not contributing to the paving of the road:—Held, that the line and the slopes of the cutting did not bound or abut upon the road within the meaning of the act. *L. B. & S. C. Ry.* v. *St. Giles', Camberwell Vestry*, 48 L. J., M. C. 184; 4 Ex. D. 239; 41 L. T. 162.

A railway which ran in a cutting, and was adjoining a new street which the vestry was about to pave, and was separated from it by a wall, through which there was no communication between the street and the railway, bounded the street within the meaning of the 25 & 26 Vict. c. 102, s. 77:—Held, that the company was liable to contribute to the expense of paving the street; and, the vestry having charged the company in the same proportion as the owners of house property, that the court had no power to control the discretion vested in them by the act. *L. & N. W. Ry.* v. *St. Pancras Vestry*, 17 L. T. 654.

A railway line ran in a deep cutting much below the level of a highway, which was carried over the railway (nearly at right angles) by a bridge built by the railway company under statutory powers and in pursuance of ss. 46-51 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). The parapets of the bridge consisted of two walls resting upon arches, which had their foundations (outside the lines of the roadway) in the railway company's land. The walls were not used by the company otherwise than as fences for the bridge. The district board of works having paved the highway, which was admitted to be a new street within s. 105 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120):—Held, that, assuming the fence walls to be the railway company's land, the company were not "owners of land bounding or abutting on" the highway within s. 77 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), and were not liable as owners of the fence walls to contribute to the expenses of paving. *G. E. Ry.* v. *Hackney Board of Works*, 52 L. J., M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769—H. L. (E.)

Held, also, by Lords Blackburn and Watson, that the railway line and slopes being much below the level of the highway, the company were not in respect of such line and slopes "owners of land bounding or abutting on" the highway within the above section, and were not liable as owners of the line and slopes to contribute to the expenses of paving. *Ib.*

A railway in the metropolitan district was carried across a new street by an arch. On one side of the street the railway was carried forward on arches, and on that side was a strip of land ten feet wide, left open for the purpose of repairing the arches; this abutted for ten feet on the street. On the other side the railway was carried forward on an embankment, and the sloping part or buttress of the embankment abutted on the street about thirty-six feet, and at the foot of the embankment was an open space, also about thirty-six feet wide, also abutting on the street, which was left for the purpose of allowing of slips in the embankment. The vestry of the parish having determined to pave the street sought to make the railway contribute, under 25 & 26 Vict. c. 102, s. 77, as an owner of land abutting on the street:—Held, that the above pieces of land, including the slope of the embankment, were land within that section. *Higgins* v. *Harding*, 42 L. J., M. C. 31; L. R. 8 Q. B. 7; 27 L. T. 483; 21 W. R. 191.

—— **Private Roads.**]—The Metropolis Management Amendment Act, 1862, s. 77, provides that where any vestry or district board shall have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving the same:—Held, that the words "land bounding or abutting on such street" include the soil of private roads leading out of a new street. *Pound* v. *Plumstead Board of Works*, 41 L. J., M. C. 51; L. R. 7 Q. B. 183; 25 L. T. 461; 20 W. R. 177.

**House forming Part of a Street.**]—The vestry of a metropolitan parish, having paved a new street, under 18 & 19 Vict. c. 120, s. 105, assessed the London school board, in respect of a school-house, as being owners of one of the houses forming the street. The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses with gardens at the back of them between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:—Held, that the school-house, though not actually one of the houses forming the street, yet practically formed part of it, within s. 105. *London School Board* v. *St. Mary, Islington*, 45 L. J., M. C. 1; 1 Q. B. D. 65; 33 L. T. 504; 24 W. R. 137.

**Back Premises—Dead Wall Part of Street.**]—B. was the owner of a house, which had its front and only entrance in F. street, and behind it a garden with a dead wall at the further end. A new street was made parallel to F. street, of which the dead wall, at the end of B.'s garden, was part of the line of street. This new street was a mews, which the metropolitan board allowed to be made of twenty feet in width:—Held, that B.'s land abutted on this new street, and therefore B. was liable for his proportion of expenses of paving it, &c., under 25 & 26 Vict. c. 102, s. 77. *Paddington Vestry* v. *Bramwell*, 44 J. P. 815.

### b. Ownership of Premises.

**Future Owners.**]—The assessment for paving expenses apportioned by the vestry or district board under 18 & 19 Vict. c. 120, s. 106, and 25 & 26 Vict. c. 102, s. 77, are a charge upon the premises in respect of which they are assessed; and the amount may be recovered from the future owners of such premises, although there has been no arrangement to accept payment by instalments. *Plumstead Board of Works* v. *Ingoldby*, 42 L. J., Ex. 50; L. R. 8 Ex. 63; 27 L. T. 656; 21 W. R. 77. Affirmed, nom. *Ingoldby* v. *Plumstead Board of Works*, 42 L. J., Ex. 136; L. R. 8 Ex. 174; 29 L. T. 375; 21 W. R. 817—Ex. Ch.

**Owner.**]—Under 18 & 19 Vict. c. 122, s. 51, an owner of land in fee simple, who lets it on a building lease at a peppercorn rent, is not

liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of one whole or of any part of the rents or profits of any land or tenement," in the interpretation clause, s. 3. *Evelyn* v. *Whichcord*, El. Bl. & El. 126; 27 L. J., M. C, 211; 4 Jur. (N.S.) 808; 6 W. R. 468. And see *Tubb* v. *Good*, and *Caudwell* or *Canwell* v. *Hanson*, ante, col. 1087.

—— **School Board.**]—The London school board are "owners" of a school house within the definition of 18 & 19 Vict. c. 120, s. 250. *London School Board* v. *St. Mary, Islington*, 45 L. J., M. C. 1; 1 Q. B. D. 65; 33 L. T. 504; 24 W. R. 137.

—— **Land subject to Covenants.**]—By the Metropolis Local Management Act, 1855, s. 250, the word "owner" shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, or who would so receive the same if such lands or premises were let at a rack-rent; and by the Metropolis Local Management Acts Amendment Act, 1862, s. 77 (which is to be read as one with the act of 1855), "owners" of land abutting on any new street are made liable to contribute towards the expenses of paving the same. The appellant, having a strip of land about four inches wide and 265 feet in length, abutting upon the north side of a new street, had erected a boundary fence upon the land along its whole extent, under a covenant to erect and for ever after maintain a fence thereon made with his vendor, who was owner of the land adjoining the strip on the north side:—Held, that the appellant was the "owner" of the strip of land within the meaning of s. 250 of the Metropolis Local Management Act, 1855, and therefore liable to contribute towards the expense of paving the new street. *Williams* v. *Wandsworth Board of Works*, 53 L. J., M. C. 187; 13 Q. B. D. 211; 32 W. R. 908; 48 J. P. 439.

**Lessees.**]—A tenant in possession, having an equitable interest only under an agreement for a lease for a term, is, in equity, an adjoining owner under 18 & 19 Vict. c. 122, and three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbour, under the powers of that act. *Cowen* v. *Phillips*, 33 Beav. 18; 9 Jur. (N.S.) 657; 8 L. T. 622; 11 W. R. 706.

A lessee of a house for a term of ninety-nine years, having demised some portions of the house to separate persons for terms varying from seven to twenty-one years, is the owner of the house within 18 & 19 Vict. c. 122. *Hunt* v. *Harris*, 19 C. B. (N.S.) 13; 34 L. J., C. P. 249; 11 Jur. (N.S.) 485; 12 L. T. 421; 13 W. R. 742.

Where the appellant was tenant of premises at a rent of 30*l.* a year, which he sublet at a rent of 31*l.* a year (the sum of 25*l.* being found to be the rack-rent of the premises), the appellant is not the "owner" of the premises within the meaning of s. 250 of the Metropolis Management Act, 1855, so as to be liable for the expenses of paving the street in which the premises are situate. *Walford* v. *Hackney Board of Works*, 15 R. 10; 43 W. R. 110.

—— **Temporary Destruction of Premises.**]—A house occupied by a tenant under a lease for twenty-one years was, during the term, accidentally burnt, and being ruinous, was pulled down under 7 & 8 Vict. c. 84. By the lease the tenant was exempt from paying rent during the time that the house was untenable by reason of an accidental fire:—Held, that the expenses incurred could not be recovered from the landlord, a tenant for life of the reversion, under s. 42, which throws the burden upon "the owner of every such building, being the person entitled to immediate possession thereof." *Saffron Hill Overseers. Ex parte*, 24 L. J., M. C. 56; 18 Jur. 1104; 3 W. R. 64.

—— **Building Lease on Conditions.**]—A., the owner in fee of land, entered into an agreement with B., by which he was to have possession of such land and to build thereon a certain number of houses, and to inclose and lay out a portion of the land as an ornamental pleasure ground, for the exclusive use of the inhabitants of such houses. A lease was to be granted by A. of each house when finished, and with the lease of the last house was to be granted a lease of the inclosed pleasure ground; and until all the leases were granted, B. was to pay A. a yearly rent in respect of the whole land, but the agreement was not to operate as a demise nor to give B. any estate or interest in the premises until the leases were executed. B. inclosed and laid out the pleasure ground, and built some of the houses, of which, and of which only, leases were granted to him; but not having completed all the houses:—Held, that A. remained the owner of the land which had been inclosed as such pleasure ground within the meaning of 18 & 19 Vict. c. 120, s. 250, and, therefore, as such owner, was liable under 25 & 26 Vict. c. 102, s. 77, to contribute to the expense incurred by the vestry in paving a new street abutting on the pleasure ground. *Holland* (*Lady*) v. *Kensington Vestry*, 36 L. J., M. C. 105; L. R. 2 C. P. 565; 17 L. T. 73; 15 W. R. 1045.

An owner of houses occupied land bounding or abutting on a new street, which a board of works had paved under 18 & 19 Vict. c. 120, s. 105, and sewered under 25 & 26 Vict. c. 102, s. 52. Amongst other items which the board had apportioned to his contribution were costs of collecting apportioned amounts, of survey plan and obtaining names of owners, and of filling-up, printing, advertising and serving notices. These sums were all paid to persons employed for the purpose, and not servants of the board, although they had in their employ a surveyor and a clerk, and payments were requested at their office. The owner of the houses occupied the land under a building agreement, by which the owner of the land agreed to demise to the owner of the houses or his nominees the several pieces of land upon which he was to build, as the houses and buildings respectively became erected and covered, for eighty years, at the rent of a peppercorn for two years, and of sums increasing every year up to 36*4l.* in the sixth and following years. He was to be considered as holding the undemised portion on the terms of the leases. There was a power of re-entry upon non-completion of the building covenants. The houses at this time were in every stage of building progress, and some had been demised to other persons at defendant's nomination:—Held, that with the exception of the houses demised to other persons, he was liable as owner of all the premises, and that the above items were incidental costs and charges

within 25 & 26 Vict. c. 102, s. 77. *Poplar Board of Works* v. *Love*, 29 L. T. 915.

**Assignee of Lease—Public Body.**]—A public body becoming assignees of a lease for a short term of an open space under the Metropolitan Open Spaces Act, 1881, is an "owner" within the meaning of the Metropolis Management Act, 1890, and liable to contribute to the expenses of paving a road upon which the open space abuts. *St. Mary, Islington, Vestry* v. *Cobbett*, 64 L. J., M. C. 36; [1895] 1 Q. B. 369; 15 R. 83; 71 L. T. 573; 43 W. R. 44.

**Time when Ownership of Property passes.**]—On the 23rd December, 1878, the metropolitan board of works served a notice on B., the owner of certain houses, stating that they would be taken compulsorily under the Artizans' and Labourers' Dwellings Improvement Act, 1875, and an arbitrator was appointed. The arbitrator made his provisional award on the 18th of March, and his final award on the 22nd July, 1880. On the 18th February, 1880, the metropolitan board of works served a notice on B. that the houses were in a dangerous state, and requiring him to take down a portion and repair them, and on the 18th March a magistrate made an order that B. should take down a part and repair the buildings. This order not having been complied with, the metropolitan board of works gave notice to B., on the 16th July, 1880, to hoard and take down the structure; and on the 19th July, the notice not having been complied with, the metropolitan board of works incurred expenses to the amount of 26*l.* 9*s.* 4*d.* in hoarding, and afterwards other expenses amounting in all to 78*l.* 9*s.* 4*d.* It was contended, on the part of B., that at the time the expenses were incurred the provisional award had been made, and therefore he was not the "owner":—Held, that the ownership in the property was not transferred until the final award was made on the 22nd July, 1880, and therefore the metropolitan board of works could recover the expenses from B. as being the owner when they were incurred. *Barnet* v. *Metropolitan Board of Works*, 46 L. T. 384; 46 J. P. 469.

**Incumbent of Church.**]—The incumbent of a district church in the metropolis, although the freehold of such church is vested in him under the Church Building Acts, is not the "owner" of the church within the meaning of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122, Part II, Dangerous Structures), so as to be personally liable for the expenses incurred by the metropolitan board of works in respect of such church as a dangerous structure. *Reg.* v. *Lee*, 48 L. J., M. C. 22; 4 Q. B. D. 75; 39 L. T. 605.

—— **Vesting of Site in — Consecration of Church and Part of Site.**]—Land having been conveyed under the Church Building Acts to the ecclesiastical commissioners as a site for a church, a church was afterwards erected on a part of the land, and the church and part only of the land were consecrated:—Held, that upon such consecration the whole of the land so conveyed vested in the incumbent under the Church Building Acts Amendment Act (8 & 9 Vict. c. 70), s. 13; that the commissioners ceased to be owners of it, and were therefore not liable under the Metropolitan Management Acts, 1855 and 1862, to contribute in respect of it towards the cost of paving a new street. *Plumstead Board of Works* v. *Ecclesiastical Commissioners*, [1891] 2 Q. B. 361; 64 L. T. 830; 39 W. R. 700; 55 J. P. 791.

**Commissioners Owning Church.**]—A church, the site of which has been conveyed to the commissioners for building churches, is not liable to be assessed to the expenses of paving a new street, as the commissioners are not owners either within 18 & 19 Vict. c. 120, s. 105, or 25 & 26 Vict. c. 102, s. 77. *Angell* v. *Paddington Vestry*, 9 B. & S. 496; 37 L. J., M. C. 171; L. R. 3 Q. B. 714; 16 W. R. 1167.

**Lessee of Chapel.**]—By 18 & 19 Vict. c. 122, s. 73, if the owner or occupier of a dangerous structure fails to comply with the order of a justice for taking down, repairing or otherwise securing the same, the commissioners may do what is necessary, and all expenses incurred by them shall be paid by the owner. By s. 3, the term owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will. The appellants, being seised in fee of a building used as a chapel, leased it for twenty-one years to N., who was then in possession of it:—Held, that N. was the owner within the meaning of the act, and therefore an order upon the appellants for expenses incurred by the commissioners, was bad. *Mourilyan* v. *Labalmondiere*, 1 El. & El. 533; 30 L. J., M. C. 95; 7 Jur. (N.S.) 627; 3 L. T. 668; 9 W. R. 341.

**Trustees of Chapel—"House," "Land."**]—The appellants were the trustees of a chapel which abutted on and formed part of a new street within the meaning of 18 & 19 Vict. c. 120. The chapel was registered as a place of religious worship, but had not been consecrated, and there was no dedication of the land in perpetuity. Attached to the chapel was a vestry, and there were also rooms for a caretaker, besides lecture and schoolrooms underneath the chapel:—Held, that the trustees were the owners of a "house" within the meaning of 18 & 19 Vict. c. 120, s. 105, or of land within 25 & 26 Vict. c. 102, s. 77, and were liable to contribute to the expense of making and paving the street. *Caiger* v. *St. Mary, Islington, Vestry*, 50 L. J., M. C. 59; 44 L. T. 605; 29 W. R. 538; 45 J. P. 570.

By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street. The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense. A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as a habitation for man. But a leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to

be used as a place of religious worship by a congregation of Wesleyans, is a house within the meaning of s. 105, for, by the consent of the landlord, the trustees, and the cestuis que trustent, the trusts might at any moment be put an end to. *Wright* v. *Ingle*, 55 L. J., M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436—C. A.

Held, also, that the trustees were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street. *Ib.*

**Land Company—Owners of the Soil of the Roads.**]—A land company, being owners of lands, in 1863 laid them out for building purposes, and made roads and ways across them; and nearly the whole of the estate was sold in lots to different purchasers, and conveyed to them by metes, bounds and admeasurements set forth on coloured plans attached to the conveyance. Each lot had a frontage upon one of the roads. The roads had been dedicated to the public, as far as any act of the land company could do so, but no proceedings were taken to make them repairable by the parish. The board of works of the district from time to time paved the new streets formed by the houses on the estate, and apportioned the costs among the owners of houses forming the streets and the owners of land bounding and abutting on the streets; and in so doing they assessed the land company in respect of the new streets and roads, where bounding or abutting on the sides or ends of the streets paved, as lands abutting on those streets, under 25 & 26 Vict. c. 102, s. 77:—Held, that assuming the soil of the roads to be in the land company, they were improperly charged under 25 & 26 Vict. c. 102, s. 77; for that they were not, in respect of the roads which had been irrevocably dedicated to the public, the owners of land within the meaning of that section and s. 250 of 18 & 19 Vict. c. 120. *Plumstead Board of Works* v. *British Land Co.*, 44 L. J., Q. B. 38; L. R. 10 Q. B. 203; 32 L. T. 94; 23 W. R. 634—Ex. Ch.

**Cemetery Company.**]—By the Metropolis Management Acts, 1855 and 1862 (which are to be construed together as one act), "the owners of the land" abutting on a new street are made liable to contribute to the expenses of paving the same incurred, or to be incurred, by the vestry of the parish; and by s. 250 of the act of 1855 "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, or who would so receive the same if such lands or premises were let at a rack-rent." A cemetery company were, by statute, prohibited from selling or disposing of any of the consecrated land belonging to them, and such land was for ever to be set apart and used exclusively for purposes of Christian burial; but they were empowered to make profits by (amongst other things) selling or disposing of, at prices to be agreed upon, the exclusive right of burial, either in perpetuity or for a limited period, in vaults made by them, and the right to make family and other vaults, with the exclusive right of burial therein, either in perpetuity or for a limited period. The company having been called upon by the vestry of the parish to contribute to the expenses of paving a new street on which consecrated land, forming part of their cemetery, abutted:—Held, that the company were "owners" of the land within the definition of s. 250 of the Metropolis Management Act, 1855, and therefore liable to contribute to such expenses. *St. Giles, Camberwell*, v. *London Cemetery Co.*, 63 L. J., M. C. 74; [1894] 1 Q. B. 699; 70 L. T. 734; 42 W. R. 446; 58 J. P. 382.

**Payment out of General Rates—Liability of adjoining Owners.**]—In 1876 a local authority caused the footpaths of a new street (within the meaning of the act of 1855) to be paved, at a cost of 1,425*l.*, raised out of the general rates, and subsequently repaired them from time to time. Ten years afterwards a resolution was passed at a vestry that these paths should be paved under the powers of s. 105 of the act of 1855 and s. 77 of the amendment act of 1862, and the costs apportioned among the adjoining owners. Upon an objection being taken by an adjoining owner that the local authority, having laid out a substantial sum in making permanent footpaths in 1876, which was then charged to the general rates, were estopped from exercising their power of paving the street again under these sections and throwing the cost upon the adjoining owners:—Held, that the work having been once done the local authority could not, ten years afterwards, throw the burden of paving upon the adjoining owners. *St. Giles, Camberwell*, v. *Hunt*, 56 L. J., M. C. 65; 52 J. P. 132.

**Payment by Purchaser of Property—Implied Covenant against Incumbrances.**]—The expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, are not a charge upon the property in respect of which they are payable, and therefore if the owner sells the property while the expenses are unpaid, and conveys as beneficial owner, and the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of s. 7, subs. (A) of the Conveyancing and Law of Property Act, 1881. *Egg* v. *Blayney*, 57 L. J., Q. B. 460; 21 Q. B. D. 107; 59 L. T. 65; 36 W. R. 893; 52 J. P. 517.

**Payable out of Capital or Income.**]—A testator bequeathed leasehold houses and other personal property to trustees, in trust, after payment of "all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise," to pay the income to his wife for life, with trusts over. One of the leasehold houses was held by the testator under a lease which threw upon the lessee all "taxes, rates, assessments, and impositions," and, after his death, the sanitary authority having served a notice under 18 & 19 Vict. c. 120, s. 73, on the occupier of the house, requiring the execution of certain drainage works, the trustees of the will employed a contractor to execute the works, and deducted the expense from the income of the tenant for life:—Held, that the expense was payable out of the income of the testator's estate, and not out of the corpus, and that the deduction had been properly made. *Crawley, In re, Acton* v. *Crawley*, 54 L. J., Ch. 652; 28 Ch. D. 431; 52 L. T. 460; 33 W. R. 611; 49 J. P. 598.

**Abatement of Nuisance by Occupier—Liability of Owner to Recoup.**]—The plaintiff was tenant from year to year to the defendants of

a house in London, in which a nuisance arose by reason of water and sewage collecting in the cellar owing to a stoppage in the drains. The sanitary authority, acting under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, served a notice at the premises directed to the owner or occupier, and requiring the nuisance to be abated; they did not serve on the owner a notice under s. 4, sub-s. 3, which provides for the service on the owner of a notice to abate in cases where the nuisance arises from any want or defect of a structural character. The plaintiff, who under s. 4, sub-s. 4, was liable to a penalty of 10*l.* if he made default in complying with the requisitions of the notice, did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect in the drains:—Held, that the plaintiff was entitled under s. 11, sub-s. 1, of the act to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants, although no notice under s. 4, sub-s. 3, had been served upon the defendants as owners of the premises:—Held, further, that the costs and expenses in carrying "the order" into effect must be taken to include the costs and expenses of carrying into effect the "notice" from the sanitary authority, although no "nuisance order" under s. 5 had been obtained by the sanitary authority upon complaint to a petty sessional division. Per Charles, J.: Apart from the provisions of s. 11, the plaintiff was entitled to recover at common law on the ground that he had been compelled to expend money upon work for which the defendants were legally responsible. *Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452; 67 L. T. 684; 40 W. R. 571; 56 J. P. 741.

Under the Public Health (London) Act, 1891, a sanitary authority served on certain premises an intimation or warning, addressed to the owners, that, if certain necessary works were not completed within a specified time, they would commence proceedings against them "by the service of a statutory notice." Thereupon, the occupier, without forwarding the document to the owners, or informing them of it, caused the work to be executed, and then sought to recover the amount expended thereon from the owners. It was decided by Lawrance, J., on the authority of *Gebhardt* v. *Saunders* ([1892] 2 Q. B. 452) that the owners were liable. On appeal:—Held, that the occupiers, not being compellable to execute the work, had acted as mere volunteers in doing so, and had no claim to be reimbursed by the owners. *Thompson and Norris Manufacturing Co.* v. *Hawes*, 73 L. T. 369; 59 J. P. 580—C. A.

### c. Landlord or Tenant.

**Covenant to Discharge Taxes—Expenses of Drainage.**]—A. held premises under a lease with a covenant to pay, bear and discharge "all such parliamentary, parochial and county, district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties and services whatsoever, as during the term should be taxed, assessed or imposed upon or in respect of the premises, or any part thereof." He granted an under-lease (at a rack-rent) to B., the latter covenanting "that the covenants, conditions and agreements contained in the original lease on lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him":—Held, that B. was liable for the expense of drainage works done upon the premises under the authority of the 18 & 19 Vict. c. 120. *Sweet* v. *Seager*, 2 C. B. (N.S.) 119; 3 Jur. (N.S.) 588; 5 W. R. 560.

—— **Paving.**]—The lessee of a house in a new street within the metropolitan district for seven, fourteen, or twenty-one years, covenanted with his lessor to pay all rates and assessments taxed, rated, charged, assessed or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof:—Held, that the proportion of the expense of paving the new street assessed upon the demised house under 25 & 26 Vict. c. 102, s. 96, was not a rate payable by the tenant under this covenant. *Allum* v. *Dickinson*, 52 L. J., Q. B. 190; 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930; 47 J. P. 102—C. A.

A. let to B. for twenty-one years, determinable at the end of five, seven or fourteen years, at his option, a house in the parish of Paddington, yielding and paying the specified rent, "clear of all deductions in respect of land-tax, sewers-rate, and all other taxes, rates and deductions whatsoever"; and B. covenanted that he would "pay and discharge all taxes, rates, duties and assessments whatsoever, which during the continuance of this present demise shall be taxed, assessed or imposed on the tenant or landlord of the premises hereby demised in respect thereof, whether parliamentary, parochial or otherwise (except property or income tax)." The house was in a new street within the meaning of the Metropolitan Management Acts, and the vestry of Paddington paved this street and obliged the landlord to pay his proportion of the expenses, by virtue of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, ss. 77, 96:—Held, that the landlord was entitled to recover this money so paid from his tenant. *Thompson* v. *Lapworth*, 37 L. J., C. P. 74; L. R. 3 C. P. 149; 17 L. T. 507; 16 W. R. 312.

By an agreement of lease, the tenant agreed to pay "all rates, taxes and assessments payable in respect of the premises during the term":—Held, that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. *Wilkinson* v. *Collyer*, 53 L. J., Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791. See also *Batchelor* v. *Bigger*, 60 L. T. 416.

—— **Rent Payable to Vestry—Distress.**]—The vestry of a metropolitan parish, having incurred expenses for paving, gave the occupier of a house liable to contribute thereto, notice, under 25 & 26 Vict. c. 102, s. 86, to pay his rent to them and not to his landlord. The tenant gave notice thereof to his landlord, who nevertheless distrained. The tenant thereupon paid his rent (which was less than the paving expenses apportioned to the house) to the vestry, and the landlord then merely levied the expenses of the distress and withdrew:—Held, that his right of distress was only taken away on actual payment by the tenant to the vestry, that the distress was therefore justifiable in the first instance, and that the

expenses thereof might be levied. *Ryan* v. *Thompson*, 37 L. J., C. P. 134; L. R. 3 C. P. 144; 17 L. T. 506; 16 W. R. 314.

—— **Abatement of Nuisance—"Charge on Lessor in respect of Premises."**]—A tenant who covenants to pay, bear and discharge all assessments, charges or impositions whatever, parliamentary, parochial or otherwise, which at any time during the continuance of the demise may be charged, assessed or imposed on the lessor, for or in respect of the premises, is liable to recoup his landlord any expenses incurred by him in complying with an order made under the Public Health (London) Act, 1891, to abate a nuisance on the demised premises, inasmuch as such expenses are a charge on the lessor in respect of the premises. *Smith* v. *Robinson*, 62 L. J., Q. B. 509; [1893] 2 Q. B. 53; 5 R. 469; 69 L. T. 434; 41 W. R. 588.

*See further* LANDLORD AND TENANT (COVENANTS).

**d. Tenant for Life or Remainderman.**

**Sanitary Works.**]—The cost of the execution of sanitary works required by a local authority under the powers of the Public Health (London) Act, 1891, falls, as between a tenant for life and remaindermen of the premises in respect of which the works are executed, upon the corpus of the property. *Lever, In re, Cordwell* v. *Lever*, 66 L. J., Ch. 66; [1897] 1 Ch. 32; 75 L. T. 383; 45 W. R. 172.

**Reinstatement of Premises.**]—Where expenses had been incurred by a tenant for life, under a will in reinstating structures on a portion of the demised property, in conformity with the requirements of the 18 & 19 Vict. c. 122, which authorises the commissioners to sell the structures if an owner refuses or neglects to pay the expenses of reinstatement:—Held, that these expenses constituted a charge on the property, and that their repayment was a proper application of the proceeds of other lands devised to the same uses, and taken under the Lands Clauses Act. *Davis, Ex parte*, 3 De G. & J. 144; 4 Jur. (N.S.) 1029.

3. APPORTIONMENT.

**Discretion of Local Authority—Paving.**]—The apportionment of the expenses of paving new streets, under 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, by a vestry or district board is in the absolute discretion of such vestry or district board, and not subject to any appeal or review whatever. *Nisbet* v. *Greenwich Board of Works*, 44 L. J., M. C. 119; L. R. 10 Q. B. 465; 32 L. T. 762; 24 W. R. 223.

The principle upon which the expenses of paving a new street have been apportioned amongst the adjoining owners pursuant to the Metropolis Management Acts, cannot be questioned before any tribunal. *Davis* v. *Greenwich Board of Works*, 64 L. J., M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517—C. A.

An apportionment by a vestry or district board of the expenses of paving a new street under s. 77 of the Metropolis Management Amendment Act, 1862, is not invalid by reason of its being at a higher rate in the case of one piece of land abutting on the street than in the case of another. Such an apportionment, on the true construction of the section, need not be made on any uniform principle, but is in the absolute discretion of the vestry or board, and can only be questioned on the ground of want of good faith. *Stotesbury* v *St. Giles, Camberwell*, 57 L. J., M. C. 114; 59 L. T. 493; 53 J. P. 5.

An apportionment by a local authority of the expenses of paving a new street under s. 77 of the Metropolis Management Amendment Act, 1862, is not invalid by reason of its being at a higher rate in the case of one piece of land abutting on the street than in the case of another. Such an apportionment is in the absolute discretion of the local authority, and, so long as it is made bonâ fide, neither the magistrate nor the court has jurisdiction to interfere. *Stotesbury* v. *Vestry of St. Giles, Camberwell* (57 L. J., M. C. 114), approved. *Metropolitan District Ry.* v. *Fulham Vestry*, 65 L. J., Q. B. 29; [1895] 2 Q. B. 443; 14 R. 685; 73 L. T. 330; 44 W. R. 53; 59 J. P. 679—C. A.

A district board of works paved a new street under s. 105 of the Metropolis Management Act, 1855, and apportioned the expenses among the adjoining frontagers; upon proceedings being taken against one owner for the amount apportioned:—Held, that the magistrate was bound to admit evidence in order to ascertain whether the whole of the expenses had been incurred in respect of "paving" work. *Reg.* v. *Marsham*, 61 L. J., M. C. 52; [1892] 1 Q. B. 371; 65 L. T. 778; 40 W. R. 84; 56 J. P. 164—C. A.

—— **Repairs of Road or Way not being a Street.**]—In executing works of repair on a road or way not being a street, under the provisions of s. 3 of the Metropolis Management Amendment Act, 1890, the vestry or district board are the sole judges as to the necessity for such works. *Reg.* v. *Marsham* ([1892] 1 Q. B. 371) distinguished. *Stroud* v. *Wandsworth District Board of Works*, 63 L. J., M. C. 88; [1894] 2 Q. B. 1; 9 R. 194; 70 L. T. 190; 42 W. R. 355; 58 J. P. 652—C. A.

**Houses on both Sides of a Street—Invalid Apportionment.**]—By 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street, under the compulsory powers of the former act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter act the expression "new street" is to include a part of any such street. Buildings and land belonging to the guardians of a union abutted upon a new street which the vestry directed to be paved over half its breadth only; the part paved being that nearest the guardians' premises. The vestry apportioned the whole costs of the paving upon the houses forming the guardians' side of the street, omitting those on the other side:—Held, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged. *Mile End Vestry* v. *Whitechapel Union*, 46 L. J., M. C. 138; 1 Q. B. D. 680; 35 L. T. 354; 24 W. R. 719—C. A.

—— **Flagging Footway.**]—The expenses of flagging a footway, under s. 1 of the Metropolis Management Act (1862) Amendment Act, 1890,

are to be borne by the owners of land or houses on both sides of the road or street in which the footway is situate. Where the footway does not extend the whole length of the street, or where only a part of it is paved, the liability is limited to the owners (on both sides of the road) of houses or land bounding or abutting on that section of the street which contains the footway or part of the footway which has been or is about to be flagged. *Paddington Vestry* v. *North Metropolitan Ry. and Canal Co.*, 63 L. J., Q. B. 316; [1894] 1 Q. B. 633; 10 R. 41; 42 W. R. 223; 58 J. P. 413.

**Streets New and Old.**]—S. was the owner of a piece of land upon which streets had been laid out since the 7th of August, 1862; building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The district board of works laid down sewers in the streets and apportioned the whole of the costs between S., his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon his land, although no sewer had previously existed in the streets thereon:—Held, that the word street in 25 & 26 Vict. c. 102, s. 53, included new streets as defined by s. 112, as well as old streets; that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the costs of the sewers should be defrayed by the board out of the sewer rate levied in their district. *Sheffield* v. *Fulham Board of Works*, 1 Ex. D. 395.

Semble, that even if s. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets. *Ib.*

Where a vestry by resolution, after declaring their intention to construct a sewer in a street which was a "new street" within s. 112 of 25 & 26 Vict. c. 102, apportioned the expense among the owners in the street, of whom the appellant was one; but for five years previous, sewer rates had been levied on the occupiers of the property therein:—Held, that the case was within s. 53 of the act and that the expense of constructing the sewer should be divided as therein mentioned. *St. Giles, Camberwell*, v. *Weller*, L. R. 6 Q. B. 168, n.; 17 W. R. 973.

The Harrow road is an ancient road, and was formerly under the management of turnpike trustees and commissioners until 1864, when the vestry of the parish took charge of it for the first time. The part of the Harrow road eastward of Elgin road had been built over for many years. In 1866, a person built a row of houses called Frankfort terrace, on the side of the Harrow road on the part westward of Elgin road. No sewer existed on that part of the road, but sewers rates had been levied and paid in respect of the land adjoining for more than five years prior to 1856. When Frankfort terrace was built, the parish constructed a sewer in that part of the road, and, upon its completion, the vestry apportioned the whole of the expense of it upon the owners of the adjoining land, under the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), s. 52:—Held, that the vestry was right, and that the road built upon was a new street within that section; and that the owners of the adjoining land were liable to be assessed for their respective portions of the whole expense. *Sawyer* v. *Paddington Vestry*, 40 L. J., M. C. 8; L. R. 6 Q. B. 164; 23 L. T. 662; 19 W. R. 96.

Held, also, that the word "street" in s. 53 did not apply to a new street within s. 52. *Ib.*

The words "a street" in s. 53 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), include "new streets" as defined by s. 112, as well as old streets. In 1872 a road in the metropolis which had up to that time been a turnpike road ceased to be a turnpike road and became a common highway. In 1883 the vestry of the parish in which the road was, constructed a sewer and apportioned part of the expense of construction on the owner of lands abutting on the road. Previously to 1883 there had been no sewer in this part of the road, Sewers rates had been levied for five years prior to the 1st January, 1856, in respect of these lands:—Held, that the case fell under s. 53 and not under s. 52 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102); that the road was a "street" within the meaning of s. 53 as defined by s. 112 of that act, and that the lands were under the proviso in s. 53 exempt from apportionment. *St. Giles, Camberwell*, v *Weller* (L. R. 6 Q. B. 168, n.) and *Sheffield* v. *Fulham Board* (1 Ex. D. 395) approved. *Sawyer* v. *Paddington Vestry* (L. R. 6 Q. B. 164) overruled. *St John's, Hampstead* v. *Cotton*, 56 L. J., Q. B. 225; 12 App. Cas. 1; 56 L. T. 1; 35 W. R. 505; 51 J. P. 340—H. L. (E.)

A road, formerly a turnpike road, which after the turnpike trust has expired becomes by the erection of houses on its side a new street within the ordinary meaning of the words, is not prevented from being a new street within the Metropolis Management Acts, by the mere fact that repairs to the footway of a temporary character have been undertaken by the vestry. *Davis* v. *Greenwich Board of Works*, 64 L. J., M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517—C. A.

In 1870 a road, which was then an unpaved "new street," with houses and a footpath on the north side only and vacant land on the south side, was paved to the satisfaction of the local authority under the provisions of s. 105 of the Metropolis Local Management Act, 1855. The expenses of such paving were apportioned upon, and were paid wholly by the owners of the houses on the north side, and the vestry afterwards kept the whole of such pavement in repair, and paid the cost out of the general rates. In 1888 the owner of the vacant land on the south side, by an arrangement with the vestry for widening the road, set back his fence thirteen feet, and dedicated this strip, and the vestry kerbed a new footpath seven feet in width on the south side, and paved and metalled the remaining six feet, making it uniform with the carriageway already paved, and they paid the expenses, as well as the expenses of the subsequent repairs, out of the general rates. The only part left unpaved was the new footpath of seven feet, and, houses having been built on the south side of this footpath, the vestry resolved in 1894 to pave this footpath, being as they said, a "new street," and they apportioned the expenses of paving the new footpath on the owners on the north side of the road as well as on the owners on the south side:—Held, that the apportionment was upon a wrong basis; that, as in 1870 the whole breadth of the road was completely

paved to the satisfaction of the local authority under s. 105, and as they had exercised their powers under the section and compelled contribution from the owners of the houses adjoining, they had no jurisdiction afterwards to declare this road a "new street," and that the only "new street" was the new footpath which formed no part of the old road, and that, as the houses on the north side did not abut on this new footpath, the owners of such houses could not be called upon to contribute to the expenses of paving the same. *White* v. *Fulham Vestry*, 74 L. T. 425 ; 60 J. P. 327.

The respondents were the owners of two plots of land abutting on a highway which had been formed and laid out in or after the year 1866. In the highway there were only two houses, and no new buildings had been erected for the last twenty years. In 1894 the appellants paved this particular road, and claimed from the respondents the proportion of such expense. The magistrate dismissed a summons by the appellants to enforce same on the ground that the road was not a new street within the meaning of s. 105 of the Metropolis Management Act, 1854, and s. 77 of the Metropolis Management Amendment Act, 1862 :—Held, that the magistrate was right. *Battersea Vestry* v. *Palmer*, 66 L. J., Q. B. 77 ; [1897] 1 Q. B. 220 ; 75 L. T. 362 ; 45 W. R. 110 ; 60 J. P. 774.

**Sewer for New Street—What is.**]—In 1867 a sewer was built in a street, formed since 1862, of some houses of which G. was owner, at his expense, under the Local Management Act, 1867 (25 & 26 Vict. c. 102), s. 44. In 1875 a metropolitan board removed this sewer, and another in the next street, and constructed a new sewer in connection with the houses in both streets. They apportioned the costs and expenses of the works upon the owners of houses and land in the two streets. G. refused to pay his apportionment, and a magistrate dismissed the summons against him :—Held, that this was not a sewer constructed in or for the drainage of a new street within s. 52, and that the apportionment was bad. *Fulham Board of Works* v. *Goodwin*, 1 Ex. D. 400 ; 35 L. T. 907.

—— **Time for Apportionment.**]—The Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53, enacts that, "where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, &c., but where sewers rates had been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed out of the sewers rate," but there is no limitation of the time within which the amount payable by the owners of such land and houses is to be apportioned. Where, therefore, a sewer had been constructed within the meaning of the section in 1868, and no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876 :—Held, that the apportionment was valid. *Bradley* v. *Greenwich Board of Works*, 47 L. J., M. C. 111 ; 3 Q. B. D. 384 ; 38 L. T. 849 ; 26 W. R. 693.

**New Street in Two Districts—Order for exclusive Management by One.**]—An order of the Metropolitan Board of Works made under 18 & 19 Vict. c. 120, s. 140, and 25 & 26 Vict. c. 102, s. 86, that a new street in more than one parish or district shall be under the exclusive management of one vestry or district board for the purposes of paving, and the expenses payable by each be divided equally between the two parishes or districts, is valid ; but such order does not entitle the managing vestry or board to require the other vestry or board to pay one-half of the expenses. *St. Giles, Camberwell*, v. *Greenwich Board of Works*, 56 L. J., Q. B. 636 ; 19 Q. B. D. 502 ; 36 W. R. 126.

**Estimate of Expenses—Evidence of Determination.**] — A metropolitan vestry, having resolved to pave a new street, and part of the expenses being apportioned on the appellant, laid a complaint before a magistrate for non-payment of such apportioned sum. An estimate was given in evidence, signed by the surveyor, who was not called as a witness, but the estimate had been acted upon by the vestry :—Held, that the signed estimate was some evidence that the surveyor had made it, and determined the amount, and that the magistrate was right in enforcing payment. *Hobman* v. *Greenwich District Board of Works*, 58 J. P. 703—C. A.

**Mistake of Clerk—Estoppel.**]—G., the owner of houses abutting on a new street, had a sum of 562*l.* apportioned as his share of the expense of paving. He was summoned for the same, but, by a mistake of the clerk, the sum was entered as 392*l.*, and that sum was paid by G. The actual expenses exceeded the estimate, and G. was summoned for the balance, including the amount insufficiently paid :—Held, that the magistrate was wrong in treating the mistake as an estoppel, and that G. was bound to pay the correct amount. *St. Mary, Islington, Vestry* v. *Goodman*, 58 J. P. 703.

### 4. Charge on Properties.

**Betterment—Valuation—Licensed Premises—Takings and Covenants.**]—For the purpose of creating a charge on properties benefited by improvements carried out in pursuance of the London County Council (Tower Bridge Southern Approach) Act, 1895, an initial valuation was to be made of all the properties affected apart from the proposed improvements. In making such valuation the valuer was to assess—first, the site ; secondly, the site and buildings ; thirdly, the separate value of the owner, and of every lessee having a term of not less than twenty-one years to run at the date of the valuation, excluding any trade interest. With regard to takings and payments, and tying covenants concerning licensed premises :—Held, first, that neither takings and payments, nor the tying covenant, are elements of the value of the site, and that evidence of them should not be admitted even for the purpose of testing the evidence of witnesses ; secondly, that the rule is the same as to takings and payments when considering the site and buildings ; but as to the tying covenant the valuation must be the same whether the tying covenant is considered or not, as the covenant would only affect t

apportionment between the lessor and the lessee; thirdly, with regard to the third part of the valuation—namely, the interests of the owner and all lessees having twenty-one years unexpired—the fact that the house is tied ought to be considered. *London County Council and City of London Brewery Co., In re*, 67 L. J. Q. B. 382; 77 L. T. 463; 61 J. P. 808.

5. PROCEEDINGS.

**Before Justices—Necessity of.**]—An action will not lie against the owner or occupier of a house for the recovery of his proportion of the expenses of paving a street under 18 & 19 Vict. c. 120, but recourse must be had to the remedy pointed out by s. 225, viz. by a proceeding before two justices. *St. Pancras Vestry* v. *Batterbury*, 2 C. B. (N.S.) 477; 26 L. J., C. P. 243; 3 Jur. (N.S.) 1106.

**Within what Time.**]—By 18 & 19 Vict. c. 122, s. 73, all expenses incurred by the commissioners in respect of any dangerous structure shall be paid by the owner, and being recoverable in a summary manner, may, by s. 103, be recovered in manner directed by 11 & 12 Vict. c. 43. In January, 1857, the commissioners took down a dangerous structure, in pursuance of the 18 & 19 Vict. c. 122, and on the 30th April, 1858, gave the owner notice of the expenses, and demanded payment. On the 11th May a complaint was laid before a police magistrate for the nonpayment of the expenses:—Held, that the matter of complaint was the nonpayment of the expenses, and therefore the six months limited by 11 & 12 Vict. c. 43, s. 11, ran from the demand and refusal, and not from the completion of the works, and therefore that the complaint was in time. *Labalmondiere* v. *Addison*, 1 El. & El. 41; 28 L. J., M. C. 25; 5 Jur. (N.S.) 433.

A board of works in the metropolis in June, 1876, made a sewer and apportioned the expenses among the owners of lands, finding 407*l.* to be the sum due by M., the owner of certain lands. No demand of the sum was made on M., the owner, till the 30th December, 1878, though the occupiers had been summoned for part of the sum and the summons dismissed. On the 14th May, 1879, M. was summoned for payment of the whole sum:—Held, that the six months counted from the 14th May, 1879, and not from the notice of apportionment, and therefore the magistrate properly ordered M. to pay the same. *Marr* v. *Greenwich Board of Works*, 44 J. P. 424.

—— **Payment of Instalments.**]—Where a district board have paved a new street under the powers given by 18 & 19 Vict. c. 120, s. 105, and have accepted payment of the amount apportioned in respect of any house or premises by instalments spread over a period not exceeding twenty years, summary proceedings can be taken to recover any instalment, provided the information is laid within six calendar months of the demand therefor; although a previous application for the whole sum apportioned may have been made more than six months before such information was laid. *Prescott* v. *Nicholson*, 60 L. T. 563; 53 J. P. 597.

—— **Nuisance Order—County Court Action.**]—The limitation of six calendar months imposed by s. 11 of the Summary Jurisdiction Act, 1848, in respect of summary proceedings before magistrates, applies to a county court action brought under s. 11 of the Public Health (London) Act, 1891, to recover the amount of costs and expenses incurred in and about serving a notice, making a complaint, and obtaining and carrying into effect a nuisance order, and the action must therefore be brought within six calendar months from the time when such costs and expenses were incurred. *Hammersmith Vestry* v. *Lowenfeld*, 65 L. J., Q. B. 662; [1896] 2 Q. B. 278; 75 L. T. 182; 45 W. R. 60; 60 J. P. 600.

**Right of Action—Judgment against former Owner no bar.**]—The Metropolis Local Management Amendment Act, 1862, ss. 77 & 96, makes certain paving expenses recoverable by the vestry by action from the present or any future owner of premises, or from any person who then or thereafter occupies the premises. The vestry had recovered a judgment against a former owner of premises in respect of such expenses, which remained unsatisfied:—Held, that such judgment was no bar to a subsequent action for the same expenses against the occupier who occupied the premises as tenant to a succeeding owner. *Bermondsey Vestry* v. *Ramsey*, 40 L. J., C. P. 206; L. R. 6 C. P. 247; 24 L. T. 429; 19 W. R. 774.

**Appeal against Orders—Mode of.**]—When an order of the metropolitan board of works has been made, under 18 & 19 Vict. c. 120, s. 140, ordering that the whole of a street situate in more than one district should be under the exclusive management of one particular vestry, and that vestry makes an order upon one of the other districts for contribution towards the expenses, if the order is good on the face of it, the only mode of appeal open to the district is by contesting the propriety of the assessment at the audit; and the court, on a return to a mandamus ordering the payment of the sum assessed, will not go into the matter, but grant a peremptory mandamus. *Reg.* v. *Strand Board of Works*, 4 B. & S. 551; 33 L. J., Q. B. 299; 11 L. T. 183; 12 W. R. 828—Ex. Ch.

**Stale Demand—Successive Occupier—Statute of Limitations.**]—In 1871, a metropolitan vestry apportioned paving expenses on the then owner of a house and made demand, but the sum was not paid. In 1885, a fresh demand was made on W., the new owner, and the justices made an order on W., within six months thereafter:—Held, that there was no Statute of Limitations or other bar to the recovery of the said expenses, and that the order was right. *Wortley* v. *St. Mary, Islington*, 51 J. P. 166.

E. LIABILITY.

1. OF COUNCIL.

a. To Actions.

i. *For Damages.*

**Neglect of Duty.**]—The Metropolis Local Management Act (18 & 19 Vict. c. 120, s. 125), not only transfers to the vestry the duties of the old parish and of the surveyor of highways, but also imposes certain specified duties created by the act. In case of nonperformance of these duties an action for damages will lie against the vestry. *Holborn Union* v. *St. Leonard, Shoreditch, Vestry*, 46 L. J., Q. B. 36; 2 Q. B. D. 145; 35 L. T. 400; 25 W. R. 40.

By s. 125, vestries are required to employ a sufficient number of persons, or to contract with any company or persons, for removing all dirt, ashes, rubbish and filth within their parishes. The guardians of a union were possessed of a workhouse situate within the parish. The vestry refused to remove from it the dirt, ashes, rubbish and filth there collected; the guardians were in consequence obliged to remove the same, and thereby incurred expense:—Held, that an action was maintainable by them to enable them to recover from the vestry the expense incurred by them in removing the dirt, ashes, rubbish and filth from the workhouse. *Ib.*

An action lies against a board of works for not keeping a sewer cleaned, whereby it became choked up, and the overflow therefrom ran into the plaintiff's premises. *Meek* v. *Whitechapel Board of Works*, 2 F. & F. 144.

—— **Statutory Duty—Penalty.**]—An action is not maintainable against a sanitary authority for damage sustained through its neglect of the statutory duty imposed upon it by s. 29 of the Public Health (London) Act, 1891, to remove street refuse. The penalty provided by that section for neglect of such statutory duty is the sole remedy available against such sanitary authority. *Saunders* v. *Holborn District Board of Works*, 64 L. J., Q. B. 101; [1895] 1 Q. B. 64; 15 R. 25; 71 L. T. 519; 43 W. R. 26; 59 J. P. 453.

**Negligence—Surveyors of Highways.**]—A water meter, which was the property of a water company and used for measuring the water supplied by the company to the defendants, the vestry of a parish, for watering the streets, was placed by the defendants in a box of theirs sunk in the footway of one of the streets and covered with an iron flap. The defendants as such vestry were, by s. 96 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the surveyors of highways, and by s. 116 authorised to cause the streets in their parish to be watered. The plaintiff, whilst walking along the street, stepped on the iron flap, and, by reason of its having been worn smooth, and become slippery and dangerous, he fell and was injured. In an action by him against the defendants for damages for such injury:—Held, that though the defendants might not be liable as surveyors of the highway for negligence in not keeping the iron flap in a proper state, they were in their capacity as the authority for watering the street, in which capacity they had placed the iron flap there. *White* v. *Hindley Local Board* (L. R. 10 Q. B. 219) approved. *Blackmore* v. *Mile End Vestry*, 51 L. J., Q. B. 496; 9 Q. B. D. 451; 46 L. T. 869; 30 W. R. 740; 47 J. P. 52—C. A.

A declaration alleged negligence on the part of a vestry in not repairing a common highway, whereby the plaintiff suffered special damage by injury to his horse:—Held, that although the 18 & 19 Vict. c. 120, transferred the duties of surveyors to vestries, yet it did not put an end to the liability of parishes to indictment, and therefore an action does not lie against the vestries for nonrepair. *Parsons* v. *St. Matthew, Bethnal Green Vestry*, 37 L. J., C. P. 62; L. R. 3 C. P. 56; 17 L. T. 211; 16 W. R. 85.

—— **Of Workmen.**]—By 18 & 19 Vict. c. 120, vestries are required to execute the office of surveyor of highways within their parishes; and if they duly execute the same, and do not personally interfere, they are not liable to a passenger for an injury caused to him by a heap of paving-stones having been negligently left on the road by the workmen employed by the acting surveyor. *Holliday* v. *St. Leonard's, Shoreditch Vestry*, 11 C. B. (N.S.) 192; 30 L. J., C. P. 361; 8 Jur. (N.S.) 79; 4 L. T. 406; 9 W. R. 694.

—— **Accumulation of Water from a Sewer.**]—The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330); but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorised them to do, they were not liable. *Dixon* v. *Metropolitan Board of Works*, 50 L. J., Q. B. 772; 7 Q. B. D. 418; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.

When a specified duty is imposed by statute upon a public body, it is, in the absence of express enactment, to be assumed that the legislature intended to exempt the public body from liability to make compensation for alleged omissions to fulfil that duty, unless negligence can be proved to exist. *Hammond* v. *St. Pancras Vestry*, 43 L. J., C. P. 157; L. R. 9 C. P. 316; 30 L. T. 296; 22 W. R. 826. S. P., *Bateman* v. *Poplar Board of Works*, 57 L. J., Ch. 579; 37 Ch. D. 272; 58 L. T. 720; 36 W. R. 501.

The Metropolis Management Act, 1855, s. 72, imposes upon vestries the duty of keeping the sewers in their respective parishes properly cleared, cleansed and emptied. An occupier of a messuage in one of these parishes received injury from the overflow of a sewer; the overflow happened without any default on the part of the vestry:—Held, that the occupier could not maintain an action against the vestry for the injury which he had sustained. *Ib.*

**Interference with River Bed.**]—The metropolitan board of works has no power under 18 & 19 Vict. c. 120, s. 135, to erect any works on the bed or soil of the Thames, without first obtaining the consent of the admiralty, pursuant to 21 & 22 Vict. c. 104, and of the conservators of the river; and consequently the board is liable to an action by an owner of a vessel which sustains damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by the board. *Brownlow* v. *Metropolitan Board*

*of Works*, 13 C. B. (N.S.) 768 ; 31 L. J., C. P. 140 ; 8 Jur. (N.S.) 891 ; 6 L. T. 187 ; 10 W. R. 384. Affirmed on appeal, 16 C. B. (N.S.) 546 ; 33 L. J., C. P. 233 ; 12 W. R. 871—Ex. Ch.

**Demolition of House—Seizure of Materials.**]—A party having erected a building in contravention of 18 & 19 Vict. c. 120, s. 143, a resolution of a vestry was passed, directing their surveyor to demolish the portion which encroached beyond the line. The surveyor having taken down the offending building, placed the materials within a hoarding on the carriage way, and afterwards removed them to the parish stone-yard, and detained them there as a security and pledge for the costs and expenses of so taking down the building, in the bonâ fide belief that he was entitled so to do under the resolution of the vestry ; and the case (settled by an arbitrator) having found that the plaintiff could not have obtained the materials back without paying the costs and expenses :—Held, a conversion. *Tear* v. *Freebody*, 4 C. B. (N.S.) 228 ; 6 W. R. 520.

**Disturbance of Ancient Market.**]—The plaintiffs were, down to 1855, seised in fee of an ancient market for the sale of cattle, known as Smithfield Market, and were entitled to certain tolls in respect of cattle exposed for sale in the market. In 1855, the Smithfield Market was, under the authority of an act of parliament, removed to Islington ; but all privileges were expressly preserved to the plaintiffs, and it was enacted that no new market for the sale of cattle should be opened within a distance of seven miles from St. Paul's Cathedral, in the city of London. For more than fifty years before the closing of Smithfield Market, the defendants, or one of them, had been in possession of a private lair near to the market, and in 1854 the business that had been there carried on was transferred to certain premises about six hundred yards distant from the Islington Market, and within the distance of seven miles from St. Paul's Cathedral ; lairs and receptacles for cattle were there provided, containing accommodation for about four hundred head. Some of the cattle were from time to time sold by the defendants upon the premises between the market days, which were held on Mondays and Thursdays. Beyond a uniform charge for lairage, there was nothing in the nature of a toll upon sales effected by other persons than the defendants ; but where the defendants themselves acted as salesmen, they charged the same commission as if the cattle had been sold in the plaintiffs' market. The cattle thus sold in the interval between the two markets would, if there had been no opportunity for sale between the two markets, have found their way to and have been sold in the market of the plaintiffs. From time immemorial cattle had been sold in certain lairs near Smithfield Market, of which that possessed by the defendants was one. The defendants now claimed to have a right either from lost grant, prescription or otherwise, to sell cattle in the manner described :—Held, on the above facts, that an action was maintainable against the defendants for a disturbance of the plaintiffs' market. *London Corporation* v. *Low*, 49 L. J., Q. B. 144 ; 42 L. T. 16 ; 28 W. R. 250 ; 44 J. P. 169.

**Under Building Acts.**]—*See* ante, PARTY-WALL.

**Repair of Highway by Contractor—Knowledge of Vestry as to State of Water-pipe.**]—A vestry, acting as a sewer authority, laid down a new sewer, and, in so doing, a contractor employed by them laid bare a wrought-iron service water-pipe, which was about two and a half feet below the surface. The surveyor of the vestry knew that the pipe was old and rusty, and likely, therefore, to become leaky. In filling in the trench some clay was put round the pipe, but not in such a quantity or in such a manner as to prevent it from leaking. A few months afterwards the pipe leaked, and the surrounding clay and earth, being thereby moistened, gave way under a heavily laden van, which the plaintiff was driving, and the van being overturned the plaintiff was thrown from it to the ground, and seriously injured. Upon an action brought to recover damages from the defendants :—Held, that the vestry knew, or ought to have known, the character and condition of the pipe at the time it was laid bare in constructing the new sewer, and consequently were liable for negligence in not having taken special precautions against its leaking thereafter. *Coe* v. *Paddington Vestry*, 64 L. T. 566.

**Levelling Street—Cutting into Cellars—Preventing Access to Shop—Injury to Trade.**]—A corporation being authorised by act of parliament to stop up or level a street for the purpose of its act, in the course of operations wrongfully cut into the cellars of a house, which were under the street, leaving them open and exposed. The corporation also, in the course of the works, partially stopped the traffic along the street. An injunction having been obtained restraining the corporation from cutting into the cellars, with an inquiry as to damages :—Held, that although the owner was entitled to damages for the structural injury to his cellars, he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shewn that the depression arose from the wrongful, as distinguished from the authorised, act of the corporation. *Bigg* v. *London Corporation*, L. R. 15 Eq. 376 ; 28 L. T. 336.

**Making Sewer — Alternative Method less likely to cause Damage.**]—An arbitrator found that commissioners of sewers had by tunnelling made a sewer fit and proper to be made, in a workmanlike, skilful and proper manner ; but that the probability of damage would have been somewhat less if the sewer had been made by open cutting instead of tunnelling :—Held, that the commissioners were not liable for an injury to an adjoining building, occasioned by the tunnelling. *Grocers' Co.* v. *Downe*, 3 Bing. (N.C.) 34 ; 3 Sc. 356 ; 2 Hodges, 120 ; 5 L. J., C. P. 307.

**Turning out Street Lamps—Accident.**]—By s. 130 of the Metropolis Management Act, 1855, vestries have a discretion as to the time during which public street lamps shall continue lighted, and when they have bonâ fide exercised their discretion in that respect they are not liable for any accident, whether the result of nonfeasance or misfeasance, caused through the lights having been turned out at the hour they have ordered. *Young* v. *St. Mary's, Islington, Vestry*, 60 J. P. 821.

ii. *On Contracts.*

**With Trustees.**]—An action upon a contract for cleansing the streets of a parish, entered into

by the trustees under a local act, is by virtue of 18 & 19 Vict. c. 120, ss. 29, 93, 94, 95, properly brought against the district board. *Sinnott* v. *Whitechapel Board of Works*, 3 C. B. (N.S.) 674; 27 L. J., C. P. 177; 4 Jur. (N.S.) 263; 6 W. R. 289.

**In Contravention of Building Act.**]—A contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act of 1855 cannot be enforced. *Stevens* v. *Gourley*, 1 F. & F. 498; 7 C. B. (N.S.) 99; 29 L. J., C. P. 1; 6 Jur. (N.S.) 147; 1 L. T. 33; 8 W. R. 85.

iii. *For Injunction.*

**Vestry repairing Road—Breaking Gas-pipes—Steam Roller.**]—The plaintiffs, a gas company, having statutory powers to place mains and pipes under the highways, and a statutory obligation to supply gas within the parish of K., laid, prior to 1872, certain pipes under certain highways within the jurisdiction of the defendants, who, being the highway authority for the district, were, by virtue of 10 Vict. c. 34, 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, bound to repair the highways, and empowered to pave and alter the level of streets under their management. In 1872 the defendants began to use steam rollers of considerable weight for the purpose of repairing the highways and thereby fractured certain pipes belonging to the plaintiffs laid under the highways:—Held, that the plaintiffs were entitled to an injunction restraining the defendants from using any steam rollers in such a way as to fracture or damage any pipes belonging to the plaintiffs which were properly laid under the highways within the jurisdiction of the defendants. *Gas Light and Coke Co.* v. *St. Mary Abbott's Vestry*, 54 L. J., Q. B. 414; 15 Q. B. D. 1; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469—C. A. Affirming 1 Cab. & E. 368.

**Improper Expenditure.**]—It is illegal for a vestry to spend moneys out of the rates in an agitation to induce persons taking water from a water company to resist payment of a charge for fixed baths, which has been decided to be a good charge. *Att.-Gen.* v. *Camberwell Vestry*, 63 L. J., Ch. 878; 8 R. 627; 71 L. T. 478.

—— **Individual Members of Vestry made Defendants, for Payment of Costs.**]—A vestry, incorporated under the Metropolis Management Act, 1855, having resolved to incur certain unauthorised expenditure, an action for an injunction was commenced by the attorney-general, at the relation of a ratepayer, against the vestry and the movers and seconders of the resolution, passed by the vestry and some of their supporters. On motion on which the individual defendants were unrepresented, the vestry consented to a perpetual injunction without costs, and the plaintiffs then moved for judgment against the individual defendants in default of pleadings, and asked that they might be ordered to pay the costs of the action. The statement of claim did not ask for costs against the vestry:—Held, that it was irregular to make the individual members of the vestry defendants for the sole purpose of making them pay costs, and that as no costs were asked against the vestry there was no necessity for an indemnity to the vestry from costs occasioned to it by the individual defendants having led the vestry astray, and that the action, therefore, must be dismissed as against the individual defendants, but without costs on either side. *Att.-Gen.* v. *Bermondsey Vestry*, 51 L. J., Ch. 848; 46 L. T. 852; 30 W. R. 872. Affirmed, 52 L. J., Ch. 567; 23 Ch. D. 60; 48 L. T. 445; 31 W. R. 463—C. A.

**Threat to demolish Houses unless Owner constructs Sewer.**]—C., being owner of land in a parish, and wishing to build thereon, had, from a misapprehension of his duties under the 18 & 19 Vict. c. 120, constructed a sewer in the street to the main sewer, at his own expense. Afterwards, wishing to build another street in a parallel direction to the former, he wrote to the vestry, asking how they required the proposed new houses to be drained. The vestry required him to continue the former sewer; to which he replied, that under the act it was not incumbent on him to construct the sewer, but only to make drains from the houses into the sewer. The vestry, however, gave him notice to discontinue the erection of the houses, adding that they had power to cause the same to be demolished. A bill was filed to restrain the vestry from demolishing, destroying, altering, or injuring the houses or interfering with or preventing the completion of them. An interim order for an injunction was granted, which, on motion by consent for a decree, was made perpetual, and the costs of the suit were ordered to be paid by the vestry. *Clarke* v. *Paddington Vestry*, 5 Jur. (N.S.) 138.

**Entry on Premises to abate Nuisance—Previous Complaint to Justices, whether necessary.**]—See *Tinkler* v. *Wandsworth District Board of Works*, 1 Giff. 412; 3 Jur. (N.S.) 1292; 6 W. R. 50 (ante, col. 1115).

**Mandatory Injunction—To construct Footway.**]—S. was entitled to the houses in Cecil and Salisbury Streets, and to a piece of low level ground at the south ends of these streets. The low level communicated by means of two lanes at the backs of the streets with the Strand on the north side, and by means of wharves, with the river Thames on the south side. In 1862 the Thames Embankment Act authorised the construction of the embankment road and of the ornamental gardens alongside of the river. These improvements were completed in 1870; their effect was to deprive the low level ground in question, and also the two streets, of all communication with the river or with the embankment on the south side. S., as the owner of the depreciated property, had obtained 10,000*l.* as compensation assessed by an umpire: but under s. 62 of the act of 1862, S. was entitled besides to full and free communication to the embankment road and the river, and he claimed that such right belonged to him in respect as well of the houses in Cecil and Salisbury Streets as of the low level ground, and that the right in dispute was to a wheel or a cart-way, and not to a footway merely. The makers of the improvements had offered to construct a convenient footway across the gardens to the embankment road, but such offer had not been entertained. A wheel or cart-way would have seriously injured the ornamental gardens:—Held, that having regard to the circumstances of the property in 1862, and to an act of Geo. 3, relative to the buildings upon it, the act of 1862 did not reserve

any right of way, much less a wheel or cart-way, to the low level; and that a mandatory injunction to construct a convenient footway for the occupiers of Cecil and Salisbury Streets could not be granted on the state of the pleadings, or an inquiry directed at that stage of the suit. *Salisbury (Marquis)* v. *Metropolitan Board of Works*, 21 W. R. 259.

—— **Sewage—Adjoining Districts—Cutting off Communications already sanctioned.**]—A nuisance was caused in watercourses within the district of the sanitary authority for B. by the discharge of sewage from cesspools within the district of the sanitary authority for C., by means of connecting-pipes laid with the sanction of that authority, which carried the sewage through main pipes laid in private roads in the C. district to the watercourses in question:—Held, that the authority for C. had not power to stop up or cut off the communications between the cesspools and the main-pipes. *Att.-Gen.* v. *Clerkenwell Vestry*, 60 L. J., Ch. 788; [1891] 3 Ch. 527; 65 L. T. 312; 40 W. R. 185.

No action will lie for an injunction to compel the sanitary authority for C. to exercise their statutory powers or perform their duties, and therefore that the authority for B. were not entitled to a mandatory injunction to restrain the authority for C. from permitting the continuance of the nuisance. *Ib.*

iv. *Procedure.*

**Board, how Sued.**]—Under 11 & 12 Vict. c. 112, which enacted that the metropolitan commissioners of sewers may sue and be sued "in the name of the clerk for the time being," as explained by 12 & 13 Vict. c. 93, s. 15, which enacted, that the chief clerk to the commissioners shall be called the "secretary," and the word "clerk," in any of the acts relating to the commissioners, shall include "secretary," the commissioners must sue and be sued in the name of their secretary. *Clements* v. *Pollard*, 10 Ex. 817; 3 C. L. R. 420.

**Notice of Action—Riparian Owners.**]—The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done under their parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction. *Att.-Gen.* v. *Hackney Local Board*, 44 L. J., Ch. 545; L. R. 20 Eq. 626; 33 L. T. 244.

The authority over sewers, and the drainage powers given by parliament to local boards, do not authorise the committal of a nuisance by the boards in their exercise of such powers. *Ib.*

—— **Third Party.**]—By 25 & 26 Vict. c. 102, s. 106 no writ or process shall be sued out against or served upon . . . the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerks, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done, under the powers of such board or vestry under the metropolitan acts, until one month after notice:—Held, that the section intended only some act done by virtue of the powers vested in the board or vestry and under their authority, and that, therefore, a person who had received notice from a district board to drain into a sewer, and in doing so committed a trespass, was not entitled to notice of action. *Doust* v. *Slater*, 10 B. & S. 400; 38 L. J., Q. B. 159; 20 L. T. 525.

—— **Action for Injunction.**]—Per North, J. Sect. 106 of the Metropolis Local Management Acts Amendment Act, 1862, which requires that before any proceeding is instituted against a district board a month's notice shall be served on them by the person intending to take the proceeding, does not apply to actions in equity:—Per Lopes, L.J. (Cotton and Lindley, L.JJ., not dissenting), that that section does not apply to an action for an injunction to restrain a nuisance. *Bateman* v. *Poplar Board of Works*, 56 L. J., Ch. 149; 33 Ch. D. 360; 55 L. T. 374.

—— **Negligence.**]—The plaintiff was a driver employed by contractors who had contracted with the defendants, a metropolitan vestry, to provide them with horses and drivers for their carts used in watering the streets under the powers of 18 & 19 Vict. c. 120. The defendants negligently supplied a cart with a defective axle, and by reason thereof the plaintiff, whilst driving the cart for the purpose of watering the street, was thrown off and injured:—Held, that the defendants were entitled to notice of action under 25 & 26 Vict. c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing "done or intended to be done" under the powers of the vestry under the act empowering them to water the streets. *Edwards* v. *St. Mary, Islington*, 58 L. J., Q. B. 165; 22 Q. B. D. 338; 60 L. T. 725; 37 W. R. 347; 53 J. P. 180—C. A.

—— **Sufficiency.**]—In a notice of action served, under s. 106 of the Metropolis Local Management Act, 1862, upon a vestry, the description of the place where the defect complained of existed should be clear and explicit: but a discrepancy not calculated to mislead, such as a statement that a sewer was in S. street, whereas it was twenty feet away from the point indicated and in another street, is not fatal to the notice, nor a ground for nonsuit. *Madden* v. *Kensington Vestry*, 61 L. J., Q. B. 527; [1892] 1 Q. B. 614; 66 L. T. 347; 40 W. R. 390; 56 J. P. 471.

—— **By Person suing as Incumbrancer on Rates.**]—Clauses in local act providing that person aggrieved by the commissioners appointed to carry it into execution, should appeal to the quarter sessions, and that twenty-one days' notice should be given before any action or suit was commenced for anything done in pursuance of the act, do not apply to the case of a person claiming as an incumbrancer of the rates which the act gave authority to assess and levy and instituting his suit in order to give effect to his incumbrance. *Drewry* v. *Barnes*, 3 Russ. 94; 5 L. J. (o.s.) Ch. 47; 27 R. R. 20.

b. For Compensation.

**Obstruction of Light—No Agreement.**]—By two acts of Geo. 3, a vestry was empowered to alter the levels of streets without compensating those injured by such alteration. The Metro-

polis Local Management Act enables a vestry to purchase any right or easement over any land which may be necessary for the execution of works undertaken by them; it also incorporates the Lands Clauses Act, 1845, but excludes the operation of ss. 16—68, being those sections which relate to "the taking of lands otherwise than by agreement"; and by s. 247, it repeals all acts which are inconsistent with it. The vestry, in raising the level of a street under its statutory powers, obstructed the light of and the entrances to the plaintiff's houses, and refused to enter into any agreement with him or to pay any compensation:—Held, that in the absence of any agreement between the plaintiff and the vestry, the plaintiff was not entitled to compensation, as s. 68 of the Lands Clauses Act was not incorporated; and that the vestry was acting under the acts of Geo. 3, which were not repealed by the Metropolis Local Management Act. *Baker* v. *St. Marylebone Vestry*, 35 L. T. 129; 24 W. R. 848.

**Temporary Obstruction.**]—The mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a damage in respect of which he is entitled to claim compensation under 18 & 19 Vict. c. 120, ss. 135, 225. *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 510.

**Obstruction of Public Way.**]—Where the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-lock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment:—Held, that he could not claim compensation under the Lands Clauses Act, 1845, s. 68. *Reg.* v. *Metropolitan Board of Works*, 10 B. & S. 391; 38 L. J., Q. B. 201; L. R. 4 Q. B. 358; 17 W. R. 1094.

**Construction of Sewer.**]—By 11 & 12 Vict. c. 112, s. 38, power is given to the commissioners of sewers to construct sewers, and to make compensation for damage done thereby, and compensation was to be made out of rates to be levied under the act. By 18 & 19 Vict. c. 120, s. 145, the Metropolitan Board of Works was appointed to take the place of the commissioners of sewers, and no action against the commissioners was to abate, but to continue against the metropolitan board. By s. 148, the property of the commissioners is vested in the board, and money recoverable from the former is made recoverable from the latter, and all liabilities which, under 11 & 12 Vict. c. 112, were charged on or payable out of any rates levied thereunder, are continued in full force and charged on the district as before. In an action against the metropolitan board for damage done by the commissioners of sewers in the construction of works several years before action:—Held, that the Metropolitan Board of Works was liable. *Pettiward and Metropolitan Board of Works, In re*, 19 C. B. (N.S.) 489; 34 L. J., C. P. 301; 11 Jur. (N.S.) 932; 12 L. T. 764.

The mere construction of a sewer by the Metropolitan Board of Works does not give the owners of the adjacent lands a right to compensation under the Sewers Act (11 & 12 Vict. c. 112), ss. 69 and 70. *Metropolitan Board of Works* v. *Metropolitan Ry.*, 37 L. J., C. P. 281; L. R. 3 C. P. 612; 19 L. T. 10; 16 W. R. 1117. *And see cases* ante, cols. 1097, et seq.

**Draining Pond.**]—In a field, situate upon a bed of gravel, there had existed from time immemorial a pond, formed in the gravel surface, underlying which was a natural basin of clay. The pond was the result of the percolation of water from the adjoining high lands into the gravel, whence, being confined by the substratum of clay, it rose to the surface, and formed the source of a rivulet supplying the owner's house, garden, &c. The Metropolitan Board of Works, in pursuance of their powers under 11 & 12 Vict. c. 112, and in order to drain a district within the limits of their commission, constructed a sewer along the highway at a short distance from the pond, cutting through the beds of clay and gravel, and thereby draining and diverting the percolating water, so as to leave the pond and rivulet permanently dry:—Held, that the case was to be treated as though the pond had never been in existence, and that the owner was not, therefore, entitled to compensation for the abstraction of the water. *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; 9 Jur. (N.S.) 1008; 11 W. R. 492.

The Metropolitan Board of Works constructed a sewer on the high road, and the Lewisham District Board made a branch sewer running into it. The combined effect of the two was, to drain an ornamental pond and rivulet on the adjoining lands of the plaintiff:—Held, first, that neither of the boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners. *Stainton* v. *Woolrych*, 23 Beav. 225; 26 L. J., Ch. 300; 3 Jur. (N.S.) 257.

Held, secondly, that they had not exceeded their statutory right, so as to be liable to be restrained by injunction. *Ib.*

Held, thirdly, that if either of the boards was producing injury to the plaintiff by the unskilful or improper construction of the sewer, the court would interfere to prevent it. *Ib.*

Held, fourthly, that such not being the case, the rights of the plaintiff were limited to a claim for compensation under 11 & 12 Vict. c. 112, s. 50, and 18 & 19 Vict. c. 120, s. 86. *Ib.*

**Compulsory Purchase of Lands—Making of Streets.**]—By certain local acts power was given to trustees to purchase land to make a road, paying the owners a rent; land was so acquired from the plaintiffs' predecessors, and a rent paid for it till 1863; in that year, by the Metropolis Roads Act, 1863, so much of the road as was within any of certain parishes was to be maintained by that parish, "and all quit rents and other outgoings payable in respect thereof" to be paid as part of the expenses of maintaining the same. Part of the land acquired from the plaintiffs' ancestors was in a parish:—Held, that an action lay for the rent, but that only a proportionate part of the rent could be recovered from the parish. *Sansom* v. *St. Leonard's, Shoreditch*, 38 L. J., C. P. 286; L. R. 4 C. P. 654; 18 W. R. 40.

By an act of 1877, with which the Lands Clauses Act was incorporated, the Metropolitan Board of Works were authorised to effect certain street improvements, and by s. 5 were authorised to "enter upon, take, use, and hold" any of the lands in the deposited plans and books of reference, with the exception of certain specified

lands. By s. 33, after reciting that it was expedient to make provision for the accommodation of such of the labouring classes as would be displaced by the improvements, the board were directed to acquire or appropriate lands, and sell them or let them on building lease for the purpose of the erection of suitable houses for the labouring classes. And it was provided that before the board should, without the consent of one of the secretaries of state, "take for the purposes of this act" fifteen houses or more occupied at the passing of the act wholly or partially by persons of the labouring classes, they should prove to the satisfaction of such secretary of state that suitable accommodation had been provided elsewhere for the same number of persons as had been accommodated in the houses to be taken. The board served on the plaintiff notice to treat for the purchase of more than fifteen houses belonging to him, which were occupied at the passing of the act by the labouring classes. The plaintiff sent in his claim, without prejudice to any question as to the right of the board to exercise their powers before complying with the proviso of s. 33. The board then served notice of their intention to summon a jury. It was admitted that the conditions of the proviso had not yet been complied with. The plaintiff brought his action to restrain the board from proceeding on their notices till they had complied with the conditions: — Held, by Chitty, J., that the word "take" in the proviso was not confined to taking possession, but included purchasing, and that the board ought to be restrained from taking any steps to acquire a title to the land till they had complied with the conditions precedent. An injunction was therefore granted. But on appeal, held, by Jessel, M.R., and Bowen, L.J. (dissentiente Cotton, L.J.), that as the conditions precedent to taking the plaintiff's land were conditions which the board were able and compellable to comply with, the land in question was land which the board were "authorised to purchase or take" within the meaning of the Lands Clauses Consolidation Act, 1845, s. 18, and that they were entitled to serve a notice to treat and summon a jury. *Spencer* v. *Metropolitan Board of Works*, 52 L. J., Ch. 249; 22 Ch. D. 142; 47 L. T. 459; 31 W. R. 347—C. A.

Held, by Jessel, M.R., and Bowen, L.J., that the prohibition against "taking" the land till the conditions had been complied with did not prohibit the board from taking before such compliance any proceeding prior to the conveyance, Jessel, M.R., giving no opinion whether they were prohibited from taking a conveyance or only from taking possession, and Bowen, L.J. (with whom on this point Cotton, L.J., concurred), holding that the getting a conveyance from the landlord without entering into possession, came within the meaning of the word "take":—Held, therefore, by Jessel, M.R., and Bowen, L.J. (dissentiente Cotton, L.J.), that the injunction must be dissolved. *Ib.*

—— **Time for Summoning Jury.**]—The authorities of the city of London seeking to take property under powers given by 10 & 11 Vict. c. cclxxx., respecting which they have given notice to treat, are bound to summon a jury within a resonable time after receiving particulars of the plaintiff's claim. Nor is it any reason for refusing or delaying to do so, that the plaintiff's only interest in the lands sought to be taken is a residue of a few months in an unexpired term. *Reg.* v. *London Corporation, Mathew, Ex parte*, 16 L. T. 673.

—— **Action for Mandamus to compel Board to issue Warrant to Sheriff—Declaration, sufficiency of—Notice to Treat given under mistaken belief.**]—By 57 Geo. 3, c. xxix., ss. 80 & 82 (taken along with 18 & 19 Vict. c. 120, s. 90), the defendants are authorised to alter, widen, &c., streets, &c., within the parish and "if any houses, walls, &c., shall be adjudged" by them "to project into, obstruct, or prevent them from so altering, turning, widening, &c., the said streets, &c., and that the possession, occupation, and purchase of such houses, walls, &c., will be necessary for that purpose"; they are to treat with the owners for their purchase, and if the owners refuse to treat the vestry is empowered, and they are thereby "required to issue" their warrant to the sheriff for having the value of the houses, &c., assessed by a jury. In an action for a mandamus to compel the defendants to issue their warrant, a declaration which avers that defendants had given plaintiff notice to treat, is not bad, because it does not allege that the house had been adjudged to project into, obstruct, or prevent defendants from altering the streets, or that the possession, occupation, and purchase of the house was necessary for altering, &c., the streets. *Birch* v. *St. Marylebone Vestry*, 20 L. T. 697; 17 W. R. 1014.

Quære, whether it would not have been a sufficient reply to the action, that the defendants gave the notice to treat under a mistaken belief in the existence of the circumstances necessary to give them power to purchase. *Ib.*

The fact that the vestry is a public body does not exempt them from the obligation imposed by a notice to treat. *Ib.*

The statute containing no provision that the owner or occupier should give particulars of his estate and interest, pleas that such particulars were not given were held bad on demurrer. *Ib.*

—— **Paving—Petition for Payment out of Purchase-money—Jurisdiction as to Costs.**]—The court of chancery has jurisdiction under s. 89 of the Metropolitan Paving Act (57 Geo. 3, c. xxix.), to order payment of the costs of a petition for payment out, and to separate accounts of the purchase-money of houses taken by a vestry under the powers of the act for the purpose of widening a street. *Saunders' Estate, In re*, L. R. 8 Eq. 681.

—— **Time for Proceedings.**]—The limitation section (136) in 57 Geo. 3, c. xxix., overrides those in the various existing local paving acts. The time of commencing proceedings, therefore, for anything done under any local paving act, is confined to three months from the time of the fact committed. *Burns* v. *Carter*, 5 Bing. 429; 3 M. & P. 1; 7 L. J. (o.s.) C. P. 161.

—— **Construction of Sewers.**]—The commissioners of sewers are not entitled under 57 Geo. 3, c. xxix., s. 80, to adjudge the whole of a house to be "necessary" to be taken for the widening of a street, and to take in pursuance of such adjudication—when in fact only a portion of the house physically obstructs such widening—with the object of reselling the remainder of the house at an increased price, and so enabling a

scheme for widening the street to be carried out, the "necessity" contemplated by the act being a purely physical necessity. The right of pre-emption given by s. 96 of the same act to the persons from whom lands have been purchased under the powers of the act, is not taken away by 14 & 15 Vict. c. 91, s. 54. *Thomas* v. *Daw*, (L. R. 2 Ch. 1) and *Galloway* v. *London Corporation* (L. R. 1 H. L. 34) distinguished. *Gard* v. *Sewers Commissioners*, 49 L. T. 325.

—— **Expenses—Interim Investments.**]—The court has jurisdiction, under ss. 84 and 89 of the General Metropolitan Paving Act (57 Geo. 3, c. xxix.), to order payment of the costs of an interim investment in consols (including the costs of a petition for the purpose) of purchase-money of land taken by a board of works under the powers of the act. *Mercerон, In re*, 47 L. J., Ch. 114; 7 Ch. D. 184; 38 L. T. 15; 26 W. R. 187.

The court will allow an investment in metropolitan consolidated stock (under 34 & 35 Vict. c. 47, s. 13) of purchase-money paid into court by a school board. *Redhead, In re*, 39 L. T. 60.

**Abolition of Office—Emoluments.**]—The services of a clerk of the works to paving commissioners were discontinued, and he ceased to act as their clerk. The powers of the commissioners having been determined in 1856 by 18 & 19 Vict. c. 120, he applied for compensation for the loss of his office to the district board of works, who rejected his application on the ground that he was not an officer of the commissioners at the time of the act coming into force. He appealed to the Metropolitan Board of Works, who made an order awarding compensation for the loss of emoluments as such officer arising from the passing of the act:—Held, that the question whether he was an officer or not was necessarily within the jurisdiction of the Metropolitan Board of Works as a court of appeal. *Reg.* v. *Metropolitan Board of Works*, 8 El. & Bl. 529; 27 L. J., Q. B. 5; 4 Jur. (N.S.) 25.

The Metropolitan Bridges Act, 1877, provided that compensation should be paid to certain officers, including clerks, but not including solicitors, of the private companies or corporations whose bridges were taken over by the Metropolitan Board of Works under the act, upon a scale to be calculated on the basis of the emoluments actually received by them in the two years previous to the passing of the act. The Deptford Creek Bridge was taken over by the board, and thereby the plaintiff, who had been clerk to the Deptford Creek Bridge Company, lost his office. He had received a salary as clerk, and also payments for legal business done by him as solicitor for the company, and commission on the rents of the company's property which he received. The Deptford Creek Bridge Company had by their act power to appoint a solicitor and receiver as well as a clerk; they had never appointed such officers, and the legal business of the company had always been done and the rents received by the clerk, who had always been a solicitor:—Held, that, by the practice of the company, these duties had been attached to the office of clerk, and that the plaintiff was entitled to compensation in respect of the payments received for discharging them as part of the emoluments of his office; but, as to the payments for legal business done by him, only in respect of his proportion as partner in the firm of solicitors of the net profits after deducting all office expenses necessarily incurred in earning the money. *Drew* v. *Metropolitan Board of Works*, 50 L. T. 138—C. A.

Held, also, that the board were not entitled to have the bills of costs taxed before the amount of compensation was assessed, as the bills had been paid by the company without taxation. *Ib.*

**Proceeding by Arbitration—Time for.**]—A proceeding for settling by arbitration the amount of compensation payable by the Metropolitan Board of Works in respect of land and buildings damaged by the sewage works of such board, under the powers of their act, is not a proceeding against the board within 25 & 26 Vict. c. 102, s. 106, which limits the time for issuing process or instituting any proceeding against such board for anything done under the powers of the board under their acts. *Delany* v. *Metropolitan Board of Works*, 37 L. J., C. P. 59; L. R. 3 C. P. 111; 17 L. T. 262; 16 W. R. 137—Ex. Ch.

—— **Jurisdiction where Liability Disputed.**]—The 69th section of the Metropolitan Commissioners of Sewers Act (11 & 12 Vict. c. 112), which provides that compensation shall be made to persons damaged by the exercise of the powers of the act, and "in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this act," does not give jurisdiction to proceed by arbitration in a case in which the commissioners dispute their liability to make any compensation. *Reg.* v. *Sewers Commissioners*, 22 L. J., Q. B. 234; 1 W. R. 286.

2. OF SURVEYORS, CONTRACTORS, &C.

**Repairs by Contractor — Subsequent Subsidence.**]—The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; three or four months after the work was finished damage ensued by the plaintiff's horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the hole was owing to the natural subsidence of the materials which sometimes takes place sooner or later, after such an excavation:—Held, that he was not liable for the damage; for that, there being no clause in the Metropolitan Management Acts directly applicable to such a case, the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, it being the duty of the parish authorities to look after the subsequent repairs, whether rendered necessary by subsidence or ordinary wear and tear. *Hyams* v. *Webster*, 8 B. & S. 272; 36 L. J., Q. B. 166; L. R. 2 Q. B. 264; 16 L. T. 118; 15 W. R. 619. Affirmed on appeal, 38 L. J., Q. B. 21; L. R. 4 Q. B. 138; 17 W. R. 232—Ex. Ch.

**Delegate of Board—Public Nuisance.**]—A district board of works being a public body cannot delegate its powers; and, therefore, a third person, though acting with their licence and under the superintendence of their surveyor, cannot justify himself for acts creating a public nuisance, although the acts so done are within their statutory powers and would be legal if

done by themselves. Quære, as to the construction of 21 & 22 Vict. c. 104, s. 24. *Head* v. *Bush*, 13 W. R. 651.

**Contract with Owner of Premises.**]—The owner of premises within 18 & 19 Vict. c. 120, was authorised under s. 77, to make a drain from his house into one of the public sewers. He employed a contractor to do the work, and in the course of doing it a trench was cut across the public footway, which was afterwards insufficiently reinstated, and in consequence a party sustained an injury:—Held, that the owner of the premises as well as the contractor was liable, by reason of the statutory duty cast on the owner to reinstate the highway properly. *Gray* v. *Pullen*, 5 B. & S. 970; 34 L. J., Q. B. 265; 11 L. T. 569; 13 W. R. 257—Ex. Ch.

Held, also, that the penalty imposed by s. 111 was cumulative, and did not take away the right of action. *Ib.*

**Injury to Premises—Damages or Compensation.**]—If in carrying out the working of a sewer authorised to be made by 18 & 19 Vict. c. 120, s. 135, due and proper care is not used, and in consequence of the want of such due and proper care damage is done to property, the owner of such property is entitled to bring an action, and is not put to his compensation under ss. 135, 225. *Clothier* v. *Webster*, 12 C. B. (N.S.) 790; 31 L. J., C. P. 316; 9 Jur. (N.S.) 231; 6 L. T. 461; 10 W. R. 624.

**Notice of Action—Persons Entitled to.**]—If an act of trespass complained of was done with a bonâ fide intention to pursue the directions of the former Building Act, 14 Geo. 3, c. 78, though not justified by it, the defendant was entitled to notice of action. *Wells* v. *Oddy*, 2 C. M. & R. 128, 184; 7 Car. & P. 22; 1 Gale, 137; 5 Tyr. 725; 3 D. P. C. 799; 4 L. J., Ex. 149.

By 18 & 19 Vict. c. 122, s. 108, no writ or process shall be sued out against any district surveyor, or other person for anything done or intended to be done under the provisions of the act until one month after notice; and every such action shall be brought within six months after the accrual of the cause of action. By s. 83 (8) a building owner has a right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation. By s. 94, a building owner who fails to make good any damage he may occasion to adjoining premises by works authorised to be executed by him incurs a penalty not exceeding 20*l.* for each day during which such failure continues. The defendant in fulfilling a contract with a building owner to build a house adjoining a house of the plaintiff, so negligently dug the ground for the foundation of the house about to be built, and underpinned the party-wall, that the plaintiff's house was injured:—Held, that the words "other person," in s. 108, included only official persons discharging official duties cast upon them by the act, or persons doing some act in respect of which they were performing or intending to perform a statutory duty, and that the defendant therefore was not entitled to notice of action under that section. *Williams* v. *Golding*, 1 H. & R. 18; 35 L. J., C. P. 1; L. R. 1 C. P. 69; 11 Jur. (N.S.) 952; 13 L. T. 291; 14 W. R. 60.

A contractor employed by the Metropolitan Board of Works to enlarge a sewer running into a tidal creek, erected a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed back into the plaintiff's premises and injured them. No notice had been given to the contractor before commencing the action:—Held, that the injury was occasioned by acts "done or intended to be done under the powers of the Metropolitan Board of Works," within the 25 & 26 Vict. c. 102, s. 106; and that he, therefore, was entitled to a notice of action. *Poulsum* v. *Thirst*, 36 L. J., C. P. 225; L. R. 2 C. P. 449; 16 L. T. 324; 15 W. R. 766.

—— **Person erecting Urinal by Direction of Vestry Officer—Authority of Officer.**]—By the directions of an officer of a vestry, the defendant in the honest belief that such officer was authorised to give such directions, erected a urinal on the wall of the plaintiff, such a work being within the powers of the vestry under 18 & 19 Vict. c. 120, s. 88. The officer had no express orders to do the work, but the parish afterwards paid the expenses of it:—Held, that the defendant was a person within the meaning of 25 & 26 Vict. c. 102, s. 106, entitled to notice of action. *Chambers* v. *Reid*, 13 L. T. 703; 14 W. R. 370.

Held, also, that the words in 25 & 26 Vict. c. 102, s. 106, "their or any of their directors" are not to be limited to the "board or vestry," but to be extended to the words following, "clerk, surveyor, contractor, officer," &c. *Ib.*

—— **Negligence.**]—The defendant was a contractor engaged in making a sewer for a vestry; one of his men who was employed to take care of a horse and cart, and who had no right to go home to dinner or leave the horse and cart, took them to his house and left them outside while he dined. The horse ran off and damaged the plaintiff's railings:—Held, first, that there was evidence to warrant the jury in finding that the man was in the defendant's employ at the time of the negligence and accident. *Whatman* v. *Pearson*, 37 L. J., C. P. 156; L. R. 3 C. P. 422; 18 L. T. 290; 16 W. R. 649.

Held, secondly, that the defendant was not entitled to notice of action under 25 & 26 Vict. c. 102, s. 106. *Ib.*

**Actions within Three Months.**]—The 14 Geo. 3, c. 78, s. 100, limited actions to be brought within three months. A. had begun to build a party-wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must have brought ejectment. *Trotter* v. *Simpson*, 5 Car. & P. 51.

J. R.

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## MIDDLESEX REGISTRY.

*See* DEED AND BOND.

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*See* WEIGHTS AND MEASURES.

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## I. WHAT ARE MINERALS.

**Freestone.**]—In a conveyance of land in Northumberland, a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, &c. :—Held, that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry. *Bell* v. *Wilson*, 35 L. J., Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N.S.) 263; 14 L. T. 115; 14 W. R. 493.

**Slate.**]—A testator bequeathed to his wife all shares in mines of which he should die possessed. At the date both of the bequest and of his death he was possessed of shares in a Welsh slate company, but other than these of no shares in mines. The slate worked by this company had at first been obtained by open quarrying, but for several years back the excavations in the stratum had become so steep as to make it necessary to carry on the works by means of ordinary underground mining operations. The slate works were rated to the relief of the poor, whereas mines are exempt from such rating :—Held, that these slate works came under the definition of a mine, such definition depending upon the mode of working, and not upon the material obtained from the mine; and that the intention of the testator being also regarded, the shares passed under the bequest. *Cleveland* v. *Meyrick*, 37 L. J., Ch. 125; 17 L. T. 238; 16 W. R. 104.

**Stone.**]—A canal company was empowered by act of parliament to prevent the owners of land adjoining the canal from working the mines and minerals within ten yards of it, but was required to give compensation for stopping any such workings :—Held, that stone used for mending roads, and worked by quarrying from the surface, was within the description of mines and minerals. *Midland Ry.* v. *Checkley*, 36 L. J., Ch. 380; L. R. 4 Eq. 19; 16 L. T. 260; 15 W. R. 671.

Stones got from quarries are minerals. *Micklethwait* v. *Winter*, 6 Ex. 644; 20 L. J., Ex. 313.

**Granite—Open Working.**]—By an inclosure act passed in 1812, certain common lands in Wales were allotted, an allotment being made to the king as lord of the manor in respect of his right to the soil. The act gave the commissioners of woods and forests the right to sell the allotment made to the king, subject to the rights of the king to the "mines, ores, minerals, coal, limestone, or matter whatsoever," in or under

the same; and contained a proviso reserving to the king his rights to any "mines, ores, minerals, coal, limestone, or slate" in the common land, and all rights and royalties previously belonging to the king, and gave a right of compensation to the owners of the land for any damage done in digging, raising and carrying away such mines, &c.:—Held, that the word "minerals" included granite, and (Fry, L.J., doubting) that the crown was entitled to win the granite by open workings. *Att.-Gen.* v. *Welsh Granite Co.*, 35 W. R. 617—C. A.

**Limestone.**]—In an agreement for a partition of lands, and in the deeds carrying out the agreement, the mines of lead and coal, and other mines and minerals, were excepted: and in another part of the deed it was agreed that the profits of the mines excepted should be taken between the parties according to their respective estates:—Held, that minerals meant substances of a mineral character which could only be worked by means of mines as distinguished from quarries, and that limestone quarries out of the surface were not within the exception. *Darrill* v. *Roper*, 3 Drew. 294; 24 L. J., Ch. 779; 3 W. R. 467.

"Minerals" in ss. 77 and 78 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), includes minerals which are got by open quarrying. Limestone is a mineral within the same sections. *Midland Ry.* v. *Robinson*, 59 L. J., Ch. 442; 15 App. Cas. 19; 62 L. T. 194; 38 W. R. 577; 54 J. P. 580—H. L. (E.)

In a fee-farm grant of lands with the appurtenances, reserving to the grantor all mines and minerals:—Held, that beds of limestone are included in the definition of "mines and minerals," whether got by quarrying or surface working. *Hext* v. *Gill* (L. R. 7 Ch. 699), considered and approved. *Fishbourne* v. *Hamilton*, 25 L. R. Ir. 483—C. A.

**Coprolites.**]—Coprolites beneath the surface of a copyhold tenement are minerals. *Att.-Gen.* v. *Tomline*, 46 L. J., Ch. 654; 5 Ch. D. 750; 36 L. T. 684; 25 W. R. 802.

**Clay.**]—The word "mines" in s. 77 of the Railways Clauses Act, 1845, includes minerals, whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine, excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the landowner, be dug and worked by him. *Midland Ry.* v. *Haunchwood Brick and Tile Co.*, 51 L. J., Ch. 778; 20 Ch. D. 552; 46 L. T. 301; 30 W. R. 640.

Clay is a mineral within the meaning of s. 77 of the Railways Clauses Act, 1845. *Loosemore* v. *Tiverton and North Devon Ry.*, 51 L. J., Ch. 570; 22 Ch. D. 25; 47 L. T. 151; 30 W. R. 628.

Sect. 18 of the Waterworks Clauses Act, 1847, provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants:—Held (Lord Herschell, diss.), that common clay, forming the surface or subsoil of land, was not included in the reservation in the act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them. *Glasgow* (*Lord Provost*) v. *Farie*, 58 L. J., P. C. 33; 13 App. Cas. 657; 60 L. T. 274; 37 W. R. 627—H. L. (Sc.)

**Brick-Earth and Clay.**]—A conveyance in fee of land reserved "all mines of coal, culm, iron and all other mines and minerals whatsoever except stone quarries," with power to work the same, and to make roads, watercourses, and other works, through, over, or upon the land, for the purpose of raising and carrying away the coal, culm, iron, or other minerals, provided that the surface or soil of the land should not be disturbed without the previous consent in writing of the grantee, his heirs or assigns, except only for the making, constructing, repairing, and using one road only, and one watercourse only, for all or any of the purposes aforesaid, the grantor, his heirs or assigns, doing as little damage as might be to the surface of the lands, and making compensation for all such damage. The defendants obtained from the owners of the land the right to put down a sewer which passed through a bed of brick-earth and clay. The plaintiff, as owner of the reserved minerals, claimed compensation for the damage he had sustained and might sustain by reason of the acts of the defendants, and obtained an award in his favour under the Public Health Act, 1875. In an action on the award:—Held, applying the rule of construction laid down in *Hext* v. *Gill* (L. R. 7 Ch. 699), that, there being nothing in the context to show that the reservation should have a more limited meaning, it included brick-earth and clay, which were substances which could be got from underneath the surface of the earth for the purpose of profit; that the plaintiff, therefore, was owner of the brick-earth and clay, and was entitled to compensation. *Jersey* (*Earl*) v. *Neath Union*, 58 L. J., Q. B. 573; 22 Q. B. D. 555; 37 W. R. 388; 53 J. P. 404—C. A.

A lease for lives renewable, and a fee farm grant into which it was subsequently converted, reserved all mines of lead, ore, tin, and other minerals, coal, and all quarries of marble, freestone, limestone, and building-stones, slates, and other quarries whatsoever, . . . as also all marl, fuller's earth, bogs, turfs, mosses, and turbaries:—Held, that brick clay lying about fifteen inches below the surface was included in the reservation. *Shaftesbury* v. *Wallace*, [1897] 1 Ir. R. 381.

**Clay and Sand.**]—The Act of Settlement of the Isle of Man, 1703, confirmed to the tenants their customary estates of inheritance, "saving always all mines and minerals, of what kind and nature soever, quarries and delfs of flag, slate or stone":—Held, that a custom by the tenants to dig for clay and sand did not contravene the saving clause, and that such tenants were entitled to dig for clay and sand. *Att.-Gen.* (*Isle of Man*) v. *Mylchreest*, 48 L. J., P. C. 36; 4 App. Cas. 294; 40 L. T. 764.

## II. RIGHTS TO.

### 1. Of Crown.

**Passing by Grant.**]—A grant by letters-patent by the crown as lord of the manor of "all those coal mines found, or to be found, within the commons, waste grounds, or marshes within the lordship," &c., with a proviso that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantee, passes coal lying under the foreshore of the estuary of the River Dee, between high and low water marks, and forming part of the manor. *Att.-Gen.* v. *Hammer*, 27 L. J., Ch. 837; 6 W. R. 804.

The prerogative right of the crown to gold and silver found in mines will not pass under a grant of land from the crown unless the intention that it shall so pass is expressed by apt and precise words. *Woolley* v. *Att.-Gen.* (*Victoria*), 46 L. J., P. C. 18; 2 App. Cas. 163; 36 L. T. 121; 25 W. R. 852.

The act for regulating the sale of waste land belonging to the crown in the Australian colonies (5 & 6 Vict. c. 36) contains no reference to the rights of the crown in the precious metals to be found under the soil:—Held, that the statute has not so modified the common law that a sale of waste lands under it must be taken to include a grant of the gold and silver that may be found under the lands so sold. *Ib.*

**Gold Mine—Gold mixed with base Metals.**]—The relaxation in favour of the subject of the royal prerogative in respect of royal mines, which was effected by the acts 1 Wm. & M. c. 30 and 5 Wm. & M. c. 6, does not apply to a mine which is worked simply as a gold mine, even though the gold is found mixed with the ores of the baser metals mentioned in the acts, if the quantity of the baser metals is so small as to be valueless for the purpose of working. In such a case the ancient prerogative of the crown remains unaffected, and the mine cannot be worked by a subject, even on his own land, without the licence of the crown. *Att.-Gen.* v. *Morgan*, 60 L. J., Ch. 126; [1891] 1 Ch. 432; 64 L. T. 403; 39 W. R. 324—C. A.

—— **Right of Pre-emption.**]—In cases to which the acts apply the crown cannot be called upon to exercise the right of pre-emption given to it by the act until the ore has been "washed and made clean and merchantable." It is not sufficient to offer the crown quartz rock in the rough just as brought up from the mine. *Att.-Gen.* v. *Morgan*, 59 L. J., Ch. 772; [1891] 1 Ch. 432; 63 L. T. 337; 39 W. R. 169.

**Lease by.**]—A lease granted by the crown of all mines in the province of Nova Scotia:—Held, to include mines in the island of Cape Breton. *Taylor* v. *Att.-Gen.*, 8 Sim. 413.

### 2. Of Ecclesiastical Persons.

**Parson cannot open without Consent.**]—The parson, with the consent of the patron and ordinary, may cut timber and open mines. *Marlborough* (*Duke*) v. *St. John*, 5 De G. & Sm. 174; 21 L. J., Ch. 381; 16 Jur. 310.

The incumbent of a living cannot open mines without the consent of the patron and ordinary. *Holden* v. *Weeches*, 1 John. & H. 278; 30 L. J., Ch. 35; 6 Jur. (N.S.) 1288; 3 L. T. 437; 9 W. R. 94.

Quære, whether he can do so with such consent without the sanction of the ecclesiastical commissioners. *Ib.*

**Restraining Opening.**]—The patron of the living is the proper person to institute a suit to restrain the opening of mines, and generally the only proper person, but, semble, the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent. *Ib.*

The patron's right is only to restrain further waste, and does not extend to an account of past profits before the filing of the bill. *Ib.*

Upon a bill by patron to have an agreement between himself and the incumbent for opening and working mines declared void and cancelled, and to restrain future working, the court declared that the workings were not lawful, and that the proceeds ought to be laid out for the permanent benefit of the living; but being of opinion that if duly authorised the workings would be beneficial to the living, directed an inquiry what steps should be taken to obtain the concurrence of all necessary parties, and gave liberty to continue the workings in the meantime, subject to account. *Ib.*

Lessee for years sans waste, remainder in fee to a bishop. Lessee enjoined from digging the ground for brick. *London* (*Bishop*) v. *Webb*, 1 P. W. 527.

**Presumption of Grant.**]—The coal under parts of the glebe of a vicarage had at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe:—Held, that no presumption could be drawn from these facts that there had been any grant authorising the vicars to open mines. *Bartlett* v. *Phillips*, 4 De G. & J. 414.

**Contract for Sale of Lands.**]—A contract for the sale of lands, with their appurtenances, belonging to a rectory, was entered into under 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the Bank of England, as directed by the acts, and the execution of the conveyance, the 39 Geo. 3, c. 21, was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold, should be absolutely excepted and reserved; and that the provisions of that act should, in the execution of the former acts, be applied as if they had been specially enacted in those acts:—Held, that the minerals passed to the purchaser. *Wilson* v. *Grey*, 36 L. J., Ch. 62; L. R. 3 Eq. 117.

The 39 Geo. 3, c. 21, s. 12, in effect provides that upon sales of lands by ecclesiastical corporations for redemption of land tax, the minerals shall not pass by the conveyance of the lands, but shall be always absolutely excepted or reserved to such ecclesiastical corporations. A conveyance of prebendal land, executed under this statute in 1799, contained a general exception of minerals, but purported to except out of

such exception the clay under twenty perches of the land:—Held, that the exception out of the exception was not rendered effectual by 57 Geo. 3, c. 100, s. 25, for that act was intended to remedy defects in the mode of conveyance, and not in the subject-matter conveyed, and that the property in the clay under the twenty perches did not pass by the deed of 1799. *Whidborne* v. *Ecclesiastical Commissioners*, 47 L. J., Ch. 129; 7 Ch. D. 375; 37 L. T. 346.

### 3. Of Tenants in Common.

**Sharing Profits.**]—Where one of two tenants in common of coal mines is sole owner of the surface on which their tenant has sunk a shaft, the profits arising from landing foreign coal through that shaft do not belong exclusively to the owner of the surface, but must be shared by both co-tenants. *Clegg* v. *Clegg*, 8 Giff. 322; 31 L. J., Ch. 153; 8 Jur. (N.S.) 92; 5 L. T. 441; 10 W. R. 75.

**Working.**]—It is not destructive waste for a tenant in common of a coal mine to get, or to licence another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds. *Job* v. *Potton*, 44 L. J., Ch. 262; L. R. 20 Eq. 84; 32 L. T. 110; 23 W. R. 588.

The plaintiff, a tenant in common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal with licence to work the coal. Under this licence some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the license for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the plaintiff filed a bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised, and an account against all the defendants as trespassers, for an injunction and receiver, and for damages:—Held, that the working was not a trespass, and the plaintiff electing to dismiss the bill with costs against his co-tenants, a decree was made without costs against the licensee for an account of the value, at the pit's mouth, of the coal raised less costs of getting and raising, and for payment of one-third to the plaintiff. *Ib.*

**Contract to Lease.**]—A contract by the owner of one undivided moiety of a colliery, for a lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specifically carried out as to his own moiety, either with or without compensation. *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L. J., Ch. 78; 15 Jur. 1093.

### 4. Of Tenants for Life.

**Right of Working.**]—Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or as the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or a new quarry. *Elias* v. *Snowdon Slate Quarries Co.*, 48 L. J., Ch. 811; 4 App. Cas. 454; 41 L. T. 289; 28 W. R. 54—H. L. (E.)

Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce. *Ib.*

One seised in fee conveys the lands and all trees and mines to trustees in fee to the use of A. for life, remainder over. A. cannot open the mines or cut down the trees. *Whitfield* v. *Bewit*, 2 P. W. 242.

Tenant for life not entitled to get stone from quarries on the settled estates (except for repairs, &c.), nor to open or work any mines of coal or minerals not opened or in work at death of testator. *Ferrand* v. *Wilson*, infra.

A tenant for life has a right to work clay pits (for making bricks), if they had been worked by the author of the settlement; but he has no right to open them himself. If they had been abandoned by the settlor, whether the tenant for life can work them, quære. *Viner* v. *Vaughan*, 2 Beav. 466.

A tenant for life of coal mines may open new pits or shafts for the working old veins of coals; for it is hazardous to grant an injunction to stay the working of a coal mine, as it may ruin the colliery for ever. So one seised of lands, wherein there are coal mines not opened, settled those lands on A. in tail, remainder to B. for life. A. opened the mines and worked them, and died without issue; B. may continue to work all the mines lawfully opened. *Clavering* v. *Clavering*, 2 P. W. 388; Sel. Ch. Ca. 79; Mos. 219.

A tenant for life, impeachable for waste, may properly work opened mines; whether he may also work dormant or abandoned mines must depend upon the circumstances under which, and the period of time during which, the mines have been abandoned. The cutting of timber also by him does not necessarily amount to waste. *Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J., Ch. 116; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.

Semble, that a mine, the working of which had been discontinued for twenty or thirty years in consequence of its not having been remunerative, might after that time be worked by a succeeding tenant for life; but a mine, where the working of it has been abandoned by the owner of the inheritance for the advantage of the property, cannot be worked by a succeeding tenant for life. *Ib.*

A mine not worked for twelve months, or two years previously to the tenant for life coming into possession, must be considered as an open mine; but a mine which has not been worked for a hundred years cannot be properly so treated. *Ib.*

A lease was granted of two seams of coal, and all other the seam and seams of coal under an estate. After the death of the grantor, a third seam, lying under the two seams, was discovered, which could only be worked by opening a new shaft:—Held, as between the tenant for life and remainderman, under the will of the lessor, that the working of this new seam was not opening a new mine. *Spencer* v. *Scurr*, 31 Beav. 334; 31 L. J., Ch. 808; 9 Jur. (N.S.) 9; 10 W. R. 878.

**Restraining Working.**]—If a person only threaten to open mines, plaintiff may come

into court to restrain him from doing it. *Gibson* v. *Smith*, 2 Atk. 182.

It is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it. *Ib.*

Though no proof appears of waste, yet, if tenant for life insists on a right to do it and has none, the reversioner may have an injunction. *Ib.*

**Right to Proceeds.**]—Tenant in tail entitled to moneys realised by tenant for life from stone not used for repairs and minerals from newly opened mines. *Ferrand* v. *Wilson*, 4 Hare, 388; 15 L. J., Ch. 41; 9 Jur. 860.

A client devised all his real estates in such manner that the plaintiff was entitled in tail in remainder expectant on a life estate. The plaintiff by his bill, which impeached the purchase by the solicitor, offered to confirm certain sales of minerals which had been made by the solicitor after the death of the client:—Held, that the plaintiff having adopted the sales of the minerals, could not claim to be entitled in præsenti to the moneys arising from them on the ground that the working mines was an act of waste, but was entitled to them only after the death of the tenant for life. *Gresley* v. *Mousley*, 3 De G. F. & J. 433; 8 Jur. (N.S.) 320; 6 L. T. 86; 10 W. R. 222.

Where a tenant for life has committed waste by opening mines, the produce of the mines belongs to the remainderman, and the tenant for life is not even entitled to the interest; but if the remainderman adopts the acts of the tenant for life for other purposes, he may be debarred from enforcing his rights to that extent. *Ib.*

Real estates were limited to A., the eldest son of the settlor for life; remainder to his first and other sons in tail male; remainder to B., C. and D., the second and other sons of the settlor for life; remainder to their first and other sons, severally and successively, in tail male; with an ultimate remainder to the heirs of the settlor. The tenants for life were impeachable for waste. The settlor died in 1806. Upon his death, A., who was also his heir-at-law, entered into possession of the settled estates, and died in 1861 without issue. B. and C. died in A.'s lifetime without issue. D. had a son born in 1847, who thereupon became tenant-in-tail in remainder expectant upon the determination of the prior life estates. A. committed various acts of waste, by cutting timber and working unopened mines. Upon a bill by the infant tenant-in-tail to make the estate of the deceased tenant for life liable for the moneys improperly received, an inquiry was directed as to what timber had been improperly cut, and minerals improperly won, by the late tenant for life, distinguishing between timber which had been cut and minerals won, prior and subsequently to the birth of the plaintiff. *Bagot* v. *Bagot*, supra.

**Rents and Royalties.**]—Rents and royalties of brick-fields, one of which had been leased by the testator and the other by the trustees of his will under a power, belong to the tenant for life. *Cowley* (*Earl*) v. *Wellesley*, 35 Beav. 638.

The produce of gravel, loam, peat, and bog-earth sold by the trustees according to the course pursued by the testator, is income and not corpus. *S. C.*, 35 Beav. 639.

A testator directed his trustees to pay to his wife "the whole annual produce and rents of the residue of his estates, both heritable and movable." Coal and iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death:—Held, that in law she was not entitled. *Campbell* v. *Wardlaw*, 8 App. Cas. 641—H. L. (Sc.)

### 5. Of Termors.

**No express power to Work.**] — Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool, through which ran a stream from the mountains, depositing in its passage mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, shine deposits, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off any soil, oxide of iron, ochre, shine deposits, or mineral substances already deposited or thereafter to be deposited upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law brought by them against the defendant, and not in an issue or action directed by the court. *Thomas* v. *Jones*, 1 Y. & Coll. C. C. 510. And see *Liardet* v. *Johnson*, *Ib.*, 527, n.

Lessee committed waste by opening a mine, and continued to work into the other land of the lessor, not comprised in his lease. Injunction was granted as to both. Cited in *Hanson* v. *Gardiner*, 7 Ves. 308.

The jurisdiction against waste by injunction and account applied to trespass, by exceeding a limited right to enter and take stone from a quarry, being a destruction of the inheritance as in the case of timber, coal, &c., and the distinction between waste and trespass therefore disregarded. *Thomas* v. *Oakley*, 18 Ves. 184; 11 R. R. 181. See also *Cowper* (*Earl*) v. *Baker*, 17 Ves. 128. *Grey* v. *Northumberland* (*Duke*), 17 Ves. 281. *Crockford* v. *Alexander*, 15 Ves. 138; 10 R. R. 44. *Mitchell* v. *Dors*, 6 Ves. 147.

Lessee for years, sans waste, remainder in fee to a bishop: lessee enjoined from digging the ground for brick. *London* (*Bishop*) v. *Webb*, 1 P. W. 527.

A tenant for lives renewable for ever having demised for years part of the lands upon which there was at the time an open quarry, which he was in the habit of working for sale, without any reservation or exception in the sublease:—Held, the subtenant was not entitled to work the quarry for sale, and that his landlord had the right to enjoin him. There is no analogy between open quarries and mines. *Mansfield* v. *Crawford*, 9 Ir. Eq. R. 271.

The lands of A., on which there was an open quarry of limestone at the time of the demise, were demised for the term of three lives, renewable for ever, reserving to the lessor and his heirs all royalties. The lessee was restrained by injunction from raising the limestone for sale. *Parcell* v. *Nash*, 1 Jones, 625; 2 Jones, 116.

A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there are no open mines, a lease of land, together with all mines therein, will enable the lessee to open mines. If there are open mines, a lease of land with the mines

will not extend to unopened mines. *Clegg* v. *Rowland*, 35 L. J., Ch. 396; L. R. 2 Eq. 160; 14 L. T. 217; 14 W. R. 530.

A termor of land, with no grant of a power to work quarries on the land, cannot open any in order to work them; but if the quarries have been worked before the commencement of the term, he may continue the working. *Elias* v. *Snowdon Slate Quarries Co.*, 48 L. J., Ch. 811; 4 App. Cas. 454; 41 L. T. 289; 28 W. R. 54—H. L. (E.)

Where the lease of a quarry reserves, not the payment of a fixed sum by way of rent, but a share of the profits of the quarry, it is to be treated as opened for purposes of commerce. *Ib.*

Semble, where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not, necessarily, the opening of a new mine or a new quarry. *Ib.*

To enable a termor to work mines, it must be shewn that the reversioner had commenced the working of the mines with a view to making a profit; and there is no difference in this respect between a mine and a quarry. *Elias* v. *Griffith*, 8 Ch. D. 521; 38 L. T. 871; 26 W. R. 869.

In 1802 the owner of land demised it to a mortgagee for 500 years at a peppercorn rent. In 1811 the mortgagor granted a lease for twenty-one years to a third party of the mines and quarries under the land. Before that date a slate quarry had been opened and worked by the mortgagor on the property; and after that date, but at what time was uncertain, a second quarry was opened, and was worked till the commencement of the suit. In 1820 the mortgagee foreclosed the equity of redemption in the term of 500 years, and took possession of the property. In 1873 the reversioner on the term of 500 years, filed a bill to restrain the termor from working the slate quarries during the term, and for an account of profits:—Held, that if the quarries had been opened by the termor without the authority of the reversioner, he would have been entitled to the relief prayed, notwithstanding the lapse of time. *Ib.*

Held, also, that the result of the evidence was that both the quarries had been opened by the authority of the reversioner, and that the termor was, therefore, entitled to continue to work them for the remainder of the term. *Ib.*

An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under sub-leases granted before he came into possession, and had parted with his interest before the commencement of the suit, was held not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term. *Ib.*

### 6. In Cornwall.

In ejectment, for a mine and land in Cornwall, the defendant cannot defend for a right of entry to dig for mines, and take the minerals known there by the name of tin-bounds. *Doe* d. *Falmouth (Earl)* v. *Alderson*, 1 M. & W. 210; 4 D. P. C. 701; 1 Tyr. & G. 543; 5 L. J., Ex. 153.

Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet, consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may, by acts of ownership for more than twenty years past, establish their right to copper mines, as well under the waste and customary lands as under the freehold lands within the vill. *Curtis* v. *Daniel*, 10 East, 273; 10 R. R. 291.

The rights of tin-bounders, according to the customary law of Cornwall, to use the water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user, nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein. *Gaved* v. *Martyn*, 19 C. B. (N.S.) 732; 34 L. J., C. P. 353; 11 Jur. (N.S.) 1017; 13 L. T. 74; 14 W. R. 62.

An ancient mine worked from a remote period by tin-bounders, under the custom of Cornwall, had from time immemorial been supplied with water by a stream originally artificial; and when the bounders ceased to work and mine, possession thereof was taken by the owners of the minerals:—Held, that the right thus acquired by prescription to the use of the water in question was the right of the owner of the minerals. *Irimey* v. *Stocker*, 34 L. J., Ch. 633; L. R. 1 Ch. 396; 12 Jur. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

### 7. In the Forest of Dean.

**Line of Boundary.**]—An award made under 1 & 2 Vict. c. 43, defined the southern boundaries of a level colliery thus: "commencing at the point where the level struck the coal, and extending in an eastward direction as deep as the level will drain." There was an old existing excavation (termed by miners a level), not horizontal, but running upward into the coal eastward from the point where it struck the coal bed. This excavation was described on the plan annexed to the award as the line of boundary:—Held, that this existing old level was the boundary meant by the award, and not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal. *Brain* v. *Harris*, 10 Ex. 908; 24 L. J., Ex. 177—Ex. Ch.

**Subsequent Grant—Working.**]—By virtue of an award made by the commissioners under 1 & 2 Vict. c. 43, the plaintiffs were galees of a section of upper veins of coal in the Forest of Dean; and by the rules attached to the award, any underlying veins not galed "might be galed to other parties, but to be so worked as not to impede or injure the working of the tracks already allotted, or hereafter to be allotted or galed":—Held, that the rule reserved to the crown the power of granting to subsequent galees of the lower veins a right to sink a shaft through the upper veins previously galed, and that the restriction as to the mode of working must be so construed as not to render the reser-

vation nugatory; i.e. as a restriction only upon the mode of working the lower seams, when reached, and not as limiting the right of the crown to grant liberty to sink a shaft through the upper veins in order to reach the lower. *Gould* v. *Great Western Deep Coal Co.*, 2 De G. J. & S. 600; 11 Jur. (N.S.) 865; 13 L. T. 109; 13 W. R. 1111.

**Surface Damage.**]—The 1 & 2 Vict. c. 43, s. 68, provides that every free miner entitled to any gale within any inclosed lands shall pay to the owner of such lands compensation for surface damage occasioned by opening or working any gale therein or thereon, which compensation shall be determined by the gaveller or deputy gaveller; and if not paid within ten days after an award by him, and a copy thereof served on the party required to pay the same, the amount may be recovered by action. A declaration in an action under that section alleged that the deputy gaveller awarded that the amount of compensation for surface damage done to the inclosed lands of the plaintiff, by the working of a gale therein or thereon by the defendant, was 60*l.* The plea set out the award, by which the deputy gaveller, after reciting that application had been made to him, to determine the compensation for surface damage to lands and buildings of the plaintiff, alleged to be inclosed lands, awarded that the amount of compensation for surface damage to the lands and buildings by reason of the working thereon and thereunder by the defendant was 60*l.*, but whether the lands and buildings were inclosed lands within the statute, he had made no award:—Held, first, that the award was good, although the deputy gaveller had not found that the lands were inclosed. *Allaway* v. *Wagstaff*, 4 H. & N. 307; 29 L. J., Ex. 51.

Held, secondly, that assuming surface damage to mean damage on the surface, the award was not bad, because the deputy gaveller had found that the damage was occasioned by working under the lands, for by such working there might be damage on the surface. *Ib.*

Held, thirdly, that as the word "lands" comprehends buildings, the declaration was good, although it appeared by the award that the compensation was in respect of the lands and buildings. *Ib.*

The plaintiff, an owner of a house standing in an open common within the hundred, but adjoining on one side a yard of the plaintiff inclosed by a wall, the defendant, a free miner, in working his gale, got the coal from under the house, in consequence of which a subsidence took place, the foundation of the house sank and the walls cracked:—Held, that the defendant was liable to an action for causing a subsidence of the surface, but that the damage so done to the owner's house was not surface damage within the meaning of 1 & 2 Vict. c. 43, s. 68, and that the deputy gaveller had no jurisdiction to award compensation. *Allaway* v. *Wagstaff*, 4 H. & N. 681; 29 L. J., Ex. 51.

**Adjoining Owners.**]—The plaintiffs and defendant possessed adjoining collieries in the Forest of Dean, which were gales subject to 1 & 2 Vict. c. 43, and the rules made thereunder. The defendant's gale being drained by a steam-engine, he was bound by rule 19 to work the engine, so as to prevent the water of his gale from falling into plaintiff's gale. The defendant stopped his engine, whereby the plaintiff's gale was flooded and damaged. Sect. 29 provides that a person working his gale contrary to the rule shall be liable to forfeit it, and may be evicted by her majesty; and in addition thereto "the compliance with such rules may be enforced by and on behalf of her majesty, or by any other person, by injunction of her majesty's court of exchequer, or otherwise, in such manner as the court shall on application think fit":—Held, that the plaintiffs had a statutory private right which had been violated by non-compliance with the rules on the part of the defendant; that s. 29 gave no specific remedy for such breach of duty, and that the plaintiffs were therefore entitled to maintain an action at common law to recover damages. *Ross* v. *Rugge-Price*, 45 L. J., Ex. 777; 1 Ex. D. 269; 34 L. T. 535; 24 W. R. 786.

—— **Liability of Mortgagee for Injury done by Mortgagor to adjoining Mine.**]—The statute 1 & 2 Vict. c. 43, and the rules made under it, regulate the use of adjoining gales in the Forest of Dean. By s. 29, compliance with the rules may be enforced "by or on behalf of her majesty, her heirs or successors, or by any other person or persons, by injunction of her majesty's court of exchequer or otherwise, in such manner as the said court shall, on application, think fit." The plaintiffs brought an action for damages against the defendants, as owners of adjoining gales in the Forest of Dean, for injury sustained by the plaintiffs through the stopping of the engines in the defendants' gale contrary to one of the rules. Some of the defendants were mortgagors in possession of and working the gale. The other defendants were mortgagees who had never been in possession of or worked it:—Held, that, with respect to the defendants, who were mortgagors, the specific remedy given by s. 29, for enforcing compliance with the rules, did not exclude the plaintiffs' right to recover damages for injuries caused to them by an antecedent breach of the rules. *Brain* v. *Thomas*, 50 L. J., Q. B. 662—C. A.

Held, also, that the mortgagees were not liable in the action. *Ross* v. *Rugge-Price* (supra) approved and followed. *Ib.*

**Gale exhausted.**]—When a free miner in the Forest of Dean has had three gales of allotments granted to him, and has surrendered one of such gales on the ground that there was not sufficient coal to make the gale worth working, he will be entitled to another gale equally as if the coal in one of the three gales had been exhausted within the language of 1 & 2 Vict. c. 43, s. 61. *Ellway* v. *Davis*, 43 L. J., Ch. 75; L. R. 16 Eq. 294; 21 W. R. 806.

**Forfeiture of Gale.**]—Where a gale is forfeited for non-user, under the provisions of the Forest of Dean acts, the forfeiture is complete on service of the notice of forfeiture without actual re-entry on the part of the crown. *Young and Grindell, Ex parte*, 50 L. J., Ch. 221; 43 L. T. 725.

An application for a gale in the Forest of Dean must be made at a time when the gale is vacant. Where a gale had become liable to be forfeited under s. 29 of the Forest of Dean Act, 1838, for non-working:—Held, that the forfeiture was not complete nor the gale become vacant until the crown had intimated its intention of enforcing the forfeiture. Actual resumption of possession by the crown is not necessary to complete the forfeiture of a gale, and this independently of the Queen's Remembrancer Act (22 & 23 Vict. c. 21),

s. 25. *James* v. *Young*, 53 L. J., Ch. 793; 27 Ch. D. 652; 51 L. T. 75; 32 W. R. 981.

The gaveller of the Forest of Dean granted a gale or colliery to a free miner, he paying for all coal brought out 2*d.* per ton, and so working the colliery as to gain 24,000 tons a year; provided that if the coal gotten should not amount to that quantity, a minimum rent of 200*l.* should be paid; provided also, and the grant was made upon the further condition, that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years; but upon arrears of rent becoming due, the gaveller declared the gale forfeited, and entered into possession thereof. Ten months after declaration of forfeiture the galee tendered the arrears of rent, which were refused:—Held, that the grant was properly made upon conditions, one of which was the payment of rent; that upon breach of that condition by nonpayment, there had been a legal forfeiture and a right of the crown to re-enter; and that the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the court to relieve against the forfeiture. *Brain, In re*, 44 L. J., Ch. 103; L. R. 18 Eq. 389; 31 L. T. 17; 22 W. R. 867.

**Interest of Galee.**]—The interest of a galee in the Forest of Dean is, under the 24 & 25 Vict. c. 40, of the nature of real estate, and is capable of occupation. *Morgan* v. *Crawshay*, 40 L. J., M. C. 202; L. R. 5 H. L. 304; 24 L. T. 889; 20 W. R. 554.

In an action by the galee of iron mines in the Forest of Dean against the overseers of the parish, for having seized his goods as a distress for a poor-rate:—Held, that the galee was an occupier, and not a mere licensee of the mines, the 24 & 25 Vict. c. 40, s. 1, having enacted that a gale of these mines shall be deemed to confer "an interest of the nature of real estate" on the grantee. *Ib.*

Where, by virtue of a custom, persons called free miners were at liberty to apply to the gaveller of the hundred of St. Briavels to allot them a particular spot of land for a coal-pit, and, when the spot was agreed upon, the gaveller cut a turf, and, having cut a stick, so many notches were cut on it as there were to be partners in the intended work, and also one for the king and one for the gaveller; the stick was fastened down with pegs on the spot where the turf was pared off, and the turf laid down again, after which that spot was considered appropriated; when coal was found, a money payment was made to the king, in lieu of his share of the coal. A share in a coal-pit so appropriated was held to be freehold. *Doe* d. *Thompson* v. *Pearce*, Peake's Add. Cas. 242; 4 R. R. 908.

**Title Transmissible by Will.**]—A free miner of the Forest of Dean applied for an unoccupied gale. The gaveller acceded to the application, duly entered it in his book, and gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, and, in the meantime, the free miner died. The devisees under his will then presented their petition of right, praying that the gale might be granted to them in right of their testator:—Held, that 1 & 2 Vict. c. 43, s. 38, applied only to the state of things at the passing of the act, and that the free miner had acquired a title transmissible by will. *James* v. *Reg.*, 43 L. J., Ch. 754; L. R. 17 Eq. 502; 30 L. T. 84; 22 W. R. 466.

By 1 & 2 Vict. c. 43, s. 23, free miners shall have the exclusive right of having gales granted to them to open mines in the Forest of Dean, and it shall be lawful for such free miners to sell, transfer, assign or dispose of such gales, and s. 60 enacts that the gaveller or deputy gaveller shall grant gales to free miners in the order of their application. In 1872 D., a free miner, applied for a gale. In 1873 the deputy gaveller gave notice of his intention to grant the gale to D., but D. died before the grant could be perfected, having by will given all his real and personal estate to certain trustees who were not free miners:—Held, that D. had not acquired any transmissible interest, and the grant could not be made to his devisees. *James* v. *Reg.*, 46 L. J., Ch. 516; 5 Ch. D. 153; 36 L. T. 903; 25 W. R. 615—C. A.

**Free Miners.**]—The defendants claimed, as owners in fee of a manor which was without the limits of the Forest of Dean, that the office of woodwards or foresters of B. walk, within the forest, was annexed to the ownership of the manor; and that, as such woodwards or foresters, they had a right to grant to persons called "free miners," gales or licences for working stone within B. walk, and to take gale rents, and apply them to their (the defendants') own purposes, without accounting to the crown. The soil of B. walk was in the crown:—Held, first, that such a right could not be maintained, unless shewn that the grantees of the gales or licences had a capacity to accept the same. *Att.-Gen.* v. *Mathias*, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur. (N.S.) 628; 6 W. R. 804.

Held, secondly, that the 1 & 2 Vict. c. 43, extinguished the rights and capacities of the free miners. *Ib.*

Held, thirdly, that the office of woodward, even if grantable by the crown in gross, could not have been assigned to a third person by any such grantee from the crown, being an office of trust. *Ib.*

Held, fourthly, semble, that such an office could not be annexed to a manor so as to pass to every person who, as grantee, devisee or assignee, might become entitled to the manor. *Ib.*

Held, fifthly, that even independent of the operation of the 1 & 2 Vict. c. 43, upon the alleged rights of the free miners, no right could ever have been established, by any custom, however ancient, uniform and clear, to the exercise of the custom as now claimed by the defendants, viz. a right in one person to enter upon the soil of another person, and carry away portions of it. *Ib.*

Held, sixthly, neither can such a right be established by prescription. *Ib.*

Held, seventhly, nor by any assumption of a lost grant. *Ib.*

—— **Effect of 1 & 2 Vict. c. 43.**]—The 1 & 2 Vict. c. 43, for confirming the titles to and granting leases of encroachment in the Forest of Dean, was not intended to affect equities to which the property might be subject in the hands of those who, at the passing of the act, were the holders of such encroachments, or the rights of parties claiming in remainder expectant upon the determination of their estates. *Yem* v.

*Edwards*, 1 De G. & J. 598; 27 L. J., Ch. 23; 4 Jur. (N.S.) 647; 6 W. R. 20.

A. having made an encroachment on the lands of the crown in the Forest of Dean, died seised of it, leaving a will by which he devised it to his widow for life, with remainder to the plaintiff. The widow entered into possession, and afterwards, under the 1 & 2 Vict. c. 42, authorising the making grants from the crown for nominal considerations to the holders of the encroachments, she procured a conveyance from the crown to herself in fee under s. 8, and died, having devised the property to the defendant:—Held, in the construction of the statute, that it contained nothing to take the case out of the general rule, according to which, the grant having been obtained by the widow by virtue of a possession referrible to her husband's will, must be treated in equity as made for the benefit of his devisees, and that, therefore, on the death of the widow, the plaintiff was entitled to the land. *Ib.*

Sect. 12 was intended to provide for disputes between parties claiming adversely the legal right (speaking without regard to the crown's title) to be in possession and treated as holders. It has no reference to the case of parties claiming as equitably interested, or as entitled in remainder. *Ib.*

### 8. In the High Peak.

**Right of Miner to remove Mining Buildings.**]—Under the mining customs set out in the schedule to, and confirmed by, the High Peak Mining Customs and Mineral Courts Act, 1851, all persons are entitled to search for veins of lead ore, "under all manner of lands" situate within the limits of the act, "of whose inheritance soever they may be," and the "first finder" of any such vein is entitled to have allotted to him by a certain mining official, called the "barmaster," a certain proportion of such vein. Upon allotment, the allottee becomes entitled to the exclusive right of working so much of the vein as is allotted, so long as he continues to work it; and further (by the fifth of the Scheduled Mining Customs) he is, so long as he works such mine, entitled, without making any payment for the same, to the exclusive use of so much of the surface land as is necessary for the proper working of the mine. If the miner ceases to work his mine, the barmaster may (under the 19th of the above-mentioned customs) give him notice that his mine will be forfeited, unless within a certain specified time the working be resumed, and in the event of non-compliance with the notice, the barmaster may give the mine to any other person who is willing to work it:—Held, that a miner who, in exercise of his rights under custom 5, has erected upon the land of the surface owner buildings reasonably necessary for the working of his mine, is entitled as against such surface owner to pull down and remove the materials of such buildings at any time whilst he continues to work the mine, or within a reasonable time after he has ceased to do so, and before he has done any act shewing an intention to abandon the mine other than the act of pulling down such buildings, notwithstanding that such buildings may be built of brick or stone, with foundations sunk into the soil; but that he is not entitled to remove them after he has allowed such reasonable time to expire or has otherwise indicated an intention to abandon the mine, although he may have received no notice of forfeiture from the barmaster under custom 19. *Wake* v. *Hall*, 52 L. J., Q. B. 494; 8 App. Cas. 195; 48 L. T. 834; 31 W. R. 585; 47 J. P. 548—H. L. (E.)

**Spoil—Rights of Miner and of Landowner.**]—The plaintiffs were owners of land in the district of K. F., which land was contiguous to the district of the wapentake of W. These two districts, though distinct, and governed by different acts of parliament, form part of the High Peak of D. The defendants sank a shaft and commenced mining operations in the plaintiffs' land, in the district of K. F., but subsequently extended them to the adjoining district of W. By the custom of the districts the right to dig and search for lead ore is conceded to all persons, who may use a specified portion of the above-lying surface for the purpose of dressing the ore and placing the spoil or refuse, which spoil when not used by the miners becomes the property of the surface owner. The defendants having sunk a shaft originally in the land of the plaintiffs, carried on the operations into another district and under the surface of another landowner, and claimed to use the plaintiffs' land for the purpose of dressing the ore, and for depositing the refuse got from under the surface in the other district, and belonging to the other landowner:—Held, that, as the two districts of K. F. and of W. were quite distinct, and governed by separate acts of parliament, it was not competent for the miner sinking his shaft in one district, to use the surface land in that district to dress the ore and place the spoil or refuse got from another district into which he had extended his operations. *Wake* v. *Redfearn*, 43 L. T. 123; 44 J. P. 681.

Even if the mine worked by the defendants were within the same, instead of being in a separate and independent district, the right asserted by them of using the plaintiffs' land for the purpose of treating the mineral got from the land not below their surface land, but that of another landowner, could not be maintained—Per Cockburn, C.J. *Ib.*

## III. LEASES OF MINES.

### 1. Grant of, and Specific Performance.

**Power to Demise—Crown.**]—By 36 & 37 Vict. c. 36, the crown has power to grant mining leases for sixty-three years.

—— **Of Trustees.**]—An estate, with the mines and minerals, was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, but so as the lessees should not be dispunishable for waste:—Held, that the last clause was repugnant, and that the trustees might demise mines, both opened and unopened, at the date of the settlement. *Daly* v. *Beckett*, 24 Beav. 114; 3 Jur. (N.S.) 754; 5 W. R. 514.

Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years without mentioning mines:—Held, that the trustees had no power to grant leases of unopened mines. *Clegg* v. *Rowland*, 35 L. J., Ch. 396; L. R. 2 Eq. 160; 14 L. T. 217; 14 W. R. 530.

—— **Of Tenant for Life.**]—A power was reserved in a deed of settlement to a tenant for

life to lease collieries and coal mines, "together with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary, or are usually contained in leases of collieries or mines in the county, place or neighbourhood where the collieries or mines are situate, for seeking, winning, working, drawing, taking and carrying away the coals within and under the same": the leases were not, except in the cases provided for, to be made dispunishable for waste by any express words. A mining lease, granted in pursuance of this power, authorised the lessee to build and erect all such engines, workmen's cottages, &c., as should be necessary and proper for the carrying out the works, and also to dig and take building materials for buildings required for the purpose of the colliery. The lessees built several cottages for workmen. It was found by a jury that the power to build cottages in places convenient to the works of the mine was a necessary and usual power in mining leases:—Held, that the lease was valid. *Morris* v. *Rhydydefed Colliery Co.*, 3 H. & N. 885; 28 L. J., Ex. 119; 5 Jur. (N.S.) 339; 7 W. R. 95—Ex. Ch. See *Jegon* v. *Vivian*, 36 L. J., C. P. 145; L. R. 2 C. P. 422; 16 L. T. 236; 15 W. R. 457—Ex. Ch.

—— **Committee of Lunatic.**]—Agreement by committee of a lunatic, that coal under lunatic's estate should be worked by owner of adjoining land, established under circumstances. *Tabbart, Ex parte*, 6 Ves. 428.

—— **Under Powers.**]—*See* POWERS.

—— **Under Settled Estates Act.**] — *See* SETTLED LAND.

**Specific Performance.**]—Whether an agreement for the digging of stone be a mere licence to dig, or a lease, is immaterial in a court of equity, which will decree performance of such a contract. *Nelson* v. *Bridges*, 1 Jur. 753.

Specific performance of an agreement to let the workings of quarries, and account of moneys due for working the quarries in a particular manner refused; the party's remedy being at law. *Booth* v. *Pollard*, 4 Y. & Coll. 61.

A contract for a lease of "coals, &c.," or "minerals," is too ambiguous to be carried out by the court. A contract by the owner of one undivided moiety of a colliery, for the lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specifically carried out as to his own moiety, either with or without compensation. Semble, in such a case the parties will be left to damages at law. *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L. J., Ch. 78; 15 Jur. 1093.

A. demised to B. and his heirs certain lands, reserving thereout all mines and minerals, with liberty to enter and dig for the same, and to hold 200 or 300 acres contiguous to the mines when found, making an allowance or abatement to B. for the same, according to the rate of rent reserved. A. found mines and selected land, and the court decreed a specific performance of the contract, deciding that the clause in the lease was a covenant, and not a condition of re-entry. Sed quære, whether it is not a condition and not a covenant. *Croker* v. *Orpen*, 3 Jo. & Lat. 589; 9 Ir. Eq. R. 563.

Semble, A. must take the lands in one place and at one time; and the court will not enter into the question of motives for enforcing the contract, or whether the mines can be profitably worked; though if colourably worked to give a claim to the land, the contract would not be enforced. *Ib.*

The abatement of rent was made in proportion to the quantity, not the quality, of the land, and A. was not bound to give compensation for improvements. *Ib.*

A bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one-fifteenth of the minerals obtained. The defendant had subsequently granted a lease to another party at the same rent. The bill charged that, under an act of parliament, it was directed that the best rent should be obtained by the owner of the mines; and although one-fifteenth was a fair rent when the plaintiff's contract was entered into, that afterwards, the mines having become more valuable, the amount was not then a fair rent, and the lease granted by the defendant was therefore contrary to the act:—Held, upon a demurrer for want of equity, that a party coming for performance of a contract could only have it as it actually existed, and that, as the rent reserved in the plaintiff's contract was not the best that could be obtained, it was contrary to the act, and in effect fraudulent. The plaintiff, therefore, could not have his contract enforced, and the demurrer was allowed:—Held, also, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing it, and afterwards acquired the right to do so, he was then bound to perform it. *Carne* v. *Mitchell*, 15 L. J., Ch. 287; 10 Jur. 909.

—— **Warranty.**]—A., on the application of B. and C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called X., at 100*l.* per annum as certain or dead-rent, and royalties of 9*d.* per ton for the coal and 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of 10*l.* per acre, and to expend not less than 500*l.* in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1*d.* per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one year's notice. On action by A. for specific performance, B. and C. alleged that the S. vein did not exist under the farm, and it was proved that on search it had not been found, but counter-evidence was given to shew that the searches were insufficient:—Held, that under the agreement B. and C. had, in consideration of the dead-rent reserved, obtained a licence to enter and search for the vein, but not a warranty that such vein was to be found; and accordingly, that A. was entitled to specific performance of the contract whether the S. vein existed or not. *Jeffreys* v. *Fairs*, 46 L. J., Ch. 113; 4 Ch. D. 448; 36 L. T. 10; 25 W. R. 227.

—— **Cannot be resisted on ground of Mine being Worthless.**]—A person contracting for the lease of a mine cannot resist its performance on the ground of his ignorance of mining matters and of the mine turning out worthless. *Haywood* v. *Cope*, 25 Beav. 140; 27 L. J., Ch. 468; 4 Jur. (N.S.) 227; 6 W. R. 304.

The taking possession of a mine by the intended lessee is not an acceptance of the title. *Ib.*

A. had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards B. cleared the pit and examined the coal in the shaft with two other persons and subsequently contracted for a lease. The colliery turned out worthless :—Held, that B. could not resist a specific performance on the ground that A. had not communicated the fact of his having worked the mine and found it unprofitable. *Ib.*

—— **Restraining Lessee from Ceasing to Pump.**]—In an action for specific performance of an agreement to grant a colliery lease where the lessee had long retained possession, and had worked the coal and then threatened to cease pumping :—Held, that a motion for an injunction to restrain the lessee from ceasing pumping was a proper motion for the preservation of the property pending the action under Ord. LII. r. 3. *Strelley* v. *Pearson*, 49 L. J., Ch. 406 ; 15 Ch. D. 113 ; 43 L. T. 155 ; 28 W. R. 752.

**Rescission—Time Essence of Contract.**]—In a contract for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and on the lessor's default may rescind the contract. *Macbryde* v. *Weeks*, 22 Beav. 533 ; 2 Jur. (N.S.) 918.

**Agreement for Mining Lease—Lessee in Possession—Payment of Royalties into Court.**]—The plaintiffs commenced an action against the defendant for specific performance of an agreement for a lease of a coal mine by the plaintiffs to the defendant at a royalty, as the plaintiffs alleged, of 10*d.* per ton. The defendant counterclaimed to have specific performance with a royalty of less amount. The defendant was in possession, and raising and selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against the plaintiffs in the Queen's Bench Division to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. The plaintiffs moved for an interlocutory order that the defendant might be ordered to pay into court the amount of royalties at 10*d.* per ton on the coal he had raised, but the court refused the motion :—Held, on appeal, that although it would not be right, while the right of royalty was in dispute, to order the defendant to pay into court the amount of royalties at the rate claimed by the plaintiffs, he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, and that as his carrying away coal diminished the value of the property, he would not have the usual option of giving up possession instead of paying money into court. *Lewis* v. *James*, 56 L. J., Ch. 163 ; 32 Ch. D. 326 ; 54 L. T. 260 ; 34 W. R. 619 ; 50 J. P. 423 —C. A.

2. Of what Lands and Mines.

**Where Subject-matter non-existent.**]—When the thing let turns out to be a nonentity, the lessee is not bound. *Gowan* v. *Christie*, L. R. 2 H. L. Sc. 273.

In such a case it is perfectly reasonable that the lease should be subject to reduction. *Ib.*

When there is a total destruction or an exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Ib.*

The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted. *Ib.*

**Where Mine "unworkable to Profit."**]—At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely. *Ib.*

**Mineral Lease is really a Sale.**]—What is termed a mineral lease is really a sale out and out of a portion of the land. *Ib.*

**Parcels.**]—By a deed of the 29th of September, 1854, R. demised to C. a fire-brick manufactory, and he granted to C. power to dig fire-clay from under lands therein described, the term of the demise and licence being twenty-one years from the 6th of April, 1854. By a deed of the 31st of August, 1862, R. demised to B. all the coal mines and seams of coal, "and also all the mines, seams, veins, or beds of ironstone and fire-clay found in connection with such coal seams as are workable as coal seams," under the same lands as those to which C.'s licence applied, for forty-two years from the 22nd of November, 1858. In 1866 C. commenced opening an old pit, called the Montague Pit, with the intention of reaching a seam known as the Stone Coal Seam, in order to work the fire-clay in connection with that seam. Previously to this, in 1864, B. had sunk a pit through the Stone Coal Seam, to get at a lower coal seam, and he had taken samples of the fire-clay in the Stone Coal Seam, some of which samples he had sent to C. to be tested, and he had afterwards sold some of the fire-clay to C. for the purpose of being manufactured. After C. had expended a considerable amount of money on his works at the Montague pit, but before he had reached the Stone Coal Seam, B. gave notice to him that he had already proved the Stone Coal Seam, and was about to work it, and that it would be an invasion of his rights if C. was to work that seam. Ultimately C. filed in equity a bill to restrain B. from working the fire-clay or the coal in the Stone Coal Seam under any part of the lands to which C.'s licence applied during the continuance of C.'s term :—Held, that the words "coal seams workable as coal seams" must be construed regard being had to all and every the powers conferred by the lease in which those words were found, and that, looking at those powers and at the evidence, which, in the opinion of the court, showed that the Stone Coal Seam was workable at a profit when both the coal and the fire-clay were taken into account, that seam must be considered to be comprised in B.'s lease. *Carr* v. *Benson*, L. R. 3 Ch. 524 ; 18 L. T. 696 ; 16 W. R. 744.

The mines under a farm of 181 acres were supposed to be divided by a fault running north and south in such a way as to leave about eighty-three acres on the west and ninety-eight acres on the east ; and the owners, by several agreements, agreed to demise to S. the mines lying to the westward of the fault, "supposed to be eighty-three acres or thereabouts," and to D. the mines

lying to the east of the same fault, "supposed to be ninety-eight acres or thereabouts," and each lessee was to pay, in addition to a royalty, a dead-rent amounting to about 2*l.* per acre on the estimated area of the mines demised to him. No lease was executed to either of the lessees, but they entered upon and commenced working the mines agreed to be demised to them respectively. S. in the course of his workings arrived at a fault, which, if taken as the boundary between the mines agreed to be demised to him and those agreed to be demised to D., would leave him only eight acres, instead of eighty-three; and he worked through the fault. D. filed a bill for an injunction to restrain him from so working:—Held, that, assuming the fault worked through by the defendant to be the same as the fault indicated in the agreement (which was not clear), the plaintiff was not entitled to a lease of mines so largely exceeding the estimated acreage of the mines agreed to be demised to him as the mines lying to the eastward of the fault, and he could not be considered as constructively in possession of more than the lessors had by their agreement bound themselves to demise. *Davis* v. *Shepherd*, 35 L. J., Ch. 581; L. R. 1 Ch. 410; 15 L. T. 122.

A lease of two seams of coal, and all other the seam and seams of coal under the D. estate, will authorise the opening an unworked seam; and after the decease of the grantor, the rents and profits of the same mines under a new lease will belong to the tenant for life under his will. *Spencer* v. *Scurr*, 31 Beav. 334; 31 L. J., Ch. 808; 9 Jur. (N.S.) 9; 10 W. R. 878.

An agreement to lease "two seams of coal lying under lands, to be hereafter defined, in the Bank End estate," construed as an agreement to lease "two seams of coal lying under the lands of the Bank End estate, the boundaries of which are to be hereafter defined," and specific performance was decreed. *Haywood* v. *Cope*, 25 Beav. 140; 27 L. J., Ch. 468; 4 Jur. (N.S.) 227; 6 W. R. 304.

—— **Meaning of Words "or thereabouts."**]—In construing the words "or thereabouts," when used to qualify the statement of the estimated quantity of mines agreed to be demised, the same principles ought to be acted upon as would guide the court in construing the same words in an agreement for a sale or a demise of the surface. *Davis* v. *Shepherd*, 35 L. J., Ch. 581; L. R. 1 Ch. 410; 15 L. T. 122.

—— **Where Lessee's Enjoyment is restricted.**]—A lessor demised for sixty years, at certain rents and royalties, the following parcels, viz. first and secondly, certain cottages and an engine-house; thirdly, all the mines which then were or thereafter during the term might be discovered within all the lands, about 514 acres, described in the map; and also liberty for the lessees to dig and carry and sell all iron and coal, in, from, over, upon, or under the lands, and to open and dig any pits or levels into, upon, about, or under the mines and lands, except in or upon the demesne lands coloured red in the plan (being a piece of four acres), on which a capital mansion-house and buildings were erected:—Held, that this was a demise of the whole mines under the whole 514 acres, but with a restricted right of enjoyment in the lessees, so that the lessor could not demise the red part to any other persons, but the lessees had no right to work the mines under the red. *Dugdale* v. *Robertson*, 3 Kay & J. 695; 3 Jur. (N.S.) 687.

—— **"Described in Map annexed."**]—A lease professed to demise to lessees all mines and minerals "in, upon, or under all or any part of the messuages or tenements, fields, closes, or parcels of land described and set forth in the map thereunto annexed; and also, in, upon, or under all or any part of that large tract of land, called Mold mountain; all which premises are situate, &c., and are bounded, &c.; and all which are particularly described, delineated, and distinguished in the map or plan, annexed to these presents, and which, by agreement of all parties thereto, was meant and intended to be taken as part of that indenture":—Held, that the words of the demise were not to be controlled or restrained by the map, but might receive full effect, and be held to include a particular spot, the boundary of which could not be traced with strict accuracy upon the map, by reason of the smallness of the scale upon which it was drawn. *Taylor* v. *Parry*, 1 Scott (N.R.) 576; 1 Man. & G. 604; 9 L. J., C. P. 298; 4 Jur. 967.

### 3. Fixtures and Spoil Bank.

**Fixtures.**]—Miners working under customs established by the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94), lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction, of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to show that the property in them was intended to be irrevocably annexed to the soil:—Held, that the maxim, quicquid plantatur solo, solo cedit, was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing. *Wake* v. *Hall*, 52 L. J., Q. B. 494; 8 App. Cas. 195; 48 L. T. 834; 31 W. R. 585—H. L. (E.)

A lease of coal mines and ironworks contained a covenant by the lessee, to yield up to the lessor, at the expiration or sooner determination of the term, all ways and other roads in or under the demised hereditaments in such good order, repair, and condition as that the coal and iron works might be continued and carried on by the lessor:—Held, that tram-plates, fastened to iron or wooden sleepers, which were not let into the ground, but rested thereon, were not included in the terms, works, or ways, or roads, and consequently might be taken up, sold, or removed by the lessee. *Beaufort* (*Duke*) v. *Bates*, 3 De G. F. & J. 381; 31 L. J., Ch. 481; 8 Jur. (N.S.) 270; 6 L. T. 82; 10 W. R. 200. See *Rolleston* v. *New*, 4 K. & J. 640.

—— **Removal of—Tenant for Life of Mines and Collieries—Remainderman.**]—A tenant for life of real estate, who was entitled to hold and enjoy the working stock and plant of certain iron mines and collieries situate on the estate, and carry on such iron mines and collieries, erected on the estate, machinery, &c. blast furnaces, and

a railway of considerable length connecting the mines and collieries. On his death the question arose whether, in an account between his executors and the remainderman, the former should be credited with the value of the machinery, &c. or whether the same passed to the remainderman as things annexed to the soil:—Held, that the interest of the tenant for life was a right of enjoyment in the chattels, and not a right to carry on a business; and that therefore his position with respect to the trustee was that of a donee of consumable chattels:—Held, also, that the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it and belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the executor as personalty, on the authority of *Wake* v. *Hall* (8 App. Cas. 195). *Ward* v. *Dudley* (*Countess*), 57 L. T. 23.

**Spoil Bank.**]—The lessee of a coal mine, under covenant to remove the spoil bank at the end of his term, has a property in the material of the bank, giving him a right of action against a stranger removing part of it for brick-making. *Robinson* v. *Milne*, 53 L. J., Ch. 1070.

—— **Parol Licence to search for Minerals.**]—A party claiming ownership in a field granted to the plaintiff a parol licence to search therein for minerals. The plaintiff acting under this licence dug pits in the field, and threw up sand and gravel mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel, and ore, the party who gave the plaintiff the parol licence granted him a similar licence by deed:—Held, that under these circumstances the plaintiff was entitled to maintain an action for the gravel, sand, and ore as against the defendant, who was a wrong-doer. *Northam* v. *Bowden*, 11 Ex. 70; 24 L. J., Ex. 237.

### 4. Covenants.

**Usual—What are.**]—A proviso for re-entry on non-observance of the lessee's covenants is not a usual clause in a mining lease, to be inserted in the absence of express stipulation. *Hodgkinson* v. *Crowe*, 44 L. J., Ch. 680; L. R. 10 Ch. 662; 33 L. T. 388; 23 W. R. 885.

In a lease of a colliery in Derbyshire a proviso that when the mines demised are incapable of being worked to a profit, the lessee should be entitled to determine the lease is not "usual." The court will make a declaration that a clause ought not to be inserted in a lease which it refers to chambers to settle. *Strelley* v. *Pearson*, 49 L. J., Ch. 406; 15 Ch. D. 113; 43 L. T. 155; 28 W. R. 752.

Whether an agreement for a lease does or does not provide that the usual covenants shall be inserted in the lease, each party is entitled to have such covenants inserted as are incidental to and necessary to protect the rights given or reserved to each. Accordingly, under an agreement for a lease of minerals, the payments to be accelerated with an increase in the quantity of work, it was held that the lessor was impliedly entitled to have a right of entry and inspection secured to him by this lease. *Blakesley* v. *Whieldon*, 1 Hare, 179; 11 L. J., Ch. 164; 6 Jur. 54.

**Liability of Assignees.**]—A mining licence was granted by deed to three persons as joint tenants, and the licensees covenanted jointly and severally to pay compensation in respect of damage to the surface. Two out of the three licensees assigned over. Damage having been done:—Held, that the covenant was one running with the subject-matter of the grant, and that the assignee from the two licensees was liable under the covenant for the whole compensation due to the grantor. *Norval* v. *Pascoe*, 4 N. R. 390; 34 L. J., Ch. 82; 10 Jur. (N.S.) 792; 10 L. T. 809; 12 W. R. 973.

A mining lease contained a covenant by the lessee not to assign without the consent of the lessor. The lessee made an agreement with three other persons to give up his right in the lease to them, and to execute all necessary deeds to carry the arrangements into effect, and that, in the meantime, the agreement should have the same force as if such deeds had been executed. No consent of the lessor had been obtained, nor were any such deeds executed. The three entered into possession and worked the mines, and after a time they assigned their interest in the mines and other property comprised in the lease to a man of straw:—Held, that the three being mere equitable assignees of the lease were not liable to the lessor for the rents and covenants in the original lease for the time they were in possession of the property. *Cox* v. *Bishop*, 8 De G. M. & G. 815; 26 L. J., Ch. 389; 3 Jur. (N.S.) 499; 5 W. R. 437.

**As to Working.**]—*See* infra.

### 5. Rent and Royalties.

**Liability of Lessee.**]—Rent of a colliery commencing the first quarter day after a certain quantity of coal had been dug, ordered to be paid from the quarter day prior to which that quantity would have been dug, but for fraudulent delay of the lessee. *Green* v. *Sparrow*, 3 Swanst. 408; 19 R. R. 248.

—— **Where Coal deficient.**]—The plaintiff was lessee of a coal mine at the rent of 300*l.* a year, and subject to a royalty of 10*s.* for every wey of coals raised in each year above 600, that being the quantity considered to be paid for by the 300*l.* a year, and the plaintiff was authorised to determine the lease on the coal being worked out. The plaintiff worked the mine for several years; and when it was nearly exhausted, he was prevented by accidents and defects in it from continuing to work it, except at a ruinous expense. The court refused to restrain the defendant from suing for the rent of 300*l.* a year, although the plaintiff offered to pay him 10*s.* per wey for all the remaining coal. *Phillips* v. *Jones*, 9 Sim. 519; 3 Jur. 242.

Plaintiff, lessee of a colliery, at a rate of so much per wey, the colliery becoming not worth working, and plaintiff offering to pay for all the coal that could be got, relieved against the future rent and the covenant in the lease to work the colliery, upon equitable terms of paying for all the coals remaining, and making a full satisfaction for the covenants, in case the landlord would accept the surrender of the lease. *Smith* v. *Morris*, 2 Bro. C. C. 311.

Demurrer allowed to a bill by the lessee of a coal mine, to be relieved from his rent on the ground of a deficiency of the coal to be worked. *Mellers* v. *Devonshire* (*Duke*), 16 Beav. 252; 22 L. J., Ch. 310; 1 W. R. 44.

A. demised a coal mine to B. at 60*l.* per acre for the coal gotten, and B. covenanted to work not less than two acres annually, or pay the rent for that quantity, "whether the same should be got or not." There was a proviso for cesser if all the coal was exhausted at the end of the term. The lessee, alleging that there was a deficiency in the coal, and that from "inevitable causes," it was impossible to get two acres annually, and that during the term he had paid for more than he had got, sought to recover back the excess. A demurrer was allowed, on the ground that the covenant was absolute, and the lessee was bound to pay whether he got the quantity or not, and that there was no allegation of an actual exhaustion of the coal. *Ib.*

Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of 300*l.* a year, or so much thereof as, with the royalty, should amount to that sum, such rent of 300*l.* to be a minimum rent for the coal demised, and the lessee covenanted to pay the rents and to work the mine:—Held, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that if the lessor were to sue upon the lessee's covenant to work the mine, the court would interfere. *Ridgway* v. *Sneyd*, 1 Kay, 627.

In applying the rule of caveat emptor to the case of lessees of coal mines, it must be remembered that everyone acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults. *Ib.*

If all the coal had been gotten by ancient workings, that might be a case for equitable relief. *Ib.*

A demise of coal mines for thirty years, yielding 400*l.* for every acre of coal, by annual payments of not less than 200*l.*, provided that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the expiration of the term, and that the coal so fairly wrought should have been wholly paid for, then that the annual payment of 200*l.* should cease and be no longer payable:—Held, that the question whether the coal could be fairly wrought, did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working; but assuming that coal of the same description as that demised could be properly worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense. *Griffiths* v. *Rigby*, 1 H. & N. 237; 25 L. J., Ex. 284.

The judge at the trial told the jury that he would not give them any explanation as to what was meant by "fairly" wrought, and that they were better judges of the meaning of the phrase than he was. He told them what he thought it meant:—Held, that this direction was insufficient. *Ib.*

A. demised to B. for fifty years all his right and interest in the coals and other minerals in an estate, in as ample a manner as was demised to him, A., by D., yielding and paying yearly for every ton of coal that should be worked, raised or got by B., in each year, not exceeding 13,000 tons in any year, 8*d.* per ton, or yielding and paying that amount of money, viz. 433*l.* 6*s.* 8*d.*, each year as fixed rent, whether the coal should be worked or not; and for every ton of coals that should be worked, raised or got in each year, above 13,000 tons, 9*d.* per ton: and B. covenanted that he would raise and work 13,000 tons of coal in each year, and pay 8*d.* per ton royalty for the same, or would pay that amount of money, viz. 433*l.* 6*s.* 8*d.*, each year as a fixed rent, whether the coals were worked or not. There was a distinct reddendum and covenant for payment of rent in respect of other minerals. In an action on this indenture, the breach assigned was, that B. did not raise or work 13,000 tons of coal in each year, and pay at the rate of 8*d.* per ton for the same, or pay that amount of money, viz. 433*l.* 6*s.* 8*d.*, each year as a fixed rent, whether the coals were worked or not, but on the contrary thereof, 216*l.* 13*s.* 4*d.* of the rent for half a year became due and was unpaid:—Held, first, that the whole rent claimed was payable, although the mine was so exhausted that the lessee could not raise 13,000 tons of coal in a year. *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 487; 14 L. J., Ex. 95.

Held, secondly, that the breach was well assigned. *Ib.*

—— **Excess in One Quarter—Deficiency in next.**]—A mining lease contained the following covenant:—That the lessees should deliver, quarterly, to the landlord, two equal thirteenth parts of all coal which should be raised, or should pay him, quarterly, the value in money: provided, that, in case at the end of the first quarter of any year such deliveries or payments should not have equalled in value or amount 38*l.* 10*s.*, then the lessees should also pay at the end of every such quarter such additional rent or sum of money as would make up 38*l.* 10*s.*; and in case at the end of the second quarter such deliveries or payments for that and the preceding quarter should not have equalled in amount 75*l.*, then the lessees should also pay at the end of every such second quarter such further sum as would make up 75*l.*; and in case at the end of the third quarter such deliveries or payments for that and the two preceding quarters should not have equalled in amount or value 111*l.* 10*s.*, then the lessees should pay at the end of every third quarter such further sum as would make up 111*l.* 10*s.*; and in case on the 24th day of June in any year the deliveries and payments for that and the three preceding quarters should not have equalled in amount or value 150*l.*, then the lessees should pay on 24th day of June such an additional rent or sum as would make up 150*l.*, it being the intent and meaning of the parties to the lease that the royalties reserved should always amount to 150*l.* per annum at the least:—Held, that, in calculating the amount due to the plaintiff at the end of each year, the excess of royalty above 38*l.* 10*s.* occurring in one quarter was not to be set against the deficiency in a previous quarter, and deducted from the sum payable to the plaintiff in respect of the latter quarter. *Bishop* v. *Goodwin*, 14 M. & W. 260; 14 L. J., Ex. 290.

—— **Coal used in Working Engine.**]—A lessee of mine A., took a lease of B., an adjoining mine, from the plaintiff, by which he was entitled to get the coal from B. mine at a certain rent, and also to be at liberty to bring the coal got in the

A. mine to the surface by way of "outstroke" through the B. mine, on payment of 1½*d.* per ton for outstrokes, watercourse rent, and shaft rent. No rent was to be paid for any coal got from the B. mine which should be used or consumed on or for any engine employed in working or carrying on the mines demised:—Held, that no rent was payable for coal used in working the engine of B. mine when employed in bringing up the coal from the A. mine, such engine being at the same time used for keeping B. mine free from water. *Senhouse* v. *Harris*, 5 L. T. 635.

—— **Coal brought on Land, but raised Elsewhere.**]—The owner of land, with mines underneath the surface, granted a lease of part of his land, and the mines under it, to the Pontypool Iron Company, carrying on the manufacture of iron. The lease contained this covenant: "yielding and paying to the lessor, his heirs and assigns, for every quantity of 2,520 lb. of coal, ironstone, fire-clay, limestone, building stone, or any other minerals, the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, and shall be brought through, over, or under the lands, mines and premises the royalty or sum of one halfpenny." The company afterwards granted an underlease of a part of the surface of the land to a railway company, which made sidings thereon, for the purpose of more conveniently and safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised within the twenty miles (often mixed with minerals in no way coming within the words of the covenant, and sent by other companies upon the line) were frequently, for safety and convenience, shunted for a time on the sidings formed on the land, and afterwards taken out and conveyed to their destination:—Held, that the minerals raised within the prescribed distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, and were therefore liable to the payment of the royalty. *G. W. Ry.* v. *Rous*, 39 L. J., Ch. 553; L. R. 4 H. L. 650; 23 L. T. 360; 19 W. R. 169.

An agreement to pay a sum by way of rent-charge or royalty, in respect of minerals which may be raised or obtained by, from or out of any mine or mines, pit or pits, in, upon, or under the property granted, does not entitle the person in whose favour the rent-charge or royalty is created to receive payment in respect of minerals brought up at the mouth of pits upon, but not procured under, the property granted. *Morgan* v. *Davey*, 1 Cab. & E. 115.

—— **Reimbursement of Expenses of Winning.**]—By a deed of grant and licence the licensee was empowered to win and work all and every or any of the coal mines, seam and seams of coal under certain lands, and to reimburse himself all expenses incurred in the winning out of the profits from the sale of the coal; and it was provided that after payment to the licensee of all expenses in winning the said colliery, coal mines, or coal mine, seam or seams of coal, he should pay the grantor such royalty for the coals yearly wrought out of the said coal mines seam or seams as should from time to time be awarded by two arbitrators once in every five years whilst the said coal mines, seam or seams of coal should continue to be wrought. More than one seam of coal lay under the lands. The licensee after winning one seam went on to win another:—Held, that the whole colliery was not won when the first seam was won, but that the deed was to be read separatim as to the winning of each seam, and that the licensee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam. *Elliot* v. *Rokeby* (*Lord*), 51 L. J., Ch. 249; 7 App. Cas. 43; 45 L. T. 769; 30 W. R. 249—H. L. (E.)

The licensee mixed the coals gotten under the licence with those gotten from his own colliery, and sold them together. He alleged that the coals gotten under the licence were inferior in value to the other coals:—Held, that as they had been mixed by the licensee's own act, he was not entitled to an inquiry as to how much the selling price of the coals was diminished by the mixture of the coals gotten under the licence. *Ib.*

—— **Payment in Specie.**]—Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it; and therefore the statute will run from the time of such receipt, and not from the time of such sale. *Donys* v. *Shuckburgh*, 4 Y. & Coll. 42.

**Liability of Assignee.**] — An intermediate assignee of the term, who had not worked the quarries himself, but had received royalties under subleases granted before he came into possession, and had parted with his interest before the commencement of the suit, was held not to be liable to account either for the profits made, or for the royalties paid to him during his possession of the term. *Elias* v. *Snowdon Slate Quarries Co.*, 48 L. J., Ch. 811; 4 App. Cas. 454; 41 L. T. 289; 28 W. R. 54—H. L. (E.)

C. in consideration of rent granted a mining licence to three persons, who covenanted jointly and severally that they would pay him compensation for the surface of any of the land rendered permanently useless, at the rate of 100*l.* per acre. Two of the covenantors assigned the benefit of the licence to P., who worked the mines. P. having died, a suit was instituted to administer his estate, when C. claimed 100*l.* for the surface of an acre of land rendered permanently useless:—Held, that C. was entitled to stand as a creditor against P.'s estate for the amount claimed. *Norval* v. *Pascoe*, 4 N. R. 390; 34 L. J., Ch. 82; 10 Jur. (N.S.) 792; 10 L. T. 809; 12 W. R. 973.

**Rights of other Persons.**]—Owners of contiguous estates, who were tenants in common of the mines beneath, held equally entitled to the landing rent paid on foreign coal, raised through a shaft which had been constructed by a lessee of the mines, but which opened into the separate estate of one of the owners. *Clegg* v. *Clegg*, 8 Giff. 322; 31 L. J., Ch. 153; 8 Jur. (N.S.) 92; 5 L. T. 441; 10 W. R. 75.

A. being seised in fee of lands, under which were coal, iron, &c. and the surface of which was in the occupation of a tenant, executed a deed by which he sold and disposed of and granted

and conveyed the mines under the land to B. for ninety-nine years, subject to the payment to A., his executors, administrators, and assigns, of 7,998*l.*, by twelve yearly instalments, which were secured by powers of distress and entry reserved to him, his executors, administrators, and assigns; and the latter power provided that, upon an entry being made, the grant and conveyance, and the term thereby granted and everything contained in the deed, on the part of A., his heirs, executors, or administrators, should cease, and that A., his heirs, executors, &c. should not be accountable to B. for any of the instalments or sums of money which B. should have then paid in part of the purchase money for the minerals. The subsequent part of the deed contained a covenant enabling B., at the end of the tenant's term, to enter upon the surface lands and to hold them for ninety-nine years, under the yearly rent of 110*l.*, which, as well as the power of distress by which it was secured, was reserved to A., his heirs, and assigns :—Held, that the instalments payable for the mines were not rent, and therefore not incident to the reversion, but personal debts due from B. to A. *Hatherton (Lord)* v. *Bradbourne*, 13 Sim. 599; 13 L. J., Ch. 171; 7 Jur. 1100.

An estate, with the mines and minerals, was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, but so as the lessees should not be dispunishable for waste :—Held, that the royalty reserved by the lease was in the nature of rent, and was payable to the tenant for life, and did not form corpus. *Daly* v. *Beckett*, 24 Beav. 114; 3 Jur. (N.S.) 754.

Testator being owner in fee, had agreed to grant leases of minerals to be worked by instroke only, the lessees paying a dead rent and royalties. The testator by his will settled his estate in strict settlement. The leases were not granted in testator's lifetime, but the lessees paid the dead rents. After his death the lessees were approaching the minerals by adits from an adjoining mine, and the tenant for life proposed to grant the leases according to the agreement. The tenant for life was impeachable for waste :—Held, that although the mines had not been actually opened in testator's lifetime, the tenant for life was entitled to the dead rents and to the royalties, when they should accrue, as income. *Kemeys-Tynte, In re, Kemeys-Tynte* v. *Kemeys-Tynte*, 61 L. J., Ch. 377; [1892] 2 Ch. 211; 66 L. T. 752; 40 W. R. 423.

A lessor, by a mining lease, reserved to himself, his heirs, and assigns, a surface rent, and also an annual consideration money or sum in respect of the workings, until payment of the full consideration money or sum therein mentioned. The lessor died intestate :—Held, that a sale was not intended, that the intention was that the payments should be in the nature of rent, and, therefore, that the heir was not a trustee for the next of kin. *Barrs* v. *Lea*, 10 Jur. (N.S.) 996; 10 L. T. 567; 12 W. R. 525.

A testator directed his trustees to pay to his wife "the whole annual produce and rents of the residue of the estates, both hereditable and movable." Coal and iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death :—Held, that in law she was not entitled. *Campbell* v. *Wardlaw*, 8 App. Cas. 641—H. L. (Sc.)

### 6. Duty to Work Under.

A lease of a coal mine was granted, reserving a minimum rent of 720*l.*, to be increased to 1000*l.* in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the lessor's property. They being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill against the lessees for specific performance of the covenant in the lease :—Held, that there was no obligation upon the lessees to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the lessees could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so the remedy was at law and not in equity; and that the court of chancery could not, by a reference to chambers give effect to the covenant by directions as to the management of a coal mine. *Wheatley* v. *Westminster Brymbo Coal Co.*, 39 L. J., Ch. 175; L. R. 9 Eq. 538; 22 L. T. 7; 18 W. R. 162.

A covenant in a coal mining lease to work and carry on the mines in a proper and workmanlike manner, is not to be construed as a covenant to continue working. *Jegon* v. *Vivian*, 40 L. J., Ch. 389; L. R. 6 Ch. 742; 19 W. R. 365.

In 1816 B. leased three coal mines and an iron mine for three hundred years, at a minimum rent of 50*l.*, and also certain royalties at a particular rate. The lease contained covenants, first, that the working should not be delayed beyond six years from the date of the lease; that as to three mines, the lessees should be at liberty either to work or relinquish them, and that they should not assign the lease without the consent in writing of the lessors, except to responsible tenants. In 1835 the lessees gave up working the iron mine, as it was not remunerative, and in 1845 the working the coal mines was also discontinued; but though the mines were not worked, the rent was paid and received. In the meantime considerable correspondence took place, but it was not until 1860 that any decidedly hostile step was taken by the lessors, who, in that year, brought ejectment against the lessees, but there being a receiver, it proceeded no further than the writ. Upon summons for liberty to prosecute the action :—Held, that reasonable time must be given to the lessees for the restitution of the works, for, although the lessors had a right to insist on their mines being kept in full working order, still, by their acquiescence in their abandonment and their receipt of rent, they had lost their right to proceed at law immediately. *Whitehead* v. *Bennett*, 4 L. T., 818.

A defendant agreed to grant to the plaintiff a coal lease for twenty-one years, the only rent reserved was dependent on the quantity raised, and was made payable quarterly :—Held, that the plaintiff was bound to commence working immediately, and to proceed continuously. *Sharp* v. *Wright*, 28 Beav. 150.

A lease of china clay granted to the lessees licence to "dig, work, and search for china clay," . . . and to "raise and . . . wash,

cleanse, prepare, and make merchantable and fit for sale, and to dispose of the same and to exercise the powers" granted by the lease, subject to the rent and royalties thereby reserved; and the lessees covenanted to work for china clay in the most proper and effective manner, and with a reasonable number of able-bodied men kept employed on the works at all reasonable and usual working time, so that the china clay might be raised and made merchantable as speedily as possible. There was a proviso for forfeiture and re-entry on failure in the performance of the covenants. For some months no fresh clay was got, but only the old stock was worked:—Held, that the lessors could not be restrained from having possession, on the ground of forfeiture for breach of covenant. *Kinsman* v. *Jackson*, 42 L. T. 558; 28 W. R. 601—C. A.

When the thing let turns out to be a nonentity, the lessee is not bound. *Gowan* v. *Christie*, L. R. 2 H. L. (Sc.) 273.

In such a case it is perfectly reasonable that the lease should be subject to reduction. *Ib.*

When there is a total destruction or an exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Ib.*

The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted. *Ib.*

At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely. *Ib.*

The defendant demised to the plaintiff a coal mine for a term of twenty-one years, subject to the payment of a sleeping rent and of royalties according to the amount of coal worked. The lease contained a covenant by the lessee to work and get the coal "in a fair, honest, and workmanlike manner, in as large quantities as the same can be got and disposed of by due and reasonable diligence and exertions, according to the best and most improved mode of working collieries in that part of the country . . . delays or stoppages arising from accidents, turnouts, or other unavoidable cause only excepted." It also contained a proviso for re-entry in case of any material breach of the lessee's covenants. The lessee proceeded to work the mine under the lease, and continued working until stopped by water, which flowed into and drowned the mine, and, although he made every effort to pump out the water, he was at length forced to discontinue the workings. Notwithstanding his offer to continue paying the sleeping rent, the lessor refused to accept it, and commenced an ejectment against the lessee for an alleged breach of covenant in having ceased to work the mine. The lessee filed a bill to restrain the action, and the lessor demurred:—Held, that the question in the action was a purely legal one, that there was no equitable ground for restraining the action, and that the demurrer must, therefore, be allowed. *Simpson* v. *Ingleby*, 27 L. T. 695; 20 W. R. 993—L.JJ.

**Working Part of Mines.**]—By a lease of collieries in Cheshire, certain pits or mines, comprising the T. mine, which was uppermost, the B. mine, which was the next, and the C. mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works, or collieries with effect. On a bill by the lessor, alleging that the defendants, after having for some time worked the three mines, had ceased working the T. mine, and also that they were working the C. mine in advance of the B. mine, and praying injunctions accordingly:—Held, that, under the terms of the covenant, the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the defendants were committing a breach of the covenant; and the bill was dismissed with costs. *Abinger* (*Lord*) v. *Ashton*, L. R. 17 Eq. 358; 22 W. R. 582.

### 7. Mode of Working.

**Sinking Pit.**]—Under a covenant in a coal mining lease, to work and carry on the mines in a proper and workmanlike manner, the lessee is not bound to sink a pit if he can carry on the works by headings from an adjoining colliery. *Jegon* v. *Vivian*, 40 L. J., Ch. 389; L. R. 6 Ch. 742; 19 W. R. 365.

There were various provisoes in a mining lease which spoke of pits or shafts in the demised lands, but there was no express covenant to make any such pit or shaft. There was also a covenant that the lessees would draw to bank at some of the pits or shafts of the said colliery, provided that the same should be pits or shafts from which the coals of the demised colliery should not be worked by an outstroke, and lay in some convenient place on the lands of the lessors all the manure made by the horses employed underground in working the demised mine:—Held, that there was no express or implied engagement by the lessees that bound them to sink a pit in the demised land. *James* v. *Cochrane*, 8 Ex. 556; 22 L. J., Ex. 201; 1 W. R. 232—Ex. Ch.

**Instroke.**]—In the absence of express contract, a lessee of a mine is entitled to work the minerals by "instroke." *Whalley* v. *Ramage*, 10 W. R. 315.

The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of 500*l.* if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were bonâ fide taken with ordinary dispatch to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal:—Held, that, under the circumstances, working the coal by

instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit it should have been provided for in the agreement. *Lewis* v. *Fothergill*, L. R. 5 Ch. 103.

Held, also, that as the lessees were actually working the coal, irremediable damage would not be presumed. *Ib.*

**Alteration in—Dissolution of Partnership.**]—A colliery partnership being dissolved by decree, and a sale of the colliery, as a going concern, directed, the court will not, until it be found impossible to effect a sale, direct such an important alteration in the working as the cutting through a fault, although the evidence was all on one side as to the economy of working to ensue on such a course, there being no immediate necessity for such cutting in order to carry on the concern. *Lees* v. *Jones*, 3 Jur. (N.S.) 954.

**Covenants by Lessee to Work as long as Mine ought to be Worked.**]—Where lessees of land and of coal mines found or to be found therein, covenanted "forthwith to proceed to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries," and, as in such cases was usual and customary, to erect fire-engines for the purpose, by the 24th of June, 1806, or in default to pay so much to the lessor as arbitrators should award; and after the day past, without any new pits sunk, &c. the parties named arbitrators to award concerning the damage, loss, and delay to the lessor, if any, and whether any rent or other satisfaction should be made to him on that account; and the lessees gave a bond to the lessor, conditioned to perform the award, and afterwards the arbitrators awarded that the lessees had not performed their covenant, by not having proceeded to sink for the said coal "as far as could and ought to be accomplished," &c. (in the words of the covenant), on or before the 24th of June, 1806, for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach; and further, "that the lessees should sink coal mines and erect fire-engines, for getting the coals demised on or before the 24th of June, 1807, and in default, and until the same should be done, they should pay a yearly rent of 200*l.* to the lessor," as a compensation for the lord's share reserved under the lease:—Held, that, to an action on the bond, it was a sufficient answer by the lessees, to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th of June, 1806, and as to the subsequent period, thence till the 24th of June, 1807, that "they did well and truly sink for coal in the lands demised, as far as could and ought to be accomplished," &c. (in the words of the covenant), and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire-engines, within the time limited by the award; but that at the time of making the lease, and thenceforth, there were no mines of coal under the lands that could or ought to be worked by any person acquainted with the nature of collieries, or that in such cases it was usual or customary to work, or that would have defrayed the necessary expenses of working and getting the same, all which premises the lessees ascertained and proved by due and sufficient experiments and trials then and there made. *Hanson* v. *Bootlman*, 13 East, 22.

A tenant agreed to work a coal mine so long as it was fairly "workable." There was coal in the mine, but of such a description that it would not pay to work it:—Held, that the tenant was not bound to work the mine, and that under the words "fairly workable," a tenant was not bound to work at a dead loss. *Jones* v. *Shears*, 7 Car. & P. 346. See *Phillips* v. *Jones*, 9 Sim. 519; 3 Jur. 242.

**Covenant by Lessee of Furnaces to Work unless prevented by Quality of Material.**]—A lessee of furnaces, iron-works and ironstone mines covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture or process, make good common pig-iron:—Held, that the mixture intended was not necessarily of ingredients procurable on the demised premises. *Foley* v. *Addenbrooke*, 13 M. & W. 174; 14 L. J., Ex. 169.

The lease also contained a covenant to raise a quantity of ironstone in each quarter of a year, and pay royalties upon it, or else to pay a fixed quarterly rent to the landlords:—Held, that the landlords having declared in respect of breaches of both these covenants, and money having been paid into court and accepted in satisfaction of the latter, they were entitled to nominal damages only in respect of the former. *Ib.*

**Agreement to Work—Inevitable Accident.**]—A declaration stated that the plaintiff let to defendants a mine of rock salt for twenty-one years from the 25th of June, 1851, and they covenanted with the plaintiff that they would, in every year during the term, get and raise from the mine 2,000 tons of rock salt; and in case of default would, at the expiration of the year, pay the plaintiff 6*d.* a ton for every ton by which the quantity was less than 2,000; and also that they would, with all reasonable diligence, sink a shaft to the salt rock, in order to get at the salt; and would also, during the continuance of the term, work the mine in a proper and workmanlike manner. The deed provided, that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, then on payment of all rent due, and performance of all covenants on the part of the defendants, the term should cease. It appeared that in a writing, dated the 29th of August, 1851, the plaintiff agreed, before the 25th of March then next, to demise to the defendants the salt mine in question for twenty-one years from the 25th of June, 1851. When the agreement was executed, the defendants thereupon began to sink a shaft for the purpose of getting the salt. This sinking was, in September, 1851, discontinued in consequence of an influx of brine. The defendants thereupon began to sink another shaft, which was in the same month discontinued, from the like cause. On the 16th of November, 1852, a lease, pursuant to the agreement, was executed, being the deed declared on, and which contained the proviso for cesser stated in the second plea. In consequence of the influx of brine before mentioned, the defendants never in any manner worked the mine, nor paid any of the rents. The jury found that the defendants could not have worked the mine by any reasonable application of labour, diligence and skill, money or

other means, and that they were prevented from working it by the influx of brine:—Held, first, that as the term commenced, in point of interest, on the 16th of November, 1852, though its duration as to computation of time was to be reckoned from the 25th of June, 1851, the proviso for cesser, which referred to a failure by inevitable accident during the continuance of the term, never came into operation; and that as the defendants had entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year, or pay for the deficiency, they were liable, for whether the salt could be got easily or with difficulty, or whether it existed at all, was immaterial. *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41; 4 W. R. 683.

Held, secondly, that the defendants having, after their inability to reach the salt by reason of the influx of brine, covenanted with all reasonable diligence to sink the shafts down to the salt, they were bound to do so, although it might be an unreasonable application of time and labour. *Ib.*

Semble, that if the lease had been executed before the interruption of the works by the influx of brine, that would have been "a failure by inevitable accident within the proviso for cesser." *Ib.*

The plaintiffs took a lease of a coal mine from the defendant, with a reservation of royalties and a sleeping rent, and covenanted to work the coal "in a fair, honest and workmanlike manner," and to use all "reasonable diligence, . . . accidents or other unavoidable causes excepted." Shortly after beginning to work the water came in in such quantities that though they made every effort to get rid of it, they could not, and were forced to give up working the coal. They paid the minimum rent for some time, but at length the defendant refused to accept it, and brought an action for breach of covenant:—The court refused an injunction restraining the action. *Simpson* v. *Ingleby*, 27 L. T. 695; 20 W. R. 993—L. JJ.

**Implied Covenant by Lessor to procure other Lands.**]—A lease of a colliery contained an implied covenant on the part of the lessor to procure land by compulsory powers, in order to enable the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The lessor did not procure the land, but brought an action against the lessees for rent. The lessees, acting under the advice of their solicitor, paid the rent, and subsequently proceeded to arbitration under a clause in the agreement, and an award was made in their favour. The lessor having commenced a second action for rent, the lessees applied to the court of chancery for an injunction to restrain the action; for specific performances of the agreement to provide the land; for a declaration that the award was binding, and for a rectification of the lease if necessary:—Held, that the colliery being valueless without the land, and the provision of the latter being the basis of the agreement, the documents did not carry out the intention. The whole matter was a failure, and the parties, as far as possible, must be put back in their original position. *Acraman* v. *Price*, 24 L. T. 487; 19 W. R. 364.

**Covenant—For Title and Quiet Enjoyment.**]—In 1844 the defendant was party to a twenty-one years' lease of coal mines, which gave certain powers over the surface incidental to the working of those mines and an adjoining colliery. The coal so demised was substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title, and for quiet enjoyment, and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of these mining operations, the land subsided, and houses built on it by J. and the plaintiff were damaged. In 1848, subsequently to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay (which was not included in the demise) and a few loose pieces of coal. In an action on the covenants, the declaration in which alleged that whilst the plaintiff was seised, the lessees entered upon the land, and worked, got and carried away the coal, whereby he had lost the coal, and the land subsided:—Held, that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the court declined to amend. *Spoor* v. *Green*, 43 L. J., Ex. 57; L. R. 9 Ex. 99; 30 L. T. 393; 22 W. R. 547.

Held, also, by Bramwell, B., and Cleasby, B., that the fact of the coals having been worked out was no breach of the covenant for title, J. never having bought those coals; that the subsistence of the lease in respect of the coal left unwrought, and the powers (not exercised) incident to the working of their collieries, did not constitute a breach; and that the breach (if any) was complete in the time of J.; and (by Bramwell, B.) that the action was barred by the statute of limitations. *Ib.*

Held, also, that neither the acts of trespass in taking the fire-clay in 1848, nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was a mere trespass, and that, as to the second, the subsidence gave no new cause of action, the principle of *Bonomi* v. *Backhouse* (9 H. L. Cas. 503) not applying to a case where the subsidence is caused by a wrongful taking of the plaintiff's minerals. *Ib.*

Held, by Kelly, C.B., first, that the subsistence of the lease was a continuing breach of the covenant for title, in respect of which the plaintiff was entitled to nominal damages; secondly, that the removal of the small pieces of coal in 1848, was a breach of the covenant for quiet enjoyment, in respect of which the plaintiff was also entitled to nominal damages; and, thirdly, that the removal of the coal by the lessees being lawful, the subsidence in 1865 gave a new cause of action to the plaintiff. *Ib.*

—— **To pay Compensation for Damage done.**]—By a deed in 1857, reciting the will of S., under which the defendant became tenant for life of the W. estate, the trustees of the defendant conveyed lands at S., part of that estate, to R. in fee, reserving the coal thereunder, with power to work and carry away the same, the defendant or the person or persons for the time being entitled thereto, and his and their assigns, paying to R., his heirs and assigns, compensation for damage sustained thereby; and the defendant covenanted

that, notwithstanding any act done by him or S. to the contrary, the trustees had power to grant and release the lands, and that free from incumbrances created by the defendant or any of his ancestors or testators, or any person rightfully claiming under him or them. In 1859 the plaintiff became the owner of a portion of the lands. In 1844 S. granted a lease of mines under the lands at S., whereby the lessees covenanted that they would work and carry on the colliery, coal mines and seams of coal thereby demised in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coal from and out of each and every the workable seams; and would not knowingly do or suffer to be done any wilful or negligent act. matter or thing whatsoever, which might hazard or endanger the colliery, coal mines or seams of coal, or which might bring any creep or thrust upon them, or occasion any loss, damage or detriment thereto, or which might tend to hinder, stop or obstruct any of the water-courses, air-courses, passages or drifts which should be in or belonging to the same. The lessees also covenanted not to sink pits within 200 yards of any dwelling-house, building or farm-yard erected, or to be erected, upon the lands, without consent in writing, and to leave unwrought the coal under the mansion-house and park, and other parts of the superincumbent lands, but not including the lands at S. The lease contained other covenants for the security or benefit of portions of the surface, not including the lands at S., and for making compensation for damage. Dwelling-houses had been built upon the lands at S. after the purchase by R., and the lessees so worked the mines as to cause portions of the lands to subside and sink, and the dwelling-houses and their foundations to be weakened, cracked, injured, &c. In an action by the plaintiff, upon the covenant to pay compensation and the covenant for title contained in the deed of 1837, the jury having found that the lessees had worked the mines according to the best and most approved method of working collieries of the like nature on the Tyne and Wear, and that the sinking of the land was not caused by the weight of the houses:—Held, that the plaintiff was not entitled to recover on the covenant for compensation. *Taylor* v. *Shafto*, 8 B. & S. 228.

Held, also, that the lessees were not only authorised but bound so to work the mines as to obtain therefrom the largest quantity of coal that could be gotten consistently with the safety of the mines, and without regard to the safety of any dwelling-house which might be erected after the date of the lease upon any portion of the surface not specially protected by any of its provisions, and therefore the covenant for title was broken by the grant of the prior lease. *S. C.*, 8 B. & S. 247; 16 L. T. 205—Ex. Ch.

A declaration for negligently excavating and working mines under and adjacent to land of the plaintiff, whereby the land gave way and sank, and a mill, cottage and other buildings became prostrate and ruinous, and a stream of water was diverted from the land. Plea, that by an indenture of lease made before the plaintiff became possessed of the land, the owners in fee demised unto certain lessees, whose interest afterwards vested in the defendants, for thirty-eight years from the 25th of March, 1839, all and all manner of veins and seams of coal, and ironstone and other stone, and minerals of any manner or sort whatsoever, that should or might be found or discovered in or under the land with full power, liberty and authority to get the coal, ironstone, and other stone and other minerals out of all pits already sunk or open, and the like liberty and authority to bore, dig, delve and sink as many other pits as the lessees might think necessary, the lessees making reasonable satisfaction to the owners in fee, their heirs and assigns, and their tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as they might sustain as well by the injury done to the lands of the owners in fee in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said owners by so doing. The lessees covenanted in case of damage or injury to such buildings to rebuild or repair the same; and also over and besides the immediate damage to stock or crops so damaged, to pay a satisfaction for all damages sustained by the owners in fee after the rate of 40*s.* per annum for five years from the commencement of the damage, and after that time to pay such a price for the land so damaged as should be settled by arbitration:—Held, that the owners in fee granted the absolute right to work the minerals, without regard to injury to the surface, subject only to the obligation to pay compensation according to the covenant. *Smith* v. *Darby*, 42 L. J., Q. B. 140; L. R. 7 Q. B. 716; 26 L. T. 762; 20 W. R. 982.

—— **To restore Surface.**]—Where there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain if it is not restored; but that gives no claim to anyone else. *Wilson* v. *Waddell*, 2 App. Cas. 95; 35 L. T. 639—H. L. (Sc.)

—— **Not to break through Barrier.**]—In a lease of a coal mine the lessees covenanted to leave unworked a barrier of coal between the mine and the adjoining mines, except where the lease gave them liberty to break through it. The liberty was to make outstrokes or other communication through the barrier, for the purpose of conveying underground coal gotten in any of the adjoining collieries in the occupation of the lessees from such colliery into the mine, and by such outstrokes and communications to convey underground the coal from such adjoining collieries into the mine, and from thence to convey and carry away all such coal, and also draw to bank at any of the pits or shafts sunk or to be sunk by the lessees in any of the lands and grounds demised the coals from such adjoining colliery:—Held, that this liberty extended to authorise the lessees to break through the barrier for the winning coal of the mine, and for winning coal of such adjoining mines, though the coal of such demised or adjoining mines when won was not to be nor was brought to the surface through a pit or shaft in the demised land, and although no such pit or shaft in fact existed. *James* v. *Cochrane*, 8 Ex. 556; 22 L. J., Ex. 201; 1 W. R. 232—Ex. Ch.

The court granted an injunction prohibitory in form, but mandatory in its effect, against a lessee of coal mines acting in contravention of the covenants, in permitting a communication to remain

open with an adjoining mine, and water to flow therefrom. *Mexborough* (*Earl*) v. *Bower*, 7 Beav. 127.

**Right of Support.**]—When the owner of surface and minerals beneath grants a mining lease of the minerals for a term, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals. The contract itself must be looked at, and construed with regard to the subject-matter, in order to arrive at the extent to which the owner authorises the minerals to be removed. *Eadon* v. *Jeffcock*, 42 L. J., Ex. 36; L. R. 7 Ex. 379; 28 L. T. 273; 20 W. R. 1033.

Where a mining lease authorised the removal of all the coal beneath the surface except certain portions subject to a covenant to work the mine in a good and workmanlike manner:—Held, that the lessees, doing only what the lease authorised them to do, were not responsible to the lessor for the subsidence of the surface caused by their mining operations. *Ib.*

There is a primâ facie inference at common law upon every demise of minerals, or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words, shewing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him modo et formâ, and with the natural support which it possessed before the demise. *Dugdale* v. *Robertson*, 3 Kay & J. 695; 3 Jur. (N.S.) 687.

A lease of alum mines gave the lessee the right to obtain alum from coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—Held, that the coal pillars could not be removed. *Glasgow* (*Earl*) v. *Hurlet Alum Co.*, 3 H. L. Cas. 25.

A lease of waste land of a manor recently inclosed by the lessee, contained a reservation to the lessor, the lord of the manor, of the mines and quarries, with full power to win and work the same, with free way-leave and passage to, from and along the same, on foot or on horseback, with all manner of carriages; and a covenant by the lessor, that in working the mines and using the liberties and privileges reserved, he would do as little damage and spoil to the soil and herbage of the premises demised as he conveniently could:—Held, that the lessee was entitled to support for the surface of the land, as incident to the demise thereof. *Proud* v. *Bates*, 34 L. J., Ch. 406; 11 Jur. (N.S.) 441; 13 L. T. 61; 6 N. R. 92.

—— **Liability of Lessee.**]—The mere possession of a partially worked-out coal mine does not render the lessees liable to the surface-owners for damage by subsidence caused, not by any act of the lessees, but by the underground workings of their predecessors carried out at a date prior to the date of their lease. Accordingly, a person who has not been concerned in making the excavation, but who is in possession of the mine before and at the time of the subsidence, is not liable for damage caused by the subsidence simply because he did not take measures to arrest the subsidence. *Greenwell* v. *Low Beechburn Colliery Co.*, 66 L. J., Q. B. 643; [1897] 2 Q. B. 165; 76 L. T. 759.

**Injury to Surface of Land not within Words of Demise.**]—A clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people. Nor did the words that the mining lessee should have liberty to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works, and things upon, in, or under, or above, the said premises, as shall be necessary or convenient for working and carrying away the same," making compensation, &c. enlarge the power so to deal with the mines as to let down the surface. *Davis* v. *Treharne*, 50 L. J., Q. B. 665; 6 App. Cas. 460; 29 W. R. 869—H. L. (E.)

Per Lord Blackburn:—In common right, the person who owns the surface has a right to have it properly supported below by minerals. A court of law has to look at the documents, to see whether the parties have agreed upon something different from the common right. *Ib.*

**Covenant not to Damage Supports—Rights of Reversioner.**]—By a mining lease, the lessees covenanted that they would "from time to time, and at all times during the term, work the pits, mines and shafts in a workmanlike manner, and leave pillars of the stone of sufficient strength to support the roofs of the mines, and get and clear the stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, and at the expiration of the term to fill up the pits and shafts, and to restore the surface to a state fit for agricultural purposes:—Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines, notwithstanding they might have worked the mines in a usual and a workmanlike manner. *Hodgson* v. *Moulson*, 18 C. B. (N.S.) 332.

In 1840 a bed of coal, called the High Hazle bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l.* as for 2 a. 1 r. 16 p., and a further yearly rent at the rate of 85*l.* per acre for coal actually got beyond the 2 a. 1 r. 16 p. "including all ribs and pillars left in working the coal, except the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars, all round the estate, and the pillars under the homestead and farm buildings." These pillars of specified dimensions, the lessees bound themselves to leave during the whole of the term, and they also covenanted to work the mines according to the best of their judgment, skill and discretion, in a good and workmanlike manner. In 1857 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with

notice, reserving to the grantor the High Hazle bed, except a small portion specified, and "the mines, veins, and bed of coal, fire-clay, and other clay, stone and other minerals lying under the bed called the High Hazel bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term," for carrying on the works of the mine, and getting and carrying away the fire-clay, &c. so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed." The pillars specified in the lease of 1840 were left; and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings:—Held (by Martin and Cleasby, BB., Bramwell, B., dissentiente), that it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury. By Bramwell, B., that so far as concerned the houses the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed. *Eadon* v. *Jeffcock*, 42 L. J., Ex. 36; L. R. 7 Ex. 379; 28 L. T. 273; 20 W. R. 1033.

**Right of Support for Barriers in Upper Seam partly Worked.**]—In June, 1866, the Duke of Rutland demised two seams of coal under a part of his Staffordshire estates to the plaintiff. The lease contained a proviso that the duke and his tenants should not be prevented from working the coal lying underneath the demised seams, provided that such workings should not prevent or unnecessarily interfere with the working by the lessees of the demised seams. Necessary interference was to be compensated for. The two demised seams had been worked out on the part of the duke's estate, adjoining the portion demised to the plaintiff, leaving the old workings filled with water. The plaintiffs worked a part of the seams, leaving a barrier of coal to keep out the water. In 1876 the duke demised the seams of coal underneath those demised to the plaintiff to the defendants, the Manners Company. The defendants claimed to work all the coal in their seams underneath the barriers. The plaintiff alleged that such working would disturb the barriers, let the water through, and drown out the mine, and brought an action to restrain it:—Held, that, without special provision, the plaintiff would have had an unqualified right to support from the underlying strata, and that, on a true construction of the provisions of the lease, the duke had granted to the plaintiff a sufficient support to the barrier to keep it substantially intact for the purpose for which it was intended as a water-tight division. An injunction, therefore, was granted to restrain the defendants from working the coal in the lower seams so as to cause the barriers to sink or crack so as to let the water through. *Mundy* v. *Rutland* (*Duke*), 23 Ch. D. 81; 31 W. R. 510—C. A. Affirming 46 L. T. 477.

**Consent to Removal of Pillars.**]—A testator devised real estates in strict settlement and empowered tenants for life (who were unimpeachable for waste) to grant mining leases. A tenant for life under this power demised in 1843 mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage, to secure 6,000*l.* and interest. On the 10th of May, 1850, the tenant for life, by arrangement with the mortgagees, demised the mines to a trustee for the mortgagees for forty years, and the lessee covenanted not to remove the pillars without the consent of the tenant for life, his heirs or assigns, or the person or persons for the time being entitled to the premises:—Held, that the covenant was for the protection of the equity of redemption, and that the mortgagees had no power to consent to the removal of the pillars by the lessee. *Mostyn* v. *Lancaster*, 52 L. J., Ch. 848; 23 Ch. D. 583; 48 L. T. 715; 31 W. R. 686—C. A.

**Restraining Damage—Action by Mortgagee.**]—Land was at the date of a mining lease (in 1842) mortgaged in fee; the mortgagor and mortgagee joined in the mining lease. In 1856 the mortgage was transferred to the plaintiffs, with a restriction against their calling in the mortgage-money until 1863:—Held, that they might sue to restrain damage to the mansion-house from the working of the mines. *Dugdale* v. *Robertson*, 3 Kay & J. 695; 3 Jur. (N.S.) 687.

**Improper Working—Proceedings for.**]—By an indenture, the plaintiff demised to the defendant all mines and beds of coal which had been, or during the demise should be, discovered or opened under the lands belonging to Dyffryn House, at a yearly rent of 20*l.*, to be paid whether any coal should be worked or not, together with 7*d.* per ton for every ton of coal raised; and the defendant covenanted that he would at all times during the demise work the mines in a proper and workmanlike manner. Breach, that he did not work the mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie, and the same were wholly ungotten. Plea, that the mines were never at any time before the demise worked or gotten, nor did he, at any time since or during the demise, work or get the mines:—Held, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, he was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being not all the mines under the lands specified, but only such as either had been, or should be, discovered or opened. *Quarrington* v. *Arthur*, 10 M. & W. 335; 11 L. J., Ex. 418.

The defendant covenanted with the plaintiff that he would sink upon the demised premises a pit to a certain depth in search of coal, and, in case a marketable vein of coal should be reached, pay to the plaintiff a certain sum. The plaintiff sued the defendant for a breach of this covenant, and gave evidence to shew that if the defendant had sunk the pit, marketable coal might have

been found :—Held, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal. *Pell* v. *Shearman*, 10 Ex. 766.

A lessor of a mine may maintain an action against his lessee for an injury to the reversion by improperly working the mine, notwithstanding that the injury is also a breach of the lessee's covenant upon which the lessor might have sued. *Marker* v. *Kenrick*, 13 C. B. 188 ; 22 L. J., C. P. 129 ; 17 Jur. 44.

**Binding Character and Effect of Lease on Company.**]—A lessor granted a lease or licence to mine under lands to two persons as trustees for a mining company. The company repudiated the lease, and alleged that they were entitled to mine under the custom of the district independently of the lease, and proceeded to mine accordingly. The applicability of the custom to the particular lands was disputed by the lessor. He filed a bill against the surviving trustee and the managing committee of the company, praying that the lease might be declared binding, not only at law on the trustee, but also in equity on the partners in the company, and that the trustee at law and the other defendants in equity were bound by the covenants in the lease ; the bill also prayed an account, and that the trustee or the company might be ordered to pay to the lessor the royalty to which he was entitled under the lease, and an injunction to restrain the working of the mine except in accordance with the lease :—Held, that the lease must be treated as binding in equity on the company, and a decree was made in accordance with the prayer against the company. *Wright* v. *Pitt*, 40 L. J., Ch. 558 ; L. R. 12 Eq. 408 ; 25 L. T. 13 ; 20 W. R. 27.

**As to Right to Streams and Wells.**]—By a lease, dated 1827, D. demised to W. a dwelling-house and fifteen closes of land, and granted all streams of water that might be found in four of those closes, called The Clough, The Moorin Clough, The Brow, and The Masleds, excepting out of the demise all "timber and other trees, mines and minerals, stone, gravel, sand and clay, and all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D., his heirs and assigns, and his and their servants and workmen, from time to time to enter upon the premises, and to crop, fall, search for and make marketable all or any of the before-mentioned articles, to make any clay into bricks or tiles on the premises, and to direct or alter the course of any river, brook, spring or water." There was a plan annexed to the lease, shewing a stream of water on the north side of the premises, and flowing through their whole extent from west to east. The Clough, The Moorin Clough, The Brow, and The Masleds were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, and others were subsequently found :—Held, that the wells and all waters in The Clough, The Moorin Clough, The Brow, and The Masleds passed by the grant to W., and that neither D. nor his lessees could work the mines so as to cut off the springs in the closes in question. *Whitehead* v. *Parks*, 2 H. & N. 870 ; 27 L. J., Ex. 169.

### 8. Ways and Way Leaves.

**Right to.**]—The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees become possessed of the first colliery, and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way. *Newmarch* v. *Brandling*, 3 Swanst. 99.

A lease of waste land of a manor recently enclosed by the lessee contained a reservation to the lessor, the lord of the manor, of the mines and quarries, with full power to win and work the same, with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriages, and a covenant by the lessor that in working the mines and using the liberties and privileges reserved, he would do as little damage and spoil to the soil and herbage of the premises demised as he conveniently could :—Held, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way leave which might rightfully be used for the purpose of working minerals not under the demised property. *Proud* v. *Bates*, 6 N. R. 92 ; 34 L. J., Ch. 406 ; 11 Jur. (N.S.) 441 ; 13 L. T. 61.

In a crown manor, where the crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the defendant, the lessee of the crown mines, who was also the lessee of the Sneyd mine outside the manor, claimed a right to use a crut or an underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the Sneyd mine to the deep pit by which the manorial mines were worked, and thence by a branch railway, constructed by the defendant over part of the same copyhold, to the main line :—Held, that such user was a trespass, and that no case of acquiescence on the part of the plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the defendant from carrying the Sneyd minerals over or under their copyhold land. *Eardley* v. *Granville* (*Earl*), 45 L. J., Ch. 669 ; 3 Ch. D. 826 ; 34 L. T. 609 ; 24 W. R. 528.

A bill by an equitable owner of an estate held under a copyhold manor to restrain a lessee of the coal mines under the manor from conveying coals, by means of an underground tramway, from under an estate A., of which the lessee was the owner, through the estate of the plaintiff, to the surface of the lessee's colliery at W. A demurrer was allowed on the ground that the plaintiff shewed no title to the place where the wrong was alleged to have been committed, and no possession of the subsoil in his estate. This decision, on appeal, was reversed. *Bowser* v. *Maclean*, 30 L. J., Ch. 273 ; 6 Jur. (N.S.) 1220 ; 3 L. T. 456 ; 9 W. R. 112—L. C.

**Implied Covenant to Procure Land.**]—A lease of a colliery contained an implied covenant on the part of the lessor to procure land by compulsory powers, in order to enable the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The lessor did not procure the land,

but brought an action against the lessees for rent. The lessees, acting under the advice of their solicitor, paid the rent, and subsequently proceeded to arbitration under a clause in the agreement, and an award was made in their favour. The lessor having commenced a second action for rent, the lessees applied to the court of chancery for an injunction to restrain the action; for specific performance of the agreement to provide the land; for a declaration that the award was binding; and for a rectification of the lease if necessary:—Held, that the colliery being valueless without the land, and the provision of the latter being the basis of the agreement, the documents did not carry out the intention. The whole matter was a failure, and the parties, as far as possible, must be put back in their original positions. *Acraman* v. *Price*, 24 L. T. 487; 19 W. R. 364.

## IV. WORKING AND WINNING MINES.

### A. *BY LESSEES.*—*See* ante, III.

### B. *BY OTHERS.*

#### 1. Rights and Obligations of Adjoining Owners.

##### a. Right to Support.

**Generally.**]—It is the natural right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour. *Smith* v. *Kenrick*, 7 C. B. 515; 18 L. J., C. P. 172; 13 Jur. 362.

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with, he has no legal ground of complaint, although in fact something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property. *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur. (N.S.) 809; 4 L. T. 754; 9 W. R. 769.

The title of the owner of surface land may be so acquired as to qualify the primâ facie right to support from the subjacent strata, and to deprive him and those claiming under him of an action for damage caused by the working of the minerals underneath. *Rowbotham* v. *Wilson*, 6 El. & Bl. 593; 25 L. J., Q. B. 362; 2 Jur. (N.S.) 736. Affirmed on appeal, 8 El. & Bl. 123; 27 L. J., Q. B. 61; 5 W. R. 820—Ex. Ch.; and 8 H. L. Cas. 348; 30 L. J., Q. B. 49; 6 Jur. (N.S.) 695; 2 L. T. 642.

The principle of law to be deduced from the authorities is, that a grant or a reservation of mines in general terms confers a right to work the mines, subject to the obligation of leaving a reasonable support to the surface as it exists at the time of such grant or reservation; and, in the absence of any express stipulation enlarging or diminishing the right, the surface owner is entitled to such reasonable support from the subjacent strata for the surface in the state in which it existed at the time when the titles to the mines and to the surface came into different hands. *Richards* v. *Jenkins*, 18 L. T. 437; 17 W. R. 30.

The reservation of mines to A. in a lease of the surface to B., giving A. the right of sinking for and carrying away the minerals, making compensation for any injury thereby done to the surface or otherwise, applies only to acts done upon the surface, such as sinking pits, or other measures in order to obtain access to the minerals, and not to underground workings. *Ib.*

By a deed executed in 1799, the lord of a manor granted copyholds in fee, reserving all mines and minerals within and under the premises, with full liberty of ingress, egress and regress to and for the grantor, his heirs and assigns, to dig and search for, and to take, use and work the excepted mines and minerals:—Held, that the grantor was not entitled to get the china clay, inasmuch as it could be got only in a manner utterly destructive of the surface, and as the deed did not clearly reserve to him power to destroy the surface, and did not contain any provision for making compensation for injury done to the surface. *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.

A declaration alleged that the plaintiff was lawfully possessed of messuages, belonging to and supporting which were foundations which, by reason of his possession of the messuages, he of right had enjoyed and was enjoying, and still of right ought to enjoy, for the support of the messuages, which foundations he was of right entitled to have supported by land in which quarries were worked; and that the defendant negligently worked the quarries near to the messuages, whereby the foundations were weakened and the messuages fell. On motion in arrest of judgment:—Held, that the declaration was sufficient. *Rogers* v. *Taylor*, 2 H. & N. 828; 27 L. J., Ex. 173; 6 W. R. 249. See *Woodall* v. *Hingley*, 14 L. T. 167.

In a declaration, each count alleged that the plaintiff was possessed of a dwelling-house, and the defendant of coal mines lying near to and under it; and that the dwelling-house was supported in part by land between the same and the mines; and that the plaintiff "of right was entitled to, and of right ought to have his dwelling-house so supported in part by the land, without the hindrance or disturbance of any person." The first count alleged that the defendant "wrongfully and injuriously, in so unskilful, careless, negligent, and improper a manner, worked and excavated" the mines, that the land by which the house was in part supported was disturbed and withdrawn, and the support of the house injured and destroyed, and the foundation of the house gave way. The second count alleged that the defendant "wrongfully and injuriously made holes, excavations and cuttings in and loosened and disturbed and removed a great part of the land" by which the dwelling-house was in part supported, whereby the support of the house was injured:—Held, after verdict, a bad declaration, for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mines. *Hilton* v. *Whitehead*, 12 Q. B. 734.

A declaration alleged that defendant, without leaving proper or sufficient pillars or supports in that behalf, and contrary to the custom of the country, worked certain coal mines under and contiguous to the close of the plaintiff, and dug

for and got and moved the coals, minerals, earth and soil of and in the mines, and that by reason thereof the soil and surface of the close sank in :—Held, sufficient, without an allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Humphreys* v. *Brogden*, 15 Q. B. 739 ; 20 L. J., Q. B. 10 ; 15 Jur. 124.

A declaration stated that certain messuages and closes were in the occupation of the tenants of the plaintiffs, the reversion thereof belonging to them, and that the defendant so wrongfully, carelessly, negligently, improperly, and without leaving any proper or sufficient support, worked certain mines, and dug and got the minerals out of the mines near to the messuages and closes, that thereby the foundations of the messuages were injured, and in consequence large portions of the buildings fell down, and the ground on which the buildings stood swagged and gave way :—Held, on motion in arrest of judgment, that the declaration was good, although it contained no averment that the plaintiffs had a right to have the messuages supported by the soil under which the defendant got the mines ; for as it neither alleged nor could be inferred that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the defendant was primâ facie a wrong-doer, and therefore as against him the declaration disclosed a sufficient title. *Jeffries* v. *Williams*, 5 Ex. 792 ; 20 L. J., Ex. 14. S. P., *M'Evoy* v. *Drogheda Harbour Commissioners*, 16 W. R. 34.

**Superfluous Lands.**]—Where a railway sells land as superfluous, the purchaser of the surface does not acquire the right of support as against the owner of the mines and minerals. *Pountney* v. *Clayton*, 52 L. J., Q. B. 566 ; 11 Q. B. D. 820 ; 49 L. T. 283 ; 31 W. R. 664.

**Obstruction to Railway Level Crossing—Embankment — Liability of Mine-owner.**] — Where a mine-owner, by properly working minerals under a highway vested in a local authority, caused a gradual subsidence of the highway, and a railway company, over whose line the highway crossed on the level, placed ballast under their line to prevent it sinking and thereby obstructed the highway, the mine-owner was held not liable to the local authority for damages for the obstruction so caused. Per Collins, J. (Wright, J., dubitante), that an action for nominal damages would lie for interference with the proprietary rights of the local authority, as it would in the case of an ordinary owner, although no appreciable damage had been done by the subsidence. *Att.-Gen.* v. *Conduit Colliery Co.*, 64 L. J., Q. B. 207 ; [1895] 1 Q. B. 301 ; 15 R. 267 ; 71 L. T. 777 ; 43 W. R. 366 ; 59 J. P. 70.

**Injunction to restrain Interference.**] — The lord of the manor granted a licence to certain persons to get china clay under the premises comprised in a deed of 1799, and under the adjoining waste land, and the licensees had entered on the premises, but the grantor asserted that they had done so by mistake, and that neither he nor they had any present intention of getting china clay on the premises, though he claimed to be entitled to do so :—Held, that this was such a threat as to empower the court to grant an injunction to restrain the grantor and his licensees from getting china clay from the premises comprised in the deed of grant. *Heat* v. *Gill*, supra.

Where houses of the plaintiffs were injured by mining operations of the defendant in adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree was made for perpetual injunction and for compensation. *Hunt* v. *Peake*, 1 Johns. 705.

An injunction to restrain the working of valuable mines refused under the circumstances, on condition of the defendants making certain admissions for the purpose of enabling the plaintiff to bring an action, although there was reason to apprehend that if the working was continued the plaintiff's houses upon the surface would be totally destroyed, or irreparably damaged, before the legal right could be decided. *Hilton* v. *Granville (Earl)*, Cr. & Ph. 283. *And see* 4 Beav. 130 ; 10 L. J., Ch. 398.

**Lessees of Land—Working on other Land.**]—The defendants, having power under a reservation in a lease to get minerals under the lands of the plaintiffs, commenced workings under their own lands of such a character and in such a direction as they would have had to make under the reservation in the lease if they had chosen to exercise it, and by such workings caused the plaintiffs' land to sink :—Held, that judgment ought to be for the plaintiffs. *Whitehouse* v. *Bayley*, 34 L. T. 93.

**When Injury the Result of Prior Workings.**]—Between the land of the plaintiffs and that of the defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when the defendants worked the coal under their land, subsidence was caused in the surface of the plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings :—Held, that the plaintiffs had no right of action against the defendants. *Birmingham Corporation* v. *Allen*, 46 L. J., Ch. 673 ; 6 Ch. D. 284 ; 37 L. T. 207 ; 25 W. R. 810—C. A.

**Extent of Right of Support.**]—The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural, undisturbed state is sufficient to afford the requisite support. *Ib.*

**When Cause of Action first Accrues.**]—A. was the owner of houses standing on land which was surrounded by the lands of B., C. and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C. and D. sank in ; and after more than six years' interval the sinking occasioned an injury to the house of A. :—Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the statute of limitations. *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503 ; 34 L. J., Q. B. 181 ; 7 Jur. (N.S.) 809 ; 4 L. T. 754 ; 9 W. R. 769.

**Successive Subsidences.**]—Case in which compensation for damage done to an estate was awarded once for all, so as to take away and

right of action for subsequent damage against the defendants, who were held to be not wrong-doers, but persons exercising their rights of mining operations over the land of the plaintiff, subject to paying compensation for the permanent injury thereby occasioned to the said estate. *Great Laxey Mining Co.* v. *Clague*, 4 App. Cas. 115; 27 W. R. 417—P.C.

In 1868 the defendants worked out a seam of coal in their mine, and thereby caused certain cottages of the plaintiff to subside. The defendants repaired the damage. The mine was no longer worked, and the excavation remained as it was until 1882, when there occurred a second subsidence, which was admitted to be the result of mining operations in 1868, and caused injury to the plaintiff's cottages, whereupon he sued the defendants for damages:—Held (Lord Blackburn dissentiente), that on the occurrence of the second subsidence a cause of action accrued to the plaintiff, and therefore that his right to maintain an action in 1883 was not barred by the Statute of Limitations. *Darley Main Colliery Co.* v. *Mitchell*, 55 L. J., Q. B. 529; 11 App. Cas. 127; 54 L. T. 882; 51 J. P. 148—H. L. (E.) Affirming 32 W. R. 947—C. A.

The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. And, therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin* v. *Williams*, 10 Ex. 259; 2 C. L. R. 1304; 23 L. J., Ex. 335.

**Within what Time Right to Support is Acquired.**]—The plaintiff's house was built (more than twenty years before) upon land under which coal mines had been worked, according to the custom of the country, leaving the soil weaker than it would otherwise have been. The defendant, knowing this, worked his coal mines under land adjacent (but not immediately adjoining), so as to cause the soil intervening to give way, and thus to cause the soil under the foundation of plaintiff's house also to give way:—Held, that the defendant was liable; and semble, that after twenty years a house acquires a right to the lateral support of the soil around it. *Browne* v. *Robins*, 4 H. & N. 186; 28 L. J., Ex. 250.

The plaintiff in 1824 built a house on a certain waste, and in the following year obtained a grant from the crown of the surface, excepting mines. The house was about thirty yards from a quarry. In 1840 the tenant of the owner of the minerals, who claimed a right to take the minerals without making compensation for damage to the surface, began to get stone from under the house, in consequence of which and of the blasting operations the house became untenantable. In 1853 the defendant cut away the supports which had been left under the house, and the house fell in. The judge left the question to the jury, who found that the plaintiff had enjoyed the right of support for his house, on the foundations on which it stood, without interruption for twenty years. On motion for a new trial, on the ground that the judge ought to have told the jury that the enjoyment was contentious and not as of right:—Held, that the question was properly left to the jury. *Rogers* v. *Taylor*, 2 H. & N. 828; 27 L. J., Ex. 173; 6 W. R. 249.

If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for his house from the adjoining land of another, at least not until twenty-one years have elapsed since the house first stood on the excavated land, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land, of such right to support, may be inferred, for rights of this sort can have their origin only in grant. *Partridge* v. *Scott*, 3 M. & W. 220; 1 H. & H. 31; 7 L. J., Ex. 101.

**Surface and Minerals belonging to Different Owners.**]—Where the surface of land belongs to one man, and the minerals underneath it belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. *Humfries* v. *Brogden*, 15 Q. B. 739; 20 L. J., Q. B. 10; 15 Jur. 124.

If the surface, while unincumbered by buildings and in its natural state, subsides and is injured by the removal of the subjacent mineral strata, although the operation may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Ib.*

Where the surface of land and the minerals under it belong to different owners, the owner of the surface is primâ facie entitled to support from the subjacent strata; and the owner of the minerals in working them is bound to leave sufficient support for the surface in its natural state. *Smart* v. *Morton*, 5 El. & Bl. 30; 3 C. L. R. 1004; 24 L. J., Q. B. 260; 1 Jur. (N.S.) 825.

**Adjacent and Subjacent Mines—Rights of Owners.**]—The rights and obligations of the owner or occupier of adjacent and subjacent mines are not the same. The surface owner is entitled, as against the occupier of adjacent mines or surface, to that support only which the adjacent land and mines afford to his property in its natural condition, and can acquire a right to support for buildings on his land only by possession or enjoyment for twenty years. The occupier, therefore, of adjacent mines, working them so as to subvert buildings on the surface, is not liable to an action unless the buildings have existed for twenty years before the working which has caused the injury; whereas the surface owner may maintain an action against the subjacent mine occupier for an injury to buildings on the surface, however recently erected, if it is before the commencement of the title and possession of the occupier of the mines. *Richards* v. *Jenkins*, 18 L. T. 437; 17 W. R. 30.

**Damage to Land not immediately adjoining.**]—When the working of mines, in however careful a manner, has occasioned the subsidence of the land of another, although not immediately adjoining, damages may be recovered in respect of the injury to buildings thereon erected or enlarged within twenty years, provided their weight did not occasion or contribute to the

subsidence. *Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J., Ex. 102; 3 L. T. 746; 9 W. R. 615.

In 1833 a manufactory was erected on a close, and in 1841, and between that time and 1849, the building was enlarged. In 1843 the close and buildings, which were leased for a term, which expired in 1851, were conveyed in fee by S., the owner, to C. C. died in 1849, and in 1851 the devisees under his will conveyed the close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent from the premises, and upon the sale thereof obtained the full value, without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands near to, but not adjoining the close on which the building stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to 1852, but the subsidence of the ground continued, the consequence of the previous mining operations. The mining was skilfully conducted, and the buildings did not contribute to the subsidence. In 1855 the plaintiff brought an action against the defendant:—Held, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase. *Ib.*

Held, also, that the devisees of C. might maintain an action for the injury to their reversion during the subsistence of the lease as trustees, and for the benefit of the vendee. *Ib.*

### b. Inundation of Mines.

**Liability for Operations causing Damage.**]—A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. He desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine:—Held, that A. was entitled to recover damages from B. in respect of this injury. *Rylands* v. *Fletcher*, 37 L. J., Ex. 161; L. R. 3 H. L. 330; 19 L. T. 220.

A mine-owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence. *Smith* v. *Musgrave* or *Fletcher* v. *Smith*, 47 L. J., Ex. 4; 2 App. Cas. 781; 37 L. T. 367; 26 W. R. 83.—H. L. (E.)

But when for his own convenience he does something, e.g., diverts the course of the stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability. *Ib.*

A.'s mine was flooded by water which had, after an unusual rainfall, accumulated in an excavation made by B. on his land, and had escaped thence through his mine into A.'s, which was situated at a lower level:—Held, that although B. in making the excavation had no intention of collecting water therein, and although he had provided an outlet for such an amount of water as might be looked for in ordinary seasons, he was liable for the damage sustained by A. *Ib.*

The defendants, the owners of a mining property, sank a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, and had thence percolated into the plaintiff's mines. The defendants then made a borehole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on the defendants' ground, whence it percolated into the plaintiff's works in the same way in which it would have done if neither shaft nor borehole had ever been made:—Held, that the defendants had not by making the shaft so appropriated the water as to lay themselves under an obligation to keep it from coming upon the plaintiff's land, and that, as the effect of the defendant's operations was not to throw upon the plaintiffs' land any burden which it had not borne before, the plaintiffs' case failed. *West Cumberland Iron and Steel Co.* v. *Kenyon*, 48 L. J., Ch. 793; 11 Ch. D. 782; 40 L. T. 703—C. A.

**Mines excepted out of Demise.**]—Where mines were altogether excepted out of a demise of the surface:—Held, that the rights of the owner of the surface and the owner of the mines did not in any way differ from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in motion by his neighbour's excavations; for it makes no difference whether the respective closes are adjacent vertically or laterally, and the grant of the service cannot carry with it more than the ownership of the entire soil would. *Ballacorkish Silver, Lead and Copper Mining Co.* v. *Dumbell*, 43 L. J., P. C. 19; L. R. 5 P. C. 49; 29 L. T. 658; 22 W. R. 277—P. C.

**Action for Injuries done by, when Maintainable.**]—The defendants worked mines in two places (A. and B.), B. being to the deep of A., towards which the water from A. would naturally flow in a proper course of working, and to

save pumping, stopped up the only opening between A. and B., so as to dam up the water in A., which they abandoned. The water thus dammed up rose so high as to overflow by natural gravitation into the plaintiffs' mines, through openings made by their predecessors trespassing in the defendants' mines:—Held, that the plaintiffs were not entitled to any relief, but inasmuch as the defendants had in the first instance, and until restrained by injunction, used artificial means (pipes) to send the water to the plaintiffs' mines, the bill was dismissed without costs. *Lomax* v. *Stott*, 39 L. J., Ch. 834.

The rule that a mine-owner must protect himself against water flowing from a neighbouring mine in the ordinary course of mining operations has no application to a case where the consequence of a man's mining operations is the tapping of a river bed, and the precipitating of the water of the river into his own mine and thence into that of his neighbour. *Crompton* v. *Lea*, 44 L. J., Ch. 69; L. R. 19 Eq. 115; 31 L. T. 469; 23 W. R. 53.

A bill alleged that the result of certain mining operations of the defendant must inevitably be the tapping of a river bed, and the consequent flooding of the mines of the defendant and the plaintiff; and it further alleged, in substance, that the operations in question were not legitimate mining operations, and could not result in any good to the defendant; and it prayed for an injunction against the defendant:—Held, that the bill was sustainable. *Ib.*

The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage:—Held, that the party excavating was liable in trespass for breaking into the neighbouring mine, but not in an action on the case for omitting to close up the aperture on his neighbour's soil, though a continuing damage resulted from its being unclosed. *Clegg* v. *Dearden*, 12 Q. B. 576; 17 L. J., Q. B. 233.

An owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. But he has no right, by pumping or otherwise, to be an agent in sending water from his mine into the adjoining mine. *Baird* v. *Williamson*, 15 C. B. (N.S.) 376; 33 L. J., C. P. 101; 10 Jur. (N.S.) 152; 9 L. T. 412; 12 W. R. 150.

A railway company, under the authority of an act, took for its line ground lying over mines, not worked, belonging to a former owner of the surface. In order to gain the level of its line, the company took away a stratum of clay, and left a surface of porous rock; they carried on the line at a slight ascent, to a brook at some distance, over which they carried the line by a flat bridge, not constructed so as to contain the waters in times of flood. Between this brook and the surface of the mine there was originally a rising ground, through which the company made a cutting for the level of its line. Afterwards, the owner of the mines began to work them, and the line began to sink; the company kept up the level of the line by heaping ashes and such substances thereon, and on the drains by the side of the line, which had also sunk. The company was bound to keep up these drains, but after they had sunk did not. A flood came, and the waters of the brook, where it is crossed by the bridge, overflowing the girders, were carried down along the hollow of the line and of the drains to the spot overlying the mines, and sinking through the porous rock, deluged the mines, and stopped the works:—Held, that the owner of the mines had a right of action against the company for the injuries arising from both the overflow from the brook and the fall of rainwater on the spot, and the overflowings of springs laid open in the cutting, and that his remedy did not lie for compensation under the act. *Bagnall* v. *L. & N. W. Ry.*, 1 H. & C. 544; 31 L. J., Ex. 480; 9 Jur. (N.S.) 254; 9 L. T. 419; 10 W. R. 802—Ex. Ch.

The lessees of a colliery, being in possession of other mines adjoining, and to the rise of a particular mine, worked the mine by drivings from their own mine, and in exercise of powers contained in their lease made a channel through which the water flowed from their own to the mine by gravitation:—Held, that they were not liable to make compensation for damage caused by the water so flowing. *Jegon* v. *Vivian*, 40 L. J., Ch. 389; L. R. 6 Ch. 742; 19 W. R. 365.

A declaration stated that the plaintiffs and defendants were in possession of coal mines abutting upon each other; that the defendants, before the committing of the grievances, had trespassed upon the plaintiffs' mines, and carried away quantities of coal; that after the trespasses quantities of water accumulated in the defendants' mine, and would have inundated the plaintiffs' mine unless a sufficient barrier existed; that the defendants, by their trespasses, carried away quantities of coal, which, but for those trespasses, would have been suffered to remain and would have constituted a barrier, preventing the water in the defendants' mine from inundating the plaintiffs' mine; that, as the defendants had by their trespasses deprived the plaintiffs of their barrier, it became the defendants' duty to make such provision that none of the water accumulated in their mine should flood the plaintiffs' mine. Breach, that the defendants neglected to make such provision, whereby the water accumulated in their mine, flooded the plaintiffs' mine, and prevented them from working the same:—Held, that an action on the case would lie for the injury; and semble, that the defendants' duty was properly described in the declaration. *Firmstone* v. *Wheeley*, 2 D. & L. 203; 13 L. J., Ex. 361.

A. and B. were lessees under the same landlord of the minerals under two adjacent parts of the same estate. The soil over the mines was in its natural condition impervious to water. B. so worked his mine that the surface of the ground cracked and sank, and the rainfall and surface water flowed through the fissures and found its way into A.'s mine, which was at a lower level than B.'s:—Held, that B. was not liable for the damage so done in the natural course of user of his own land. *Wilson* v. *Waddell*, 2 App. Cas. 95; 35 L. T. 639—H. L. (Sc.)

Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coalfield, the injuries being entirely from gravitation and percolation are not a valid ground for any claim of damages. *Ib.*

**Right to Injunction.**]—On a bill for an injunction to protect the plaintiffs' coal mines from injury by the water flowing to them from the defendants' colliery, the court, on motion, granted an injunction restraining the defendants from working their coal mines in any places which might injure or endanger the plaintiffs' mines until answer or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence and the cause was brought to a hearing, when the court refused until the plaintiffs had established their right at law to make the injunction perpetual, but retained the bill for a year, giving the plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the meantime. *Beaufort* (*Duke*) v. *Morris*, 6 Hare, 340. Varied on appeal, 2 Ph. 683; 12 Jur. 614.

In a suit for an injunction to restrain the defendant from making a drift from his colliery, which would have the effect of conveying water from his colliery to the colliery of the plaintiff, the injunction was granted, the bill retained for a year, with liberty for the plaintiff to bring such action as he might be advised. The plaintiff brought his action on the case for damages, but failed in the action in consequence of its appearing from the evidence, that, by the plaintiff having ceased to work his engines before the making of the drift, the water in his own colliery had risen above the level of the water in the defendant's colliery. The plaintiff therefore failed in proving actual damage; but the question as to the legal right to make the drift was not decided. The answer stated that the drift was completed, and that no injury had arisen to the plaintiff. Lord Chancellor refused to direct an issue or a special case, and dismissed the bill, no injury from any future acts of the defendant being apprehended. *S. C.*, 14 Jur. 607.

Injunction granted, prohibitory in form, but mandatory in its effect. Tenant of a mine restrained, on motion, from permitting a communication with an adjoining mine to continue open, and water to flow through the same, the effect intended being to compel the defendants to close the communication. *Mexborough* (*Earl*) v. *Bower*, 7 Beav. 127.

The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein, that they had caused the neighbouring and adjoining mine to be flooded, and from such openings they had also abstracted coal from their neighbours' mine, and sold the same for their own benefit. An injunction was granted to restrain them from further proceeding: to stop up the existing openings and cuttings; from making another further opening which would have the effect complained of; for compensation for what damage had been sustained, and for an account of the value of the coal abstracted. *Plant* v. *Stott*, 21 L. T. 106.

The barrier between two mines having been perforated, the owner of one of them artificially conducted his water so as to pass by the perforations into the other, that mode of removing it from his mine being most beneficial to himself, thereby causing irreparable damage to the plaintiff:—Held, that the court would, on an interlocutory application, grant a mandatory injunction, so as to keep things in the state in which they were ante litem motam until the hearing. *Westminster Brymbo Coal and Coke Co.* v. *Clayton*, 36 L. J., Ch. 476.

2. GRANT OF SURFACE—RESERVATION OF MINES.

**Generally.**]—No presumption of a grant of mines against an express reservation on a sale many years ago, merely from permitting expenditure without claim. *Norway* v. *Rowe*, 19 Ves. 156; 12 R. R. 157.

Primâ facie, the owner of the surface is entitled to the surface itself, and all below it, ex jure naturæ; and those who claim the property in the minerals below must do so by some grant or conveyance by him, or from the crown. *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 49; 6 Jur. (N.S.) 965; 2 L. T. 642. Affirming 5 W. R. 820—Ex. Ch.

The rights of a grantee of the minerals, by whomsoever granted, must depend upon the terms of the deed of conveyance; but primâ facie it will be presumed, if the minerals are to be enjoyed, that a power to get them was also granted or reserved as a necessary incident. *Ib.*

Where the owner conveys land to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested at the date of the conveyance. *Hamilton* (*Duke*) v. *Dunlop*, 10 App. Cas. 813—H. L. (Sc.)

When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to shew clearly that he is intended to have that power. *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957. S. P., *Harris* v. *Ryding*, 5 M. & W. 60; 8 L. J., Ex. 181.

If the owner of a piece of land sells the surface and reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power in such language that the court may be able to say from the titles that such was clearly the intention of the parties. The rule established in *Rowbotham* v. *Wilson* (8 H. L. Cas. 348) and *Buchanan* v. *Andrew* (L. R. 2 H. L. (Sc.) 286) cited. *Aspden* v. *Seddon* (L. R. 10 Ch. 394) approved, but distinguished. *Dixon* v. *White*, 8 App. Cas. 833—H. L. (Sc.)

A lease contained an exception in favour of the lessor, of the mines and quarries under the demised property, with full power to win and work, and also with free way leave and passage to, from and along the same. The lessor covenanted, in using the excepted rights, to do as little damage and spoil to the soil as possible:—Held, that the lessor was not entitled so to work the reserved mines as to let down the surface. The right to support is incident to a grant of the surface, and cannot be taken away, except by a clear indication in the instrument of such an intent. *Proud* v. *Bates*, 6 N. R. 92; 34 L. J., Ch. 406; 11 Jur. (N.S.) 441; 13 L. T. 61.

Where an owner of land has granted the surface, reserving the coal mines and seams of coal, and a right of entry for the purpose of working and winning the same, making compensation for the damage caused in so doing, he is not entitled to work out all the coal so as to cause the surface to sink, unless the established course and practice of good mining at the time of the reservation justifies him in so doing.

*Smart* v. *Morton*, 5 El. & Bl. 30; 3 C. L. R. 1004; 24 L. J., Q. B. 260; 1 Jur. (N.S.) 825.

A deed of the 9th December, 1671, which severed the surface from the minerals, contained a reservation of the mines to the grantor, with free and full power and liberty to work, sink, dig for or win the same, and to drive drifts, make water-courses, or do any other act necessary or convenient for the working, winning, or getting the same, with a covenant by the grantor to pay to the grantee treble the damages, loss, or prejudice which the grantee should sustain by reason of such digging or working:—Held, that the reservation was subject to the implied right of the grantee of the surface to support from the minerals, and did not empower the grantor to remove the whole of the minerals without leaving a support for the surface. *Ib.*

A. conveyed to B. in fee, a messuage, buildings, yard, gardens and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the lands and hereditaments; with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains necessary for working the coal; except as to such lands as lay within 150 yards of the messuage and buildings, and except any homestead:—Held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and homesteads, and within 150 yards of the same, but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead. *Bowler* v. *Woolley*, 15 East, 444.

A., being seised in fee of lands, granted the lands to P., his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the premises, with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get the mines and every part thereof, and to sell, dispose of, take, and convey away the same at their free will and pleasure; and also to sink shafts for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the premises, and the pasture and crops growing thereon":—Held, that under this reversion, A. was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface. *Harris* v. *Ryding*, 5 M. & W. 60; 8 L. J., Ex. 181.

Where mines were altogether excepted out of a demise of the surface:—Held, that the rights of the owner of the surface and the owner of the mines did not in any way differ from those of the owners of adjoining closes, who are strangers, in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in motion by his neighbour's excavations; for it makes no difference whether the respective closes are adjacent vertically or laterally, and the grant of the surface cannot carry with it more than the ownership of the entire soil would. *Ballacorkish, Silver, Lead and Copper Mining Co.* v. *Dumbell*, 43 L. J., P. C. 19; L. R. 5 P. C. 49; 29 L. T. 658; 22 W. R. 227.

By a deed dated in 1783, the plaintiff's predecessors in title revoked the old uses of certain lands, and granted and appointed such lands to the defendant's predecessors in title and his heirs, saving and reserving to themselves and their heirs full and free liberty to get and carry away the minerals thereunder:—Held, that the clause of reservation operated, not as an exception of the minerals, but as a regrant of a non-exclusive licence to get them, and that the defendant could not be restrained from working the mines. *Sutherland (Duke)* v. *Heathcote*, 61 L. J., Ch. 248; [1892] 1 Ch. 475; 66 L. T. 210—C. A.

**Contract Expressly Exempting from Liability.**] A feu of land was granted reserving the subjacent minerals, and stipulating that the feuar should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar is not entitled to an interdict prohibiting the workings complained of, as he has by his contract bound himself to submit to the consequences. *Buchanan* v. *Andrew*, L. R. 2 H. L. Sc. 286.

**Mode of Working.**]—In a conveyance of land in Northumberland, a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, &c.:—Held, that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry. *Bell* v. *Wilson*, 35 L. J., Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N.S.) 263; 14 L. T. 115; 14 W. R. 493.

Case in which grants of land reserving the minerals, each reservation varying in substance and expression, were held to have secured or not to have secured, a right to carry outside minerals underneath and through the land granted. Remarks as to whether the rights reserved were rights of property, or rather in the nature of privileges, servitudes or easements. *Ramsay* v. *Blair*, 1 App. Cas. 701—H. L. (Sc.)

When in a feu charter the superior reserves the coal and limestone, with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or an absolute ownership, and not a mere servitude or easement; the surface and the minerals becoming separate tenements severed in title, and in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent. *Hamilton (Duke)* v. *Graham*, L. R. 2 H. L. (Sc.) 166.

—— **"Unnecessary Interference."**] — The owner of land under which there were several strata of coal, demised one of the upper strata to the plaintiff, reserving to himself and his lessees the right of working any coal not included in that demise, and the same powers and privileges with respect to such last-mentioned coal as if that demise had not been made; provided always, that in exercising such powers and privileges the working of the coal then demised should not be prevented or unnecessarily interfered with, and that compensation should be made to the plaintiff for any necessary interference with the workings. The landowner afterwards demised some of the strata of coal, underlying the coal demised to the plaintiff, to the M. company.

The plaintiff brought an action for an injunction against the landowner and the company :—Held, by Kay, J., on the construction of the lease, that working under a barrier between the demised coal and an adjoining worked-out mine, in such a way as might probably endanger the barrier, and thereby let in a sufficiently large quantity of water to delay and impede the working of the upper strata, was an "unnecessary interference" within the meaning of the proviso in the lease. But held, by the court of appeal, that the proviso in the lease was unintelligible and could not determine the rights of the parties; that if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms; and that on that ground the plaintiff was entitled to an injunction if he could prove that the works threatened by the defendants would in all probability affect the security of his mine. *Mundy* v. *Rutland (Duke)*, 23 Ch. D. 81; 31 W. R. 510—C. A. Affirming 46 L. T. 477.

**Estate Sold in Lots.**]—The conveyance of an estate in a mining district, sold in lots, contained an exception of all mines and minerals under the land included in the lot conveyed, with full power for the grantor to work, get, and dispose of them, without entering upon the land sold, and without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted mines or minerals, and without being liable to any action or suit for any such injury :—Held, that a purchaser of two of the lots was not entitled against the grantor to either vertical or lateral support for the surface of his land. *Williams* v. *Bagnall*, 12 Jur. (N.S.) 987; 15 W. R. 272.

**Covenant or Condition.**]—The plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. The defendant, claiming title under a demise from a descendant of the grantor, had for more than twenty years worked from mines of his own under adjacent lands into, and had taken coals from, the mines under the plaintiff's lands :—Held, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it. *Ashton* v. *Stock*, 6 Ch. D. 719; 25 W. R. 862.

**Buildings to be Erected.**]—Upon a conveyance of land for the express purpose that buildings or other works shall be erected upon it—the right of working minerals being reserved to the vendor—the purchaser is entitled to support from the adjacent and underlying soil, not only for the surface land, but for the buildings erected upon it; and this right is not affected by the circumstance that the conveyance is to a company taking the land under compulsory powers, and not from the vendor voluntarily. *Elliot* v. *North Eastern Ry.*, 10 H. L. Cas. 333; 32 L. J., Ch. 402; 9 Jur. (N.S.) 555; 8 L. T. 337; 11 W. R. 604.

The vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. *Siddons* v. *Short*, 46 L. J., C. P. 795; 2 C. P. D. 572; 37 L. T. 230.

A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability :—Held, ground for an injunction against A. and C., although no actual damage had been sustained by B. *Ib.*

The holder of a building lease, where minerals are reserved, has a right to dig foundations for buildings about to be erected and dispose of the materials dug out, but not to do so in order to improve the surface as a building site. *Robinson* v. *Milne*, 53 L. J., Ch. 1070.

A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build and keep and repair the cotton mill :—Held, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured. *Aspden* v. *Seddon*, 44 L. J., Ch. 359; L. R. 10 Ch. 394; 32 L. T. 415; 23 W. R. 580.

**Custom whether Consistent with Reservation.**]—A farm was let under a written agreement, reserving to the landlord "all mines and minerals, sand, quarries of stone, brick, earth, and gravel pits." A local custom (which, it was suggested, had grown up within the last thirty or forty years) allowed tenants of such farms, let with a similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry, and to sell them for their own benefit. If the flints were not turned up and removed such farms could not be properly cultivated :—Held, that the custom was reasonable and valid; and when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines and minerals" included such flints. *Tucker* v. *Linger*, 52 L. J., Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40—H. L. (E.)

**Compensation in respect of Operations.**]—W. purchased lands, formerly part of the waste of a manor, which were sold under a local inclosure act to defray the expenses of the act. The lord of the manor leased the mines under the lands so sold to K., who commenced working by sinking shafts. W. filed a bill against the lord of the manor and K., to restrain the working of the mines, or at least such a working as to cause a subsidence of the surface. It having been proved that the mines could not effectually be worked without causing a subsidence of the surface :—Held, that the lord of the manor, or his tenant, had a right to work the mines, to an extent which might cause the utter destruction of the land above, making compensation to the owner of the surface for the damage done. *Wakefield* v.

*Buccleuch* (*Duke*), 39 L. J., Ch. 441; L. R. 4 H. L. 377; 23 L. T. 102.

Semble, that there may be a valid claim by custom, or prescription in a manor, for the lord or his licensees to work mines so as to destroy the tenants' surface. *Ib.*

The owner in fee of an estate granted away a portion of it, which ultimately became the property of the plaintiff, but reserved a rent-charge (subsequently redeemed), and also the minerals under the land so granted, and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land. The grantee (for the better securing of the rent-charge) covenanted to build a mill on the land granted to him. The owner in fee afterwards granted to the defendants' predecessor in title the minerals, rights and liberties so reserved, and also the other and adjacent portion of the estate. The defendants, who took with notice of the agreement as to the payment of compensation, worked the minerals under the plaintiff's land, and also the minerals under their own land, and by the operation of one or other of these workings, or by their joint operation, let down the surface of his land, and so injured the mill which had been built there in accordance with the covenant:—Held, first, that the right to work the subjacent mines being subject to the condition of paying compensation, the plaintiff could maintain an action for the injury done to the mill by the working of those mines. *Aspden* v. *Seddon*, 46 L. J., Ex. 353: 1 Ex. D. 496; 36 L. T. 45; 25 W. R. 277—C. A.

Held, secondly, that if the injury arose from the working of the mines under the adjacent lands, or from the combined effect of working those mines and the subjacent ones, the plaintiff was still entitled to recover. *Ib.*

A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantors should be prevented, hindered, or obstructed in the exercise of the powers reserved, and also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations:—Held, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage. *Mordue* v. *Durham* (*Dean*), 42 L. J., C. P. 114; L. R. 8 C. P. 336; 28 L. T. 593.

By a deed of 1857, A., who was tenant for life under the will of S., conveyed (under a power) land to B. in fee, with a reservation out of the grant of "all and every the seam or seams of coal and other minerals under the hereditaments granted, with power to win, work, and carry away the same under or over any part of the hereditaments and premises, A., or the person or persons for the time being entitled thereto, and his or their assigns, paying to B., his heirs and assigns compensation for any damage which he or they may sustain," and a covenant by A. that he had not done or permitted any act or thing whereby the premises or the like should or might be incumbered or prejudicially affected. And B. covenanted, for himself, his heirs and assigns, "that the hereditaments and premises conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls to be not less than eighteen feet high, and to be in uniformity with the street." In 1844, S., A.'s testator, demised to C. and D. "a colliery and coal mines and seams of coal, as well opened as not opened" (including and comprising all seams of coal under the land conveyed by the deed of 1857), with full power to the lessees, their executors, administrators, and assigns, to win, work, and carry away the seams of coal for a term of years not yet expired. The plaintiff became possessed of the land comprised in the deed of 1857, and built four houses thereon; and, whilst he was so possessed, the houses were injured by the working and carrying away by the assignees under the lease of 1844 of the seams of coal thereunder. He thereupon brought an action against A., claiming compensation under the reservation contained in the deed of 1857. A. pleaded as to the damages and injury done to the part of the piece of ground on which the houses were built, and to the houses, and to the compensation claimed, that such damage and injury were occasioned by reason of the houses having been erected thereon:—Held, that the compensation clause in the deed of 1857 extended to houses thereafter built upon the land, and consequently that the plea was no answer. *Berkley* v. *Shafto*, 15 C. B. (N.S.) 79.

### 3. Wrongful Working.

**By Railway — Amalgamation.**] — Questions having arisen in 1862, between the lessees of two adjoining collieries, one of such lessees being the West Hartlepool Railway Company, as to the boundaries of their respective collieries, new boundary maps were prepared, and in 1864 it was by an agreement mutually agreed between the parties that all claims on account of damage of every kind, whether by trespass or otherwise, should be condoned. Pending that agreement, an act of parliament was passed in 1863, under which the West Hartlepool Company were to sell their collieries within a period of five years and in 1865 another act was passed whereby the West Hartlepool Company became amalgamated with, and all their assets, debts, and liabilities, and engagements were transferred to, the railway company. In 1870 the plaintiffs for the first time discovered, and the evidence distinctly showed, that in 1863, after the boundaries had been settled, the West Hartlepool Company had broken through the barrier between the collieries

and worked out the plaintiffs' coal. Upon a bill filed for an account of the coal worked by the West Hartlepool Company, and for damages in respect of the injury sustained by the breaking down of the barrier :—Held, that the working of the colliery by the West Hartlepool Company was not ultra vires, as the power to work for a period of five years must be implied from the authority to sell, and that whatever liability they were under at the time of their amalgamation with the railway company, was transferred to the defendant company by the act of 1865. *Ecclesiastical Commissioners* v. *North Eastern Ry.*, 47 L. J., Ch. 20 ; 4 Ch. D. 845 ; 36 L. T. 174.

**Where "Trespass" will Lie.**]—Trespass, and not case, will lie for encroaching on a lead mine, though the plaintiff has no property in the soil above the mine, but only a liberty of digging. *Harker* v. *Birkbeck*, 1 W. Bl. 482 ; 3 Burr. 1556.

**Action of Trespass—What sufficient Possession as against Wrong-doer.**]—D. and H. agreed between themselves, in writing, to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, and H. the minerals at one-fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The lands were duly conveyed to D. by the owner, H. being a party to the purchase deed, and executing a release of all his interest in the lands to D. Afterwards, by an indenture of the 12th July, 1834, D. granted, bargained, and sold to H., his executors, administrators and assigns, all the minerals lying under the lands, upon terms substantially the same as those contained in the previous agreement between D. and H. The indenture of the 12th July, 1834, was not inrolled as a bargain and sale, and there was no livery of seisin to make it operate as a feoffment. There were seven seams of coal and minerals lying under the lands, and soon after the execution of the deed, H. began to work and get the coal under the lands, and continued so to do between 1834 and 1844. He did not, however, go below the two first seams of coal, and on his ceasing to work in 1844, H. left tramways, implements, &c. in the tunnels and levels he had made. In 1855, H. by deed, conveyed the minerals (except the two first or upper seams), with power to dig for and get the coal, to the plaintiffs, who shortly afterwards entered and bored down below the two first seams, in order to try for, but they did not work the coal. D. died in 1848, and in 1857 his devisee and heir-at-law, by deed, granted the lands (except the coal thereunder theretofore sold and conveyed to H.) to S. subject as to the beds of coal under the same to the indenture of the 12th July, 1834. In 1872, S. granted a lease of the coal under the lands to the defendants, and they entered and worked, and got coal under the lease in 1872. On the 1st January, 1873, the surviving trustee for sale of D. granted and confirmed unto S. and his heirs, all the seams and beds of coal lying under the lands, subject to such right or interest as legally passed to H., his executors, administrators or assigns, under the indenture of the 12th July, 1834. H. died in 1861 :—Held, that the plaintiffs, through H., had sufficient possession of all the seams of coal to entitle them to maintain trespass against the defendants, who were mere wrong-doers, for intruding upon the plaintiffs' mines. *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186—C. A.

**Damages for Abstracting — Measure of.**] — When coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser, in the absence of any suggestion of fraud, will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements, not including any profit or trade allowances, for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *United Merthyr Collieries Co., In re, Powell Duffryn Steam Coal Co.'s Claim, Ex parte*, L. R. 15 Eq. 46 ; 21 W. R. 117.

When a coal mine has been worked by a trespasser, but under a bonâ fide claim of title, in taking an account of the coal wrongfully worked, he will be allowed to deduct the cost of getting and severing the coal as well as the cost of bringing it to the pit's mouth. *Jegon* v. *Virian*, 40 L. J., Ch. 389 ; L. R. 6 Ch. 742 ; 19 W. R. 365.

When a vendor of a coal mine, against whom a suit for specific performance was brought, had, during his delay of completion, worked the mine for his own benefit :—Held, that the purchaser was entitled to compensation on an estimate of the market value of the coal in situ, i.e. the value at the place where it was to be sold, less the cost of severing and taking it from the mine to that place. *Brown* v. *Dibbs*, 37 L. T. 171 ; 25 W. R. 776—P. C.

A defendant wrongfully worked the plaintiff's coal so that some coal left in large pillars was rendered partly by the effect of crushing less valuable to work :—Held, that inasmuch as the physical constitution of the unworked coal was changed, damages would be given for the injury to the unworked coal. *Williams* v. *Raggett*, 46 L. J., Ch. 849 ; 37 L. T. 96 ; 25 W. R. 874.

The lord of a manor, in which there was no custom authorising him so to do, entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, and dug for and carried away coprolites. A large trench was dug, which at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass, was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after filing the bill, and until the coprolites were exhausted :—Held, that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expense of the working, and such a sum by way of profit as would have induced a stranger to undertake the working. *Att.-Gen.* v. *Tomline*, 46 L. J., Ch. 654 ; 5 Ch. D. 750 ; 36 L. T. 684 ; 25 W. R. 802.

The owner of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it :—Held, that the landowner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own mines and carried under his land. *Fothergill* v. *Phillips*, L. R. 6 Ch. 770.

In an action for digging the plaintiff's coals

in his mine, and taking and converting them, the proper measure of damages is the value of the coals when first severed from the mine. *Morgan* v. *Powell*, 3 Q. B. 278 ; 2 G. & D. 721 ; 11 L. J., Q. B. 263 ; 6 Jur. 1109.

Where a party, in working his coal mine, broke through the barrier and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale :—Held, in trespass for such working, that the proper estimate of damages was the value of coal so raised without deducting the expense of getting it. *Martin* v. *Porter*, 5 M. & W. 352 ; 2 H. & H. 70.

In a suit in equity for an account of coal wrongfully worked by the defendant, where the working was inadvertent and without fraud, the court, in assessing the compensation for the coal got by him, directed him to be charged only with the fair market value of the coal, as if the coal-field had been purchased by him of the plaintiff. *Hilton* v. *Woods*, 36 L. J., Ch. 941 ; L. R. 4 Eq. 432 ; 16 L. T. 736 ; 15 W. R. 1105.

So in an action for cutting into and carrying away land, the measure of damages is the value to the plaintiff of the land so taken, not the expense which would be incurred in restoring it to its original condition. *Jones* v. *Gooday*, 1 D. (N.S.) 50 ; 8 M. & W. 146 ; 10 L. J., Ex. 275.

In assessing the amount of damages to be paid where another person's coal has been wrongfully taken by an adjoining mine-owner, if the wrongful working was by inadvertence simply, or under a bonâ fide mistake of title, the wrongful worker is entitled to deduct from the market value both costs of severance and of bringing to bank. If the wrongful act has been fraudulent, negligent, wilful, or wholly unauthorised and unlawful, only the costs of bringing to bank are allowed. But in no case is the wrongful getter deprived of the costs of bringing to bank. *Joicey* v. *Dickinson*, 45 L. T. 643—C. A.

In an action for taking coals from a mine, where the defendant is a mere wrongdoer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals from the mine. *Wild* v. *Holt*, 9 M. & W. 672 ; 1 D. (N.S.) 876 ; 11 L. J., Ex. 285.

A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When A. purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior ; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surroundings land to R. and C. They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under A.'s acre and a half ; and in so doing so damaged the surface. A. could not have worked the coal to a profit himself ; there was no person to whom he could dispose of it but to R. and C. ; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent. In a claim by A. for (1) the value of the coal ; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu ; and (3) for damages done to the houses on the surface :—Held, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by R. and C. for the surrounding coalfield ; therefore A. was entitled to the lordship on the coal excavated, calculated at that rate ; together with the payment of a sum for damage done to the houses on the surface. *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25 ; 42 L. T. 334 ; 28 W. R. 357 ; 44 J. P. 392—H. L. (Sc.)

—— **Statute of Limitations.**]—The plaintiffs, the owners of coal mines, discovered in 1872 that the defendant more than six years previously had, when working an adjoining colliery, worked a large quantity of the plaintiffs' coal by breaking their boundary. There had been no subsidence of the surface or anything to put the plaintiffs on inquiry, and the defendant, in plans which he kept of the workings in his own mine, had not marked the illegal workings :—Held, that the omission in the plans was not sufficient to constitute a case of concealed fraud so as to entitle the plaintiffs to an account and damages. *Dawes* v. *Bagnall*, 23 W. R. 690.

The plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the Hartlepool Railway Company. The boundaries of the two mines were settled by mutual agreement in 1862, and after negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides :—Held, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken. *Ecclesiastical Commissioners* v. *North-Eastern Ry.*, 47 L. J., Ch. 20 ; 4 Ch. D. 845 ; 36 L. T. 174.

Held, also, that the Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. *Ib.*

**Liability to Account.**]—A mine-owner who passes his boundary, and takes coals from his neighbour's mine, is liable to account for the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing. *Llynvi Coal Co.* v. *Brogden*, 40 L. J., Ch. 46 ; L. R. 11 Eq. 188 ; 23 L. T. 518 ; 19 W. R. 196.

When by underground working a party had taken the coal of his neighbour, a court of equity limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the onus of proof would lie on the wrongdoer to show that it was not taken within six years. *Dean* v. *Thwaite*, 21 Beav. 621.

The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the bonâ fide belief that he was about to obtain from them a contract authorising him so to work, and gave to one of the trustees notice that he was about to commence working :—Held, that the working, though no contract

was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, and in taking an account of the minerals gotten without authority the defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But from the time that notice was given to the defendant that no contract would be made with him authorising him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank. *Trotter* v. *Maclean*, 49 L. J., Ch. 256; 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.

So long as a wrongful working is to be treated as inadvertent the Statute of Limitations applies, and the account will only be directed for six years from the issue of the writ. But the onus is on the defendant to shew that minerals gotten by him were gotten before the six years. *Ib.*

The plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. The defendant, claiming title under a demise from a descendant of the grantor, had for more than twenty years worked from mines of his own under adjacent lands into, and had taken coals from, the mines under the plaintiffs' lands:—Held, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction with an account for six years. *Ashton* v. *Stock*, 6 Ch. D. 719; 25 W. R. 862.

Where a defendant had been working under a bonâ fide belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank. *Ib.*

—— **By Mortgagee**]. — The plaintiffs were mortgagees in possession of a colliery, and were also treated by the court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery and gave their sub-lessees permission to work and remove the pillars, which they did:—Held, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sub-lessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; and the foreclosure, which had been made absolute before the appeal was heard, was re-opened. *Livingstone* v. *Rawyards Coal Co.* (5 App. Cas. 25) distinguished. *Taylor* v. *Mostyn*, 55 L. J., Ch. 893; 33 Ch. D. 226; 55 L. T. 651—C. A.

When a mortgagor knows that a mortgagee in possession is working mines under the mortgaged premises, and for a number of years allows the working to go on without objection or complaint, the court will not allow him to surcharge the mortgagee with the value of the ores raised by him or his lessees, or of the surface land necessarily damaged by reason of such working. *Millett* v. *Davey*, 31 Beav. 470; 32 L. J., Ch. 122; 9 Jur. (N.S.) 392; 7 L. T. 551; 11 W. R. 176. See *Hood* v. *Easton*, 4 W. R. 786.

**Compensation Moneys — Successive Tenants for Life — Remaindermen.**] — Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for the defendant for life without impeachment of waste, with remainders over. During the life and also after the death of B., part of these minerals were won by instroke by the owners of the adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—Held, that the moneys paid in respect of the minerals so won during the respective lives of B. and the defendant, belonged to the estate of B. and to the defendant respectively. *Barrington, In re, Gamlen* v. *Lyon*, 56 L. J., Ch. 175; 33 Ch. D. 523; 55 L. T. 87; 35 W. R. 164.

**Prospective Damages.**]—When injury has been occasioned to land and buildings by mining operations under the land of an adjoining owner, the plaintiff is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from the defendant's act. As the cause of action was complete at the moment that the first damage accrued to him, the plaintiff must recover once for all in one and the same action for all damage past, present and future, resulting from that one cause of action—for the reason that no occurrence of damage subsequently, as the result of the original act of the defendant, would give a fresh cause of action. *Lamb* v. *Walker*, 47 L. J., Q. B. 451; 3 Q. B. D. 389; 38 L. T. 643; 26 W. R. 775.

There being no abstract right to the support of the adjacent land, the act of the excavating owner is only tortious when it produces and to the extent to which it produces actual damage, On the one hand, therefore, the defendant is not liable for damage which has not occurred, and which never may occur, and on the other, each fresh interference with the enjoyment of property, on the occurrence of subsequent damage, is a wrong done, and creates a further cause of action, of which the plaintiff can avail himself. *Ib.*

Case in which compensation for damage done to an estate was awarded once for all, so as to take away any right of action for subsequent damage against the defendants, who were held to be not wrongdoers, but persons exercising their rights of mining operations over the land of the plaintiff, subjecting to paying compensation for the permanent injury thereby occasioned to the said estate. *Great Laxey Mining Co.* v. *Clague*, 4 App. Cas. 115; 27 W. R. 417—P. C.

**Right of Inspection of Adjoining Mine.**]—*See* PRACTICE (INSPECTION OF PROPERTY).

**Compensation Moneys—Interest—Lapse of Time.**]—By a decree made in 1871, the defendants were declared liable in respect of coal wrongfully removed by them from under the land of the plaintiffs, and an inquiry was directed as to the quantity and value of the coal so taken. After the decree the defendants died,

and the inquiry was continued against their representatives. In 1889 the official referee reported the value of the minerals taken. In 1890, on the further consideration of the action, the plaintiffs claimed to be entitled to interest on the amount so found:—Held, first, that the action was not an action for trover or trespass de bonis asportatis, and that interest could not be claimed under s. 29 of 3 & 4 Will. 4, c. 42: secondly, that assuming interest might have been awarded by the decree on the theory that this was an equitable action to compel a wrongdoer to account for benefits accruing to his estate by reason of his wrongful act, the plaintiffs' claim was barred by lapse of time. *Phillips* v. *Homfray*, 61 L. J., Ch. 210; [1892] 1 Ch. 465; 66 L. T. 657—C. A.

**Trover for Minerals abstracted—Evidence.**]—In trover for copper ore raised under the plaintiff's land, the presumption that the right to the minerals accompanied the fee simple of the land may be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe* v. *Grenfel*, R. & M. 396; 27 R. R. 761.

Where, in trover for copper ore, it was proved that the plaintiff was in possession of land, in which he had sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft:—Held, that this was primâ facie evidence of the plaintiff's title to the ore, which must be left to the jury. *Rowe* v. *Brenton*, 8 B. & C. 737; 3 M. & Ry. 133.

The plaintiffs were lessees, under certain persons called the lords of Mold, of all mines and minerals under a large tract of waste land called Mold mountain. In trover, for ore wrongfully extracted by the defendants from a spot which the plaintiffs alleged to be part of Mold mountain:—Held, that it was not necessary for the plaintiffs to prove the title or seisin of their lessors; but that it was enough for them, as against the defendants, who were wrongdoers, to show a possession and an enjoyment by themselves under the lease; and that, for this purpose, acts of ownership exercised by the plaintiffs, by working mines on other parts of the mountain, were evidence of their right under the spot in question, being part of the waste. *Taylor* v. *Parry*, 1 Scott (N.R.) 576; 1 Man. & G. 604; 9 L. J., C. P. 298; 4 Jur. 967.

**Injunction—Right to.**]—Injunction granted where defendant, having begun to work mine in his own land, continued it into plaintiff's. *Mitchell* v. *Dors*, 6 Ves. 147.

The court will not by injunction restrain the working of mines, permitted during eight years, without directing an action. *Field* v. *Beaumont*, 1 Swan. 208.

An injunction to restrain the working of a quarry was granted as against a defendant claiming under a lease, and not denying the fact of his having worked, although the plaintiff's evidence did not distinctly prove the defendant's participation. *Bell* v. *Wilson*, 34 L. J., Ch. 572; 12 L. T. 529; 13 W. R. 708.

An injunction at the suit of a reversioner to restrain from quarrying, where a parol licence was granted by his lessee, and acts done on the faith of it, and the grantee was not a party to the suit, was refused with costs. *Donegal (Marquis)* v. *Connor*, 15 W. R. 888.

If a person only threatens to open mines, plaintiff may come into court to restrain him from doing it. *Gibson* v. *Smith*, 2 Atk. 182.

An injunction to restrain the working of valuable mines refused under the circumstances, on condition of the defendants making certain admissions for the purpose of enabling the plaintiff to bring an action, although there was reason to apprehend that if the working was continued the plaintiff's houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided. *Hilton* v. *Granville (Earl)*, Cr. & Ph. 283; 11 L. J., Ch. 388; 4 Beav. 130.

By a deed executed in 1799, the lord of a manor granted copyholds in fee, reserving all mines and minerals within and under the premises, with full liberty of ingress, egress and regress to and for the grantor, his heirs and assigns, to dig and search for, and to take, use and work the excepted mines and minerals. The lord of the manor granted a licence to certain persons to get china clay under the premises comprised in the deed of 1799, and under the adjoining waste land, and the licensees had entered on the premises, but the grantor asserted that they had done so by mistake, and that neither he nor they had any present intention of getting china clay on the premises, though he claimed to be entitled to do so:—Held, that this was such a threat as to empower the court to grant an injunction to restrain the grantor and his licensees from getting china clay from the premises comprised in the deed of grant *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.

**Tipping Mining Spoil—Land—Continuous User—Measure of Damages.**]—In assessing damages for trespass by tipping mining spoil for eight years on another's land, the value of the land to the wrongdoer for the purposes for which it was used by him must be taken into consideration. The principle of the way-leave cases, *Jegon* v. *Vivian* (40 L. J., Ch. 389; L. R. 6 Ch. 742) and *Phillips* v. *Homfray* (L. R. 6 Ch. 770), that a trespasser shall not be allowed to use another person's land without paying for it, applied on the ground that the trespasser, besides injuring the land, had also had the use of it. *Whitwham* v. *Westminster Brymbo Coal and Coke Co.*, 65 L. J., Ch. 741; [1896] 2 Ch. 538; 74 L. T. 804; 44 W. R. 698—C. A.

4. UNDER CANALS, WATERCOURSES, &C.

**Right of Support—Statutory Powers—Subjacent Minerals—Compensation.**]—Ordinarily, where land is granted by private grant for the construction of specific works, the grant, in the absence of a contrary intention appearing on the face of it, carries by implication the right of reasonable and necessary support for the works to be constructed. The same principle applies to titles and rights created by act of parliament, and, where an express statutory right is given to make and maintain a thing necessarily requiring support, the right to necessary support is, in the absence of a context pointing to the contrary, implied to accompany the right to make and maintain the thing requiring support; and, in cases where a mode of compensation is provided for the owners of the lands furnishing such

support, the reasons for implying that such right of support is intended by the act are overwhelming. *L. & N. W. Ry.* v. *Evans*, 62 L. J., Ch. 1; [1893] 1 Ch. 16; 2 R. 120; 67 L. T. 630; 41 W. R. 149—C. A.

**Security of Canal and Mines — Compensation for not Working.**]—By a section of an act empowering a company to make a canal it was provided that nothing therein contained should affect the right of any owners of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for such owners to work such mines and minerals, not thereby injuring, prejudicing, or obstructing the canal. By another section it was provided that if the owners should in pursuing such mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal company to treat and agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; and in case they should disagree then it should be lawful for certain commissioners at the request of the canal company or of such owners to summon a jury to assess what satisfaction such owners ought to receive from the canal company; and upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should by the jury be declared to extend. Owners of a coal mine under and near the canal having given the canal company notice that they were going to work the coal, the company declined to purchase or pay compensation for leaving the coal, and the owners then worked the coal, and thereby damaged the canal. The working was in the usual mode, without negligence and without doing unnecessary damage save in not leaving sufficient support:—Held, that the owners of the mine had a right under the act to initiate proceedings and to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for working the mine to the injury of the canal. *Dudley Canal Co.* v. *Grazebrook* (1 B. & Ad. 59) distinguished. *Cromford Canal Co.* v. *Cutts* (5 Railw. Cas. 442) approved. *Knowles* v. *Lancashire and Yorkshire Ry.*, 59 L. J., Q. B. 39; 14 App. Cas. 248; 61 L. T. 91; 54 J. P. 103—H. L. (E.)

Where a private act of parliament, authorising the contruction of a canal, empowers the canal company to give notice to mine-owners by the side of the canal to discontinue working adjacent minerals if the continued working is likely to damage the canal, and empowers the mine-owners to discontinue working if they consider that damage to the mines will probably result from further working, and in each case provides for compensation for the coal unworked—but there is no statutory prohibition against working—the mine-owners are not entitled to discontinue working and claim compensation on the ground that some injury may be caused to the canal by such working. *Cromford Canal Co.* v. *Cutts* (5 Railw. Cas. 442), and *Knowles* v. *Lancashire and Yorkshire Ry.* (14 App. Cas. 248), discussed and distinguished:—Semble, that if the private act imposed a prohibition upon working the mines to the danger of the canal, the canal company could not waive it. *Chamber Colliery Co.* v. *Rochdale Canal Co.*, 64 L. J., Q. B. 645; [1895] A. C. 564; 11 R. 264; 73 L. T. 258—H. L. (E.)

A special act empowered certain persons to make a canal, the mines and minerals under the lands taken being reserved to the owners, with power to work them not thereby injuring the canal; and it was provided that if the owners in working any mines near or under the canal should endanger or damage it, the canal proprietors might require them to desist on making compensation. The plaintiffs were owners of mines lying under the canal, and also under lands adjacent thereto:—Held, that so far as their adjacent mines were concerned, and notwithstanding that they were also owners of subjacent mines, the plaintiffs were under no statutory liability towards the canal proprietors not to damage or endanger the canal, and consequently that they had no corresponding right to claim satisfaction for the minerals left. *New Moss Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry.*, 66 L. J., Ch. 381; [1897] 1 Ch. 725; 76 L. T. 231; 45 W. R. 493.

—— **Undertaking by Canal Proprietors not to Sue.**]—In such a case, if the canal proprietors undertake to allow the owners of subjacent minerals to work them, and not to sue for any damage consequent thereon to the canal (it being admitted that such damage will be comparatively trifling, and will not interfere with the navigation), the owners are not entitled to have it ascertained what portion of the subjacent minerals should be left, and what compensation should be paid therefor by the canal proprietors. *Chamber Colliery Co.* v. *Rochdale Canal Co.* (63 L. J., Q. B. 811; 64 *Ib.* 645; [1894] 2 Q. B. 632; [1895] A. C. 564) followed. *Knowles* v. *Lancashire and Yorkshire Ry.* (59 L. J. Q. B. 39; 14 App. Cas. 248) considered. *Ib.*

**Waterworks — Prospective Prevention of Working through Leakage—Compensation.**]—Under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), compensation for the prospective prevention of the working of a mine by reason of leakage from a reservoir cannot be awarded at any time before the working has approached the limits mentioned in s. 22. *Holliday* v. *Wakefield Corporation*, 60 L. J., Q. B. 361; [1891] A. C. 81; 64 L. T. 1; 40 W. R. 129; 55 J. P. 325—H. L. (E.). *And see also* WATER.

**Refusal to Purchase—Liability of Owner for Injury.**]—A canal act provided, that no owner of any mines should carry on any work for the getting of coal or minerals within twelve yards from the canal, or any reservoir to be made by the company, nor should any coals or other minerals be got under any part of the canal, or towing-paths thereunto belonging, or any such reservoir, or any land or ground lying within the distance of twelve yards of either side of the canal, or any reservoir, except as thereinafter mentioned, without the consent of the company. By another clause it was provided, that when the owner of any coal mine, lying under the canal, towing-paths, reservoir, &c., or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give notice of his intention to the company, three months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice, it should be lawful for the company to inspect such mines in order to

determine what coal or other minerals might be come at and gotten without prejudice to the canal; and if the company should neglect to inspect such mines within thirty days next after the receipt of such notice, then the owners of such mines were authorised to work such part of the said mines as lay under the canal, or within the distance aforesaid; and if upon inspection the company should refuse to permit the owners of the mines to work such part of the mines lying as aforesaid, or any part thereof, as they might have come to and gotten, then the company should within three calendar months pay the owners the value thereof. By another clause, nothing in the act contained was to defeat the right of any owner of lands or grounds in, upon, or through which the canal should be made, to the mines lying within or under the lands or grounds to be set out or made use of for such canal, but all such mines were reserved to such owners respectively; and it should be lawful to such owners, subject to the conditions therein contained, to work all such mines, provided that in working such mines no injury was done to the navigation:—Held, that this proviso was to be construed with some qualifications, viz., either as importing that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode; and, therefore, where notice had been given by the lessee of a coal mine of his intention to work the same under a reservoir belonging to the canal company, and the latter had not purchased his right within the time limited by the act, that the lessee was entitled to work the mine under such reservoir in the usual and ordinary mode; and the reservoir having been damaged by reason of such working by the lessee, that no action was maintainable by the company against him for such damage. *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59; 8 L. J. (O.S.) K. B. 361.

An act provided that the canal company should not be entitled, on purchasing lands for making a canal, to any coal mines under the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the company of their intention to work the mines within ten yards of the canal, and that the company might inspect the mines, and might stop the further working of them, on paying compensation to the owners:—Held, that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the company, the latter did not purchase out their rights; and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing. Aliter, where the house of one claiming under a grant from the owner of the soil was undermined. *Wyrley and Essington Canal* v. *Bradley*, 7 East, 368; 8 R. R. 642. And see *Rex* v. *Birmingham Canal Co.*, 2 B. & Ald. 570.

By a canal act it was provided that no owner of any mine should work the same under the reservoir of the canal company, except as therein mentioned, without the consent of the company; and that when the owner of any mine under the canal works should be desirous of working the same, such owner should give notice in writing of such his intention to the company before beginning to work; that the company might then inspect such mine, and upon failure or neglect of the company so to inspect within thirty days after such notice, the owner of such mine might work and get such part of the mines as lay under the canal and works; and that if upon such inspection the company should refuse to permit the owner of the mines to work such part of the mine, the company should, within three calendar months after such refusal, purchase the same. And nothing therein contained should be construed to prejudice the right of the lord of the manor or waste, or any owner of any ground through which the company's works should be made, to the mines under such ground, such lord or owner being thereby empowered to work the same, subject to the conditions therein contained; provided that no injury were done in the working to the navigation:—Held, that this last proviso was not to be construed as rendering futile all the previous provisions of the act; therefore, where an owner of mines had given notice of his intention to work them, and the company had neglected to purchase the mines in the manner prescribed by the act:—Held, that the owner of mines might work the same under the company's works, and the company's works having been damaged in consequence of such working, that the company could not maintain an action against the mine-owner to recover compensation for such damage. *Stourbridge Canal Co.* v. *Dudley* (*Earl*), 30 L. J., Q. B. 108; 7 Jur. (N.S.) 329; 3 L. T. 449; 9 W. R. 158—Ex. Ch.

—— **Liability of Company for Leakage.**]—An action was brought against a canal company by the owners of mines lying beneath a canal for so negligently managing the canal as to allow the water to escape from it and flood the mines. The canal was constructed by a company under the provisions of a local act, by which it was enacted that if any proprietor of mines under the canal, or within twelve yards of either side of it, should be desirous of working them, he should give three months' notice to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked; and if, on inspection, they refused permission, they should be compelled to purchase the same. There was a proviso in working the mines, "No injury be done to the navigation, anything therein contained to the contrary notwithstanding." By the compensation clauses of the act, the company, in making the canal, was to do as little damage as possible, and to make satisfaction for damage sustained by the owners of the lands, tenements or hereditaments taken, or used or prejudiced by the execution of the powers of the act, and compensation was made payable for the damage which should be at any time or times whatsoever sustained by the owners of the lands, &c., by reason of making, repairing, or maintaining the canal, or by flowing, leaking or oozing of the water over or through the banks of the canal (if complaint were made within six months of the injury). The owners of the mines gave notice of their intention to work the mines within the prescribed distance of the canal. The company did not inspect the mines, and refused to purchase them. The owners proceeded to work the mines, the canal being then in good order, and water-tight. They worked the mines

in the usual manner, without which they could not have had the full benefit of the coal, and the effect of such working was to let down and crack the bed of the canal, and to allow the water to flow into and cause damage to the mines. The company, during the working of the mines, took all proper precautions to keep the canal water-tight:—Held, that the company was not responsible for the damage to the mines, as there was no proof of any negligence on their part, or of anything done in excess of their statutory powers. *Dunn* v. *Birmingham Canal Co.*, 42 L. J., Q. B. 34; L. R. 8 Q. B. 42; 27 L. T. 683; 21 W. R. 266—Ex. Ch.

A company with statutory powers suffered water to percolate from their canal into an adjoining mill, and cause damage. Such percolation arose in the first instance from a subsidence of the land caused by the working of a mine-owner under both the canal and the mill, and could not have been foreseen or prevented by the company by any reasonable means at any reasonable cost:—Held, that the canal company were nevertheless guilty of negligence, in not making good the damage when it occurred, and must pay compensation to be assessed as provided by the Canal Act, but that it was not a case for granting an injunction against the company to restrain the percolation of water. *Evans* v. *Manchester, Sheffield and Lincolnshire Ry.*, 57 L. J., Ch. 153; 36 Ch. D. 626; 57 L. T. 194; 36 W. R. 328.

**Company preventing Working—Limits.**]—A canal company was empowered by act of parliament to prevent the owners of land adjoining the canal from working the mines and minerals within ten yards of it, but was required to give compensation for stopping any such workings:—Held, that the company might prohibit the working of mines beyond the ten yards if in their opinion the working would endanger the canal, but that they must compensate the owner for stopping mines beyond the ten yards. *Midland Ry.* v. *Checkley*, 36 L. J., Ch. 380; L. R. 4 Eq. 19; 16 L. T. 260; 15 W. R. 671.

A canal act provided that no owner of mines should carry on any work for getting such mines under any tunnel, or within twenty yards of the same, without the consent of the company; and that no owner of any mines should, without such consent, carry on any work for getting coal or mineral within twelve yards of the canal, "except as hereinafter mentioned." Then followed clauses which provided that the owner of mines might, without such consent, get coal and minerals beyond the prescribed limits, and that the company might enter upon lands and mines for discovering the distance of the canal from the working parts of such mines, and that if any mine should be worked contrary to the act, they might use all necessary means for making the canal safe. By a subsequent clause it was provided, that when the owner of any mine lying under the canal, or within the limited distance, should be desirous of working the same, he should give the company three months notice of his intention, and upon the receipt of such notice it should be lawful for the company to inspect such mines in order to determine what materials might be gotten without prejudice to the canal; and if upon inspection the company should refuse to permit the owners of such mines to work them, then the company should within three months pay to the owners the value thereof. Another clause provided that nothing in the act contained should defeat the right of any owner of land through which the canal should be made to the mines under the land used for the canal, and that it should be lawful for such owner to work such mines, provided that no injury were done to the navigation:—Held, that the prohibition against working any mine within twenty yards of a tunnel without the consent of the company was not absolute, but subject to the same exception as working within twelve yards of the canal, and therefore if the company refused to permit the owner of a mine to work it within twenty yards of a tunnel, they were bound to pay him the value thereof. *Birmingham Canal Co.* v. *Dudley (Earl)*, 7 H. & N. 969; 9 Jur. (N.S.) 24—Ex. Ch.

—— **Compensation.**]—By a local act, tenants for life were empowered to sell lands to a canal company for the purposes of their undertaking. It was provided that in case the parties should differ as to the amount of the purchase-money, a jury should assess the amount, and ascertain what sum should be paid for the land, and also what other sums should be paid for past and future damage. The mines and minerals under the lands conveyed were reserved to the owners, with power to the owners to get them, provided no injury should be done to the canal thereby. And the company was empowered to inspect the mines, and to compel the owners to desist from working so as to injure the canal. Under the act a tenant for life sold lands to the company, which were known to contain coal, though at the time it was not known whether the coal would be gotten. Some years afterwards a mine was opened for the purpose of getting the coal underlying the canal. The company restrained the owners of the mine from working so as to endanger the canal:—Held, that, in the absence of a special provision in the act to that effect, the company was not liable to make any compensation to the owners of the coal mine for the loss incurred by them by reason of this restriction of their powers of working the mine. *Reg.* v. *Aire and Calder Navigation Co.*, 30 L. J., Q. B. 337; 8 Jur. (N.S.) 115; 10 W. R. 40.

—— **Amount of Compensation.**]—A canal company was authorised by their act of incorporation to require the workers of any mines under the canal to leave so much coal on each side of the canal as they might require for the safety of it; and the company were to make compensation, to be assessed (if the parties differed) by a jury:—Held, that the company were bound to make compensation, not only for the value of the coal in the bed, but also for the additional profit which could only be made by getting it. And a bill having been granted to a coal-worker pending the purchase of part by the company, he also was entitled to compensation. *Barnsley Canal Co.* v. *Twibell*, 7 Beav. 19; 13 L. J., Ch. 434.

—— **Mode of Obtaining Compensation.**]—By an act a company was empowered to take lands for the purpose of its navigation, with provision for a jury to ascertain the sums to be paid as purchase-money, and for damage in carrying the act into effect. By s. 170, no mine-owner should work any mines in or under any lands within forty yards of certain tunnels (by which the canal passed under a hill), without the leave of the company; and by s. 171, if the company

instead of insisting upon having the full forty yards left unworked, should require less than thirty yards to be left, then the mine-owner might insist on having a greater quantity, not exceeding thirty yards, left unworked for his security: and the question in dispute as to such last-mentioned quantity was to be tried, settled and determined by an issue at law. By s. 172, whenever any mine in due course should become workable within forty yards of the tunnels, the mine-owner should give notice to the company, who, thereupon should pay him (as the case might be) for so much of the forty yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his, provided that no mines should in any case be worked under the tunnels. But whenever any such last-mentioned mines should become workable, satisfaction should be made by the company for the same, such satisfaction to be settled by an issue at law. Sect. 173 gave the mode of trying any feigned issue, and enacted, that, after trial and verdict, the court should give judgment for the sum of money awarded by the jury:—Held, that where a mine had become workable within forty yards of the tunnels, and the company had required the whole forty yards to be left unworked for their security, the owner of the mine was entitled to compensation for the forty yards; but that the only remedy to enforce it was by a feigned issue, and not by an action. *Fenton* v. *Trent and Mersey Navigation Co.*, 2 Railw. Cas. 837; 9 M. & W. 203.

A canal act prohibited any proprietor of mines from working the same under or within twenty yards of any tunnel, and directed that if he should be desirous of so working the same, he was to give notice of the intention to the company; and if they refused to permit him to work such part of the mines as he might have gotten, they were to pay him for it such sum as a compensation jury should assess. The lessees of minerals under a lease covenanted with the lessors to work the mines, and raise and get the coal thereout, until the whole of the mines, or as great a quantity as, by working, could be gotten, should be worked out, "except the ribs and pillars, which must necessarily or which the lessors might require to be left." The lessees accordingly gave notice of their intention to work the mines under a tunnel of the company; on which the company gave their refusal, and a jury assessed a sum to be paid by the company to the lessees for their ceasing to work such part of the mines. In an action by the lessees against the company for nonpayment of the assessed sum, the company pleaded that the mines which the lessee so ceased to work were a rib within the meaning of the covenant in their lease, and that the lessors did require the coal to be left by the lessees; also, that the lessees did not cease from working the minerals within twenty yards of the tunnel; also, that after refusal by the company, and before the summoning of a jury, the lessees abandoned their notice, and did, in fact, work and carry away a portion of the coal within twenty yards:—Held, that there was no answer to the action. *Swindell* v. *Birmingham Navigation Co.*, 9 C. B. (N.S.) 241; 29 L. J., C. P. 364; 7 Jur. (N.S.) 190.

**Injuries to Watercourses.**]—An owner of freehold lands and his lessee will be restrained from working mines under a watercourse otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works. *Elwell* v. *Crowther*, 31 Beav. 163; 31 L. J., Ch. 763; 8 Jur. (N.S.) 1004; 10 W. R. 615.

By mining operations, the defendant had sunk not only the level of a stream supplying the plaintiff's mill, but also that of the adjoining land. The plaintiff filed a bill for an injunction; but it did not appear that there had been any diminution of water to the mill:—Held, that the bill ought not to be dismissed; and, on the defendants undertaking not to work the minerals so as to obstruct the water and the supply thereof along the watercourse, it was retained, with liberty to apply. The court, however, intimated that, in default of the undertaking being given, an injunction would be granted. *Ib.*

### 5. Under Railways.

#### a. Purchase of and Compensation for.

**"Minerals"—Open Workings.**]—"Minerals" in ss. 77 & 78 of the Railways Clauses Act, 1845, includes minerals which are got by open quarrying. Limestone is a mineral within the same sections. *Midland Ry.* v. *Robinson*, infra.

The word "mines" in s. 77 of the Railways Clauses Act, 1845, includes minerals, whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the landowner, be dug and worked by him. *Midland Ry.* v. *Haunchwood Brick and Tile Co.*, 51 L. J., Ch. 778; 20 Ch. D. 552; 46 L. T. 301; 30 W. R. 640.

Clay is a mineral within the meaning of s. 77 of the Railways Clauses Act, 1845. Therefore a railway company was held liable to the owner of land taken by them in respect of clay for such land used for puddling bridges, which clay it was not necessary to remove in the construction of their line. *Loosemore* v. *Tiverton and North Devon Ry.*, 51 L. J., Ch. 570; 22 Ch. D. 25; 47 L. T. 151; 30 W. R. 628.

**Where Land Purchased.**]—The company having, by the terms of its purchase, precluded the owners of lands from working mines in a way injurious to their property, cannot, in the absence of statutory provision to that effect, be compelled to purchase those minerals of the owners. *North Eastern Ry.* v. *Crosland*, 4 De G. F. & J. 550; 1 N. R. 72; 32 L. J., Ch. 353; 7 L. T. 765; 11 W. R. 83.

**Construction of ss. 6 and 78 of Railways Clauses Act.**]—In claims for compensation for not working mines adjoining a railway and railway works, s. 6 and s. 78 of the Railways Clauses Act, 1845, must be read together. *Smith* v. *G. W. Ry.*, 47 L. J., Ch. 97; 3 App. Cas. 165; 37 L. T. 645; 26 W. R. 130—H. L. (E.)

Sect. 6 gives a general right to compensation to "owners and occupiers of, and all other parties interested in, lands taken or injuriously affected by the construction" of the railway. *Ib.*

In s. 78 the person entitled to give notice to the directors of a railway company of his intention, within thirty days, to work a mine, is the owner, lessee or occupier, who has the right and the power to work it. The directors are entitled

to have an inspection of the mine, and to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice, and receiving compensation, the owner, if he can show a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under s. 6. *Ib.* But see *Dixon* v. *Caledonian Ry.*, infra.

The words "he" and "his," in two of the parts of s. 78, refer to the person entitled to compensation, whether owner, lessee, or occupier. *Ib.*

The word "lands" in s. 6 includes mines; and that section, in regard to the compensation thereby provided, is to be read with reference to the Lands Clauses Act. *Ib.*

**Injunction restraining Working after Compensation.**]—After compensation agreed on, and obtained or tendered, a perpetual injunction may be granted against the working of the mines. H. was the lessee of mines under a railway, his lease being of sufficient length to enable him to exhaust the coal; he gave the company notice of his intention to work the mines, and they gave him a counter-notice under s. 78 of the Railways Clauses Act, 1845, and made compensation as provided by the section. Before the expiration of his term, H. surrendered his lease, and S. became owner of the mines in fee. On a bill by the company to restrain S. from working the mines:—Held, that the company, by compensating the lessee, became the owner of the mines, and was entitled to a perpetual injunction, but that S. might obtain compensation for any injury he had sustained under s. 6. *Smith* v. *G. W. Ry.*, supra.

**Purchase by Company of other Strata besides the Surface Soil—Compensation.**]—The provisions of ss. 77—85 of the Railways Clauses Act, 1845, apply to every case where a railway company acquiring land leaves untaken any portion of the mines or minerals beneath it; their operation is not restricted to the case of a purchase of the surface soil only. Where a railway company serves a notice to treat for the compulsory taking of land including mineral strata, but leaving other strata to the original owner, compensation for the interference with the latter cannot be awarded in the arbitration under the notice to treat, but can be obtained only under the provisions and subject to the conditions of ss. 77—85 of the Railways Clauses Act. *Gerard (Lord) and L. & N. W. Ry., In re*, 64 L. J., Q. B. 260; [1895] 1 Q. B. 459; 14 R. 201; 72 L. T. 142; 43 W. R. 374—C. A.

**When Notice may be Given.**]—An owner is not justified in giving a notice under s. 78 unless he has a bonâ fide present intention to work the minerals, but it is immaterial whether he intends to work them himself or by lessees or licensees. *Midland Ry.* v. *Robinson*, 59 L. J., Ch. 442; 15 App. Cas. 19; 62 L. T. 194; 38 W. R. 577; 54 J. P. 580—H. L. (E.)

Though a mine-owner may give notice under ss. 77 to 79 of the Railways Clauses Act, 1845, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter-notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing. *Dixon* v. *Caledonian Ry.*, 5 App. Cas. 820; 43 L. T. 513; 29 W. R. 249; 45 J. P. 105—H. L. (Sc.)

A. and B. were the lessees of the minerals, viz., limestone, under a railway passing through Caldwell. They, on the 8th of July, 1878, gave notice in terms of the above sections to the proprietors of the railway that they were desirous of working, and intended to work, the "mines and minerals including limestone" lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to A. and B. of their desire to have such mines and minerals left unworked, but they did give such notice on the 20th of February, 1879, offering compensation for the limestone unworked. A. and B. contended that the notice of the 20th of February, 1879, was too late to prevent them working out the limestone; because such notice to be valid was required to be given before the expiration of thirty days from the date of their notice of the 8th of July, 1878:—Held, that the notice of the railway proprietors was valid. *Ib.*

The incidental dictum in *Smith* v. *G. W. Ry.* (3 App. Cas. 182), that after thirty days had expired the time had passed for the railway proprietors to give a counter-notice is no judicial authority, being said where it was in no way material for the decision, and where the point could not have been fully argued, no counter-notice having been given in that case. *Ib.*

**Company not Purchasing — Working by Owner.**]—If the owner of minerals usually worked by open quarrying desires to work them and the railway company does not purchase them, he may, under s. 79 of the Railways Clauses Act, 1845, enter upon and break up the surface of the land of the railway company for the purpose of winning the minerals, even though the consequence be the destruction of the railway. *Ruabon Brick and Terra Cotta Co.* v. *G. W. Ry.*, 62 L. J., Ch. 483; [1893] 1 Ch. 427; 2 R. 237; 68 L. T. 110; 41 W. R. 418—C. A.

A railway company on purchasing, under 8 & 9 Vict. c. 20, ss. 77—79, land for the purpose of the railway, does not become entitled to the mines under the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a proper manner and according to the usual manner of working such mines in the district. *G. W. Ry.* v. *Bennett*, 36 L. J., Q. B. 133; L. R. 2 H. L. 27; 16 L. T. 186; 15 W. R. 647. S. P., *Fletcher* v. *G. W. Ry.*, 29 L. J., Ex. 253; 6 Jur. (N.S.) 961; 2 L. T. 803; 8 W. R. 501—Ex. Ch.

**Claim for Compensation—Lands Clauses Act.**]—The provisions of the Lands Clauses Act, 1845, are applicable to claims for compensation made under s. 78 of the Railways Clauses Act, 1845, but, semble, not under s. 81. A prerogative writ of mandamus is the proper remedy for enforcing the taking up of awards made under the Lands Clauses Act. *Reg.* v. *Lambourn Valley Ry.* (22 Q. B. D. 463) distinguished. *Reg.* v. *L. & N. W. Ry.*, 63 L. J., Q. B. 695; [1894] 2 Q. B. 512; 10 R. 359; 58 J. P. 719.

—— **Items of Compensation.**]—By s. 81 of the Railways Clauses Act, 1845, a railway company shall "from time to time pay to the owner, lessee or occupier of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner," by reason of the severance of the surface land or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway; and in case or dispute as to the amount of "such losses of expenses," the same shall be settled by arbitration:—Held, that an arbitrator appointed to assess the losses or expenses sustained and incurred by a mine-owner by reason of his land being severed and the working of his mine being interrupted, rightly included in his award items of compensation for additional losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred in working the mines and which were capable of being immediately estimated with reasonable certainty. *Whitehouse* v. *Wolverhampton and Walsall Ry.*, 39 L. J., Ex. 1; L. R. 5 Ex. 6; 21 L. T. 558; 18 W. R. 147.

**Bond given before Entry on Lands—Amount.**]—The compensation in respect of which the bond is given by a railway company under s. 85 of the Lands Clauses Act, on entering upon lands before agreement, does not include compensation for minerals under ss. 78 and 81 of the Railways Clauses Act, 1845. *Neath and Brecon Ry., Ex parte*, 45 L. J., Ch. 196; 2 Ch. D. 201; 24 W. R. 357.

A railway company, being desirous of entering upon certain lands before agreement, made the usual deposit and gave the usual bond. Afterwards, by an agreement in writing between the company and landowner, it was referred to an arbitrator to determine the purchase-money for the lands taken by the company and also the "compensation for any damage sustained by the landowner by reason of the execution of their works, and which, under the special act, the Lands Clauses Act, or the Railways Clauses Act, the landowner was entitled to claim against the company":—Held, that the bond did not include compensation awarded by the arbitrator in respect of minerals under the Railways Clauses Act, ss. 78 and 81, and that the company, having paid the sum awarded as the purchase-money and compensation in respect of the lands taken by them, had performed the condition of the bond, and was entitled to the return of their deposit. *Ib.*

**No Conveyance of, unless expressly Purchased.**]—A railway company compulsorily purchasing land is not entitled to a conveyance of the mines and minerals, unless they have been expressly purchased, even where the land has been valued and taken at a large price as building land. *Metropolitan District Ry. and Cotton's Trustees, In re*, 45 L. T. 103—C. A.

**Where Corporation purchases Land.**]—A corporation served the usual notice on a landowner before applying to parliament for power to take his land. The act, when obtained, gave the corporation power to take more of his land than was described in the notice:—Held, that under the circumstances the corporation was not obliged to take the mines and minerals under the land taken by them. *Huddersfield Corporation and Jacomb, In re*, 44 L. J., Ch. 96; L. R. 10 Ch. 92; 31 L. T. 466; 23 W. R. 100.

**Subsequent Purchase of Minerals under Lands previously acquired.**]—A railway company having the usual power to purchase lands under its special act, has, by virtue of s. 6 of the Lands Clauses Act, 1845, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable. That power is not taken away by the 77th and following sections of the Railways Clauses Act, 1845, which are for the benefit, not of the mine-owner, but of the company, and only exempt the company from the obligation of buying the minerals at once, together with the surface lands. The words "expressly purchased" in s. 77 are not to be confined to "purchased by agreement." There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands. *Errington* v. *Metropolitan District Ry.*, 51 L. J., Ch. 305; 19 Ch. D. 559; 46 L. T. 443; 30 W. R. 663—C. A.

**Compensation Money—Apportionment—Tenant for Life.**]—A tenant for life without impeachment of waste is not entitled to an apportioned part of the compensation money paid into court by a railway company under s. 69 of the Lands Clauses Act, 1845, in respect of unworked mines and minerals lying under or adjacent to a railway, constructed on land conveyed to the company by the tenant for life under s. 7 of the act, even though the bulk of the minerals could have been, in all probability, worked out during his life. *Robinson's Settlement Trusts, In re*, 60 L. J., Ch. 776; [1891] 3 Ch. 129; 65 L. T. 244; 39 W. R. 632.

Minerals were devised on trust for B. for life with remainder on trust for defendant for life without impeachment of waste, with remainders over. The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B. the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter-notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under s. 74 of the Lands Clauses Act, 1845. *Barrington, In re, Gamlen* v. *Lyon*, 56 L. J., Ch. 175; 33 Ch. D. 523; 55 L. T. 87; 35 W. R. 164.

### b. Working, and Right to Support.

**Land conveyed to Company for Purposes of Railway.**]—A conveyance of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable subjacent

and adjacent support connected with the subject-matter of the conveyance, and therefore, although in the conveyance to the company minerals are reserved, the grantor is not entitled to work them even under his own land, in any manner calculated to endanger the railway. *Caledonian Ry.* v. *Sprot*, 2 Macq. H. L. 449; 2 Jur. (N.S.) 623; 4 W. R. 659.

In a grant to a railway company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil. *Ib.*

But if the dividing line traverse a bog or bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the land granted from retreating. *Ib.*

S. had in 1834 sold to a railway company land over which the railway was to pass, but by the same deed stipulated in these terms—"Reserving always to me, and my heirs and successors, the whole mines and minerals, of whatsoever description, within the lands conveyed, and full power and liberty to us, or any person or persons authorised by us, to search for, work, win and carry away the same, and to make aqueducts, levels," &c. Subsequently several acts of parliament passed giving further powers to the company, and providing for cases of dispute with the landed proprietors as to value of land for purchase, mines, &c. S. continued to work out his minerals until August, 1848, when he received notice from the company that his works were of a nature to endanger the line. A suit having been brought to try the question, and judgment given:—Held, that S. by his conveyance had contracted an implied obligation to afford to the land so conveyed for the purpose specified, viz. a railway, all necessary adjacent and subjacent support by his other land, underlying or contiguous to it. *Ib.*

Held, also, that the subsequent acts of parliament were not retrospective, and could not alter the effect of the previous bargain and conveyance. *Ib.*

B. gratuitously granted a portion of his land to a railway company for the purpose of forming a line of railway thereon, with a reservation to him and his heirs of all the mines and minerals in the land so granted, and with full liberty to dig, search for, work and carry away the same, so as the same be done without entering upon or breaking the surface of the land thereby granted:—Held, that the company was entitled to the subjacent and adjacent lateral support necessary for the maintenance of the railway. *Caledonian Ry.* v. *Belhaven (Lord)*, 3 Macq. H. L. 56; 3 Jur. (N.S.) 573.

A conveyance of a strip of land was made to a railway company in 1834 under an act of parliament, which provided, that all coal or other mineral should be deemed to be excepted out of any purchase of lands by the company, and might be worked by the owners and lessees thereof, so that no damage or obstruction be done or thereby occur to or in such railway or other works; and in case of damage, reparation was to be made by the owners or lessees. And whenever the working should approach within twenty yards of any masonry or building belonging to the company, notice should be given to it, and it might deliver a declaration requiring the minerals under such masonry or building to be reserved for its protection, and in that case it should purchase the same; and in case it should not deliver such declaration, that the owners or lessees might work the minerals under the masonry or buildings, in the usual and ordinary manner of working mines, doing no avoidable damage. The land was taken for the purpose of building thereon a bridge of great weight, which was subsequently built by the company. At the time of the purchase there was beneath the land, and a large tract of adjoining land belonging to the vendor, an old mine which had been accidentally flooded, and had long previously been full of water. In 1859, a lessee, deriving title under the vendor, threatened to drain the mine and renew the workings:—Held, that in addition to the special protection afforded by the act in respect of workings within twenty yards' distance of any masonry or building, the company was entitled, by way of necessary incident to the grant of the land, to such lateral support from the adjacent land of the vendor not situate within the twenty yards as might be necessary to uphold the bridge; and that the lessee was properly restrained from working minerals under the adjacent land not the property of the company, and not within the limits of twenty yards, so as to affect the stability of the bridge. *Elliot* v. *North Eastern Ry.*, 10 H. L. Cas. 333; 2 N. R. 87; 32 L. J., Ch. 402; 9 Jur. (N.S.) 555; 8 L. T. 337; 11 W. R. 604.

Held, also, that the circumstance that the conveyance of the land was compulsory and not voluntary could not, in the absence of any special enactment, affect the construction of the conveyance, nor prevent it from passing to the company the necessary right of support as an ordinary legal incident. *Ib.*

Held, however, that although the water might afford additional support to the surface, the company had no right to speculate on the continuance of such an accidental circumstance, and that the lessee ought not to be restrained from withdrawing the water from the spaces left in the old workings, if such effect should be produced by working the colliery in a proper manner. *Ib.*

In cases similar to the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended. *Ib.*

A railway company is entitled to the vertical and lateral supports of the adjoining lands of the proprietor from whom the lands or easements required for the railway were purchased: and such proprietor is not at liberty to work the minerals adjoining the railway in such a way as to cause damage to it. *North Eastern Ry.* v. *Crosland*, 4 De G. F. & J. 550; 1 N. R. 72; 32 L. J., Ch. 353; 7 L. T. 765; 11 W. R. 83.

In 1835 the Leeds Railway Company, constituted under an act which excepted mines from land purchased and allowed the landowners to work them provided they did no damage to the railway, bought land for its railway. In 1836 the York Railway Company was constituted under an act, containing provisions as to mines similar to those of the Railways Clauses Act. Afterwards the York company purchased the Leeds railway under the powers of an act of 1844, which provided, by s. 4, that on completion of the line the Leeds act should be repealed, provided that the repeal should not affect

anything done under the act, but that all acts done under it should remain as valid as if there had been no repeal. The 9th section provided, that all the provisions of the York railway act, so far as they were not repealed, altered, or otherwise provided for by the act of 1844, or by any statute should apply to the Leeds railway :—Held, that the provisions as to mines in the York railway act were not, by the act of 1844, made applicable to the Leeds railway, so as to give the owners of the mines under the lands purchased by the Leeds company a right to work them to the injury of the railway, if the York Railway Company did not choose to purchase them, but that the unqualified right to support, which was incident to the grant of the lands for the purposes of the railway, remained unaffected. *Ib.*

The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine-owner are regulated. *G. W. Ry.* v. *Bennett*, 36 L. J., Q. B. 133 ; L. R. 2 H. L. 27 ; 16 L. T. 186 ; 15 W. R. 647.

**User of Tunnel—Grant of.**]—The grant to a railway company, under its act and the railway acts, of the right to make, maintain and use a tunnel, does not give the company such a right to support to its tunnel that the grantor, acting duly in accordance with the Railways Clauses Act, ss. 77, 78, cannot work or have the benefit of mines under and adjacent to the tunnel. *L. & N. W. Ry.* v. *Ackroyd*, 31 L. J., Ch. 588 ; 8 Jur. (N.S.) 911 ; 6 L. T. 124 ; 10 W. R. 367.

**Tunnelling under Railway — Compensation.**]—Sect. 80 of the Railways Clauses Consolidation Act, 1845, applies to minerals lying more than forty yards from a line of railway, and enables the owner of minerals, whose access to them is cut off, by reason of a railway company having purchased from him the minerals lying under their line of railway or within forty yards from it to tunnel under the railway for the purpose of working his minerals which are on the other side of it. And this power extends, not only to minerals in the ordinary sense of the word, but also to such a substance as clay, which is usually worked from the surface. And by s. 81 the mineral owner is entitled to be compensated by the company for any additional expense caused by his having to work the minerals in this way. *Midland Ry.* v. *Miles*, 55 L. J., Ch. 251 ; 30 Ch. D. 634 ; 53 L. T. 381 ; 34 W. R. 136.

The defendant was the owner of the minerals lying in and under a triangular piece of land, which was completely surrounded by three lines of railway belonging to the plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface of the triangular piece of land, and also the surface of the land on which those parts of the three lines were constructed. The minerals in and under the lands so purchased were not in the first instance purchased by the company. The defendant, in April, 1885, gave the company notice, under s. 78 of the Railways Clauses Act, 1845, of his intention to work the minerals belonging to him in and under the triangular piece of land, and also under the lines of railway. The company gave the defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The defendant then gave the company notice that he intended to work the minerals in and under the triangular piece of land, and for that purpose to enter upon and across the line of railway :—Held, that such a mode of working would be a trespass, and that the defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals in and under the triangular piece of land, and that the company must compensate him for the extra expense of so working. *Ib.*

A railway company under the powers of a special act and of the Railways Clauses Act, 1845, bought a piece of land on part of which they made three railways, leaving the rest of the land within the triangle formed by the railways, except two small pieces on the west of their lines. The landowner from whom they bought owned the adjoining land on the east. This he afterwards sold, but acquired a right of way over it. He had also bought the two severed pieces on the west. The conveyances to the railway company did not include the minerals under the land :—Held, that as under the special act and under s. 80 of the Railways Clauses Act, the landowner when he sold the land was entitled to make passages under the railway from his land on the east, no right of way over the railway for the purpose of working the minerals would be implied, and that he had not now such right of way. And that, being neither "owner, lessee, nor occupier" of the land to the east, he had no right, under s. 79 of the Railways Clauses Act, to work the minerals under the land within the triangle by means of passages under the railway ; but he might work the minerals from the pieces of land on the west, and under s. 81 get compensation for extra expenses. *Midland Ry.* v. *Miles*, 55 L. J., Ch. 745 ; 33 Ch. D. 632 ; 55 L. T. 428 ; 35 W. R. 76.

Held, also, that under s. 79 of the Railways Clauses Act the owner of the minerals might, having lawfully made a communication with the land sold to the railway company, work the minerals by open workings, that being the usual mode of working such minerals in the district where the same were situate. *Ib.*

**Flooding—Liability of Company.**]—A railway company is responsible for injuries sustained by reason of water escaping from a stream in flood time, or collected from rain falling on the railway, and flowing along a cutting of the railway and percolating through the substratum into mines beneath, although such mines had not been worked at the time of the formation of the railway. *Bagnall* v. *L. & N. W. Ry.*, 1 H. & C. 544 ; 31 L. J., Ex. 480 ; 9 Jur. (N.S.) 254 ; 9 L. T. 419 ; 10 W. R. 802—Ex. Ch.

## V. CUSTOMS AND PRESCRIPTION.

**To Work Mines to Injury of House Property.**]—In an action for working mines under ground near to a house, so that the house was injured, and in danger of falling for want of support, the defendant claimed, as lessee of the manor in which the house was situate and of the mines therein, a prescriptive right to work the mines under any houses parcel of the manor, paying to

the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account, and justified under that right :—Held, first, that such a prescription was bad, as being unreasonable. *Hilton* v. *Granville* (*Earl*), D. & M. 614 ; 5 Q. B. 701 ; 13 L. J., Q. B. 193 ; 8 Jur. 310.

Held, secondly, that such a right could not exist by custom. *Ib.*

—— **To Injury of Surface.**]—A declaration stated that the plaintiff was possessed of land, and that the defendant wrongfully and without leaving sufficient support, worked the mines beneath the land, by reason whereof part of the land fell in and sunk. Plea, that the lord of a manor being seised of the common and waste land, parcel of the manor, and of the coal mines underneath, and certain persons being entitled to a right of common over the same, an act was passed, whereby the common and waste land was divided and allotted amongst the persons so entitled to rights of common, but reserving to the lord all original rights by him enjoyed in respect of the manor, and the right of working all mines underneath the common and waste land, together with convenient and necessary rights of way. That from time whereof the memory of man is not to the contrary, up to the time of the act, the lord for the time being and his assigns had been used and accustomed as of right to search for, win and work the coal mines lying and being under the commons, without let or interruption, and without leaving any support for the lands in and under which the mines were situate, and without making or paying satisfaction for an injury caused by working the mines, and that the mines had always been so worked without leaving support ; and justified under a lease granted by the lord of the manor : —Held, a bad plea. *Beckett* v. *Bradley*, 1 B. & S. 140 ; 31 L. J., Q. B. 65 ; 8 Jur. (N.S.) 588 ; 5 L. T. 832.

Pleas that, for forty years and for twenty years the lord of the manor and his tenants had been used and accustomed of right to work the mines, without leaving any support for the lands ; that the defendants were tenants to the lord of the mines, and that the working the mines without leaving any support for the land was a working of the mines in the exercise of and according to the right and custom :—Held, that both pleas were bad, as not shewing any acts done on the plaintiff's land ; acts done on the land of another, though done as of right for twenty or forty years, not affecting the plaintiff's rights. *Ib.*

To a statement of claim for working mines under the plaintiff's land without leaving sufficient support for the surface, the defendant pleaded that he was the lessee of the mines from the lord of the manor ; that the plaintiff's land had, previously to the passing of an inclosure act under which the waste of the manor was inclosed and allotted, formed part of such waste ; that the lord of the manor from time immemorial had been accustomed to work the mines under the waste without leaving sufficient support for the surface, and without making any compensation for injury so caused ; that by the inclosure act it was provided that the lord of the manor, his successors or assigns, might hold all the mines and quarries lying under the waste, together with liberty of searching for, winning and working the same as fully and freely as he or they might have had and enjoyed the same in case the act had not been passed, and that without making or paying any satisfaction for so doing ; and that it was further provided by the act that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, and should, when so assessed, be paid by the occupiers of the other allotments in the same township :—Held, that the defence was good, on the ground that, whether any valid custom such as alleged existed previously to the act or not, the act expressly gave to the lord of the manor and his assigns the right to let down the surface by mining without making any compensation. *Beckett* v. *Bradley* (31 L. J., Q. B. 65) not followed. *Gill* v. *Dickinson*, 49 L. J., Q. B. 262 ; 5 Q. B. D. 159 ; 42 L. T. 510 ; 28 W. R. 415 ; 44 J. P. 587.

Semble, that there may be a valid claim by custom, or prescription in a manor, for the lord or his licensees to work mines so as to destroy the tenants' surface. *Wakefield* v. *Buccleugh* (*Duke*), 39 L. J., Ch. 441 ; L. R. 4 H. L. 377 ; 23 L. T. 102.

To a declaration by a reversioner of land, alleging that the defendant dug and excavated stone and sand, and converted the same to his own use, and made holes and excavations in the land, and erected mounds of earth and rubbish, so as permanently to alter, damage, injure and spoil the surface of the land, he pleaded that R. was seised in fee of the mines and stone within certain parts of a lordship, and that R. and all whose estate he had, and his and their tenants, from time immemorial had been used and accustomed of right, as often as it might be necessary for the purpose of effectually working the quarries, to enter upon the waste lands within the part of the lordship within which the quarries were situate, and to dig through the same to the quarries, and to raise the stone and carry away the same, doing no more than necessary for the purpose aforesaid. The plea alleged a demise by R. to the defendant of a quarry of stone under the lands, and justified the acts complained of in exercise of the right. The defendant also pleaded statutory prescriptive pleas, under the 2 & 3 Will. 4, c. 71, alleging the enjoyment of the right for forty and twenty years :—Held, that the pleas were good, for the right was not unreasonable, and might have originated in grant. *Rogers* v. *Taylor*, 1 H. & N. 706 ; 26 L. J., Ex. 203.

**User of Stream.**]—The privilege of washing away sand, stone and rubble, dislodged in the necessary working of a tin mine, and of having the same sent down a natural stream running through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right, under the 2 & 3 Will. 4, c. 71, to an action charging the defendant with throwing such stone, sand, and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. *Carlyon* v. *Lovering*, 1 H. & N. 784 ; 26 L. J., Ex. 251 ; 5 W. R. 347.

An ancient mine, worked from a remote period by tin-bounders, under the custom of Cornwall, had from time immemorial been supplied with water by a stream originally artificial ; and when the bounders ceased to work and mine, possession thereof was taken by the owners of the minerals.

Upon a bill filed to restrain the diversion of the stream by the owner of the land in which it rose:—Held, that the right thus acquired by prescription to the use of the water in question was the right of the owner of the minerals. *Ivimey* v. *Stocker*, L. R. 1 Ch. 396; 12 Jur. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

**Parol Evidence as to Meaning of Written Document.**]—Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to shew that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where the lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point":—Held, that parol evidence of the understanding amongst miners was admissible to shew that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line." *Clayton* v. *Greyson*, 4 N. & M. 602; 5 A. & E. 302; 6 N. & M. 694; 1 H. & W. 159. See *Brain* v. *Harris*, 10 Ex. 908; 24 L. J., Ex. 177—Ex. Ch.

**Right to Search for—Gardens excepted—What constitutes Garden.**]—Where, to an action for entering a close of the plaintiff, called a garden, the defendant pleaded an immemorial custom to search for minerals in the district within which the locus in quo was situate ("the sites of houses, &c., gardens, orchards and highways, excepted"), and it was proved that the locus in quo was planted with shrubs within the last six years, and with potatoes just before the trespass was committed:—Held, that it was a garden within the meaning of the exception. *Gilbert* v. *Tomison*, 4 D. & R. 222; 27 R. R. 510.

**Colliers leaving Work without Notice—Right to Payment.**]—A custom exists that, where butty colliers leave off working a coal mine, without giving notice, they are not entitled to be paid for gate roading, air heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine is not worked, they are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier. *Bannister* v. *Bannister*, 9 Car. & P. 743.

**To divert Stream—Devonshire.**]—The stanners of Devonshire are not entitled by custom to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. *Bastard* v. *Smith*, 2 M. & Rob. 129.

**Rights of Tinners—Cornwall.**]—A custom that any tinner within Cornwall may acquire a right to the tin within certain limits, taking proceedings in the stannary court, of which the landowner has notice, and completing his title in that court, and in case of minerals being found, rendering a portion of the produce to the lord or owner of the soil; and that the right so acquired may be preserved by an annual renewal of the bounds; and that it is not necessary for its preservation that the minerals (if any) within the limits should be sought after, and the land worked for mineral purposes by the boundowner, or on his behalf, is bad for unreasonableness. *Rogers* v. *Brenton*, 10 Q. B. 26; 17 L. J., Q. B. 34; 12 Jur. 263.

**Custom of Tenants to dig Clay and Sand—Act of Settlement—Isle of Man.**]—The Act of Settlement of the Isle of Man, 1703, confirmed to the tenants their customary estates of inheritance "saving always all mines and minerals of what kind and nature soever, quarries and delfs of flag, slate or stone":—Held, that a custom by the tenants to dig for clay and sand did not contravene the saving clause, and that such tenants were entitled to dig for clay and sand. *Att.-Gen. (Isle of Man)* v. *Mylchreest*, 48 L. J., P. C. 36; 4 App. Cas. 294; 40 L. T. 764.

**Custom of Country — Whether Reservation includes Flints.**]—A farm was let under a written agreement, reserving to the landlord "all mines and minerals, sand, quarries of stone, brick earth and gravel pits." A local custom (which, it was suggested, had grown up within the last thirty or forty years) allowed tenants of such farms, let with a similar reservation, to take away the flints that were turned up in the ordinary course of good husbandry, and to sell them for their own benefit. If the flints were not turned up and removed such farms could not be properly cultivated:—Held, that the custom was reasonable and valid; and when read into the written agreement was not inconsistent with the reservation, even assuming (but without deciding) that the reservation of "mines and minerals" included such flints. *Tucker* v. *Linger*, 52 L. J., Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4—H. L. (E.)

**Unopened Mine under Another's Land.**]—The right to an unopened mine of coal, under the close of another person, is a right to land, and cannot be claimed by prescription. *Wilkinson* v. *Proud*, 11 M. & W. 33; 12 L. J., Ex. 227; 7 Jur. 284.

## VI. GRANT, SALE AND PURCHASE OF.

**Licence to Search for—Right of Re-Entry in Grantor.**]—The owner of the fee granted to A., his partners and fellow-adventurers, free liberty to dig for tin, and all other metals, throughout certain lands therein described, and to raise, make merchantable and dispose of the same to their own use; and to make adits, &c. necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any watercourse over the premises granted; habendum for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c. and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor:—Held, that this deed did not amount to a lease, but contained a mere licence to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. *Doe* d. *Hanley* v. *Woods*, 2 B. & Ald. 724; 21 R. R. 469.

The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other

inevitable accident. The grantor, after some lapse of time, verbally authorised other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards, in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing:—Held, that these acts amounted to a re-entry by the grantor, inasmuch as, unless referred to the exercise of that right, they would be acts of trespass by him. *Ib.*

—— **Licensee can assign Interest.**]—A licence to search for and raise metals, and also to carry them away, and to convert them to the licensee's own use, passes an interest which is capable of being assigned. *Muskett* v. *Hill*, 5 Bing. (N.C.) 694; 7 Scott, 855; 9 L. J., C. P. 201.

A licence to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed notice on the premises that he intended to avoid the licence, it should be lawful for the grantor to re-enter within a month after fixing the notice, and then the licence should be void:—Held, that notice to the grantee that unless he kept six miners at work the grantor would re-enter at the expiration of a month, did not avoid the licence, or render the grantor's re-entry lawful. *Ib.*

An action on the case is maintainable against the grantors of a lease of mines for unlawfully expelling the assignee and his workmen, and forcibly preventing them from having access to, or working, the mines. *Ib.*

—— **How affecting adjoining Lands.**]—A. and B. were severally seised of parcels of woody ground, and B., having other lands adjoining to his woody ground, intended to make a colliery under his ground; A. granted to B., his heirs and assigns, liberty for him, his heirs and assigns, to carry up a sough or a drain through A.'s woody ground into B.'s woody ground, and also liberty for B., his heirs and assigns, to make two little sough pits, in A.'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer; and B. covenanted that he, his heirs and assigns, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that A., his heirs and assigns, from time to time, and at all times after, might go down into any pit or pits of B., his heirs or assigns, to discover whether any coals of A., his heirs or assigns, should be gotten; and that B., his heirs and assigns, should repair any injury to A.'s fence:—Held, that by the grant to B., his heirs and assigns, of the liberty of making the sough in A.'s land, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto; and that the use of such sough for the carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B.; and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered in by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have a continuing operation while any coals in B.'s woody ground and adjoining lands remained to be gotten. *Hodgson* v. *Field*, 7 East, 613; 3 Smith, 538; 8 R. R. 701.

—— **Breach of Covenant — Grant Void or Voidable.**]—A. granted to B. a licence to enter upon his lands to search and dig for ores for a term of twenty-one years, with a proviso that if B. ceased to work the mines for six months, or broke any other of the covenants contained in the licence, then the "supposed indenture, and the liberties, licences, powers and authorities thereby granted shall cease, determine and be utterly void and of no effect":—Held, that the word "void" was to be construed to mean voidable, and that some act of A. to shew his election to enforce the forfeiture was necessary to put an end to the licence. *Roberts* v. *Davy*, 1 N. & M. 443; 4 B. & Ad. 665; 2 L. J., K. B. 141.

**Licence not Exclusive—Possession of Seam—Knowledge of Licensor.**]—By a deed of the 29th of September, 1854, R. demised to C. a fire-brick manufactory, and he granted to C. power to dig fire-clay from under lands therein described, the term of the demise and licence being twenty-one years from the 6th of April, 1854. By a deed of the 31st of August, 1862, R. demised to B. all the coal mines and seams of coal, "and also all the mines, seams, veins or beds of ironstone and fire-clay found in connection with such coal seams as are workable as coal seams," under the same lands as those to which C.'s licence applied for forty-two years from the 22nd of November, 1858. In 1866 C. commenced opening an old pit, called the Montague Pit, with the intention of reaching a seam known as the Stone Coal Seam, in order to work the fire-clay in connection with that seam. Previously to this, in 1864, B. had sunk a pit through the Stone Coal Seam, to get at a lower coal seam, and he had taken samples of the fire-clay in the Stone Coal Seam, some of which samples he had sent to C. to be tested, and he had afterwards sold some of the fire-clay to C. for the purpose of being manufactured. After C. had expended a considerable amount of money on his works at the Montague Pit, but before he had reached the Stone Coal Seam, B. gave notice to him that he had already proved the Stone Coal Seam, and was about to work it, and that it would be an invasion of his rights if C. was to work that seam. Ultimately C. filed in equity a bill to restrain B. from working the fire-clay or the coal in the Stone Coal Seam under any part of the lands to which C.'s licence applied during the continuance of C.'s term:—Held, that as C.'s licence was not an exclusive licence, the licensor had still a right to deal with the property comprised in that licence in any manner not inconsistent therewith. *Carr* v. *Benson*, 3 L. R. Ch. 524; 18 L. T. 696; 16 W. R. 744.

Held, also, that B. had first taken possession of the Stone Coal Seam, and that C. had no right to an injunction to restrain B. from working that seam. *Ib.*

Held, also, that no knowledge could be imputed to the licensor of the extent of C.'s business, or of the probability that he would require for the purposes of that business during his term of twenty-one years the whole of the fire-clay lying under the lands comprised in his licence. *Ib.*

**Licence whether Revocable—Liability of Licensor for Acts of Licensee.**]—The plaintiff owned the surface of lands on which he had erected houses. The mines and minerals under them, and a right of access to the same, were, by virtue of an exception and a reservation in the deed of grant under which he was entitled, vested in the defendant, who in 1873, by an instrument signed by him, gave N. a licence to raise coal from these mines in the following terms: "I agree to allow you to sink a pit for coal in B., at 1*s.* 6*d.* per ton, and not to allow anyone else to sink on any coal you prove in the pit; also an air-pit, and 100 yards in each square of the pit." On procuring this licence, N. sunk pits, and mined in such a manner that no sufficient support was left for the land above, and the plaintiff's houses fell. The plaintiff thereupon sued the defendant for wrongfully digging away and removing the soil adjacent to the lands and the mines and minerals under the same without leaving proper support, and for breaking and entering his land. The defendant pleaded that he did not do the acts complained of, and that he did leave proper support. The jury, in answer to questions left to them, found that the defendant did not personally direct or interfere in the mining so as to cause or authorise the injurious operation, but that, knowing injurious consequences to the houses would follow, he allowed the work to go on—that is, he did nothing to stop it:—Held, that the licence was irrevocable; that the defendant had no power by any proceeding to restrain N. from working under it to the plaintiff's injury; and that, therefore, he was not liable to him for the injurious acts of N. *Atkinson* v. *King*, 2 L. R., Ir. 320.

—— **Absence of Expenditure by Licensee.**]—R., the tenant for life of certain estates under a power contained in will, entered into an agreement with the plaintiff by which the plaintiff agreed to take from R. the bog ore on the estate, with full power to enter upon the estate and raise and remove the ore for the period of three years from the 1st January, 1882, at a certain yearly royalty, provided that if, after the said period of three years, he should desire to continue to raise the ore, he should be entitled to do so on paying to the person entitled to the said estates a royalty equal to one-fifth of the net profits which he might derive from the sale of the said ore. In July, 1891, R. informed the plaintiff that she intended to work the bog ore herself, and at the end of the year commenced raising ore. The ore in question lay on or near the surface of the ground, and the plaintiff had not expended any money in the erection of works or otherwise. In an action for an injunction to restrain R. (1) from raising and digging up the ore, and from carrying away ore already raised, and (2) to restrain her from impeding the plaintiff in raising and removing the said ore:—Held, that after the said period of three years the licence was revocable, and that the plaintiff was not entitled to the injunction. *Stanley* v. *Riky*, 31 L. R., Ir. 196—C. A.

**Parcels.**]—A deed granted certain property by the description of "all that copyhold tenement called Greys, consisting of a house with divers parcels of land containing 103 acres (that is to say)"—then followed parcels concluding with "a parcel of land running with Garka Moor, containing twenty-seven acres, which tenement called Greys is now held for the life of H. by copy of court roll":—Held, that a piece of uninclosed land, containing twenty-seven acres and forming part of the waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it. *Hext* v. *Gill*, 41 L. J., Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.

D. mortgaged in fee lands having beds of coal under them, the conveyance expressly mentioning the mines, to T., for securing a sum of money and interest; then devised all the mines under the lands to her seven children, as tenants in common in fee, and all other her real estate to A., B. and C., their heirs and assigns, upon trust to sell; then demised to A. and B. two seams of coal under the lands for fifty years, at 105*l.* rent; and afterwards died; and after her death the rent was paid to the seven children. Previously to her death T. died, after having devised all freehold estates held by him in mortgage to H. and J., their heirs and assigns. Afterwards, by lease and release, between A., B. and C. of the first part, H. and J. of the second part, mortgagee of other premises of the third part, and K. of the fourth part, reciting that A., B. and C. had put up for sale the lands comprised in the mortgage, and K. had been declared purchaser of the lands (except the beds of coal underneath), it was witnessed that H. and J., at the request of A., B. and C., did bargain, sell and release unto K. the closes of land, together with all and singular quarries (omitting the word "mines"), except and always reserved unto A. and B. during the term of thirty years all the mines and beds of coal under the lands, &c. to hold the said closes of land (except as before excepted) unto K., his heirs and assigns, for ever:—Held, that the mines or seams of coal did not pass to K. *Holliday* v. *Denison*, 3 H. & N. 670; 28 L. J., Ex. 25; 4 Jur. (N.S.) 1002; 6 W. R. 719—Ex. Ch.

**Exception and Reservation of Minerals.**]—A. being mortgagee in fee of lands, and B. the mortgagor entitled to the equity of redemption, by lease and release, A. conveyed and B. released the land to C. in fee, who by the same instrument covenanted with and granted to B. that it should be lawful for B., his heirs and assigns, at all times to enter upon the lands to search and dig for coal, and to take and carry away the same to his and their own use. This is only a licence, and conveyed no interest in the soil, so as to exclude C., and those claiming under him, from getting coal there, nor could it operate as an exception or a reservation out of the grant in respect to B., who had not the legal title in him at the time. *Chetham* v. *Williamson*, 4 East, 469; 1 Smith, 278.

A. being seised of a manor, and of the demesne

lands thereof, and of all the coal mines therein, in fee, granted part of the lands to B. in fee, excepting and reserving to himself, his heirs and assigns, all tithes of corn arising therefrom, and also excepting and always reserving out of the grant, to himself and his heirs, all the coals in the lands so granted, together with free liberty for himself, his heirs and his and their assigns and servants, from time to time, and at all times thereafter, during the time that he and his heirs should continue owners of the demesne lands, to sink and dig pits, or otherwise to sough and get coals in the lands, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals, at his and their will and pleasure, he and his heirs, from time to time, giving and paying to the grantee, his heirs and assigns, such satisfaction for damage as the grantee and his heirs should sustain by reason of getting and carrying away the coals in the lands, as two gentlemen, neigbours, indifferently chosen by the grantor and grantee, their heirs and assigns, should from time to time award. An heir of the grantor by descent having alienedthe manor and demesne lands, and the coals therein, in fee to C., the latter entered the lands granted to B., and dug pits and carried away coals therefrom, and an action having been brought against him and his servant:—Held, first, that under the general exception and reservation contained in the grant to B., the title to the coals remained in A. and his heirs, and would pass to his or their assigns, under the word "heirs"; and, secondly, that the special liberty as to the manner of taking the coals was not restrictive, but in furtherance of the previous exception of the coals out of the grant, and would enure for the benefit of C. as owner, by purchase of the manor and demesne lands. *Cardigan (Earl)* v. *Armitage*, 3 D. & R. 414; 2 B. & C. 197; 26 R. R. 313.

A close, held by copyhold tenure, contained an unopened coal mine. B. was tenant from year to year of the close to the copyholder in fee; B. in fact occupied the surface; and it did not appear that in the demise to B. there had been any exception or reservation of the mine. While B. was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to B. and P. In 1832 B.'s tenancy from year to year ceased:—Held, that before and at the time of the grant of 1821, B. was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine; that he, therefore, by the grant, became possessed of the mine for the term without actual entry, and that his possession enured to the benefit both of himself and P.; and therefore B. and P. were both possessed of the mine from the time of the grant, and had not a bare interesse termini. *Keyse* v. *Powell*, 2 El. & Bl. 132; 22 L. J., Q. B. 305; 17 Jur. 1052.

Where an owner of the fee-simple of a close with minerals under it conveys the surface, reserving the minerals with the right of entry to get them, and he afterwards grants the minerals with such right, mere nonuser for more than forty years, no other person having worked or having been in possession of the minerals, is not sufficient under 3 & 4 Will. c. 27, ss. 2, 3, to bar the grantee's right of entry to get the minerals. *Smith* v. *Lloyd*, 9 Ex. 562; 2 C. L. R. 1007; 23 L. J., Ex. 194; 2 W. R. 271.

When in a feu charter the superior reserves the coal and limestone with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or an absolute ownership, and not a mere servitude or easement: the surface and the minerals becoming separate tenements severed in title, and in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent. *Hamilton (Duke)* v. *Graham*, L. R. 2 H. L. (Sc.) 166.

—— **Effect of, on Right to Support.**]—*See* supra, col. 1213.

**Sale of Shares.**]—The purchaser of shares in a mining company is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the company and of the nature of the title under which the mines are worked as will shew that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title to the shares. *Curling* v. *Flight*, 2 Ph. 613; 17 L. J., Ch. 359; 12 Jur. 423.

Before taking shares in a mine, a purchaser availed himself of the means, by inspection and otherwise, of obtaining information respecting it, and afterwards embarked in the speculation. On a bill filed to set aside the contract, on the ground of false representations of the character and value of the mine:—Held, that as he acted upon his own opinion, and not upon the representations of the directors of the mining company, he was not entitled to any relief. *Jennings* v. *Broughton*, 17 Beav. 234; 22 L. J., Ch. 585; 17 Jur. 905; 1 W. R. 441.

The sale, in one transaction, of several kinds of mining shares will not be set aside in equity for misrepresentation if the person seeking relief is unable to restore all the shares he has taken. *Maturin* v. *Tredennick*, 10 L. T. 331; 12 W. R. 740.

Secus, when the sale is of shares of one kind only. *Ib.*

**Sale of Mines—Misrepresentation.**]—Upon the sale of certain collieries, the vendors stated the annual profits to be 66,000*l.*, and estimated the total value at 423,000*l.* The purchasers contracted to buy the collieries for 365,000*l.* It being proved that the amount of annual profits was overstated by 9,500*l.*:—Held, that in order to arrive at the amount to be deducted from the purchase-money, the purchase-money of 365,000*l.* must be taken as the capitalised value of the annual profits stated, and that the sum to be deducted must bear the same ratio to the 9,500*l.* as the 365,000*l.* bore to the 66,000*l.* *Powell* v. *Elliott*, L. R. 10 Ch. 424; 33 L. T. 110; 23 W. R. 777.

When the purchasers of a colliery, which it was necessary should be to a certain extent worked, had entered into possession, and afterwards filed a bill to rescind the contract on the ground of fraudulent misrepresentation, the court, on the application of the purchasers, who alleged that the colliery was worked at a loss, appointed a receiver and manager to work the colliery until the hearing, the means of working to be supplied by the purchasers. *Gibbs* v. *David*, 44 L. J., Ch. 770; L. R. 20 Eq. 373; 33 L. T. 298; 23 W. R. 786.

—— **Liberty to Inspect implied.**]—Under a contract for the sale of the minerals under a given surface, the price payable by instalment, and times of payment to be accelerated according to the quantities raised :—Held, to amount to an implied contract for the vendor to have liberty to enter and inspect with the view of ascertaining the quantities raised ; and a specific decree for executing the contract with such covenant in the conveyance. *Blakesley* v. *Whieldon*, 1 Hare, 176 ; 11 L. J., Ch. 164 ; 6 Jur. 54.

—— **Improper Working.**]—When a vendor of a coal mine, against whom a suit for specific performance was brought, had, during his delay of completion, worked the mine for his own benefit :—Held, that the purchaser was entitled to compensation on an estimate of the market value of the coal in situ, i.e. the value at the place where it was to be sold, less the cost of severing and taking it from the mine to that place. *Brown* v. *Dibbs*, 37 L. T. 171 ; 25 W. R. 776. *See also Cases*, ante, col. 1230.

—— **Memorandum—Statute of Frauds.**]—A., to whom the owner of a quarry had agreed to grant a lease, agreed on behalf of himself and all persons interested to sell the quarry to B., and "that the lease agreed to be granted by the lessor should be granted as B. might direct." B. having refused to complete the purchase, A. brought an action for specific performance, and in his statement of claim stated his agreement with the owner of the quarry, as well as the memorandum of agreement with B., and alleged that B. was aware of the nature of A.'s interest in the quarry, and had accepted the title. B. demurred, on the ground that the memorandum was not sufficient within the Statute of Frauds ; —Held, that it was sufficient. *Morgan* v. *Worthington*, 38 L. T. 443.

**Royalty—"Shipped for Sale."**]—D., in 1824, agreed with S. for the purchase of an estate, and that the purchase-deed should contain a covenant by D. that he, his heirs and assigns, would pay to S., his executors, administrators and assigns, the sum of 6*s.* for each chaldron of coals gotten out of the estate and shipped for sale. The purchase-deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale :—Held, that the execution by D. of a counterpart of the deed containing the covenant must be presumed, and that the words "shipped for sale" in the deed meant coal actually shipped for sale. *Witham* v. *Vane*, 32 W. R. 617—H. L. (E.) Reversing 44 L. T. 718 —C. A.

**Sales by Mortgagees.**]—Mortgagees are within the Confirmation of Sales Act (25 & 26 Vict. c. 108), and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them. *Beaumont's Trusts, In re*, 40 L. J., Ch. 400 ; L. R. 12 Eq. 86 ; 19 W. R. 767.

Mortgagees in possession with a power of sale, after filing a bill for foreclosure, and setting down the cause for hearing on motion for a decree, presented a petition, not intitled in the cause, but in the matter of the 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines and minerals, of the hereditaments comprised in the mortgage deeds :—Held, that they were entitled to the order asked. *Wilkinson's Mortgaged Estate, In re*, 41 L. J., Ch. 392 ; L. R. 13 Eq. 634.

—— **Land and Minerals separately—Parties to be Served.**]—A petition under 25 & 26 Vict. c. 108, s. 2, by trustees of settled land with power of sale, exercisable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder. *Pryse, In re*, 39 L. J., Ch. 760 ; L. R. 10 Eq. 531 ; 18 W. R. 1064.

It is not necessary for mortgagees, in order to exercise the power of selling with a reservation of the mines, to serve the petition on any subsequent incumbrancers. *Beaumont's Trusts, In re*, supra.

The cestuis que trustent ought to be made parties to an application under 25 & 26 Vict. c. 108, s. 2, for sale of the surface apart from the minerals. *Palmer's Will, In re*, 41 L. J., Ch. 511 ; L. R. 13 Eq. 408.

A petition was presented, under the Confirmation of Sales Act (25 & 26 Vict. c. 108), by trustees with a power of sale, and the first tenant for life, and the tenant for life in remainder, for leave to sell the land and minerals separately : —Held, that the next remainderman need not be served with the petition. *Powell, In re*, 23 W. R. 151.

**Powers of Court in Respect of Powers of Sale.**] —The court has power under the Confirmation of Sales Act (25 & 26 Vict. c. 108) to give a general direction that persons having powers of sale and exchange in a settlement or will which do not expressly authorise the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorise such reservation or separation. *Wynn's Devised Estate, In re*, 43 L. J., Ch. 95 ; L. R. 16 Eq. 237 ; 21 W. R. 695.

**Sale of Lunatic's Property—Reserving the Minerals.**]—The court has power under the Lunacy Regulation Act, 1853, s. 124, to make an exchange of the land of the lunatic without the minerals under it. *Dicconson, In re*, 15 Ch. D. 316 ; 29 W. R. 222—C. A.

**Sales under Powers.**]—*See* POWERS.

**Sales under Settled Land Act.**]—*See* SETTLED LAND.

## VII. MINING COMPANIES.

### A. *COST-BOOK MINES.*

#### 1. NATURE AND CHARACTERISTICS OF.

**Mere Partnership.**]—A cost-book mining company, not being incorporated, is a mere partnership. *Kittow* v. *Liskeard Union*, 44 L. J., M. C. 23 ; L. R. 10 Q. B. 7 ; 31 L. T. 601 ; 23 W. R. 72.

A shareholder in a cost-book mining company filed a bill against the managing committee and against a creditor of the company, to restrain an action brought against him by the creditor at the instigation of the committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The court

granted an injunction to restrain the action, but dismissed the bill as against the committee, on the ground that as the company was a simple partnership, formed under no act of parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill. *Sibley* v. *Minton*, 27 L. J., Ch. 53; 5 W. R. 675.

**Agreement for Partnership—Interest in Land.**]—An agreement between A., a lessee of a mine, and B., to become partners in the mine, paying the reserved rent, subletting the mine at a royalty, and dividing the profits, is within the Statute of Frauds, 29 Car. 2, c. 3, and not sufficiently proved by a receipt signed by A. and given to B., for a sum as B.'s share of the head-rent of the mine, the sum being exactly half of that rent. *Caddick* v. *Skidmore*, 2 De G. & J. 52; 27 L. J., Ch. 153; 3 Jur. (N.S.) 1185; 6 W. R. 119.

**Judicial Cognizance.**]—The court does not, without evidence, take judicial cognizance of the meaning of the term "cost-book principle." *Bodmin United Mines Co., In re*, 23 Beav. 370; 26 L. J., Ch. 570; 3 Jur. (N.S.) 350; 5 W. R. 300.

**Rules.**]—Rules peculiar to the cost-book system must be proved. *Great Cambrian Mining Co., In re, Hawkins' Case*, 2 Kay & J. 253; 25 L. J., Ch. 221; 2 Jur. (N.S.) 885; 4 W. R. 224.

A company formed upon the cost-book system is only bound by the rules and regulations entered in the cost-book, and is not bound by a preliminary contract entered into before the formation of the company and not embodied in the rules of the cost-book. *Thomas* v. *Hobler*, 4 De G. F. & J. 199; 8 Jur (N.S.) 125; 5 L. T. 564.

R., on the faith of a prospectus stating that a company was shortly to be formed to be conducted on the cost-book system, applied for, received and paid deposit on shares in the company. He subsequently received scrip certificates in respect of such shares, whereon it was stated that the shares were to be held "subject to the rules and regulations of the company." At the date of the receipt by R. of the scrip certificates sent to him there were no rules or regulations of the company in existence, but soon after such receipt rules and regulations were entered on the cost-book of the company. R. neither signed the cost-book, nor attended meetings of the company, nor received any notices of such meetings, and he alleged that the rules and regulations above mentioned were at variance with the prospectus, and not in accordance with the cost-book system. The company was not abortive or fraudulent, but was unsuccessful, and was in course of being wound up. On the question whether R. ought to be placed on the list of contributories:—Held, that he ought, no substantial variation between the prospectus and the rules having been proved, but leave reserved to enter into evidence in chambers to prove that the rules were at variance with the cost-book system. *Richardson's Case, Great Cambrian Mining Co., In re*, 4 W. R. 670.

**Meeting—Single Member.**]—A single shareholder cannot constitute a meeting of a company under the Stannaries Act, 1869, s. 4. *Sharpe* v. *Dawes*, 46 L. J., Q. B. 104; 2 Q. B. D. 26; 36 L. T. 188; 25 W. R. 66—C. A.

**Unpaid Calls—Power of Shareholders.**]—It is not competent to the adventurers or shareholders in a cost-book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to the purser. *Hybart* v. *Parker*, 4 C. B. (N.S.) 209; 27 L. J., C. P. 120; 4 Jur. (N.S.) 265; 6 W. R. 364.

—— **Judgment Creditor—Secretary—Bankruptcy Petition.**]—Sect. 13 of the Stannaries Act, 1869, which empowers cost-book mining companies to sue shareholders for the amount of unpaid calls in the name of their purser or secretary, does not empower the company to present a bankruptcy petition in the name of the purser or secretary in respect of a judgment recovered in such an action. *Ashmead, Ex parte, Nance, In re*, 62 L. J., Q. B. 500; [1893] 1 Q. B. 590; 4 R. 311; 68 L. T. 733; 41 W. R. 370—C. A.

—— **Proceedings by Creditor.**]—A creditor of a cost-book mining company will not be allowed to bring an action against a shareholder of the company for the purpose of enforcing a call, and therefore, if the action is not really an action by the creditor, but a collusive action by the company, it will be stayed. *Escott* v. *Gray*, 47 L. J., C. P. 606; 39 L. T. 121.

**Actions by and against.**]—A cost-book mining company, though unincorporated, may, since the judicature acts, sue and be sued by its partnership name. *Ib.*

**Liability of Members for Debts.**]—The defendant and others met for the purpose of forming a company for working a mine on the cost-book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner of the mine, 33,750 to A., B. and C., and the remainder allotted to other parties in proportion to capital subscribed by them; 1,125 being allotted to the defendant, for which he paid 100*l.*; and it was at that meeting resolved that the requisite capital to work the mine for the first six months should be found by A., B. and C. The same resolution also stated that the mine had been purchased of the owner for 1,000*l.* in cash, and 15,000*l.* to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations; such payment of 15,000*l.* or surrender of the mine to the owner, being optional by the adventurers:—Held, that by this arrangement each adventurer being a partner in the concern from the commencement, was liable as such for goods supplied for the working of the mine. *Peel* v. *Thomas*, 15 C. B. 714; 3 C. L. R. 397; 24 L. J., C. P. 86.

A transferee of shares in a cost-book mine, the rules of which require transfers to be registered in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transfer is registered. *Thomas* v. *Clark*, 18 C. B. 662; 25 L. J., C. P. 309.

A. agreed to accept a transfer of shares (in trust) from B., with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without (as the jury found) A.'s authority, registered the transfer:—Held, that this unauthorised registration did not render A. liable as a partner for the debts of the company. *Ib.*

In an action against a shareholder, also the secretary of a mine conducted on the cost-book

principle, under which the mine agents made monthly or quarterly estimates of the money required to carry on the business, and raised the amount by calls on the shareholders, it being also the practice, when sufficient funds were not forthcoming, to obtain goods on credit, and the defendant having, as secretary, entered the order for the goods, the question was left to the jury whether the captain had authority to pledge the credit of the shareholders for goods which were necessary. *Newton* v. *Daly*, 1 F. & F. 26.

In an action against a shareholder for coals sold and delivered to a cost-book mining company there was general evidence that coals had been delivered:—Held, that the monthly cost-sheets sent in by the creditor to the purser of the mine, and by him laid before the managing committee and passed by them, were evidence as against the shareholders of the quality and value of the coals so delivered. *Geake* v. *Jackson*, 36 L. J., C. P. 108; 15 L. T. 509; 15 W. R. 338.

—— **Shares sold before Registration—21 & 22 Vict. c. 60, s. 6.**]—A shareholder in an unregistered mining company, and carried on upon the cost-book principle, who had disposed of his shares previously to the company being registered in 1861, under the acts 1856, 1857, is not protected by 21 & 22 Vict. c. 60, s. 6, from being sued for the price of goods furnished to the company before registration, and during the time that he was such shareholder. *Harvey* v. *Clough*, 8 L. T. 324.

**Retiring Members—Rights and Obligations.**]—In a company formed on the cost-book system the practice had been for a shareholder to be at liberty to retire on the terms that if the company was solvent he received from the company a sum of money equal to his ratable proportion of the excess of the assets above the liabilities, but if the company was insolvent he paid to the company his ratable proportion of the excess of the liabilities above the assets. In every case in which a shareholder had retired when the liabilities were in excess of the assets, the purser in calculating the value of the assets had entered all the arrears of calls as good debts, and the shareholder retired on paying only his proportionate part of the excess of the liabilities over the assets according to the number of shares, without regard to the solvency or insolvency of the other shareholders. C. gave notice to retire in November, 1879, but no account was made out shewing what he had to pay. In March, 1880, an order was made to wind up the company. The liquidator, in 1882, made out an account shewing what C. was to pay, and in estimating the assets omitted all arrears of calls owing by insolvent shareholders, and then calculated C.'s contribution by dividing the excess of liabilities over assets ratably among C. and the other solvent shareholders:—Held, that this decision was correct in principle, and that the fact that on all previous occasions the assets had been reckoned without any allowance for the insolvency of persons owing arrears of calls, and the contribution of the retiring shareholder ascertained without reference to the insolvency of any of the continuing shareholders, was not sufficient evidence of an agreement among the shareholders that the contribution of a retiring shareholder should be calculated on that footing. The course of practice followed by an officer of a company is not so strong evidence of an agreement sanctioning that practice as a course of practice in an ordinary partnership of few members. *Frank Mills Mining Co., In re*, 52 L. J., Ch. 457; 23 Ch. D. 52; 49 L. T. 193; 31 W. R. 440—C. A.

But held, that C. was entitled to have the assets of the company valued on the footing of its being a going concern, which it was when he gave notice of retirement, and that the solvency of the persons who owed calls, and of the continuing shareholders, must be taken as matters stood at the date of the notice of retirement, and not at the time when the account was made out. *Ib.*

A shareholder in a mining company on the cost-book principle gave notice, according to the rules of the company, of his ceasing to be a member; afterwards the company was registered as a limited company, and was subsequently wound up:—Held, that the shareholder was not liable to be placed on the list of contributories of the company ordered to be wound up. *Welsh Potosi Mining Co., In re, Lofthouse's Case*, 2 De G. & J. 69; 27 L. J., Bk. 1; 6 W. R. 140.

A shareholder in a company carried on upon the cost-book principle relinquished his shares upon paying his pro ratâ portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly complied with, and entered in the books of the company, and the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder, without the sanction of the managing committee:—Held, that the purser, being the authorised officer of the company to conduct such transactions, the shareholder was exempted from the liability in respect of any excess of power on the part of the purser, and upon the winding-up of the company such shareholder should not be placed upon the list of contributories. *Wrysgan Slate Co., In re, Birch, Ex parte*, 28 L. J., Ch. 894; 7 W. R. 335.

A. was holder of shares in a mining company established on the cost-book principle. In accordance with one of the rules of the company, he gave notice, in April, 1857, to relinquish his shares, but he had not then paid all his arrears, and the purser declined to make the relinquishment. In May the arrears were paid, and on the 4th of June his solicitor applied to the purser to know why the name was retained on the list. On the 26th of June the company was registered as a limited company, under the 19 & 20 Vict. c. 47, and A.'s name was then returned as a shareholder. The company being, in July, ordered to be wound up, A.'s name was placed on the list of contributories. On appeal it was considered that the proper course was for A. to apply to have his name removed from the list of shareholders, the petition of appeal being agreed to be treated as such application:—Held, that B.'s name ought never to have beeen on the register of shareholders, and ought to be removed from it under the power given by 19 & 20 Vict. c. 47, s. 25, of amending the register, and that it ought also to be removed from the list of contributories. *Welsh Potosi Mining Co., In re, Birch's Case*, 2 De G. & J. 10; 27 L. J., Bk. 4; 6 W. R. 141.

By one of the rules of a mining company, carried on under the cost-book principle, it was provided that any shareholder might determine his responsibility or liability upon giving

notice in writing to the purser of his desire of retiring, and upon depositing with the purser the transfer of the shares held by him, and signing a relinquishment of all claims or demands on the company in respect of such shares; the prospectus of the company also stated that under the cost-book principle, shareholders had the right of determining their responsibility, by giving notice of their intention to relinquish their shares, and on forfeiture of all previous payments. A. B., a shareholder in the company, gave notice in writing to the purser of his desire to retire, and thereby relinquished all right and title to his shares:—Held, on winding up the company, that under the terms of the rule as explained by the prospectus, A. B. had by his notice absolved himself from all liability to the past and future debts of the company. *Pennant Lead Mining Co., In re, Fenn's Case*, 4 De G. M. & G. 285; 22 L. J., Ch. 692; 2 W. R. 282.

2. SHARES IN.

**Contract for Sale — Interest in Land.**]—A contract for the sale of shares in a mining company managed on the cost-book principle is not a contract for the sale of land or an interest in land under s. 4 of the Statute of Frauds. Nor is it a contract for the sale of goods, wares or merchandise within s. 17. *Watson* v. *Spratley*, 2 C. L. R. 1434; 10 Ex. 222; 24 L. J., Ex. 53; 2 W. R. 627.

Shares in a mine worked on the cost-book principle do not necessarily constitute an interest in land within s. 4 of the Statute of Frauds, in the absence of evidence that the shareholders take a direct interest in the freehold. *Powell* v. *Jessop*, 18 C. B. 336; 25 L. J., C. P. 199; 4 W. R. 465.

**Not within Statute of Mortmain.**]—Shares in a mine carried on on the cost-book principle are not within the Statute of Mortmain (9 Geo. 2, c. 36), when it appears that the mines and other real estates were not vested in the purser or any person on a direct trust for the shareholders as tenants in common, in proportion to the number of their shares, but upon trust to work the same for the benefit of all the shareholders. *Hayter* v. *Tucker*, 4 Kay & J. 243; 4 Jur. (N.S.) 257; 6 W. R. 243.

**Surrender of Shares.**]—A meeting of shareholders of a mining company carried on on the cost-book principle, acting within the scope of their authority, passed a resolution authorising the committee of management to make an arrangement with the shareholders in arrear for calls, that on any shareholder in arrear surrendering to the committee his shares, he might be entitled to redeem within the month so many of the surrendered shares which, at 19*s.* per share (the amount of calls in arrear), would equal the amount paid by him, provided a call of 2*s.* per share were paid upon the shares when redeemed. In January three shareholders executed a surrender of their shares to the committee, and claimed to be entitled to the reduced number of shares upon payment of the call of 2*s.* per share. Nothing further was done either on the part of these shareholders or the company, but in May the secretary wrote to them, stating that the number of their shares had been reduced, and requiring them to pay the call of 2*s.*, and other calls since made. In answer to this letter one of the three shareholders wrote, stating that it would not be convenient for him to pay the calls upon the whole number of shares, and asking that the number might be reduced. The company was afterwards wound up. Upon its being sought to charge them as contributories:—Held, from the practice of the company in other cases, that the shares were legally surrendered; that the letter by the one shareholder was written under an erroneous idea of his position with regard to the shares; that all right under the resolution was gone; that he was not at the time in the position of a shareholder, and that none of them were entitled to redeem, and ought not therefore to be placed on the list of contributories. *Bodmin United Mines Co., In re*, 23 Beav. 370; 26 L. J., Ch. 570; 3 Jur. (N.S.) 350; 5 W. R. 300.

**Past Member.**]—A shareholder in a cost-book mining company who has ceased to be a shareholder more than two years before the order for winding up cannot be put on the list of contributories as a past member, although he had not so ceased for two years before the mine ceased to be worked. *Chynoweth's Case, Wheal Unity Wood Mining Co., In re*, 15 Ch. D. 13; 42 L. T. 636; 28 W. R. 897.

A. B. signs the cost-book for certain shares, and transfers them to C. D., who accepts the transfer, and signs the book in respect of the shares. C. D. having been made a contributory in respect of these shares:—Held, that A. B. could not also be fixed with liability as a contributory in respect of these shares. *Bowen's Case, Cambrian Mining Co., In re*, 4 W. R. 800.

**Forfeiture of Shares on Nonpayment of Calls.**]—A power in co-adventurers to forfeit the shares of one of their number for nonpayment of calls is not necessarily incident to a mining adventure conducted on the cost-book principle. *Clarke* v. *Hart*, 6 H. L. Cas. 633; 27 L. J., Ch. 615; 5 Jur. (N.S.) 447.

Where such a power exists by agreement between the parties, it is to be treated as strictissimi juris, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed. *Ib.*

Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement) that his shares are liable to forfeiture on nonpayment of calls, will not affect his rights under the agreement. *Ib.*

A., B. and C. joined in a mining adventure on the cost-book principle as recognised in Devonshire and Cornwall. A. fell into arrear with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time; no payment was made, and no further notice was given, but a fortnight after the extended time had expired the shares were declared forfeited:—Held, that such declaration of forfeiture was invalid. *Ib.*

At a meeting of the partners in a cost-book mine, held in 1874, it was stated that the mine was 2,003*l.* in debt, and a call of 25*l.* was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings,

in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still partners. It appeared that the mine was in debt in 1878 :—Held, that even assuming the shares not to have been regularly forfeited, the plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners. *Clarke* v. *Hart* (6 H. L. Cas. 633) distinguished. *Rule* v. *Jewell*, 18 Ch. D. 660 ; 29 W. R. 755.

**Certificate — Notice of Rules.**]—A mining company by its prospectus and certificates professed to be a company in 30,000 shares, of 1*l.* each, to be conducted upon the cost-book principle. The directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so soon as one-third of the shares should have been subscribed, and by another that no person should be recognised as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and be duly registered in the cost-book as an adventurer. H. having seen the prospectus, but not the rules, applied verbally, and paid for and received certificates of shares in the company. The certificates stated that the shares were to be held subject to the rules of the company. The company failed. H., a year after he received the certificates, brought an action to recover his money, as upon a failure of consideration, and the action was compromised :—Held, first, that the certificates were notice of the rules, and although H., assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable locus pœnitentiæ to return the certificates, still, having retained them, and not having brought his action for a year, he must be taken to have acquiesced in and be bound by the rules. *Great Cambrian Mining Co., In re, Hawkins' Case*, 2 Kay & J. 253 ; 25 L. J., Ch. 221 ; 2 Jur. (N.S.) 85 ; 4 W. R. 224.

Held, secondly, that although H. had not signed the rules, still, having applied and paid for, and accepted the certificates of shares, he had authorised the company to register his name in the cost-book, without his signing the rules, that the contract was complete, and that he was a contributory. *Ib.*

Although in general no contract exists between a company and a person who holds scrip certificates by assignment from a shareholder who has signed the cost-book bonâ fide in respect of those shares, so as to fix such scrip holder with the liabilities of a shareholder, there may be such a course of dealing as to establish a privity between the company and the holder of scrip certificates, and a liability against him, although he has not signed the cost-book in respect of the shares represented by such scrip certificates. *Bowen's Case, Cambrian Mining Co., In re*, 4 W. R. 800.

**Liability of Transferee.**]—A transferee of shares in a company conducted on the cost-book principle takes his shares with their past as well as future liabilities, the deed of settlement of the company containing a provision for the transfer of shares. Such liability is independent of any special contract between the transferor and the transferee. *Taylor* v. *Ifill*, 8 L. T. 148.

The rule is not affected by the circumstance that the transferor is one of the creditors of the company ; and the shares in the hands of the transferee, and the transferee personally, become liable, on a deficiency of the assets of the company, to contribute towards the payment of the debt of the transferor. *Ib.*

In 1851 a company had called up and expended all the capital contemplated by the deed, viz. 10*l.* per share. The company had been established in 1849, professedly on the cost-book principle, with monthly meetings, three directors, one to retire annually, and no new member to be admitted until approved by a board of directors. After 1851 no new directors were appointed. In March, 1852, the company being indebted to S., one of the shareholders, in 1,000*l.*, a meeting was called and held some time in the spring or summer of that year, at which all the adventurers attended. It was then resolved that the whole authority of the board of directors should be handed over to the secretary, to be exercised under the supervision of S. alone, who was to furnish all moneys necessary to work the mine, to try and redeem what had been already lost. Previously to this meeting, viz. in 1851, P., one of the shareholders, being indebted to De C., placed in deposit with him ten shares as a security. After the meeting, P., without informing De C. of the change of circumstances in the company, offered to relinquish the ten shares to De C. in part payment. In December, 1852, De C., having put inquiries to the secretary, which were satisfactorily answered, agreed in writing to take these shares on the same terms as P. held them. In April, 1853, De C. endeavoured to sell the shares to other parties, and with that view applied to be admitted on the register as a transferee. This was at first refused, but ultimately assented to, but no such registration ever took place. The next meeting did not take place till 1854, when it appeared that the loss for which the company was liable to S. amounted to nearly 5,000*l.* In 1856 S. alone presented his petition to have the company wound up, on which an order was made accordingly :—Held, that De C. was not liable to be placed on the list of contributories. *De Castro's Case, Court Grange Silver Lead Co., In re*, 2 Jur. (N.S.) 1203.

The test applied was not whether De C. could have insisted, as against P., on having the shares, but whether P. could have insisted on a specific performance of the agreement of December, 1852 ; and :—Held, that P. could not have done so. *Ib.*

Under the above circumstances :—Held, that the company in 1852, at the time of the contract, was no longer carrying on business under its deed ; that P. knew that fact, and that De C. did not know it ; and therefore that the contract could not be sustained. *Ib.*

C. took 300 shares in a cost-book mining company, and in order to increase the apparent number of shareholders, and thereby cause the mining scheme to be more favourably regarded in the share market, caused 100 of them to be transferred into the name of A., and 100 to be transferred into the name of B., who, notwithstanding the transfers, neither attended meetings nor paid calls, nor took any part in the affairs of the company :—Held, that having regard to the absence of any bonâ fide trusteeship on the part of A. and B., and to the extended definition of the word "contributory" in the Companies Act, 1862, s. 200, C. was properly inserted on the list of contributories in respect

of the whole 300 shares. *Cox, Ex parte, Wheal Emily Mining Co., In re*, 4 De G. J. & S. 53 ; 33 L. J., Ch. 145 ; 9 Jur. 1184.

The secretary of an unregistered company carried on upon the cost-book system purchased shares in the company, and had them transferred to a nominee, who was a man of small means, his object being to prevent its being generally known that he was trafficking in shares in the company. The transfer was registered, and about three years afterwards the company was wound up :—Held, that the transaction was a bonâ fide purchase of shares in the name of the trustee, and that the secretary could not be put on the list of contributories in respect of them. *King's Case, Great Wheal Busy Mining Co., In re*, 40 L. J., Ch. 361 ; L. R. 6 Ch. 196 ; 24 L. T. 599 ; 19 W. R. 549.

C. transferred 510 shares in a cost-book mining company to A. for 5*l*. The transfer was registered. The company having suspicions as to A.'s means asked for information about him, but got none. It made calls upon him, and on nonpayment recovered judgment for the amount, but obtained nothing. About two years afterwards the company was ordered to be wound up. The liquidator sought to put C. upon the list of contributories, on the ground that the transfer was fraudulent, within s. 35 of the Stannaries Act, 1869 :—Held, that the court could only act in the winding-up, as the company could have acted if there had been no winding-up, and that as the company would have been estopped by having recognised the transfer with knowledge, the court could not set it aside. *Chynoweth's Case, Wheal Unity Wood Mining Co., In re*, 15 Ch. D. 13 ; 42 L. T. 636 ; 28 W. R. 897.

—— **Transferee not Registered.**]—An owner of 500 shares in a cost-book mine, according to the rules of which the person registered as owner in the cost-book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the owner requested the secretary to enter a transfer of the shares from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. The defendant did not cause the shares to be registered in his name, and the plaintiff, in consequence of his name being continued in the cost-book as the owner, was compelled to pay some subsequent calls :—Held, that there was no legal obligation on the defendant to cause the shares to be registered in his name as the owner, but that there was an implied obligation on him to indemnify the plaintiff against calls made during the time when he was virtually and potentially the owner of the shares. *Walker* v. *Bartlett*, 18 C. B. 845 ; 25 L. J., C. P. 263 ; 2 Jur. (N.S.) 643 ; 4 W. R. 681 —Ex. Ch.

**Liability of a Person on Register who has sold Shares.**]—In a company on the cost-book principle the regulations were, that any person who was the holder of share certificates could cause himself to be registered as a shareholder, and could not receive any dividends unless he was the registered holder, and on registration the former holder was freed from all liability :—Held, that a registered shareholder, who had disposed of his shares and handed over the certificates, but no other person had registered himself in respect of those shares, remained liable to be a contributory. *Wrysgan Slate Co., In re, Humby's Case*, 28 L. J., Ch. 875 ; 5 Jur. (N.S.) 215 ; 7 W. R. 335.

The rules of a mining company carried on upon the cost-book principle provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, and that every transfer should be according to a particular form provided for that purpose. The form was printed, and contained a notice that no transfer was valid or complete unless entered in the cost-book, and acknowledged by the purser. A shareholder agreed to transfer his shares, and the proposed transferee stipulated that the transferor should pay the calls then due. They went together to the office of the company, and deposited with the purser a transfer of the shares executed by them both in the required form, and the transferor paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser :—Held, that the transferee was properly placed upon the list of contributories. *Pennant Lead Mining Co., In re, Mayhew's Case*, 5 De G. M. & G. 837 ; 24 L. J., Ch. 353 ; 1 Jur. (N.S.) 566 ; 3 W. R. 95.

**Stamping Transfers—23 Vict. c. 15, Sch.**]—Before this enactment, transfers of shares of mines conducted on the cost-book principle were exempt from stamp duty. *Toll* v. *Lee*, 4 Ex. 230 ; 18 L. J., Ex. 364 ; 13 Jur. 614.

**Charging Shares with Judgment Debts.**]—Quære, whether a mining company on the cost-book principle is a public company within 1 & 2 Vict. c. 110, s. 14, so as to make shares therein liable to be charged with a judgment debt. *Nicholls* v. *Rosewarne*, 6 C. B. (N.S.) 480 ; 28 L. J., C. P. 273 ; 5 Jur. (N.S.) 1266 ; 7 W. R. 612.

### 3. Jurisdiction of Stannary Court.

**In what Cases.**]—The stannary court was a court of law, but not of equity. *Trelawny* v. *Williams*, 2 Vern. 483.

The equitable jurisdiction of the vice-warden of the stannaries of Cornwall depended upon the principles of equity as administered in the court of chancery. Therefore, where ejectment lay for a mine, a petition to the vice-warden for delivery of possession to the plaintiff without alleging any impediment to the recovery of the premises in a court of law was bad on demurrer. Nor would a petition lie simply for an account of mesne profits of a mine, where it was not shewn that any difficulty existed in taking the account, or that the account might not be taken as conveniently at law as in equity. *Vice* v. *Thomas*, 4 Y. & Coll. 538.

**In Winding-up.**]—*See* infra.

**Abolition.**]—*By* 59 *&* 60 *Vict. c.* 45, *which came into operation on* 1*st January*, 1897, *the court of the vice-warden of the stannaries was abolished, and the jurisdiction and powers of the court were transferred to and vested in such*

*county courts as the Lord Chancellor might by order direct.*

4. WINDING-UP.

**By what Court.**]—Sect. 32 of 18 & 19 Vict. c. 32, extending the jurisdiction of the stannaries court over the county of Devon, did not oust the jurisdiction of the court of chancery over mines in that county; and therefore it was no objection to a petition for winding-up a mining company in that county that the petitioners are not owners of one-tenth in value of the shares, as required by the 12 & 13 Vict. c. 108, s. 1, in the case of mining companies formed on the cost-book principle within the jurisdiction of the court of stannaries. *South Lady Bertha Copper Mining Co., In re*, 2 John. & H. 376; 32 L. J., Ch. 92; 9 Jur. (N.S.) 170; 7 L. T. 20; 10 W. R. 687.

Leave to present such a petition was properly granted, under 20 & 21 Vict. c. 78, s. 12, on the ground that the stannaries court had no jurisdiction to restrain proceedings at law against individual shareholders. *Ib.*

Where a shareholder in a mining company on the cost-book system in the stannaries was being sued in London, the vice-warden had no power to stay the action:—Held (the company having ceased to carry on business), that this was a proper case for a winding-up order in chancery, and not in the stannaries court. *Wheal Anne Mining Co., In re*, 30 Beav. 601; 6 L. T. 38; 10 W. R. 330.

A company registered in the stannaries court for the working of mines in Cornwall must be wound up in the court of the vice-warden of the stannaries, although the company never commenced working any mines, and had not any creditors within the jurisdiction of the court. *East Botallack Mining Co., In re*, 34 Beav. 82; 34 L. J., Ch. 81; 11 L. T. 408; 10 Jur. (N.S.) 1193; 13 W. R. 197.

Mining companies formed before the passing of the act 11 & 12 Vict. c. 45, are not within its provisions, the intention of s. 2 being only to bring the associations therein mentioned within the description and operation of s. 1. *Wyld, Ex parte, Wheal Lovell Mining Co., In re*, 1 Macn. & G. 1; 1 H. & Tw. 125; 18 L. J., Ch. 139; 13 Jur. 133.

A company had carried on business upon the cost-book principle until a certain day, when it was registered as a company with limited liability. An order was afterwards obtained before the court of bankruptcy, under the 19 & 20 Vict. c. 47, for winding up the company. Many actions were brought against the directors and shareholders on account of debts accrued before the registration:—Held, that the court of chancery had jurisdiction to make an order for winding up the company as it existed before the registration. *Welsh Potosi Mining Co., In re*, 27 L. J., Ch. 311; 4 Jur. (N.S.) 577.

A company established for the purpose of acquiring and working mines in Cornwall, and carrying on the business of a smelting and refining company, and as auxiliary thereto, the purchase and erection of buildings, jetties, piers, railways, &c., and the freighting of vessels, is subject to the jurisdiction of the court of the stannaries. *Atter, Ex parte, Penhale Lead Mining Co., In re*, 36 L. J., Ch. 515; L. R. 2 Ch. 398; 16 L. T. 336; 15 W. R. 664.

When a company has been established for working mines within the district of the stannaries, the fact that some of the objects of the company are to be carried out beyond the district does not exempt the company from the jurisdiction of the stannaries court. *Ib.*

**On whose Application.**]—A., a shareholder in a cost-book mine, receives notice in 1851 of an intended sale of a portion of the mine with a view to its being worked by a new company, and is subsequently informed that the arrangement had been adopted, that a transfer of the old share and issue of shares in the new company had been agreed upon, and a call directed in order to clear off the liability remaining upon the old mine as shown by the balance-sheet. A. does not transfer his shares or take up those issued by the new company, and declines to pay the call. On his being sued by a creditor of the company for a sum equal in amount to this unpaid call:—Held, that although A. could not disturb the arrangement of 1851 as to the transfer and sale, he was entitled to have the old company wound up for the purpose of settling the outstanding liabilities, in respect of which the allegations in the petition had not been satisfactorily explained. *Birch, Torr and Vitifer Mining Co., In re*, 1 Kay & J. 204; 3 W. R. 148.

**Creditor Appearing.**]—On a petition to wind up a company within the stannaries, a creditor is not entitled to appear and oppose. *Tretoil and Messer Mining Co., In re*, 2 John. & H. 421; 6 L. T. 154; 10 W. R. 338.

**Staying Actions.**]—In an action against a shareholder in a company working a mine on the cost-book system for goods supplied to the company, it appeared that after he had parted with his shares in it, the remaining members of the company caused it to be registered under 21 & 22 Vict. c. 60, and an order was made by the court of the vice-warden of the stannaries to wind up the company and stay all actions by creditors against it; and a list of contributories was drawn up, in which the name of the defendant was included. On an application to stay the action:—Held, that the plaintiff had a right to proceed, and that the court of the vice-warden had no power to make that order, as the defendant was not a member of the registered company, and the debt sued for was not a debt of that company. *Lanyon* v. *Smith*, 3 B. & S. 938; 32 L. J., Q. B. 212; 9 Jur. (N.S.) 1228; 8 L. T. 312; 11 W. R. 665.

**Inspection of Books.**]—The practice of the stannaries court is the same as that of the high court of justice, that the mere fact of a petition is not enough to justify an order for inspection of books. But if grounds are shewn, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection. The right of inspection under the 22nd section of the Stannaries Act, 1855, is personal to the shareholder, and does not extend to his solicitors or agents. *West Devon Great Consols Mine, In re*, 27 Ch. D. 106; 51 L. T. 841; 32 W. R. 890—C. A.

**Rectifying Register.**]—Under the Companies Act of 1862, s. 35, the vice-warden of the stannaries has not exclusive, but concurrent, jurisdiction to entertain an application to rectify the register of members. *Penhale Lead Mining Co., In re, Atter, Ex parte*, 36 L. J., Ch. 515; L. R. 2 Ch. 393; 16 L. T. 336; 15 W. R. 664.

**Misfeasance.**]—M. and T. were the principal shareholders in the Ambrose Lake Mine, which was a cost-book company divided into 6,000 shares. In 1871 it was determined to convert it into a limited company, and for this purpose the lease of the mine was assigned to E., a clerk of T., and an agreement was executed that E. should convey it to T. and another as trustees for a new company to be thereafter formed in consideration of the sum of 24,000*l.* to be paid to E. as follows:—6,000 fully paid-up shares of 2*l.* each and 12,000 shares with 20*s.* each considered as paid thereon in the capital of the company to be formed. This new company was incorporated under the above title on the 19th of January, 1872, and the agreement which was printed in the memorandum and articles of association was duly registered. M. and T. were two of the directors named in the articles. One of the objects for which the company was established was as stated in the memorandum—the purchase of the lease of the Ambrose Lake Mine—and the nominal capital of the company was stated to be 36,000*l.* divided into 18,000 shares of 2*l.* each. By the articles of association it was provided, inter alia, that the first 6,000 shares were to be deemed fully paid up, and the remaining 12,000 to have 20*s.* per share paid thereon on allotment. At the first meeting of the directors, all of whom had interests in the cost-book mine, a resolution was passed adopting the agreement to purchase the mine and the articles of association. The shares which formed the purchase money were, in pursuance of an arrangement, divided by E. between M. and T. and the other shareholders of the cost-book mine, according to their former holdings in the mine. Shares were allotted to M. and T. of the nominal value of 11,450*l.* and 11,410*l.* respectively. There was no allotment of shares to the outside public, the new company consisting entirely of the former holders in the cost-book mine or their nominees. No prospectus was issued. The company was ordered to be wound up compulsorily in January, 1878, and the liquidator applied in the winding-up, that M. and T. might be ordered, under s. 165 of the Companies Act, 1862, to pay the sums of 11,450*l.* and 11,410*l.* respectively, by way of compensation for misfeasance as directors:—Held, that though the conversion of the cost-book mine into a limited company might be a fraud on the public, it was not a wrong as between the company and the vendors. It was no fraud on the existing shareholders, because they were all cognisant of it, nor on future shareholders, because by the constitution of the company there could be no future allottees of shares. The vendors and the purchasers forming the whole company, the company could not complain, the remedy, if any, being the remedy of a purchaser from the original allottees who might have been deceived by the representation of his vendor as to the value of the shares. *Taylor, Ex parte, Ambrose Lake Tin Mining Co., In re*, 49 L. J., Ch. 457; 14 Ch. D. 390; 42 L. T. 604; 28 W. R. 783.

**Registration of Contract.**]—The owners of a mine worked on the cost-book principle formed a limited company by registration under the Companies Acts, 1862 and 1867, and signed the memorandum of association for the full number of 10*l.* shares into which the capital was to be divided in proportion to their respective interests in the mine, and a clause in the articles of association (which were duly signed) stated, that it was agreed that 7*l.* should be credited on each of their 10*l.* shares, and that all their interests should vest in the company:—Held, that this was a valid contract sufficiently registered under the Companies Act, 1867, s. 25. *Appletreewick Lead Mining Co., In re*, 43 L. J., Ch. 793; L. R. 18 Eq. 95; 30 L. T. 287; 22 W. R. 678.

**Proof by Member against.**]—A shareholder in a Cornish mine worked on the cost-book system relinquished his shares in July, 1868, and paid his share of the expenses up to his retirement. In August, 1869, an order for winding up the company was made, and the retired shareholder claimed to prove as a creditor for the value of his share of the stock and plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of Cornwall, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, was entitled to be paid his share of the then value of the stock and plant, and that such share was due to him immediately, and payable within two years, the proof was admitted. *Prosper United Mining Co., In re, Palmer, Ex parte*, L. R. 7 Ch. 206; 26 L. T. 374; 20 W. R. 323.

**Costs.**]—On appeal from the stannaries court, the registrar of which is the official liquidator of companies wound up in that jurisdiction, as well as the officer charged with the taxation of the costs or proceedings in that court, it was ordered that the costs of the appeal, as well as the costs of the prior proceedings in relation to the order appealed from, should be taxed by the taxing master of the court of chancery. *Spargo's Case, Harmony and Montague Mining Co., In re*, 42 L. J., Ch. 488; L. R. 8 Ch. 407; 28 L. T. 153; 21 W. R. 306.

**Contributories.**]—*See* supra, SHARES, col. 1271, et seq.

## VIII. REGULATION AND INSPECTION OF MINES.

### 1. COAL MINES.

**Employment of Females.**]—To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to 5 & 6 Vict. c. 99, ss. 8 & 13, knowledge of or acquiescence in their being so employed must be brought home to him. *Reg. v. Handley*, 9 L. T. 827.

Evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient. *Ib.*

The court has power to entertain a special case sent by the quarter sessions for their opinion, they having confirmed a conviction appealed against, under 5 & 6 Vict. c. 99, s. 21, subject to the opinion of the court. *Ib.*

**Notice of Accident.**]—By 18 & 19 Vict. c. 108, s. 9, if loss of life to any person employed in a coal mine occurs by reason of any accident within such coal mine, or if any serious personal injury arises from explosion therein, the owner shall, "within twenty-four hours next after such loss of life," send notice of such accident to the

inspector of the district:—Held, that where serious personal injury arose, not attended with loss of life, the owner could not be convicted for not sending notice to the inspector. *Underhill* v. *Longridge*, 29 L. J., M. C. 65; 6 Jur. (N.S.) 221.

**Ventilation.**]—By the Mines Inspection Act, 1860, s. 10, r. 1, an adequate amount of ventilation shall be constantly produced in all coal mines or collieries and ironstone mines to dilute and render harmless noxious gases to such an extent that the working-places of the pits, levels and workings of every such colliery and mine, and the travelling roads to and from such working-places, shall, under ordinary circumstances, be in a fit state for working and passing therein:—Held, that r. 1 was not confined to the ventilation of the working-places and travelling roads, but required that so much of the mine must be kept ventilated as to render the working-places and travelling-roads safe. *Brough* v. *Homfray*, 9 B. & S. 492; 37 L. J., M. C. 177; L. R. 3 Q. B. 771; 16 W. R. 1123.

**Timbering—Props and Sprags where "required."**]—Rule 22 of s. 49 of the Coal Mines Regulation Act, 1887, provides for the use of sprags or holding props in mines to support the top coal whilst the bottom coal is being worked. Upon their true construction, the words of that rule, "where they are required," mean where they are "necessary," and not where the workmen think them necessary. Whether they be necessary or not is a question of fact to be decided by the justices in each case. *Gibbon* v. *Phillips*, 64 L. J., M. C. 42.

**Examination of Machinery, &c., and Shafts.**]—Rule 5 of s. 49 of the Coal Mines Regulation Act, 1887, requires the report of the result of the daily examination of the external parts of the machinery, guides, conductors, &c., to be recorded, as well as the report of the weekly examination of the shafts. *Scott* v. *Bould*, 64 L. J., M. C. 16; [1895] 1 Q. B. 9; 15 R. 134; 71 L. T. 577; 18 Cox, C. C. 52; 59 J. P. 390.

**Breach of Rules by Workman.**]—By the Coal Mines Regulation Act, 1872, s. 52, power is given to frame special rules for the conduct and guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in a mine no person employed in or about the works was to ascend the pit contrary to the direction of the hooker-on. In this mine the workmen had power to dismiss themselves at a moment's notice. The workmen employed in the mine being dissatisfied with their working-place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the workmen, however, ascended contrary to his direction:—Held, that they had been guilty of a breach of the special rule above mentioned. *Higham* v. *Wright*, 46 L. J., M. C. 223; 2 C. P. D. 397; 37 L. T. 187.

By the Mines Inspection Act, 1860, it is by s. 11 enacted that special rules shall be established in every mine within the act, and by s. 22 a penalty is imposed upon workpeople employed in such mines who neglect or wilfully violate any of such special rules. By r. 11 of the special rules in force in the present case, every charter-master, underlooker, manager or other person, upon employing any workman, was to deliver to him a copy of such rules; and by r. 34 it was provided that "Every workman is engaged subject to these rules, and shall observe the same and abide by the consequences of neglecting them, and shall receive a copy thereof from the manager, chartermaster or other person who shall engage him." Upon an information under s. 22 against the appellant for disobeying the orders of the respondent, who was the chartermaster under whose control the appellant was, contrary to the rules, there was no evidence that a copy of the said rules had been given to the appellant:—Held, that the delivery of a copy of such rules was a condition precedent to the respondent's right to enforce them. *Higginson* v. *Hapley*, 19 L. T. 690.

**Notice by Inspector of Danger—Objection of Owner—Powers of Arbitrator.**]—In an arbitration under s. 46 of the Coal Mines Regulation Act, 1872, the duty of the arbitrator is limited to determining whether the matter complained of by the inspector is dangerous and ought to be remedied, and he has no power to determine what is the proper remedy, or to direct that any particular remedy be adopted. *Home Secretary and Fletcher, In re*, 56 L. J., Q. B. 177; 18 Q. B. D. 339; 35 W. R. 282; 51 J. P. 707—C. A.

—— **Remedy not possible.**]—A colliery being in danger of being flooded by the accumulation of water in an adjacent disused pit belonging to a different owner, the inspector of mines served a notice under the Coal Mines Regulation Act, 1872, s. 46, on the owner of the colliery, calling on him to remedy the matter. He attempted to do so, but found that it was impossible without going on to his neighbour's property, and consequently failed to comply with the notice, and did not remove his men from his own workings. On these facts he was convicted of an offence under s. 46:—Held, that he was wrongly convicted, for that section only applied to cases where the remedy was within the owner's power, which it was not in the present case, and that he was not bound to withdraw his men in consequence of the notice, the withdrawal of men being provided for by s. 51, sub-s. 6. *Spon Lane Colliery Co.* v. *Baker*, 48 L. J., M. C. 25; 3 Q. B. D. 673; 39 L. T. 13; 27 W. R. 46.

**Boiler Explosion—Power of Board of Trade to direct Inquiry.**]—The Boiler Explosions Act, 1882, by s. 4, provides that "this act shall not apply to any boiler used exclusively for domestic purposes, or to any boiler used in the service of her majesty, or to any boiler on board a steamship having a certificate from the board of trade, or to any boiler explosion into which an inquiry may be held under the provisions of the Coal Mines Regulation Act, 1872, and the Metalliferous Mines Regulation Act, 1872, or either of them"; and by s. 2 of the Boiler Explosions Act, 1890, "so much of s. 4 of the Boiler Explosions Act, 1882, as relates to any boiler other than a boiler used in the service of her majesty, or used exclusively for domestic purposes, is hereby repealed":—Held, that the board of trade has power under these acts to direct an inquiry under the Boiler Explosions Act, 1882, into a boiler explosion, notwithstanding that the secretary of state also has power to direct an inquiry

as to the explosion under the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872. *Reg.* v. *Boiler Explosions Commissioners*, 60 L. J., Q. B. 544; [1891] 1 Q. B. 703; 64 L. T. 674; 39 W. R. 440—C. A. Affirming 55 J. P. 616.

**Penalties—Limitation of Time for Recovering.**]—Mandamus tested the 14th May, 1857, to justices, to hear and determine the merits of an information, which they had dismissed without hearing and determining the merits, on the 20th of January. Return, that the justices, in obedience to the writ on the 22nd of December, 1857, heard and determined the information, which was for penalties incurred by a contravention of the 18 & 19 Vict. c. 108, and dismissed it, on the ground that the offence having been committed on the 17th of December, 1856, more than three months had elapsed, and the defendant was therefore protected, and could not be convicted. Sect. 14 enacts, that all penalties imposed by the act may be recovered within three months of the commission of the offence:—Held, that whether the justices were right or wrong in their construction of the act, the return shewed that they had obeyed the writ, and was therefore good. *Reg.* v. *Mainwaring*, El. Bl. & El. 474; 27 L. J., M. C. 278; 4 Jur. (N.S.) 928; 6 W. R. 594.

Semble, per Lord Campbell, C.J., and Crompton, J., that the justices' construction of the act was right; Coleridge, J., and Erle, J., inclining to a contrary opinion. *Ib.*

**Compliance with General Rules when "Reasonably Practicable."**]—The Coal Mines Regulation Act, 1872, by s. 51 enacts that certain general rules shall be observed so far as is reasonably practicable, and among them that gunpowder or other explosive or inflammable substance shall not be used in the mine underground, during three months after any inflammable gas has been found in any such mine, if the inflammable gas issued so freely that it shewed a blue cap on the flame of the safety-lamp, except when the persons ordinarily employed in the mine are out of the mine "or out of the part of the mine where it is used":—Held, that the expression "reasonably practicable" did not relate to the carrying on of the mine as a profitable concern, but to physical or engineering difficulties in the way of carrying out the rules, and that the expression "part of the mine," did not mean the neighbourhood where the gunpowder would be used, but such a part of the mine as could be treated under the statute as a separate mine. *Walls* or *Wales* v. *Thomas*, 55 L. J., M. C. 57; 16 Q. B. D. 340; 55 L. T. 400; 16 Cox, C. C. 128; 50 J. P. 516.

**Liability of Joint Owners.**]—A party was summoned before justices, upon an information under 18 & 19 Vict. c. 108, s. 11, charging that he, "being one of the owners and managers" of a colliery, had worked the colliery without providing the boiler with a proper steam gauge. In defence he contended that, as there were other owners, they ought to be charged with him; but he did not deny that he was resident owner, and took an active part in the management. The justices, upon this objection alone, dismissed the complaint, considering the information to be bad on the face of it, because it shewed that there were other owners. A mandamus was granted, commanding them to hear and determine the information; for that, first, the objection was invalid; and, secondly the justices had not exercised jurisdiction, but had declined it, the objection being preliminary, though taken in defence, and not at the outset. *Reg.* v. *Brown*, 7 El. & Bl. 757; 26 L. J., M. C. 183; 3 Jur. (N.S.) 745; 5 W. R. 625.

**Immunity of Mine-owners for Negligence of Servants.**]—By the Mines Regulation Act, 1860, s. 10, it was provided that certain general rules should be observed in every coal mine by the owner and agent thereof; and among those rules was one providing that, whenever safety lamps were required to be used, they should be first examined and safely locked by a person or persons duly authorised for that purpose. By s. 22, a penalty is imposed on the owner or agent if, through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, were neglected or wilfully violated. The owner of a mine appointed a competent person to examine and lock the safety lamps required for use in the mine, but such person delivered out certain safety lamps to miners for use in the mine unlocked:—Held, that, in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him. *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R. 9 C. P. 1; 29 L. T. 540.

The owners of a colliery who have appointed a certificated manager under the Coal Mines Regulation Act, 1872, s. 26, are not liable for an injury to a workman in the colliery caused by the negligence of the manager, as there is nothing in the statute to make him other than a fellow-workman of the person injured. *Howells* v. *Landore Steel Co.*, 44 L. J., Q. B. 25; L. R. 10 Q. B. 62; 32 L. T. 19; 23 W. R. 335. Also reported, 31 L. T. 433.

**Owner's Liability for not Publishing Rules.**]—By s. 51 of the Coal Mines Regulation Act, 1872, certain general rules are provided, to be observed in every mine to which the act applies, and it is enacted that, "in the event of any contravention or non-compliance with any of the general rules by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against the act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules and regulations for the working of the mine, to prevent such contravention or non-compliance":—Held, that in the case of a non-resident part owner of a mine, taking no part in the management, the appointment of a certificated manager is evidence upon which, without proof of personal interference on the part of such owner, he may be acquitted of an offence under that section. *Baker* v. *Carter*, 47 L. J., M. C. 87; 3 Ex. D. 132; 26 W. R. 497.

**"Owner"—Who is.**]—In 1860, S. proposed in writing to take from the landlord certain coal mines for fourteen years, from Michaelmas of that year, at a certain rent, a lease to be granted and accepted, with provisions contained in a then existing lease of other mines. The landlord accepted this proposal in writing, but no lease was executed. One of the provisions mentioned was, that when and so soon as the pits, shafts,

roads, &c., should be discontinued or become useless, the lessee would fill up or remove the same unless the lessor should signify his wish that the same should be kept open or continued. In 1871 S. discontinued working these mines. In December, 1875, he was convicted by justices under the Coal Mines Regulation Act, 1872, s. 41, upon a charge of not causing the tops of the shafts of these mines to be kept securely fenced for the prevention of accidents on the 29th November previously:—Held, that he was not at the date charged an owner of the shafts within the interpretation of that term in s. 72. *Stott* v. *Dickinson*, 34 L. T. 291.

**Breach of Rules and Regulations—Liability of Agent and Manager.**]—By a special rule for the regulation of coal mines under the Mines Regulation Act, 1860, the banksman is directed to take care that the persons descending the pit shall in no case exceed the number of eight men and boys; a breach of these rules is punishable on summary conviction by fine and imprisonment. The chartermaster of a pit (who by the rules was declared to be the responsible manager of the pit under his charge) was close to the pit, and was cognizant that more than eight men were being lowered down at one time, and had power to prevent the banksman (who was his servant) from so doing, and did not interfere:—Held, that he was properly convicted of a breach of the regulations, as being a person aiding, abetting or procuring the commission of the offence, within 11 & 12 Vict. c. 43, s. 5. *Howells* v. *Wynne*, 15 C. B. (N.S.) 3; 32 L. J., M. C. 241; 9 Jur. (N.S.) 1041.

The 18 & 19 Vict. c. 108, s. 4, required certain rules to be observed in every coal mine and colliery by the owner and agent thereof. By r. 1, an adequate amount of ventilation is to be constantly produced at all collieries, in order that the working-places of the pits and levels of such collieries may, under ordinary circumstances, be in a fit state for working. Sect. 11 imposes a penalty upon the owner and agent if any colliery be worked and the aforesaid rules are neglected or wilfully violated:—Held, that the agent of a colliery which was actually worked only on week days incurred a penalty under s. 11 for a breach of r. 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night and Monday morning; for that, notwithstanding such suspension, the colliery was worked during that time within the meaning of that section. *Knowles* v. *Dickinson*, 2 El. & El. 705; 29 L. J., M. C. 135; 6 Jur. (N.S.) 678; 2 L. T. 174; 8 W. R. 411.

By the Coal Mines Regulation Act, 1872, s. 51, it is provided that, in the event of any contravention of the general rules set out in that section, the owner, agent and manager shall be each guilty of an offence, unless he proves that he had taken all reasonable means to prevent such contravention. The first of all such general rules provides that an adequate amount of ventilation shall be constantly produced in every mine to render harmless noxious gases, so that the working-places of the shaft of such mine, and the travelling-roads to and from such working-places, shall be in a fit state for working and passing therein. The respondent, who was a certified manager of a colliery mine, at a salary of 1*l.* per week, was charged with an offence under s. 51, r. 1. It was proved that the mine was improperly ventilated, and that the respondent might have improved the ventilation with the resources at his disposal, but that the requisite provision for the proper ventilation of the mine would have involved an outlay of 200*l.*:—Held, that the finding of the justices, that the respondent had omitted to employ the resources at his disposal for the improvement of the ventilation of the mine, disclosed an offence under s. 51, for which he was liable to be convicted. *Hall* v. *Hopwood*, 49 L. J., M. C. 17; 41 L. T. 797.

The Coal Mines Regulation Act, 1872, s. 51, enacts certain general rules which are to be observed in every mine to which that act applies, and that every person who contravenes or does not comply with such rules shall be guilty of an offence against the act, and that in the event of any contravention of or non-compliance with any of the rules "by any person whomsoever being proved, the owner, agent and manager shall each be guilty of an offence against the act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules," to prevent such contravention or non-compliance. The manager of a coal mine in Staffordshire and the respondent, the agent of the same mine, were summoned for non-compliance with the first general rule for procuring adequate ventilation in the mine. The magistrate convicted the manager, under whose directions the mine was being worked, but declined to convict the agent also of the same offence:—Held, that the agent as well as the manager of a mine to which the said act applies was liable to be convicted of an offence against the act, in not complying with the said rules as to ventilation in the mine, unless he gives evidence to shew that he had to the best of his power enforced the said rules. *Wynne* v. *Forrester*, 48 L. J., M. C. 140; 5 C. P. D. 361; 40 L. T. 524; 27 W. R. 820.

A managing director of a colliery company appointed a duly certificated manager of a mine, and did not in any way interfere with the actual management of the colliery underground, which was left in the hands of the manager. He also caused the rules under the Coal Mines Regulation Act, 1887, and the abstract of the act itself, to be duly published at the colliery, and had authorised all necessary expenditure for the safety and working of the mine. An offence against the act having been committed in the mine:—Held, that the managing director was an "agent" within the meaning of s. 50 of the act, but that as he had caused the rules and the act to be duly published at the mine, as required by that section, he had taken all reasonable means to prevent such "contravention," and had therefore discharged himself from responsibility for such offence. *Stokes* v. *Checkland*, 5 R. 240; 68 L. T. 457; 17 Cox, C. C. 631; 57 J. P. 232.

—— **Liability of Owner—Certificated Manager.**]—Where the owner of a coal mine took no part in the management, had appointed a certificated manager, had duly posted up the rules in accordance with the Coal Mines Regulation Act, 1887, and was found to have taken all reasonable means to prevent non-compliance with those rules:—Held, that he could not be convicted of permitting dangerous working within s. 50 of the above act. *Bell* v. *Bruce*, 55 J. P. 535.

**Check-weigher, Appointment of — Person "Employed in the Mine."**]—By the Coal Mines

Regulation Act, 1872, s. 18, the persons employed in a mine, and paid according to the weight of the mineral gotten by them, may, at their own cost, station a check-weigher at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed; and "the check-weigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine." The plaintiff, a check-weigher, duly appointed under s. 18, received a fortnight's notice to quit his employment from the men employed in the mine. Before the notice expired the men held a fresh election, at which the plaintiff (with others) presented himself as a candidate, and was again appointed:—Held, that the true construction of s. 18 was to limit the class of persons from whom the men might appoint a check-weigher to persons employed in the mine by the mine-owner; that the plaintiff ceased to have any employment under the mine-owner when he was first appointed check-weigher by the men; and therefore that his second appointment was invalid. *Hopkinson* v. *Caunt*, 54 L. J., Q. B. 284; 14 Q. B. D. 592; 33 W. R. 522; 49 J. P. 550.

—— **Effect of Closing and Re-opening Mine on Appointment of.**]—The appellant, who was a miner in the respondents' coal mine, was appointed check-weigher by the other miners under the provisions of s. 18 of the Coal Mines Regulation Act, 1872, and acted in that capacity, and was paid by the miners. Subsequently the respondents dismissed all the miners and closed the mine. No notice was given to the appellant by the respondents, or by or on behalf of the miners. On the mine being re-opened a short time afterwards, the appellant claimed to be still check-weigher and to be entitled to perform the duties of that office, and brought an action against the respondents for preventing his doing so:—Held, that the appellant had, on the dismissal of the miners, ceased to be check-weigher, and that the action could not be maintained. *Whitehead* v. *Holdsworth*, 48 L. J., Ex. 254; 4 Ex. D. 13; 39 L. T. 638; 27 W. R. 94.

**Check-weighers—Misconduct of.**]—A check-weigher, stationed by the person employed in H.'s mine to take an account of the weighing of the mineral gotten by them, under s. 18 of the Coal Mines Regulation Act, 1872, had been convicted and imprisoned for intimidating one of the workmen with a view to compel him to abstain from working as a waggon-rider in H.'s employment. He applied to justices for a summary order for the check-weigher's removal under the provisions of that section, and the justices, although it did not so appear on the face of the conviction, admitted evidence to shew, and found as a fact, that the intimidation took place on H.'s premises, where the appellant had no right to be, except in his capacity of check-weigher. It did not appear that this intimidation caused any impediment or interruption of the working of the mine, but the justices made the order of removal:—Held, that the check-weigher had misconducted himself within the meaning of the section, and that the justices were justified in making the order. *Prentice* v. *Hall*, 37 L. T. 605; 26 W. R. 237.

**Wages—Payment by Weight of Mineral—Mineral contracted to be gotten.**]—Persons were employed in a mine under a contract that coals should be paid for at 1*s.* 6*d.* per ton, and heading slack at 7*d.* per ton, no other slack to be paid for; all other slack to be deducted from the different places in proportion to their loading, and a premium of 2*d.* a ton on the coal to be paid to all those places whose boxes of coal did not contain an average of more than 112 lbs. of dust each per week. The coal (including the slack gotten) was weighed close to the pit's mouth, and was then sorted and carried forty yards and shot on to a screen, more slack being caused by the operations: a note of the slack which passed through the screen was taken by a person employed only by the mine-owners, and the weight of the slack was deducted from the weight at the pit's mouth. The wages of the miners were paid according to the weight of the coal after thus deducting the slack. In an action by the miners to recover from their employers the difference between the wages so ascertained and the full wages if no such deduction had been made:—Held, that the miners were entitled to recover. By Lord Halsbury, L.C., and Lords Herschell and Macnaghten:—Because by the contract the amount of wages paid depended "on the amount of mineral gotten" within the meaning of s. 17 of the Coal Mines Regulation Act, 1872, but the miners were not paid "according to the weight of the mineral gotten," nor was "such mineral truly weighed accordingly," within the meaning of that section; for "the mineral contracted to be gotten" was coal including slack, and slack was not "material other than mineral to be gotten," and was therefore not one of the deductions allowed by that section. By Lords Bramwell and Fitzgerald:—Because, though the deductions were not in contravention of s. 17, the weights were not ascertained in the manner required by s. 18. *Netherseal Colliery Co.* v. *Bourne*, 59 L. J., Q. B. 66; 14 App. Cas. 228; 61 L. T. 125; 54 J. P. 84—H. L. (E.) Affirming 36 W. R. 405—C. A.

The Coal Mines Regulation Act, 1887, provides (s. 12, sub-s. 1) that where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten . . . provided that nothing in the section shall preclude the owner, agent or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten:—Held, that, in the case of a coal mine, a deduction in respect of small coal, upon the ground that the "mineral contracted to be gotten" was large coal, was illegal under the section, and that the miners were entitled to be paid according to the actual weight of all the coal gotten by them. *Brace* v. *Abercarn Colliery Co.*, 60 L. J., Q. B. 706; [1891] 2 Q. B. 699; 65 L. T. 694; 40 W. R. 3; 56 J. P. 20—C. A.

According to the true construction of s. 12 of the Coal Mines Regulation Act, 1887, which provides for the payment of miners by weight, subject to the right of masters and men to agree upon certain deductions, the "deductions" therein mentioned are deductions from weight, not from wages. That from which the deduction is to be made is the whole amount of material which

is sent up in tubs from the mine. That which is to be deducted is the foreign substance which is sent up in the tubs with the coal, or the slack or coal dust with which the tubs are improperly filled. Any other mode of making deductions is in contravention of the statute. *Kearney* v. *Whitehaven Colliery Co.*, 62 L. J., M. C. 129; [1893] 1 Q. B. 700; 4 R. 388; 68 L. T. 690; 41 W. R. 594; 57 J. P. 645—C. A.

A miner entered into a contract of employment with the owners of a colliery, by which he agreed not to leave his employment without giving fourteen days' notice, and further agreed that deductions that were in contravention of the above section might be made from his wages:—Held, that the whole contract of employment was not thereby rendered illegal, and that he therefore was liable in damages to the colliery owners for leaving without notice. *Netherseal Colliery Co.* v. *Bourne* (14 App. Cas. 228), considered. *Ib.*

—— **Payment by weight of Mineral—Exemption.**]—Orders exempting mines from the provisions of s. 17 of the Coal Mines Regulation Act, 1872, made by a secretary of state before the passing of the Coal Mines Regulation Act, 1887, are specially preserved and kept in force by ss. 79 and 84 of that act, unless revoked or altered by a secretary of state under the provisions of s. 72 of the same act, and exempt the mines to which they were granted from the provisions of s. 12, sub-s. 1, of the act of 1887. *Dickinson* v. *Handsley*, 60 L. T. 567; 53 J. P. 676.

2. OTHER MINES.

**"Mine"—Slate Quarry.**]—A slate quarry, worked by means of underground workings by levels, is a mine within the intention of the Metalliferous Mines Regulation Act, 1872. *Sim* v. *Evans*, 23 W. R. 730.

**"Quarry"—Slag-heap.**]—A slag-heap (covering a large area and about thirty-seven feet in height from the natural surface of the ground) accumulated by artificial and not natural means, the natural surface of the ground remaining intact, is not a "quarry" within the Quarries Act, 1894. *Scott* v. *Midland Ry.*, 61 J. P. 358.

**"Skip," or Open Box—Miners using Skip without Cover.**]—By s. 23, sub-s. 11, of the Metalliferous Mines Regulation Act, 1872, a sufficient cover overhead shall be used when lowering or raising persons in every working shaft with certain exceptions. By the last clause of s. 23, every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this act. By s. 31, every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which, in the case of an owner or agent, would be an offence against this act, shall be guilty of an offence against this act, and is rendered liable to a penalty. S. and others were working miners in the D. mine. The D. mine had two shafts, in one of which was a man engine, with a proper cover, used to lower miners from and raise them to the surface of the mine. In the other was a "skip," or open box, without a cover, used for raising ores and refuse. S. and certain other miners, who were then at the bottom of the mine, while the man engine and "skip" were both at work, got into the "skip," and were raised to the surface of the mine:—Held, that they were guilty of an offence against the act. *Frecheville* v. *Souden*, 48 L. T. 612; 47 J. P. 613.

**Duty of Mine-owner towards Miner.**]—It is no answer to a claim for damages by the surviving relatives of a workman accidentally killed in a mine, which was not in a safe and sufficient state, to say that he was at that moment of time in the act of leaving the work for a purpose of his own. *Brydon* v. *Stewart*, 2 Macq. H. L. 30.

The master who lets a workman down his mine is bound to bring him up safely, even though he came up on his own business, and not for that of his master. *Ib.*

**Working—Guides in "Working Shaft"—Signalling.**]—The respondents, who had completed a shaft in their mine, and were driving a level or tunnel from the same, but had not commenced to raise any ore by means of the shaft, had not provided guides nor proper means of communicating signals from the bottom of the shaft to the surface. An information was laid against the respondents, under s. 23, sub-s. 10, of the Metalliferous Mines Regulation Act, 1872, which enacts that every working shaft of a certain depth shall be provided with guides and proper means of signalling. The information was dismissed upon the ground that as no ore was being raised, it was not a working shaft within the act:—Held, that the shaft was a working shaft, and that the respondents should have been convicted. *Foster* v. *North Hendre Lead Mining Co.*, 60 L. J., M. C. 6; [1891] 1 Q. B. 71; 63 L. T. 458; 17 Cox, C. C. 216; 55 J. P. 103.

**Gunpowder—Conveyance of—"Case or Canister."**]—By the Metalliferous Mines Act, 1872, s. 23, sub-s. 2, "Gunpowder or other explosive or inflammable substance shall not be taken into the mines except in a case or canister containing not more than four pounds":—Held, that the word "case" as used in the section must be taken to mean something solid and substantial in the nature of a canister, and that a bag of linen or calico was not such a "case." *Foster* v. *Diphwys Casson Slate Co.*, 56 L. J., M. C. 21; 18 Q. B. D. 428; 51 J. P. 470.

**Obligation to Fence—Who Bound.**]—A person entitled to the minerals under the land of another, with licence to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle, which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing. *Williams* v. *Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 237; 9 Jur. (N.S.) 1237; 8 L. T. 458; 11 W. R. 886.

Harbour trustees had a licence to take flints and chalk from a quarry at a certain price:—Held, that they were not thereby "owners" of the quarry within the meaning of s. 41 of the Metalliferous Mines Regulation Act, 1872, so as to be liable to fence same. *Foster* v. *Newhaven Harbour Trustees*, 61 J. P. 629.

—— **Working Discontinued—Side Entrance.**]—A side entrance of a disused mine situated upon an enclosed piece of land is not securely

fenced within the meaning of s. 13 of the Metalliferous Mines Regulation Act, 1872, unless the fence be placed close to the entrance. *Foster* v. *Owen*, 62 L. J., M. C. 7; 5 R. 50; 67 L. T. 712; 41 W. R. 240; 57 J. P. 87.

**Fencing Shaft of Abandoned Mine—Who Liable for.**]—The appellant was lessee of a lead mine, and of all the duties arising therefrom, under a lease from the Duchy of Lancaster, by which he had to pay to the duchy, by way of rent, all he might annually receive in respect of the mine, with an additional yearly rent of five shillings. The mine was demised to him subject to a custom by which all the subjects of the realm have a right to search there for veins of lead ore, upon paying certain duties, and the appellant had no pecuniary interest in the mine or in the minerals thereof. Sect. 13 of the Metalliferous Mines Regulation Act, 1872, requires the owner of an abandoned mine to which the act applies, and every other person interested in the minerals of the mine, to cause the top of the shaft to be fenced, and s. 41 states that the term "owner" means any person "who is the immediate proprietor, or lessee, or occupier of a mine," and "does not include a person who merely receives a royalty, rent or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant or licence for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine":—Held, that the appellant was neither owner of the mine nor a person interested in its minerals within the meaning of s. 13, and, therefore, upon the mine being abandoned he was not liable to cause the top of its shaft to be fenced, as required by that section. *Arkwright* v. *Evans*, 49 L. J., M. C. 82.

Quære, whether the statute applies to a mine which belongs to the Duchy of Lancaster. *Ib.*

Sect. 41 applies to a mine abandoned or discontinued at any time before or after the time when the act comes into operation. *Stott* v. *Dickinson*, 34 L. T. 291.

Sect. 21 of the Mines Regulation Act, 1860, which imposes on the owner of an abandoned mine the duty of securely fencing it, does not apply to a mine abandoned before the passing of the statute. *Reg.* v. *Gratrex*, 12 Cox, C. C. 157.

The owners in fee of a mine granted a lease for a term of years, reserving to themselves a royalty on the minerals produced, with power to distrain for the rent, and to detain the minerals gotten until the royalty was paid:—Held, that such lessors were, during the existence of the lease, persons interested in the minerals within s. 13 of the Metalliferous Mines Regulation Act, 1872, and were therefore liable, in the event of the mine becoming an abandoned mine, to cause its shaft to be fenced for the prevention of accidents. *Evans* v. *Mostyn* (*Lady*), 47 L. J., M. C. 25; 2 C. P. D. 547; 36 L. T. 856.

The owner of the soil of an abandoned lead-mine, and of the calc-spar and calk (barytes) it contains, is a "person interested in the minerals of the mine" within the meaning of s. 13 of the Metalliferous Mines Regulation Act, 1872, and is therefore liable to fence its shafts and entrances for the prevention of accidents. *Stokes* v. *Arkwright*, 66 L. J., Q. B. 845; 77 L. T. 400; 61 J. P. 775.

The appellant was the lord of the manor of H., and freeholder of the soil of a mine, which had not been worked for over thirty years, and the workers of which or their representatives could not be traced. Notice was served on him to fence, on the ground that the entrance was specially dangerous. By the Derbyshire Mining Act, 1852, the appellant was entitled to dues of lot and cope and a third meer, and this act further only gave the worker the right to mine, and conferred no title on the soil. The appellant having failed to comply with the terms of the notice was summoned and convicted:—Held, that the appellant was a person interested in the minerals within s. 13 of the act of 1872, and that on abandonment the mine reverted to him as owner, and that, therefore, being liable to fence, he was rightly convicted. *Devonshire* (*Duke*) v. *Stokes*, 76 L. T. 424; 61 J. P. 406.

**Neglect to securely fence Shaft—Information in Name of Inspector laid by Agent.**]—An information under s. 35 of the Metalliferous Mines Regulation Act, 1872, for an offence against that act may be laid by a person authorised in that behalf by an inspector under the act. *Foster* v. *Fyfe*, 65 L. J., M. C. 184; [1896] 2 Q. B. 104; 74 L. T. 784; 44 W. R. 524; 18 Cox, C. C. 364; 60 J. P. 423.

J. M.

## MINISTER.

*See* ECCLESIASTICAL LAW.

## MINOR.

*See* INFANT.

## MINUTES.

*See* PRACTICE (JUDGMENTS AND ORDERS).

## MISDEMEANOUR.

*See* CRIMINAL LAW.

## MISDESCRIPTION.

*See* VENDOR AND PURCHASER.

## MISDIRECTION.

*See* PRACTICE (NEW TRIAL).

## MISFEASANCE.

*See* COMPANY—NEGLIGENCE.

# MISJOINDER.

*See* PRACTICE (PARTIES).

# MISREPRESENTATION.

*See* FRAUD.

# MISTAKE.

1. *General Principles*, 1293.
2. *Evidence and Onus of Proof*, 1297.
3. *Form of Relief*, 1298.
4. *Laches and Delay*, 1301.
5. *Pleading*, 1302.

**Rectification of Proof in Bankruptcy.**]—*See* BANKRUPTCY.

**Arising from Ignorance of Rights.**] — *See* FRAUD AND MISREPRESENTATION.

**In Gifts by Will.**]—*See* WILL.

**In Contracts for Sale of Lands.**]—*See* VENDOR AND PURCHASER.

**As a Defence to Suits for Specific Performance.**] —*See* SPECIFIC PERFORMANCE.

**Rectification of Mortgages.**]—*See* MORTGAGE.

**Rectification of Marriage and Voluntary Settlements.**]—*See* SETTLEMENT.

## 1. GENERAL PRINCIPLES.

**Jurisdiction of Court.**]—The court has jurisdiction to set aside an agreement on the ground of mistake, but the mistake must be plain and palpable, and it must be possible to replace the parties in substantially their original position. *Beauchamp* v. *Wynn*, 38 L. J., Ch. 556; 21 L. T. 253; 17 W. R. 866.

When in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief. *S. C.*, sub nom. *Beauchamp (Earl)* v. *Winn*, L. R. 6 H. L. 223.

A court of equity will not, if such a ground for relief is clearly established, decline to grant relief merely because it may be difficult to restore the parties exactly to their original condition. *Ib.*

What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. *Ib.*

Where two parties, under a mistake of fact, enter into an agreement, either of them has a title to come to equity to be relieved from it. That relief will be given on the principles of good conscience alone. *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049.

A. entered into an agreement for a lease of a fishery from B. At the time both parties believed that B. was the owner of the fishery, but it was afterwards discovered that A. was the owner. There was no fraud, and the deeds establishing A.'s title were equally known and accessible to both parties:—Held, that A. was entitled to have the agreement set aside, subject to certain equitable terms for the benefit of B., and that the maxim, ignorantia juris non excusat, did not apply. *Ib.*

**Mistake of Law.**]—Although mistake is one of the grounds for equitable relief, it must be a mistake of fact, and not of law. The construction of a contract is matter of law, and if a party acts upon a mistaken view of his rights under a contract, he is not entitled to relief in equity. *Midland Great Western Ry.* v. *Johnson*, 6 H. L. Cas. 798; 4 Jur. (N.S.) 643; 6 W. R. 510.

The court refused an injunction to restrain plaintiffs in an action at law from taking out of court money which the defendants had paid into court, in ignorance that upon such payment the plaintiffs were entitled to stay their action and take the sum so paid. *G. W. Ry.* v. *Cripps*, 5 Hare, 91; 4 Railw. Cas. 473.

If parties are entering into an agreement, and the will out of which a forfeiture arose was lying before them and their counsel, while the drafts were preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point. *Pullen* v. *Ready*, 2 Atk. 591.

A party who, under a misapprehension of his legal rights, parts with his property for a valuable consideration, cannot have the transactions set aside on the mere ground of mistake. *Marshall* v. *Collett*, 1 Y. & Coll. 232.

A husband was advised by counsel that he had no title as tenant by the curtesy, and that if he intended to set up such a title, he ought not to sue in a partition suit then in contemplation. The suit was nevertheless instituted by him, and a decree was obtained. A partition was made under the decree, and the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, and afterwards to her own use in fee. The father filed a bill to be relieved from the trusts, on the ground of mistake, and to have his title as tenant by the curtesy established:—Held, that the court has power to relieve against mistakes in law as well as against mistakes in fact; but that where relief is sought against the consequences of mistakes in law, the court must be satisfied that the plaintiff's conduct has been determined by those mistakes. *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 23 L. J., Ch. 769; 18 Jur. 524.

—— **Payment.**]—The court will only exercise its power to relieve against mistakes in law as well as against mistakes in fact where there is some equitable ground which makes it inequitable that the relief should not be granted. *Rogers* v. *Ingham*, 3 Ch. D. 351; 35 L. T. 667; 25 W. R. 338.

Therefore, such relief will not be granted in a case where, there being no fiduciary relationship between the parties, and both parties having had a full knowledge of all the facts, one party demands repayment of money received by the other, on the ground that, owing to a mistake in law, both parties had believed that the person receiving the money was entitled to it. *Ib.*

Although, the giving credit in account may be treated, as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law; yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. *Daniell* v. *Sinclair*, 50 L. J., P. C. 50; 6 App. Cas. 181; 44 L. T. 257; 29 W. R. 569.

**Forged Indorsement — Amount paid and received in Good Faith.**]—The plaintiffs paid the defendants the amount due on the first and second of a bill of exchange, drawn in three sets. The defendants bought the bill in good faith, but the prior endorsements were forgeries. Some months later the third of exchange properly endorsed was presented, and the plaintiffs were compelled to pay it. The plaintiffs then sought to recover the amount paid on the first and second of exchange from the defendants as money paid under a mistake of fact:—Held, that their action failed. When money is once paid and received on a bill of exchange in good faith under a mistake, not instantly discovered, it cannot be recovered back. The rule in *Cocks* v. *Masterman*, (9 B. & C. 902) discussed and followed. *London and River Plate Bank* v. *Bank of Liverpool*, 65 L. J., Q. B. 80; [1896] 1 Q. B. 7; 73 L. T. 473.

**What Proof required.**]—A mistake in law, in order to be relieved against, must be distinctly stated and proved in the bill, and on the evidence. *Kilvington* v. *Parker*, 21 W. R. 121.

**Compromise.**]—In an agreement for compromise the consideration which each party receives is the settlement of the dispute; the real consideration being, not the sacrifice of the right, but the abandonment of the claim; and it is no objection to the validity of such contract, that the right was really in one of the parties only. *Trigge* v. *Lavallee*, 14 Moore, P. C. 271; 9 Jur. (N.S.) 261; 11 W. R. 404.

It is no objection to such a transaction, that the right was really in one of the parties only; nor is an agreement of compromise vitiated by mistake of either party in matters of law. *Ib.*

If the error relied on is in a matter of fact, and the fact is one not included in the compromise, and of such a character that it must be considered as the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied though not expressed; and then if the fact fails the foundation of the agreement fails. *Ib.*

A plaintiff may be entitled to relief from a contract or conveyance on the ground of ignorance and mistake, although the defendant was also in ignorance and under mistake, the contract or conveyance not being made upon the principle of compromising doubtful rights. *Reynell* v. *Sprye*, 8 Hare, 222; 21 L. J., Ch. 633. *And see next case.*

—— **Doubtful Rights.**]—When parties whose rights are questionable have equal knowledge of facts and equal means of ascertaining what their rights really are, and they endeavour to settle their claims among themselves, the court feels disposed to support the agreements to which they may fairly come, notwithstanding the subsequent discovery of common error. *Pickering* v. *Pickering*, 2 Beav. 31; 4 Myl. & Cr. 289; 8 L. J., Ch. 336; 3 Jur. 331, 743. *And see preceding case.*

**Conveyance.**]—Where there is a mistake in a conveyance so that the deed does not represent the final contract between the parties, the court will rectify the deed if both parties can be restored to their original position. *Harris* v. *Pepperell*, L. R. 3 Eq. 1; 17 L. T. 191; 16 W. R. 68.

**Mistake in Drawing Deed.**]—Mistakes and misapprehensions in the drawers of deeds are as much a head of relief as fraud and imposition. *Langley* v. *Brown*, 2 Atk. 202.

Where a man, in consideration of an intended marriage, and of a debt stated to be owing by him to the intended wife, conveys to her, and there is no proof of actual fraud nor of actual mistake, though some of the deeds are absurdly framed, there was no ground to relieve nor any pretence to set aside the deeds. *Ib.*, 195.

**Omission.**]—An omission by mistake in an agreement stands on the same ground as an omission by fraud. *Ramsbottom* v. *Gosden*, 1 V. & B. 168; 12 R. R. 207.

**Mistake in Telegram.**]—The defendant wrote to the plaintiffs inquiring upon what terms they could supply him with fifty rifles. They, having stated terms, received a telegram from the defendant for "the rifles." The message by the defendant was for "three" rifles, but the telegraph clerk had mistaken the word "three":—Held, that the defendant was not bound by the mistake of the clerk. *Henkel* v. *Pape*, 40 L. J., Ex. 15; L. R. 6 Ex. 7; 23 L. T. 419; 19 W. R. 106.

**Errors in Calculation.**]—A contractor agreed to execute works for a gross sum. A schedule of quantities, to shew in detail how the gross sum was made up, was appended to the contract. There were in the schedule several manifest errors in calculations. The bill sought to have the errors rectified, and the defendant demurred for want of equity, and the demurrer was overruled. *Neill* v. *Midland Ry.*, 20 L. T. 864; 17 W. R. 871.

**Personal Contract—Mistake as to Persons making.**]—Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith* v. *Wheatcroft*, 47 L. J., Ch. 745; 9 Ch. D. 223; 39 L. T. 103; 27 W. R. 42.

**Ignorance of Rights.**]—A negotiable security given by a party in satisfaction of a liability, from which he was discharged in law, in ignorance, cannot be enforced against him. *Bell* v. *Gardiner*, 4 Man. & G. 11; 1 D. (N.S.) 683; 4 Scott (N.R.) 621.

**Tenant for Life—Death of.**]—A. was tenant for life, without impeachment of waste. A. became insolvent, and B. his agent in England entered into an agreement with the official assignee's agents that the official assignee should be entitled to the timber as if the same had been felled and taken away prior to the 15th of August, but that it should not be cut until the 1st of December. It was afterwards discovered that A. had died on the 24th of August:—Held, that it had been entered into upon a mistake of the facts, and

without sufficient consideration. *Cochrane* v. *Willis*, 35 L. J., Ch. 36 ; 13 L. T. 339 ; 14 W. R. 19.

2. Evidence and Onus of Proof.

**Mistake in Law.**]—A mistake in law, in order to be relieved against, must be distinctly stated and proved in the bill, and on the evidence. *Kilvington* v. *Parker*, 21 W. R. 121.

**Compromise.**]—For the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely shewing a mistake, but shewing a deed and its proposed state to be in conformity with the intention of all the parties at the very time of its execution, and a statement by one of the parties that the deed as it stands was not according to his intention at the time ought to have considerable weight. *Fowler* v. *Fowler*, 4 De G. & J. 250.

A deed of compromise recited a letter of the mother's, stating that by her will her residuary estate would be divided equally between her sons. The deed also recited that the mother was seised of real estate, the particulars whereof were specified in a schedule. By the witnessing part the mother covenanted that her executors would at her death pay to the son a sum to which he would have been entitled if her real and personal estate had consisted of the particulars specified in the schedule, and she had died without altering her will. The description in the schedule comprehended, not only property of which she could dispose, but other property of which she was tenant for life only, and which was intermixed with the former, and this was noticed in the schedule :—Held, first, that there was not sufficient controlling context to restrict the covenant to the value of her own property. *Ib.*

Held, secondly, that without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it could not be reformed. *Ib.*

**Bond—Declaration by Obligor.**]—Bill, by the obligee in a bond who had delivered it up by mistake to one of his co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it, but traversed the allegation as to mistake :—Held, that declarations made by the obligor, to whom the bond had been delivered, tending to prove the plaintiff's allegations, were admissible against the co-obligor. *Crosse* v. *Bedingfield*, 12 Sim. 35.

**Statement by Agent.**]—An erroneous statement was made to a life insurance company, by their agent, as to A.'s interest in his son's life, upon which the company granted a policy to A. After the son's death, the company discovered the error. A bill by A. to have the mistake rectified was dismissed, because the evidence did not shew whether the mistake arose from the agent's inadvertency or from his having been misinformed by A. *Parsons* v. *Bignold*, 13 Sim. 518 ; 7 Jur. 591.

**Parol Evidence.**]—Parol evidence to prove mistake in agreement. *Baker* v. *Paine*, 1 Ves. Sen. 457.

—— **Blank in Contract.**]—A court of equity will not readily act on parol evidence to fill up a blank in a written contract, where the object of the evidence is to inflict a penalty or forfeiture. *Kemp* v. *Rose*, 1 Giff. 258 ; 4 Jur. (N.S.) 919.

—— **Grant of Annuity.**]—Grant of an annuity ; a bill filed to redeem, suggesting that it was part of the agreement that it should be redeemable but the agreement left out of the deeds on the idea that, if inserted, the transaction would be usurious. Parol evidence tendered to prove an agreement that the grant of the annuity should be redeemable, but not admitted to contradict the deed, not being charged to have been omitted by fraud. *Irnham* (*Lord*) v. *Child*, 1 Bro. C. C. 92 ; Dick. 554. *See* per Lord Eldon on this case, in *Townshend* v. *Stangroom*, 6 Ves. 322 ; 5 R. R. 312.

—— **Lease.**]—D. and F. made a written agreement for a lease ; a lease was executed according to the terms of the agreement. In a suit by D. to reform the lease by introducing a new term :—Held, that parol evidence was not admissible to shew that the lease, though in conformity with the terms of the written agreement, was contrary to its spirit. *Davies* v. *Fitton*, 2 Dr. & War. 225 ; 4 Ir. Eq. R. 612.

Semble, if there had not been a written agreement, the evidence would have been admissible. *Ib.*

A lease made in pursuance of a verbal agreement, and which included, by mistake, two fields more than the lessor intended to demise, or the lessees bargained for, was decreed to be amended as to the overplus, and parol evidence, supported by written documents and acts of the parties, was admitted to prove the mistake. *Mortimer* v. *Shortall*, 2 Dr. & War. 363 ; 1 Con. & L. 417.

There is no objection to correct a deed by parol evidence when there is anything in writing beyond the parol evidence to go by. *Ib.*

The mistake must be proved to the clear satisfaction of the court. *Ib.*

In a suit to reform a mistake in a lease, principally by parol evidence, what the defendant admits or denies is of the utmost importance. *Ib.*

3. Form of Relief.

**Deducting Excess.**]—A conveyance which passes too much may be rectified, and the excess deducted. *Beaumont* v. *Bromley*, Turn. & R. 41.

Where a deed affects by its recital to carry an agreement into execution and goes beyond the agreement, the court will rectify it. *Ib.*

The court will reform a deed under a previous agreement, by ordering a fresh conveyance to be executed, from which a covenant will be directed to be expunged. *Rob* v. *Butterwick*, 2 Price, 190 ; 16 R. R. 754.

**Conveyance—Option of Vendee.**]—The court will rectify a conveyance of lands where a clear case of mistake on the part of the conveying party is made out, but will give the vendee the option either of giving up the purchase or of taking the conveyance intended by the vendor. *Harris* v. *Pepperell*, L. R. 3 Eq. 1 ; 17 L. T. 191 ; 16 W. R. 68.

**Payment out of Court.**]—Words were inserted in a settlement by mistake, and the court ordered funds, paid into court under the Trustee Relief Act, to be paid to the persons who would be entitled under the settlement as intended to be

drawn, without rectifying the settlement. *De La Touche, In re*, 40 L. J., Ch. 85; L. R. 10 Eq. 599.

**Release of Debtor—Rights of Surety.**]—When a creditor releases the principal debtor at the request of the surety, and upon a representation made by him, which turns out to be a mistake, the surety cannot claim, as against the creditor, the benefit of the doctrine that release of the principal releases the surety. *Scholefield* v. *Templer*, 1 Johns. 155; 4 De G. & J. 429; 28 L. J., Ch. 452; 5 Jur. (N.S.) 619; 7 W. R. 633.

A surety concurs with the debtor in suggesting to the creditor to accept a transfer of a mortgage, which the debtor knows to be fictitious, but the surety believes to be genuine. Subsequently, in reliance on the pretended transfer, the creditor releases the surety, and erases his name from the securities. Upon discovery of the fraud:—Held, that the creditor was entitled to be restored to all his rights as against the surety. *Ib.*

**Insurance—Mistake in Rebuilding.**]—B. mortgaged certain premises to C., and covenanted to insure, and, in the event of fire, to apply the insurance moneys in rebuilding. A fire took place, and B. rebuilt, but the premises so erected extended beyond the boundary line of the mortgaged property on to adjoining land belonging to the mortgagor. B. subsequently mortgaged this land to H., and also gave him a second mortgage on the premises in mortgage to C.; and H. afterwards joined with C. in a demise of the whole of the property, the rent being made payable to C., all parties being under the impression that the premises originally mortgaged to C. comprehended the property subsequently mortgaged to H.:—Held, that it was a mistake of facts, against which the court would relieve; and an apportionment of the rent was decreed. *Harryman* v. *Collins*, 18 Jur. 501.

**Hardship.**]—The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to—that is, in other words, if he was misled by any act of the vendors; if the mistake was entirely his own, then the court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship. *Goddard* v. *Jeffreys*, 51 L. J., Ch. 57; 45 L. T. 675; 30 W. R. 270.

**Lease—Cancellation.**]—R., acting on behalf of G., the intending lessor, wrote to M., offering a lease at a rent of 33*l.* 10*s.* yearly, which was accepted by M., and a lease at that rent was executed by G. and M.:—Held, that the sum of 33*l.* 10*s.* had been inserted by mistake in R.'s offer, and in the lease, and that the offer had been accepted and the lease taken by M. with knowledge of the mistake; and therefore the court directed the lease to be delivered up to be cancelled. *Gun* v. *M'Carthy*, 13 L. R., Ir. 304.

And see *Barrow* v. *Isaacs*, 60 L. J., Q. B. 179; [1891] 1 Q. B. 417; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517.

**Mutual or Unilateral Mistake—Rectification or Cancellation.**]—Where there is mutual mistake in a deed or contract, the remedy is to rectify by substituting the terms really agreed to. Where the mistake is unilateral, the remedy is rescission, but the court may give a defendant the option of taking what the plaintiff meant to give in lieu of rescission. *Paget* v. *Marshall*, 54 L. J., Ch. 575; 28 Ch. D. 255; 51 L. T. 351; 33 W. R. 608; 49 J. P. 85.

**Money paid under Legal Process—Res Judicata.**]—After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement, as contrary to the intention of all parties, is barred. *Caird* v. *Moss*, 55 L. J., Ch. 854; 33 Ch. D. 22; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—C. A.

—— **Action to recover back Money.**]—The rule that money paid under compulsion of legal process cannot be recovered back, applies where the money was paid under a material mistake of fact, and under the compulsion of a summons which was afterwards withdrawn. *Caird* v. *Moss* (supra) explained. *Moore* v. *Fulham Vestry*, 64 L. J., Q. B. 226; [1895] 1 Q. B. 399; 14 R. 343; 71 L. T. 862; 43 W. R. 277; 59 J. P. 596—C. A.

**Right to Repayment—Privity of Parties.**]—R. instructed his agent at A. to remit money to a bank at H. The agent paid the money into plaintiffs' bank at A., with instructions to make the remittance. By mistake the money was paid into the defendants' bank, where R. was a customer, and being indebted to the defendants, the money was placed to his credit in reduction of the debt. On the following day the defendants were informed of the mistake:—Held, that there was direct privity between the plaintiffs and the defendants, and that the plaintiffs were entitled to recover the money. *Colonial Bank* v. *Bank of Nova Scotia*, 55 L. J., P. C. 14; 11 App. Cas. 84; 54 L. T. 256; 34 W. R. 417—P. C.

The doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorising it to be made. *Miles* v. *Scotting*, 1 Cab. & E. 491. See also *Hooper* v. *Exeter Corporation*, 56 L. J., Q. B. 457; and *Plater* v. *Burnley Corporation*, 59 L. T. 636; 36 W. R. 831.

**Officer of Company—Refunding.**]—If the assets in the hands of an officer of the court have been increased by a transaction occasioned by a mistake of law, the court will compel its officer to repay the money. *Opera, In re*, 60 L. J., Ch. 464; [1891] 2 Ch. 154; 64 L. T. 313; 39 W. R. 398.

**Money paid to Trustee in Liquidation.**]—Where money has been paid to the trustee in bankruptcy or liquidation under a mistake, the court will order it to be repaid provided that no injustice accrue to any one by such order. *Simmonds, Ex parte, Carnac, In re*, 55 L. J., Q. B. 74; 16 Q. B. D. 308; 54 L. T. 439; 34 W. R. 421—C. A.

Where the money so paid had been already distributed in dividends, the court ordered the money to be repaid out of sums subsequently coming to the hands of the trustee. *Ib.*

B., a trustee and a beneficiary, under a power of sale in a will sold a portion of the estate and appropriated to his own use more than his share of the purchase-money. He afterwards went into liquidation. In administration of the testator's estate further portions were sold, and B.'s share of the proceeds paid to his trustee in liquidation:—Held, that the payment to his trustee

in liquidation was made under a mistake of law; and, in analogy to the rule laid down in *James, Ex parte* (L. R. 9 Ch. 609), and *Simmonds, Ex parte* (supra), the court ordered B.'s trustee in liquidation to refund the sum. *Brown, In re, Dixon* v. *Brown*, 55 L. J., Ch. 556; 32 Ch. D. 597; 54 L. T. 789. And see *Bootle-cum-Linacre Corporation* v. *Lancashire County Council*, 60 L. J., Q. B. 323.

**Payment of Interest by Mortgagee.**]—The defendant, as trustee of a settlement, invested money on a mortgage of the plaintiff's land. The mortgage deed provided for interest at the rate of 5 per cent., with reduction of the rate to 4 per cent. on punctual payments. All the payments of interest except the first had been punctual, but, through the plaintiff's ignorance of the proviso for reduction of the interest, they had been made at the rate of 5 per cent. In an action by the plaintiff to recover from the defendant, the trustee, the extra 1 per cent. paid under this mistake:—Held, that the action was rightly brought against the trustee; that the only contract was between the plaintiff as mortgagor and the defendant as mortgagee; that money had been received under that contract by the mortgagee, and that he alone could be asked or required to repay it. *King* v. *Stewart*, 66 L. T. 339.

4. Laches and Delay.

**Limitation from what Time.**]—In cases of mistake, the time of limitation, which by analogy is held to bar the remedy in courts of equity, begins to run from the time of the discovery of the mistake. *Brooksbank* v. *Smith*, 2 Y. & Coll. 58; 6 L. J., Ex. Eq. 34. And see *Durrant* v. *Ecclesiastical Commissioners*, 50 L. J., Q. B. 30; 6 Q. B. D. 234; 44 L. T. 348; 29 W. R. 443; 45 J. P. 270.

**Laches.**]—A party relying on his ignorance of facts must shew, not only that he had not the information, but that he could not, with due diligence, obtain it. The plaintiff sought to set aside a deed executed in 1848, on the ground that he had been released by a transaction in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so:—Held, that having in 1845 the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed. *Wason* v. *Wareing*, 15 Beav. 151.

**Reservation of Minerals.**]—The conveyance on a sale of land contained a reservation of the minerals to the vendor, which was not intended. Five years afterwards the purchaser discovered the mistake, and filed a bill to have the conveyance rectified:—Held, having regard to the lapse of time, that if the defendant did not consent to have the conveyance rectified, the transaction must be set aside, in which event the plaintiff would be fixed with an occupation rent, while the defendant would have to repay the purchase-money, with interest, and also all sums expended by the plaintiff in permanent improvements. *Bloomer* v. *Spittle*, 41 L. J., Ch. 369; L. R. 13 Eq. 427; 26 L. T. 272; 20 W. R. 435.

**What amount to.**]—A husband was advised by counsel that he had no title as tenant by the curtesy, and that if he intended to set up such a title he ought not to sue in a partition suit then in contemplation. The suit was nevertheless instituted by him, and in 1830 a decree was obtained. A partition was made under the decree. The daughter married in 1847. In 1852 the father filed a bill to be relieved on the ground of mistake:—Held, that length of time and acquiescence constituted a sufficient answer to the suit. *Stone* v. *Godfrey*, 5 De G. M. & G. 76; 23 L. J., Ch. 769; 18 Jur. 524.

**Altering Conveyance to Mortgage.**]—The court refused after a long lapse of time to rectify a deed by altering it from an absolute conveyance to a mortgage. *Tull* v. *Owen*, 4 Y. & Coll. 192; 9 L. J., Ex. Eq. 33; 4 Jur. 503.

**Settlement.**]—A court of equity will reform a settlement upon parol evidence alone and after a long lapse of time if it arrives at the conclusion that the actual contract made between the parties differs from that expressed in the instrument. *M'Cormack* v. *M'Cormack*, 1 L. R., Ir. 119.

A marriage settlement, reformed after a lapse of thirty-five years, by giving the lady an absolute interest in the trust funds, the evidence clearly establishing that such was the intention of all parties. *Wolterbeek* v. *Barrow*, 23 Beav. 423; 3 Jur. (N.S.) 804.

**Release.**]—Where a release has been executed and for a long time acquiesced in, the mere proof of errors will not induce the court either to set it aside or to give leave to surcharge and falsify. *Millar* v. *Craig*, 6 Beav. 433.

5. Pleading.

**By one Party.**]—It is no answer, in an action at law on an agreement, that the defendant entered into the agreement by mistake. *Wood* v. *Scarth*, 1 F. & F. 293.

**What Plea allowed.**]—Declaration for not delivering tea, in pursuance of a contract. A plea on equitable grounds, that the contract was made by sample, that the sample was a sample of a totally different tea, and that the defendant on the day the contract was entered into discovered the mistake, and, before the plaintiff had in any respect altered his position, gave notice of the mistake, and that he would treat the contract as void, is bad. *Scott* v. *Littledale*, 8 El. & Bl. 815; 27 L. J., Q. B. 201; 4 Jur. (N.S.) 849.

—— **Mistake of Agent.**]—To an action for the non-performance of an agreement to load a ship with a guaranteed freight of no less than 5,500*l.*, the court refused to allow the defendant to plead that, by mistake of the person who reduced the contract into writing in the Spanish language, it was described as an absolute guarantee that the ship should have a freight of 5,500*l.* *Perez* v. *Oleaga*, 11 Ex. 506; 25 L. J., Ex. 65; 2 Jur. (N.S.) 44; 4 W. R. 250.

To a count for not accepting petroleum pursuant to contract, by bought and sold notes, a plea, that the real contract was not that which was contained in the bought and sold notes, but was a contract for 150 cases of refined petroleum, to agree with a sample shewn, and that the brokers, who were agents for both parties, in

drawing up the contract, by mistake omitted to state therein that the sale was by sample, affords a good equitable defence. *Borrowman* v. *Rossel*, 16 C. B. (N.S.) 58; 33 L. J., C. P. 111; 10 Jur. (N.S.) 679; 10 L. T. 236; 12 W. R. 426.

In trover for goods, a plea that the defendant agreed to purchase the works from the plaintiff, and the goods were to be included in the property sold, that brokers were employed to make the contract, and that they made it by bought and sold notes, and, by their mistake, the notes were so worded as not to include the stock-in-trade and materials, which were intended to be included by the plaintiff and the defendant, is good. *Steele* v. *Haddock*, 10 Ex. 643; 3 C. L. R. 326; 24 L. J., Ex. 78; 3 W. R. 172.

**Restraint of Trade.**]—An equitable plea (to a declaration for allowing business to be carried on on the defendant's premises near to certain premises let by plaintiff to defendant, contrary to agreement) that at the time of making the agreement the defendant possessed a shop near the premises let, where such business was carried on, as plaintiff knew; that it never was intended that such business should not be carried on there; that the agreement was by mistake so framed as to include the carrying on of such business there, is a good plea. *Nicoll* v. *Bell*, 32 L. T. 815. And see *Hayman* v. *Gover*, 25 L. T. 903.

Covenant by defendant that he would not practise in the parish of A. or C. without the consent of the plaintiff, alleging as a breach that he had so practised. The defendant was allowed to plead that part of C. was in the B. district, and that it was not intended that the covenant should restrain him from practising there, but that the covenant was so framed by mistake, and that the breaches were committed in that part. *Luce* v. *Izod*, 1 H. & N. 245; 25 L. J., Ex. 307; 2 Jur. (N.S.) 573.

**Bill of Exchange.**]—To an action by drawer against acceptor of a bill of exchange at three months, dated the 12th of July, a plea that the bill ought to have been, and was, represented by the plaintiff to be drawn on the 25th of July, and that three months from the 25th had not elapsed before action. The court set aside the plea, but allowed the defendant to substitute a plea of fraud. *Drain* v. *Harvey*, 17 C. B. 257; 25 L. J., C. P. 81.

To an action on a bill of exchange, the court allowed the defendant to plead that the defendant was chairman of a company completely registered; that the bill was drawn for the company's purposes, and accepted by the defendant as chairman of the company; that, in order to bind the company, it ought to have been accepted by another director also, and countersigned by the secretary; that by mistake this was omitted to be done, and that it never was intended that the defendant should be bound personally. *Burgoyne* v. *Cottrell*, 24 L. J., Q. B. 28.

**Charter-Party—Agency.**]—To a declaration on a charter-party, a plea that the defendants entered into the charter-party solely as agents for A., D. & Co., and that when they signed the charter-party it was agreed and understood that they were only to sign as such agents, and were not to make themselves liable as principals; that they signed: "For A., D. & Co., of Messina, H. & Co., agents," notwithstanding the charter professed to be made between the plaintiff as owner of the one part and the defendants as freighters of the other part; that the defendants had power to bind A., D. & Co.:—Held, a good equitable answer. *Wake* v. *Harrop*, 1 H. & C. 202; 31 L. J., Ex. 451; 8 Jur. (N.S.) 845; 7 L. T. 96; 10 W. R. 626—Ex. Ch.

Semble, that the plea was a good answer at law. *Ib.*

**Grant by Company in Possession.**]—The East India Company, being entitled by escheat to real property of S. in India, granted it, together with all the rents which had arisen between the death of the testator and the date of the grant, to the plaintiffs, in trust. To a declaration on this grant that the company held and enjoyed the land, and took, and had and received to their use the rents of the land from the testator's death to the date of the grant, and as a breach the nonpayment to the plaintiffs, a plea by the company that the testator appointed P. his executor in India, who agreed with the officers of the company to grant a lease of the property; and they, without the company's knowledge, entered into occupation, and the rent was paid to the date of the grant to P. during his life, and after his death to T., his executor; and that the company, at the time of the grant, had no knowledge that the company had been in possession:—Held, that the plea was an answer to the action. *Billing* v. *East India Co.*, 31 L. J., Ex. 240.

**Replication—Principal and Surety.**]—To an action by the plaintiff to recover contribution from the defendant, his co-surety, he pleaded that without his privity or consent the plaintiff agreed to discharge the principal. A replication, on equitable grounds, that the agreement was worded by mistake so as to include the claim sued for, and that the plaintiff did not otherwise discharge the principal, is a good replication. *Verley* v. *Barrett*, 1 C. B. (N.S.) 225; 26 L. J., C. P. 1; 5 W. R. 137.

**Power of Attorney.**]—A plaintiff declared that he was possessed of stock in trust; that M. caused it to be represented to the plaintiff by the defendants that the trust had been executed, and that he (M.) was entitled to the stock, and they requested him to execute a power of attorney for the purpose of effecting a transfer of the stock to him (M.); that in consideration of the premises, and that the plaintiff would execute the power, the defendants promised the plaintiff to pay him 32*l.* within fourteen days. Breach, nonpayment. A plea, that before making the promise the plaintiff represented to the defendants that certain dividends on the stock had not yet been received by the plaintiff; that the power of attorney authorised M. to receive any such unpaid dividends; that the defendants, relying on such representation, made the promise, but that the same was not true, inasmuch as the plaintiff had received one of the dividends; and that the defendants would not have made their promise if they had known that the plaintiff had received the dividend, is bad, on equitable grounds. *Gorsuch* v. *Cree*, 8 C. B. (N.S.) 574; 29 L. J., C. P. 308; 6 Jur. (N.S.) 1342; 2 L. T. 567; 8 W. R. 543.

E. E. H. B.

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## A. FOR MONEY LENT.

### 1. When Action Maintainable.

An action will lie for a loan to the wife at the request of the husband. *Stevenson* v. *Hardie*, 2 W. Bl. 872.

But a husband is not liable for money lent to his wife, though the money is afterwards applied by her in procuring necessaries, for the supply of which he would have been liable. *Knox* v. *Bushell*, 3 C. B. (N.S.) 334.

The action will not lie against a defendant for money lent to a third person. *Marriott* v. *Lister*, 2 Wils. 141.

Where the defendant, a commercial traveller, was authorised by the plaintiff to deduct certain sums from the amount he might receive on his account, to be repaid out of the commission the defendant was to be paid by other employers: —Held, that the sums might be recovered as money lent. *Shepherd* v. *Phillips*, 2 Car. & K. 722.

Money deposited by a customer in a banker's hand is money lent, with the superadded obligation, that it is to be repaid when called for. *Pott* v. *Cleg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

**Security Given.**]—A person who lends money to another, and receives a gun as a security for the repayment, may recover the amount without first returning the gun. *Lawton* v. *Newland*, 2 Stark. 72; 19 R. R. 676.

A. lent B. money, and received from B. shares in a company as a security, and agreed to give twenty-one days' notice to B. before proceeding to compel the repayment of the loan, or of any part thereof; and, upon repayment of any part of the loan, to give back a proportionate amount of shares :—Held, that after twenty-one days, A. was not bound to declare specially, averring a tender of the shares, but that he might declare for money lent. *Scott* v. *Parker*, 1 G. & D. 258; 1 Q. B. 809; 10 L. J., Q. B. 244.

**Worthless Security.**]—Where a party advances money on exchequer bills, which are afterwards repudiated at the exchequer office, on the ground that the comptroller's signature to them is forged, he is entitled to recover it back as money lent. *Bank of England* v. *Tomkins*, 6 Jur. 348.

A. deposited with a banking company 80*l.* consisting partly of the notes of a country bank,

payable either at that bank or in London, and representing 65*l.* The company gave a receipt as follows: "Received of A. 80*l.*, for which we are accountable; 80*l.* at 3*l.* per cent. interest, with fourteen days' notice." The company sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the company, who on the following day gave notice of dishonour to A., and, on A.'s giving fourteen days' notice of withdrawal, tendered the notes back, which he refused. The company refused to pay the amount of the notes. The country bank, which was about five miles from the office of the company, had stopped payment from the close of day on which the notes were deposited:—Held, that A. could not recover the amount of the notes from the company as money lent. *Timmis* v. *Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403.

**Welsh Mortgage.**]—P. and F. entered into an agreement in writing, whereby P. agreed to let five fields, part of his farm, to F., "in consideration of the sum of 50*l.*" for six years, F. to pay the rent of the fields to P., and "P. to get back his said five fields when P. pays to F. the sum of 50*l.*" There was no express agreement by P. to pay the 50*l.* After the expiration of six years F.'s administrator sued P. for the 50*l.* as money lent:—Held, on the construction of the agreement, that there was no personal liability on P. to pay this sum, and that the action could not be sustained. *Cassidy* v. *Cassidy*, 24 L. R., Ir. 577.

### 2. Parties.

The defendant instructed his attorney S. to borrow 100*l.* upon the security of a freehold estate, and gave him his title deeds to enable him to do so. S., professedly on behalf of the defendant, applied to the plaintiff for a loan on mortgage, the amount of which was fixed at 420*l.* Thereupon, having forged a mortgage from the defendant to the plaintiff, S. delivered it to the plaintiff and received the 420*l.* He then represented to the defendant that he could not obtain the proposed advance, and afterwards lent him certain sums as his own money, taking a promissory note as security for part, and a mortgage for the whole of the advances:—Held, that on these facts there was no evidence, as to any part of the 420*l.*, of an implied promise by the plaintiff to the defendant so as to support an action for money lent. *Painter* v. *Abel*, 2 H. & C. 113; 33 L. J., Ex. 60; 9 Jur. (N.S.) 549; 8 L. T. 287; 11 W. R. 651.

Where A. lent money to B. on a guarantee of H., and afterwards B., the principal debtor, and H. signed a paper promising jointly and severally to repay the money borrowed by B. from A.:—Held, that there was evidence to charge B. and H. jointly, and that they were liable to be sued jointly. *Buck* v. *Hurst*, L. R. 1 C. P. 297; 12 Jur. (N.S.) 704.

### 3. Repayment secured by Deed.

A. borrowed money from B., and conveyed land in trust for him, with a power of sale, in trust to pay him principal and interest, and pay over the residue to A. He, A., afterwards borrowed other money of B., and charged that also on the land, but without any power of sale. Afterwards, C. paying both sums to B., and advancing an additional sum to A., by deed between C., A., B. and B.'s trustee, the former securities were assigned to C. (B. giving C. a power of attorney to sue in his name as to the first sum borrowed), and the lands were conveyed to C. to hold them to the same trusts, but for his own benefit, as were mentioned in the other deeds with respect to B. None of the deeds contained a covenant to pay. C. sued A. for money paid, money lent, interest, and on an account stated:—Held, that he was entitled to recover the whole sum, on proof that he had paid it as above, and that he was not bound to declare on the deed. *Yates* v. *Aston*, 3 G. & D. 351; 4 Q. B. 182; 12 L. J., Q. B. 160.

L. devised lands to the defendant on trust to sell and apply the proceeds in payment of debts. The defendant mortgaged the lands to the plaintiff as a security for money lent to him. The deed contained a covenant by the defendant that he would, out of the moneys which should come to his hands as such trustee, from the lands comprised in the mortgaged security and the personal estate (if any) of L., pay the plaintiff the principal and interest:—Held, that as there was an express covenant by the defendant to pay in a qualified manner, no contract by parol could be implied for the repayment, and consequently an action for money lent would not lie. *Mathew* v. *Blackmore*, 1 H. & N. 762; 26 L. J., Ex. 150; 5 W. R. 363.

**Deed not Executed.**]—Money advanced upon a contract to repay it on demand, or to execute a mortgage, may, after refusal to execute a mortgage, be recovered as money lent. *Bristowe* v. *Needham*, 9 M. & W. 729; 1 D. P. C. 700; 11 L. J., Ex. 278.

B. engaged to let A. land on building leases and to lend him 4,000*l.* to assist him in the erection of twenty houses, the money to be repaid by June, 1828. A. agreed to build the houses, to convey them as security for the loan, and repay the money. When six houses were built, and 1,168*l.* had been advanced, B. requested A. not to go on with the other fourteen houses; A. desisted:—Held, that after June, 1828, B. might recover the 1,168*l.* as money lent, and that it was not necessary to sue on the agreement, which was rescinded by consent. *James* v. *Cotton*, 7 Bing. 266; 5 M. & P. 26; 9 L. J. (O.S.) C. P. 55.

### 4. Illegal Purposes or Objects.

Whenever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, the lender cannot recover it back. *M'Kinnell* v. *Robinson*, 3 M. & W. 434; 7 L. J., Ex. 149. S. P., *Cannan* v. *Bryce*, 3 B. & Ald. 179; 22 R. R. 342. See *Pearce* v. *Brooks*, L. R. 1 Ex. 213; *Bagot* v. *Arnott*, Ir. R. 2 C. L. 1.

But money lent for the purpose of gambling in a country where the game is not illegal may be recovered in this country. *Quarrier* v. *Colston*, 1 Ph. 147; 12 L. J., Ch. 57; 6 Jur. 959. S. P., *King* v. *Kemp*, 8 L. T. 255.

### 5. Evidence of Loan.

In an action for money lent, the only evidence was, that the defendant, having asked the plaintiff for some money, the latter handed him a note which was believed to be a bank-note, but

the amount of which did not appear:—Held, that the jury was rightly directed to presume it to have been a note for 5*l.*, as being the smallest note in circulation in this country. *Lawton* v. *Sweeney*, 8 Jur. 964.

Evidence of the poverty of the alleged lender is admissible upon the issue, whether or not the money was lent. *Dowling* v. *Dowling*, 10 Ir. C. L. R. 236.

The payment of certain notes having been made to the defendant's credit, and the fact that he had been told the balance afterwards, is sufficient proof that the notes were paid, and had therefore been received by him. *Gill* v. *Gillingham*, 1 F. & F. 284.

It is not evidence of itself to establish a loan of money by the plaintiff to the defendant, to prove that the defendant received cash for a draft or a cheque drawn by the plaintiff on his bankers, and payable to him by name, out of money of the plaintiff's then in the bank. *Carey* v. *Gerrish*, 4 Esp. 9.

If there is a loan of money by A. to B., it is not to be inferred from the bare fact that A. delivered a sum of money to B., which A. had borrowed from another. *Welch* v. *Seaborn*, 1 Stark. 474.

An instrument in the following terms, "Nine years after the date hereof, I promise to pay to, &c., with lawful interest, provided D. M. shall not return to England, or his death be duly certified, in the mean time," is no evidence of money lent. *Morgan* v. *Jones*, 1 C. & J. 162; 1 Tyr. 21; 9 L. J. (O.S.) Ex. 41.

A. transferred 1,000*l.* in the 4*l.* per cents. to B., who possessed other stock of the same description. B., after some years, sold out all his stock, including the 1,000*l.*; B. made payments to A., equal to interest at 5*l.* per cent. upon that sum, until A.'s death. After the death of A. her executor wrote to B., referring to the transaction as a loan of money. B., in reply, asserted that he was employed by A. to purchase an annuity for her, and that he had done so. No purchase of an annuity was proved:—Held, that there was evidence to go to the jury in support of a count for money lent. *Howard* v. *Danbury*, 2 C. B. 803.

**Invalid Instruments.**]—The plaintiff lent money upon promissory notes or debentures, in the following form:—"The Governor and Company of Copper Miners in England. Incorporated by royal charter. Capital one million. No. 5,252. 500*l.* London. On the 15th July, 1850 the Governor and Company of Copper Miners in England promise to pay to H. J. Enthoven, Esq., or order, at the banking-house of Messrs. D., H., K. & Co., 500*l.* value received, and further to pay to the holder of the warrants annexed, on presentment as they fall due, interest on the 500*l.* at the rate of 5*l.* per cent. per annum. Given under the common seal of the corporation, this 15th day of July, 1845. By order, J. M'Donnell. W. Inglis, secretary." When the seal of the corporation was affixed to these documents, there was a blank left for the name of the payee. At the time of depositing them with the plaintiff, the defendant filled up the blanks with the words "Enthoven or order," and indorsed them "H. J. Enthoven." Annexed to each note or debenture were warrants or coupons for the interest due half-yearly in respect of each. As each half-yearly amount of interest was paid the corresponding warrant or coupon was detached and given up to the company. The company having failed in payment of a half-yearly instalment of the interest, the plaintiff gave the defendant notice of the default, and demanded payment of him and afterwards brought an action upon the debentures. At the trial, he produced the debentures, with the warrants or coupons annexed, and also one of the warrants or coupons detached. The former were respectively stamped with a 12*s.* 6*d.* note stamp, the latter was unstamped:—Held, that the instruments were not promissory notes, and consequently were not properly stamped; but that inasmuch as they were void instruments, by reason of the blank therein at the time of sealing, they were admissible on the counts for money lent and interest for the purpose of shewing that they were worthless. *Enthoven* v. *Hoyle*, 13 C. B. 373; 21 L. J., C. P. 100; 16 Jur. 272—Ex. Ch.

Where a plaintiff cannot recover on a count for a note for want of a stamp, he may recover on a count for money lent, by proving an acknowledgment on a demand made. *Tyte* v. *Jones*, 1 East, 58, n.

**I O U.**]—An I O U is sufficient primâ facie evidence in an action for money lent, though it is not addressed, and no proof be given that U means the plaintiff, except his producing the document. *Douglas* v. *Holme*, 12 A. & E. 641; 4 P. & D. 685; 10 L. J., Q. B. 43.

But in a subsequent case it was decided that an I O U, though evidence of an account stated between the holder and the party signing it, is not of money lent to him by the holder. *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

**Terms of Lending.**]—A company borrowed from a bank a sum of money, to be repaid with interest, and deposited a lease as a security. Afterwards a document was drawn up by the company, stating that the lease had been deposited as a security for the loan, without mentioning the interest. The bank refused to give up the deed until the whole of the interest as well as the loan had been repaid:—Held, in an action of detinue for the lease, that the written document was not conclusive against the bank as to the terms of the loan, and that parol evidence was rightly admitted to shew that the lease had been intended as a security for the interest as well as the principal. *Pentreguinny Fuel Co.* v. *Young*, 12 Jur. (N.S.) 56.

## B. FOR MONEY PAID.

### 1. General Principles.

#### a. Request.

An action lies to recover money paid for another at his request. *Alcinbrook* v. *Hall*, 2 Wils. 309.

But the plaintiff must prove some authority, either express or implied, from the defendant, to make the payment on his account. *Tappin* v. *Broster*, 1 Car. & P. 112.

The breach of an agreement to carry goods in consideration of the carriage of other goods, which is executed by the carriage of the goods, does not support a common count stating that the defendant is indebted in money to the plaintiff for the carriage of goods at his request. *Bracegirdle* v. *Hincks*, 9 Ex. 361; 2 C. L. R.

991; 23 L. J., Ex. 128; 18 Jur. 70; 2 W. R. 232.

The action will not lie, when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. *Stokes* v. *Lewis*, 1 Term Rep. 20.

A., being in want of some harness, went to B., accompanied by C., and ordered some, C. saying in A.'s presence that he would pay the money if A. did not:—Held, that C. thereby acquired an authority to pay the money on the default of A., and that having paid it he was entitled to recover it back from A., the authority not being shewn to have been countermanded. *Alexander* v. *Vane*, 1 M. & W. 511; 2 Gale, 57; 5 L. J., Ex. 187.

The drawer of an accommodation bill cannot sue the acceptor for money paid to his use, to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. *Sleigh* v. *Sleigh*, 5 Ex. 514; 19 L. J., Ex. 345.

Though no one has a right of his own motion to pay another's debt, yet if the debtor afterwards assent to the payment or recognise or adopt it, the person paying the debt may recover it from the debtor as money paid on his account. *Roberts* v. *Champion*, 5 L. J. (O.S.) K. B. 44.

The plaintiff accepted a bill for 25*l.* for the accommodation of F., who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession-money; F. was to get the bill discounted by the defendant or elsewhere, and to give the plaintiff the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that the plaintiff had no value for his acceptance: the defendant indorsed it over and kept the proceeds: the holder sued the plaintiff, who thereupon paid him the whole amount of the bill:—Held, that the plaintiff had no right of action against the defendant as for money paid to his use on a request implied by law; but that his remedy was against F. on an implied contract to indemnify the plaintiff for lending him his, the plaintiff's, acceptance. *Asprey* v. *Levy*, 16 M. & W. 851.

A., having accepted a bill drawn upon him by B., for money lent by B. to A., compounded with B. and his other creditors, and paid the composition. An indorsee of the bill afterwards sued A., and compelled him to pay the amount with interest and costs:—Held, that A. might recover the amount from B. as money paid to B.'s use. *Hawley* v. *Beverley*, 6 Man. & G. 221.

If the indorser of a bill is compelled by the holder to pay him part of the amount, he may recover it back from the acceptor in an action for money paid to his use. *Pownall* v. *Ferrand*, 9 D. & R. 603; 6 B. & C. 439; 5 L. J. (O.S.) K. B. 176; 30 R. R. 394.

A. & Co. agreed with a company to build for them two steamships within a stated time, the price to be paid by instalments; provided that if A. & Co. should make default in any of the conditions of the agreement, it should be lawful for the company to take possession of the ships, and cause the works to be completed by any persons they chose, and pay those persons such reasonable sums as should be agreed upon, and that A. & Co. should, forthwith on demand, pay the company all sums so advanced. Afterwards F. became a partner in the firm of A. & Co.; and four instalments having been paid, and A. & Co. not being able to complete the ships, another agreement was made with the firm of A. & Co., including F., whereby the company, in terms of the first contract, agreed to take possession of the ships and complete them, and for that purpose to take into their employ the workmen of A. & Co.; and as a security to the company for any advances they might make beyond the balance receivable by A. & Co., it was agreed that the company should have a lien for such balance upon certain shares of A. & Co. in the company. The company having proceeded with the works, and for that purpose made large advances:—Held, that they could not forthwith recover such advances by action against the firm of A. & Co., including F., for money paid, there being no liability to repay until the ultimate balance was ascertained, and then only after demand. *Royal Mail Steam Packet Co.* v. *Acraman*, 2 Ex. 569.

A defendant became surety for the due payment by one M. of "all such sums of money as he, M., should from time to time become indebted to the plaintiffs for goods which should be supplied to him by them in the course of their business, when and as such sum or sums of money should respectively become due and payable, at the expiration of the credit given for the same goods, according to the usual course of business of the plaintiffs." The course of business proved was for the plaintiffs to draw upon M. at two months from the first of each month, for the amount of coals delivered during the preceding month. One of these bills becoming due in the hands of third persons, and being dishonoured, M. went to the plaintiffs, and telling them that he had not funds enough by 80*l.* to take up the bill, asked them for a loan of that sum to enable him to do so, and obtained from them a cheque for 80*l.*, with which and his own moneys he paid the bill:—Held, that this was in substance a failure by M. duly to pay for the goods, and not a mere loan to him; and consequently that the plaintiffs were entitled to recover the 80*l.* from the defendant. *Davey* v. *Phelps*, 2 Scott (N.R.) 564; 2 Man. & G. 300.

Leasehold property was bequeathed to the testator's wife for life, and afterwards to the defendant for the residue of the term. The wife entered with the assent of the executor, and after her death the defendant entered, and continued in possession for fifteen years, when the leaseholds were sold. No duty was ever paid on the legacy till after the sale, when 10 per cent. on the value of the leaseholds, and 10 per cent. on the amount of profits received by the defendant, were paid by the executor:—Held, that the executor was entitled to recover from the defendant, as money paid, the whole duty paid. *Bate* v. *Pyne*, 13 Q. B. 900; 18 L. J., Q. B. 273; 13 Jur. 609.

B., requiring an advance of 50*l.* to pay the stamp duty on a patent, and S. being willing to lend him that sum if A. would become surety for it, A. wrote as follows:—"If B. will get his friend S. to advance 50*l.* for the completion of the patent, I will give him or S. the 50*l.* on the patent being handed over to me." The 50*l.* was accordingly advanced by S., and the patent was afterwards tendered to A., but he declined to accept it; and S. having sued him for and recovered the 50*l.*, he brought an action against B. for money paid to his use:—Held, that A. was entitled to recover the 50*l.*, and that the refusal of the judge to put it to the jury, whether the

money was advanced by S. for the joint purpose of A. and B. did not amount to a misdirection, inasmuch as it was a payment for the use of the defendant solely. *Pelly* v. *Sidney*, 5 C. B. (N.S.) 679; 28 L. J., C. P. 182; 5 Jur. (N.S.) 793.

Money expended on the alteration of premises, for the leasing of which an agreement has been entered into, but which is incapable of being enforced by reason of the Statute of Frauds, may be recovered back as on a failure of consideration. *Pulbrook* v. *Lawes*, 45 L. J., Q. B. 178; 1 Q. B. D. 284; 34 L. T. 95.

P., by letter, proposed to take a lease for seven, fourteen, or twenty-one years of one of L.'s houses, conditionally on certain alterations being made. A correspondence ensued between the parties, and it was ultimately agreed that the alterations should be carried out, P. undertaking to contribute a sum of money towards them. By L.'s consent some of the alterations were executed by P.'s workmen. Eventually P. was unable, owing to L.'s fault, to take the house:—Held, that though he was unable to recover damages occasioned through not having a lease granted, by reason of the letters not disclosing an agreement such as to satisfy the Statute of Frauds, he was, nevertheless, entitled to recover on a quantum meruit for the loss incurred in making the alterations. *Ib.*

The bonâ fide purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner. *Walker* v. *Matthews*, 51 L. J., Q. B. 243; 8 Q. B. D. 109; 46 L. T. 915; 30 W. R. 388.

If a man buys property which is in the hands of a third person, who sets up an unfounded claim, and who will not deliver unless that claim is paid, and the purchaser several months afterwards goes and pays the demand, he is bound to give notice to the seller; and if he does not, he cannot recover the money so paid from the seller. *Bevan* v. *Waters*, 3 Car. & P. 520.

The owner of a ship mortgaged it, and subsequently entered into an agreement in contemplation of a partnership with C., under which the latter was to work the vessel, paying all expenses, and receiving all profits. The vessel was employed on several voyages, and was then given up to the mortgagor. At this time C. owed large sums for wages. The master and seamen took proceedings against the vessel for the wages unpaid, and she was seized. The mortgagor then paid the wages:—Held, that he was entitled to recover those payments from C., as money paid to his use. *Johnston* v. *Royal Mail Steam Packet Co.*, 37 L. J., C. P. 33; L. R. 3 C. P. 38; 17 L. T. 445.

The plaintiffs were the registered mortgagees of forty-eight sixty-fourth shares in a ship, the defendants being the owners of the residue of such shares. The captain, having incurred a debt for necessary disbursements made by him, instituted proceedings in rem against the ship and arrested her in the admiralty division. The plaintiffs, in order to obtain the release and get possession of the ship, paid the captain's claim, together with the cost of the proceedings:—Held, that as the plaintiffs were compelled under pressure of law to pay the sum in question in order to release the ship from arrest and get possession of her, there was an implied promise on the part of the defendants to repay them that sum, inasmuch as the mortgagor and the defendants (the co-owners) were liable to the captain for the disbursements made by him. *The Orchis*, 59 L. J., P. 31; 15 P. D. 38; 62 L. T. 407; 38 W. R. 472—C. A.

The plaintiffs purchased stock which the defendant agreed to transfer on a given day. In consequence of a rise, the loss on the sale amounted to 45*l.*, which the defendant refused to pay. The plaintiff afterwards paid that sum to another broker, by whom the transfer was made:—Held, that the plaintiff could not recover in an action for money paid, but that he should have declared on the contract with the defendant as his claim was in the nature of unliquidated damages. *Lightfoot* v. *Creed*, 2 Moore, 225; 8 Taunt. 268.

The plaintiff, a stockbroker, at the defendant's request entered into a contract for the purchase of foreign stock, the price of which he was ultimately, according to the usage of the Stock Exchange, compelled to pay; before the settling day the defendant informed the plaintiff that he was unable to meet his engagements, but afterwards promised to pay the amount:—Held, that the jury was warranted in finding that the payment was made at the defendant's request. *Pawle* v. *Gun*, 6 Scott, 286; 4 Bing. (N.C.) 445; 1 Arn. 200; 7 L. J., C. P. 206.

**Original Liability.**]—The plaintiff demised a house to the defendant, who agreed to pay a yearly rent, clear of all deductions for taxes and parochial rates; after occupying the premises for some time, the defendant quitted them, leaving claims for poor-rate and land-tax unpaid, which the plaintiff, as landlord, was obliged to pay:—Held, that he could not recover the amount from the defendant, because, as there was no original liability on the defendant to pay, it could not be said to be money paid to his use. *Spencer* v. *Parry*, 4 N. & M. 771; 3 A. & E. 331; 1 H. & W. 179; 4 L. J., K. B. 186. S. P., *Thurnell* v. *Symonds*, 1 Car. & K. 44.

**Relief by Payment.**]—An action for money paid is maintainable in every case in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, with an undertaking, express or implied, to repay the amount, and it is immaterial whether the defendant is relieved from a liability by the payment or not. *Brittain* v. *Lloyd*, 14 M. & W. 762; 15 L. J., Ex. 43.

In order to maintain an action for money paid, it is not necessary that the defendant should be relieved, by the payment, from a liability to a third person. *Lewis* v. *Campbell*, 8 C. B. 541; 19 L. J., C. P. 130; 14 Jur. 396.

**Goods lawfully Seized for another's Debt.**]—The sheriff had seized goods for the debt of the defendant, and the claim of the plaintiff to the goods was barred upon interpleader, but the defendant had bound himself by admission as between the parties that the goods were the plaintiff's, and had agreed to pay a sum of money in consideration of the seizure:—Held, that the plaintiff was entitled to recover that sum from the defendant. *Edmunds* v. *Wallingford*, 54 L. J., Q. B. 305; 14 Q. B. D. 811; 52

L. T. 720 ; 33 W. R. 647 ; 49 J. P. 549—C. A. Affirming 1 Cab. & E. 334.

**Occupier of part of Holding—Payment of Rent under Threat of Distress.**]—A., who held certain lands under lease at a rent, gave possession of a small part thereof to B. on the terms that he was to hold rent free, and make certain expenditure in buildings, which was done. C. afterwards acquired the residue of the holding from A., subject to this arrangement, and for many years paid the entire rent reserved by the lease. One year's rent being due, the landlord brought an ejectment, and B. paid the rent claimed in order to save the lands from eviction : —Held, that he was entitled to recover the amount from C. in an action for money paid. *Murphy* v. *Davey*, 14 L. R. Ir. 28.

**Voluntary Payments.**]—It has always been clear that a purely voluntary payment cannot be recovered back. Voluntary payment may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed him to adopt or decline the benefit ; in this case, if he exercises his option to adopt the benefit he will be liable to repay the money expended ; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact that he is bound to accept it ; in this case he has no opportunity of exercising any option, and he will be under no liability. —Per Lord Esher, M.R. *Leigh* v. *Dickeson*, 54 L. J., Q. B. 18 ; 15 Q. B. D. 64 ; 52 L. T. 791 ; 33 W. R. 539.

### b. Payment.

One of the makers of a joint and several note, after it had become due, gave his bond to the holder for the amount, but before the commencement of the action no money had been paid upon the bond :—Held, that until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the other makers of the note. *Maxwell* v. *Jameson*, 2 B. & Ald. 51.

If a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is a payment of money to the debtor's use, and may be recovered as such. *Barclay* v. *Gooch*, 2 Esp. 571.

The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit ; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his, the plaintiff's, name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not paid at maturity, when he sued the defendant on his promise :—Held, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered his agent for the purpose of making such payment. *Adams* v. *Dansey*, 4 M. & P. 245 ; 6 Bing. 506 ; 8 L. J. (o.s.) C. P. 165 ; 31 R. R. 480.

**Transfer of Security by Surety to Creditor—Liability of Principal to Surety for Money Paid.**] —Where at the trial of an action for money paid, the jury found that the plaintiff was surety, and the defendant one of the principals, on a promissory note, and it was also proved that the plaintiff had transferred a mortgage security, which was his property, to the holder of the note, who thereupon released him from liability, and which security was valued by the jury (under the direction of the judge) at a certain sum ; but it did not appear that any cash was paid on foot of the security or otherwise, by or on behalf of the plaintiff :—Held (diss. O'Brien, J.), that the plaintiff was entitled to retain the verdict entered for him at the trial for the value of the mortgage. *Barclay* v. *Gooch* (2 Esp. 571) discussed. *Fahey* v. *Frawley*, 26 L. R. Ir. 78.

### 2. On Distresses.

Where a man by compulsion of law is obliged to pay a debt, he has a remedy against those who by law were bound to pay, but did not. *Exall* v. *Partridge*, 8 Term Rep. 308 ; 3 Esp. 8 ; 4 R. R. 656.

The goods of a stranger on the premises of another were distrained by the landlord for the rent in arrear, and the stranger was obliged to pay the rent to redeem them :—Held, that the stranger might maintain an action for money paid to the use of the original lessees, who were bound by their covenant to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their colessees, who was in the exclusive possession at the time. *Ib.*

An under-tenant, whose goods are distrained and sold by the original landlord for rent due from his immediate tenant, cannot immediately maintain an action against him for money paid ; for, on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant. *Moore* v. *Pyrke*, 11 East, 52.

A tenant under a lease cannot maintain an action on an implied promise for money paid under a distress by a superior landlord, being excluded by the express contract. The remedy is on the covenant. *Schlenker* v. *Moxey*, 5 D. & R. 747 ; 3 B. & C. 789 ; 1 Car. & P. 178 ; 27 R. R. 482.

A tenant, shortly after he had paid half-a-year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay :—Held, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose. *Carter* v. *Carter*, 2 M. & P. 732 ; 5 Bing. 406 ; 7 L. J. (o.s.) C. P. 141 ; 30 R. R. 677.

By an act for draining lands in Lincoln, it was declared, that the taxes to be charged and assessed by virtue of the same, should be paid by the tenants of the lands charged with the same, who might deduct and retain the same out of the rents payable to their respective landlords ; and also, that, in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear ; and that, if the

same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment, and might be taken possession of, and left in discharge of the tax. Where, therefore, a tenant had quitted lands liable to a drainage tax under this act, and, after he had left, the collector levied the tax in arrear upon property which he had left in the possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenant for the time being; and, therefore, that the plaintiff might maintain an action against the landlord for money paid to his use. *Dawson* v. *Linton*, 1 D. & R. 117; 5 B. & Ald. 521. Cp. *Griffinhoofe* v. *Daubuz*, 5 El. & Bl. 746; 25 L. J., Q. B. 237; 2 Jur. (N.S.) 392—Ex. Ch.

A. and B. were under-lessees, at distinct rents, of separate portions of premises, the whole of which was held under one original lease at an entire rent. A. having paid the whole rent under a threat of distress, brought an action against B. to recover the proportion of rent due from him, as for money paid to his use:—Held, that the action was not maintainable. *Hunter* v. *Hunt*, 1 C. B. 300; 9 Jur. 375.

The plaintiff under a bill of sale seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord having distrained them, the plaintiff paid the rent and expenses:—Held, that this was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request. *England* v. *Marsden*, 35 L. J., C. P. 259; L. R. 1 C. P. 529; 12 Jur. (N.S.) 706; 14 L. T. 405; 14 W. R. 650.

A distress for rent was levied upon certain property, and cattle lent for hire by the plaintiff to the tenant were seized. The defendant, the holder of a bill of sale upon the goods and chattels of the tenant, then paid off the distress, and seized the cattle in question under his bill of sale. In an action for trover and conversion:—Held, that the defendant was not entitled to set off and counter-claim the amount paid by him to relieve the cattle from the distress. *Jones* v. *Simmons*, 45 J. P. 666.

A purchaser of a leasehold interest, entering into possession before execution of an assignment, is entitled to sue the vendor for money paid to the landlord under a distress for rent accruing due before entry. *Gregory* v. *Stanway*, 2 F. & F. 309.

### 3. Damages and Costs.

If A. defends an action at the desire of B., in which action B. is concerned, and may be benefited by the event, and A. has a verdict against him, B. is liable to pay the expenses of the defence. *Howes* v. *Martin*, 1 Esp. 162.

A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorised by him to defend. *Gillett* v. *Rippon*, M. & M. 406.

A declaration stated that the plaintiff, at the request of the defendant, and upon his undertaking to indemnify, defended an action for the recovery of money in which he claimed an interest; that judgment was given against the plaintiff for 42*l.*; and that he was imprisoned and paid the money under a ca. sa.:—Held, that he might recover against the defendant this sum under this count, upon proof of the judgment, without proof of the capias; or even on a count for money paid to the defendant's use; the defendant having taken out a summons to be permitted to pay such sum in discharge of the plaintiff's demand. *Williamson* v. *Henley*, 6 Bing. 299; 3 M. & P. 731.

In an action by A. against B., B. gave notice to C., against whom B. had a remedy over, to come in and defend the action. C. refused to do so, but did not prohibit B. from continuing the defence. B. suffered judgment by default, and watched the proceedings under the writ of inquiry, putting A. to the proof of his claim. At the trial of the action over by B. against C., the jury included in their verdict the costs incurred by B. in the former action, no objection being then taken by C. to the right of B. to recover such costs. The court refused to disturb the verdict, being of opinion that there was evidence to go to the jury, that C. had sanctioned the incurring of these costs. *Blyth* v. *Smith*, 5 Man. & G. 405; 6 Scott (N.R.) 199; 12 L. J., C. P. 203.

If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—Held, that A. cannot in an action against B., recover the amount of the costs of the two actions, if his declaration contains only the common money accounts; but that to recover these costs he should have declared specially. *Seaver* v. *Seaver*, 6 Car. & P. 673.

A plaintiff having accepted a bill for the defendant's accommodation, defended an action brought by the indorsee, and finally paid the amount with the costs of the action. The plaintiff brought an action for money paid; the jury was directed that if the defendant requested the plaintiff to undertake the defence (as to which there was some evidence, but no express request proved) the costs were recoverable as money paid to the plaintiff's use:—Held, that the direction was right, and the costs recoverable under the count for money paid. *Ganard* v. *Cottrell*, 10 Q. B. 679.

Where a party has incurred and paid costs in bringing actions against committee-men to recover the amount of his claim, at the request of another committee-man, he may recover such costs from the committee-man at whose instance he sued as for money paid. *Bailey* v. *Haines*, 13 Q. B. 816; 19 L. J., Q. B. 73.

A plaintiff, as the agent of the defendant, ordered for him goods of a particular description and for a particular purpose, of W. and R., the defendant undertaking to save the plaintiff harmless from the consequences. The goods were of a different description from what were ordered, and unfit for the purpose required; but W. and R. contended that they had been misled by the misspelling contained in the order given by the plaintiff, who was a very illiterate person, and they refused to take the goods back. An action having been brought by W. and R. against the plaintiff for the price, and the defendant having had notice of the same, the plaintiff compromised such action by returning the goods, and paying a sum of money in discharge of debt and costs:—Held, that the plaintiff had an authority from the defendant to compromise such an action, and that he could recover from the defendant the amount so paid. *Pettman* v. *Keble*, 9 C. B. 701; 19 L. J., C. P. 325; 15 Jur. 38.

4. CONTRIBUTION.

a. In Cases of Tort.

If a plaintiff recovers in an action of tort against two, and levies the whole damages on one, that one cannot recover a moiety against the other for his contribution. Otherwise where the recovery against the two was in assumpsit. *Merryweather* v. *Nixan*, 8 Term Rep. 186; 16 R. R. 810. See *Palmer* v. *Wick Steam Shipping Co.*, [1894] A. C. 318; 6 R. 245; 71 L. T. 163—H. L. (Sc.)

But the rule that there is no contribution among joint tort feasors, does not apply to a case where the party seeking contribution was a tort feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. *Pearson* v. *Skelton*, 1 M. & W. 504; 1 Tyr. & G. 848.

Or the act is of an obviously illegal character. *Betts* v. *Gibbins*, 4 N. & M. 64; 2 A. & E. 57; 4 L. J., K. B. 1.

Nor does it extend to a case in which there is any bonâ fide doubt whatever, whether in point of law the act was authorised. *Ib.*

So also, the rule that a tort feasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, must be similarly confined. *Ib.*

Contribution is indemnity, and the same consideration that will support a promise to indemnify, will also support a promise to contribute, et e converso. *Ib.*

Where several persons were jointly interested in a stage-coach, and there was a partnership fund, out of which expenses were first to be paid, and the residue divided amongst them:—Held, that one of them, against whom damages and costs had been recovered in an action brought by a party to whom damage was done by the negligent driving of the coach, could not recover against another proprietor his proportion of such damages and costs. *Pearson* v. *Skelton*, 1 M. & W. 504; 1 Tyr. & G. 848.

Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. *Att.-Gen.* v. *Wilson*, 1 Cr. & Ph. 1.

b. In Cases of Contract.

The plaintiff and defendant entered into a joint and written contract with the owner of a vessel to supply her with colonial produce at Jamaica by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to arbitration, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid against the defendant for a moiety:—Held, that he was entitled to recover. *Burnell* v. *Minot*, 4 Moore, 340.

Four persons, who had acted as directors of a projected company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on personal responsibility:—Held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. *Edger* v. *Knapp*, 6 Scott (N.R.) 707; 1 D. & L. 73; 5 Man. & G. 753.

A., B. and C., by an agreement in writing, hired premises of D.; the premises so hired were intended to be, and were used for the purposes of a company, of which A., B. and C. were at the time of the contract committee-men; rent was for some time paid by the company, but ultimately became in arrear; whereupon D. sued A., B. and C. upon the agreement; B. and C. suffered judgment by default, and D. recovered the amount of the rent and costs against A.:—Held, that A. was entitled to sue B. and C. for contribution; and that his remedy against B. was not affected by the circumstance of B.'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought. *Boulter* v. *Peploe*, 9 C. B. 493.

The right to enforce contribution between joint makers of a promissory note by an action is not affected by the fact that the makers were co-partners together with others, and that the note was given to secure money raised for the purposes of the partnership. *Sedgwick* v. *Daniell*, 2 H. & N. 319; 27 L. J., Ex. 116.

Where the plaintiff and the defendant were two of a committee, appointed at a vestry meeting, for the purpose of prosecuting nuisances on the waste lands and highways of the parish, which committee appointed an attorney, who prosecuted and obtained a verdict, and afterwards sued the plaintiff for his bill of costs, which was referred to arbitration, and 235*l.*, with costs of the action, were awarded against the plaintiff:—Held, that he might maintain an action against the defendant for contribution. *Holmes* v. *Williamson*, 6 M. & S. 158.

c. Amount and Proportion.

Where A. and B. had taken some pasturage jointly, and each had turned his cattle upon it, but how many each had turned was not shown; and A. having paid the whole rent:—Held, in an action for half the sum so paid by A., that the jury was not warranted in finding that the share of each was a moiety. *Sharpe* v. *Cummings*, 2 D. & L. 504; 14 L. J., Q. B. 10; 9 Jur. 68.

Differences and disputes having arisen between the trustees and managers of a chapel as to the conduct of B., one of the trustees, and an information having been filed in the court of chancery at the relation of all the trustees (except B.) against B. and another person, praying an account against B., in respect of such part of the trust funds as had come into his hands; and B. having by his answer charged the relators with a breach of trust in their management of the trust funds, an order was made with the consent of all parties, that the cause and all matters in difference should be referred, the arbitrator to have full authority over the costs of the suit and reference. The order expressly provided, that the death of any of the parties should not operate as a revocation of the arbitrator's authority; but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference, one of the relators, being a party thereto, died, and afterwards the arbitrator made his award, and thereby directed that the costs of the reference should be borne and paid by the parties by whom they were incurred. The plaintiff, who was one of the relators, paid the solicitor, who had been retained for them in the conduct of the reference, his bill of costs and brought an action for money paid against the executors of the deceased

relator for his proportion of the costs incurred after his death, including the costs of the award: —Held, that the executors were liable in such action for their testator's proportion of the costs of the reference incurred after his death, and also the costs of the award. *Prior* v. *Hembrow*, 8 M. & W. 873; 10 L. J., Ex. 371.

Where two or more members of a provisional committee jointly enter into a contract with a third party, and one of them is compelled to pay more than his just share of a debt, he may maintain an action against his co-contractors to recover contribution in respect of the amount overpaid by him. *Batard* v. *Hawes*, 2 El. & Bl. 287; 22 L. J., Q. B. 443; 17 Jur. 1154; 1 W. R. 387.

In order to determine the aliquot part of the whole amount which each co-contractor is to contribute in such a case, the number of the persons who originally entered into the contract must be looked to, and not the number of persons jointly liable to be sued as contractors at the time when the plaintiff in the action paid. *Ib.*

By agreement between the plaintiff of the one part, and the defendants of the other part, differences between them were referred to arbitration; the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, after finding a sum due from the defendants to the plaintiff, awarded that the costs of the reference and award, including compensation to the arbitrator, should be borne as follows: that is to say, one moiety by the plaintiff, and the other moiety by the defendants. The plaintiff took up the award, and paid the whole costs of it:—Held, that he could not recover a moiety of the costs as money paid for the use of the defendants. *Bates* v. *Townley*, 2 Ex. 152; 19 L. J., Ex. 399; 12 Jur. 606.

### d. Without Legal Proceedings.

Generally, one joint contractor, who pays money for another under an equitable claim, may recover it from the other, as money paid to his use. *Hutton* v. *Eyre*, 1 Marsh. 603; 6 Taunt. 289; 16 R. R. 619.

But in all cases of partnership in illegal transactions, one partner cannot recover back money paid for the other, unless he has received express directions for such payment. *Webb* v. *Brooke*, 3 Taunt. 11. And see *Simpson* v. *Bloss*, 2 Marsh. 542; 7 Taunt. 246; Holt, 273; 17 R. R. 509.

Twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed:—Held, that he could not sue for contribution from the persons who signed the order. *Lanchester* v. *Frewer*, 2 Bing. 361; 9 Moore, 688; 3 L. J. (O.S.) C. P. 40. See *Sprott* v. *Powell*, 3 Bing. 478; 11 Moore, 398; 4 L. J. (O.S.) C. P. 161; 28 R. R. 665.

Where a lord of a manor, bound by tenure to repair, has repaired a bridge, he may recover contribution from a person who holds lands which were parcel of the demesnes at any time whilst the manor was so charged, in proportion to the value of the lands so held. *Dimes* v. *Arden*, 6 N. & M. 494; 5 L. J., K. B. 158.

### 5. Money paid by Sheriffs.

No cause of action can arise out of a breach of duty; therefore, if an officer permits a prisoner to go at large on his promise to pay the debt, and in consequence he is himself obliged to pay it, he cannot recover the money from the debtor. *Pitcher* v. *Bailey*, 8 East, 171.

If a sheriff voluntarily permits an escape, and is afterwards obliged to pay the debt, he may maintain an action for money paid against the debtor. *Morris* v. *Berkeley*, 8 East, 172, n.; Peake, 144, n.

A sheriff's officer, who discharges a debtor on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the debtor as money paid to his use. *Cordron* v. *Massarene* (*Lord*), Peake, 143.

An action will not lie upon an implied promise to repay a sheriff the expenses incurred in seizing and keeping possession under a fi. fa. at the request of the party suing out the writ, although they were not sold on account of his refusing to give an indemnity against the claims of third persons. *Bilke* v. *Havelock*, 3 Camp. 374; 14 R. R. 758.

### 6. Expenses of Bail.

Where a person becomes bail above for another, he is entitled to recover all the expenses to which he has been put by reason of it, and may, therefore, recover his expenses in sending after the principal to take him, in order to render him; but not the expenses of a suit improperly defended. *Fisher* v. *Fallows*, 5 Esp. 171; 8 R. R. 843.

And not for trouble and loss of time in going to a place to become bail. *Reason* v. *Wirdnam*, 1 Car. & P. 434.

And, primâ facie, the charges of the bail for putting in bail above are due from the bail to the sheriff. *Hector* v. *Carpenter*, 1 Stark. 190.

A. entered into a recognisance of bail for B. on the removal by certiorari of an indictment for conspiracy from the central criminal court to the queen's bench. B. was convicted, and the recognisance was estreated for the nonpayment of the prosecutor's costs:—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J., C. P. 229; 1 Jur. (N.S.) 936; 3 W. R. 554.

## C. FOR MONEY HAD AND RECEIVED.

### 1. General Principles to support Action.

The action for money had and received is a liberal action, in which the party waives all torts, trespasses, and damages. *Anon.*, Lofft, 320.

The doctrine that the action for money had and received is an equitable action, must be looked on as exploded. *Miller* v. *Atlee*, 3 Ex. 799; 13 Jur. 431.

Money paid by A. to B. upon a condition which has not been complied with, cannot be recovered as money received to A.'s use. *Hardingham* v. *Allen*, 5 C. B. 793; 17 L. J., C. P. 198.

An action for money had and received will not lie where the plaintiff upon the same transaction would be liable to a cross-action to recover damages to an equal amount. *Simpson* v. *Swan*, 3 Camp. 291; 13 R. R. 805.

Goods were consigned to two persons for sale by commission; upon a dissolution of partnership the commission to sell was assumed by one:—Held, that having sold, he was rightly sued for money had and received. *Wells* v. *Ross*, 7 Taunt. 403.

When a person is employed to receive money

for another, and he employs a third person to receive it for him, an action for money had and received will not lie against the first, without evidence that the money came to the hands of such third person. *Matthews* v. *Haydon*, 2 Esp. 509.

A defendant being employed to procure payment of a bill, and to remit the proceeds direct to the plaintiff, remitted it to a third person, whereby it got into the hands of the plaintiff's creditors:—Held, that the defendant was not liable for money had and received. *Duncan* v. *Shipwith*, 2 Camp. 68.

The action will lie for the assignee of a respondentia bond; the obligor having beforehand engaged, by an indorsement, to pay the same to any assignee. *Fenner* v. *Meares*, 2 W. Bl. 1269.

The plaintiff must prove to what specific sum he is entitled. *Harvey* v. *Archbold*, 5 D. & R. 500; 3 B. & C. 626; R. & M. 184.

An execution issued against one of two partners for a separate debt, under which the goods of the partnership were seized; before the sale, a fiat in bankruptcy issued against the partnership. The partnership property was afterwards sold, and the produce received by the assignees:—Held, that the exection creditor could not maintain an action against the assignees for a moiety of the produce as money had and received to his use, having acquired no legal interest in the goods. *Garbett* v. *Veale*, D. & M. 458; 5 Q. B. 408; 13 L. J., Q. B. 98; 8 Jur. 335.

The plaintiff, an attorney, agreed for a consideration to convey to the defendant an estate, which the latter had purchased, upon the terms, that the vendor and vendee should pay for the conveyance in equal proportions, and the plaintiff also agreed, that, if the vendor objected to pay any expenses, he, the plaintiff, would not apply to the defendant for any further remuneration. The conveyance was made by the plaintiff; the defendant agreed with the vendor, that, if the vendor would pay the whole expense of another transaction between himself and the defendant, he, the vendor, should not pay any of the expenses of the above conveyance:—Held, that so much of those expenses as the defendant (as between himself and the vendor) had been allowed to set off against his share of the liability on the other transaction, was money had and received to the plaintiff's use, and might be recovered by him, besides the consideration originally agreed upon for making the conveyance. *Noy* v. *Reynolds*, 1 A. & E. 159.

Upon a contract of sale and return, with a certain sum to be paid for hire if a return should be made, the money received by the seller becomes money had and received to the use of the other party if a return is made, and may be recovered as money had and received. *Hurst* v. *Orbell*, 3 N. & P. 237; 1 W. W. & H. 156; 8 A. & E. 107; 7 L. J., Q. B. 138; 2 Jur. 840.

The defendant, who had been illegally elected for the office of surgeon of a county infirmary in Ireland, entered into office, and though cautioned, kept out the plaintiff, who had been legally elected:—Held, that the plaintiff, as he had not actually discharged the duties of the office, though he had offered and was ready to do so, was not entitled to recover, as money had and received, the salary which the defendant had received under the grand jury presentment. *Lawlor* v. *Alton*, Ir. R. 8 C. L. 160.

The legal estate in lands being vested in trustees, and the plaintiff equitably entitled to the rents, by his direction a tenant, holding under the trustees, paid his rent to the defendant in discharge of an annuity claimed by the latter as charged upon the land; and the plaintiff sought, by an action for money had and received, to recover back the money so paid:—Held, that he was not entitled to sustain the action. *Leader* v. *Leader*, Ir. R. 6 C. L. 20.

A. was tenant of a farm over which two railways passed, in respect of which tenant's damages were payable to the owner of the land, or to his lessees or tenants. A. received the money:—Held, that, if the land covered by the railways passed to A. by the agreement under which he became tenant, the owner could not recover that money as received to his use. *Wilson* v. *Anderson*, 1 Car. & K. 544.

### 2. Privity of Contract.

A. paid a sum of money into a banker's hands for a specific purpose, and the banker's clerk, by mistake, paid the money to B.:—Held, that A. could not maintain an action against B. to recover it back. *Rogers* v. *Kelly*, 2 Camp. 123.

But if A. remits money to B. to pay C., and B. promises C. to pay it to him, C. can maintain an action against B. for money had and received. *Lilly* v. *Hays*, 1 N. & P. 26; 5 A. & E. 548; 2 H. & W. 338; 6 L. J., K. B. 5.

The plaintiff purchased the interest of a member of a building society, and paid to the manager certain instalments who misapplied the money. By the rules, the manager was only justified in receiving instalments in conjunction with the treasurer and one of the trustees:—Held, that an action would not lie against the manager for money had and received, as the money was received by the manager for the society and not for the plaintiff. *Haverson* v. *Cole*, 6 W. R. 17.

The defendant was an office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by the defendant was. The defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion, the defendant sent to the plaintiff, a proprietor, a packet purporting to contain 23*l.* which was due to him, but in reality containing 20*l.* only. The plaintiff sued the defendant for 3*l.* had and received to his use:—Held, that he was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defence by having told the plaintiff (after action brought), that he, the defendant, had had the 23*l.* of C., and sent it to the plaintiff and debited C. with it. *Howell* v. *Batt*, 2 N. & M. 381; 5 B. & Ad. 504; 3 L. J., K. B. 49. See *Stephens* v *Badcock*, 8 B. & Ad. 354; 1 L. J., K. B. 75.

The defendant chartered a ship to K., at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, K. received from the plaintiff, through whom he had sub-chartered the ship to B., a cheque for half the amount due, payable to the order of the defendant, upon the terms that K. should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. K. paid the cheque to the defendant, but omitted to inform him of the terms on which it had been given, and he had no notice of them, and, the remainder of

the money being unpaid, the defendant, who had obtained cash for the cheque, stopped the ship :—Held, that an action for money had and received to recover the amount of the cheque was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by K. *Watson* v. *Russell*, 5 B. & S. 968 ; 34 L. J., Q. B. 93 ; 11 L. T. 641 ; 13 W. R. 231—Ex. Ch.

When a bill of exchange, payable at the house of A., had been presented there for payment, and dishonoured, and the acceptor on the following day remitted a sum to A. for the purpose of paying that bill and another ; and A. in answer stated that the bill had been dishonoured, but added that the money received should be carried to the acceptor's account, and afterwards paid the other bill :—Held, that the holder of the original dishonoured bill could not maintain an action against A. for money had and received, unless some agreement had taken place between them. *Yates* v. *Bell*, 3 B. & Ald. 643.

Guardians of a poor-law union indicted the plaintiff for disobeying an order of sessions for maintenance of a bastard. Before trial, he offered a compromise, and the clerk to the guardians on their behalf agreed with him for a sum on account of costs and maintenance, which he paid, and the indictment was dropped. Afterwards, the plaintiff discovered that the order of sessions was defective and void, and he brought an action against the clerk for money had and received :—Held, that the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment ; and that, if the compromise was illegal, the plaintiff, being in pari delicto with the other parties offending, could not sue them for the money which he had paid. *Goodall* v. *Lowndes*, 6 Q. B. 464 ; 9 Jur. 177.

An action for money had and received will not lie against a mere money bearer, to recover the money he has received and paid over. *Coles* v. *Wright*, 4 Taunt. 213 ; 2 Rose, 110.

The defendant having recovered judgment against H. on the 25th of April, lodged with the sheriff a fi. fa. The sheriff neglected to execute the writ until the 11th May, when he seized the goods of H., and assigned them to the defendant, by a bill of sale, which stated the consideration to be 256*l.*, paid by the defendant to him. He then returned the fi. fa. Before the seizure, the defendant had notice of an act of bankruptcy committed by H. before the 25th of April, upon which a fiat issued in August, and assignees were appointed, who recovered from the sheriff the value of the goods seized, whereupon he brought an action to recover back the money so paid :—Held, first, that although no money, in fact, passed, the plaintiff and defendant were, as between themselves, in the same situation as if the plaintiff had sold the goods to the defendant, and received the money. *Standish* v. *Ross*, 3 Ex. 527 ; 19 L. J., Ex. 185.

Held, secondly, that though the money was not the plaintiff's, still he was entitled to recover, since it was money which he ought to have received as soon as he had been compelled by the owner to pay for the goods seized. *Ib.*

Held, thirdly, that the plaintiff was not estopped, by his return, from saying that the then title of the debtor was defeated by matter subsequent. *Ib.*

Held, lastly, that the money having been paid by the plaintiff, in ignorance of the facts, he was entitled to recover it back, although the defendant could not, in every respect, be placed in statu quo. *Ib.*

The assignees of a bankrupt gave B., their solicitor, a cheque for the amount of the bill of costs of A., the petitioning creditor (who was his own solicitor) ; B, offered to pay A. the full amount of those costs, provided that he would engage in the receipts that the costs should be afterwards liable to taxation ; A. refused to give such engagement, and requested B. to pay out of the same some commissioners' fees included in the bill :—Held, that no promise arose upon the offer, the terms of which were not acceded to ; and without the promise there was no privity of contract to support an action for money had and received. *Barron* v. *Husband*, 1 N. & M. 728 ; 4 B. & Ad. 611. See *Kymer* v. *Larkin*, 5 Bing. 71 ; 2 M. & P. 183 ; 6 L. J. (o.s.) C. P. 237.

A legacy having been left to the plaintiff, the defendant, who acted as agent for the executor, stated, in a letter to a third party, that he would remit the plaintiff's legacy in any way the latter might suggest. He afterwards paid 24*l.* to the plaintiff, having deducted 6*l.* 17*s.* 6*d.* for his trouble and expenses, and afterwards sent him an account, stating the reason of the deduction : —Held, that the plaintiff was not entitled to recover this sum in an action for money had and received. *Burlow* v. *Browne*, 16 M. & W. 126 ; 16 L. J., Ex. 62.

The defendant, as trustee of a certain marriage settlement, invested money on a mortgage of the plaintiff's land. The mortgage deed provided for interest at the rate of 5 per cent., but contained a proviso for the reduction of the rate to 4 per cent. on punctual payments. All the payments of interest except the first had been punctual, but, through the plaintiff's ignorance of the proviso for the reduction of the interest, they had been made at the rate of 5 per cent. In an action by the plaintiff to recover from the defendant, the trustee, the extra 1 per cent. paid under this mistake :—Held, that the action was rightly brought against the trustee ; that the only contract was between the plaintiff as mortgagor and the defendant as mortgagee ; that money had been received under that contract by the mortgagee, and that he alone could be asked or required to repay it. *King* v. *Stewart*, 66 L. T. 339.

### 3. On Waiving, Condoning or Satisfying Torts.

A. and B. went together to the house of C.'s mother, and A. seized there a sum of money belonging to C. There was some evidence of A. and B. having gone with the intent to get the money, but there was no evidence that B. went into the house. They subsequently paid the money into a bank to their joint account :—Held, that C. might waive the trespass and maintain an action for money had and received against A. and B. *Neat* v. *Harding*, 6 Ex. 349 ; 20 L. J., Ex. 250.

Where, after a wrongful sale of goods, the owner claims the proceeds of the sale as money received to his use, and the wrongdoer thereupon pays, and the owner accepts, part of the proceeds as money received to his use ; the tort is waived, and the owner's remedy for the residue of the amount of the sale is by an action for money had

and received to his use. *Lythgoe* v. *Vernon*, 5 H. & N. 180 ; 29 L. J., Ex. 164.

To an action for money received, a plea that the debt was for money due from the defendant jointly with A., and that the plaintiff had already sued A. in trover, and recovered judgment against him for 100*l.*, and that the causes of action for which the plaintiff recovered judgment included all the present causes of action. The evidence was, that the defendant and A. had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150*l.* ; and that the plaintiff had sued A. in trover, and recovered 100*l.* as the value of the goods at the time of the conversion. The plea was then amended by striking out the allegation, that the debt was for money due from the defendant and A. jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned :—Held, that the plea, as amended, was an answer to the plaintiff's claim for the whole proceeds of the sale. *Buckland* v. *Johnson*, 15 C. B. 145 ; 2 C. L. R. 784 ; 23 L. J., C. P. 204 ; 18 Jur. 775 ; 2 W. R. 565.

### 4. Receiver's Knowledge of Title to Money or Appropriation.

Where money is paid by A. to B., to be applied by the latter, pursuant to a binding contract between the parties, A. cannot revoke its destination. *Yates* v. *Hoppe*, 9 C. B. 541 ; 19 L. J., C. P. 180 ; 14 Jur. 372.

The drawer of an accommodation bill, a few days before its maturity, handed money over to the acceptor, for the purpose of meeting the bill. A fiat having been issued against the drawer between the day of such deposit and the maturity and payment of the bill :—Held, that the money having been handed over to the acceptor in pursuance of a binding contract, upon a good consideration, viz., an implied contract of indemnity, the bankruptcy of the drawer was no revocation of the authority to apply the money in satisfaction of the bill, and consequently that his assignees could not recover it back from the acceptor as money had and received to their use. *Ib.*

Notice of an order was given to the party to whom it was directed before it was due, and he wrote letters to the plaintiff, in one of which he undertook to honour the order when he had funds in his hands, and in a later one said he had received money available for the order, but had disposed of it in other ways :—Held, it might be read in evidence against the defendant in support of a claim for money received, founded upon his assent to a direction to hold a fund in his hands for the use of the plaintiff. *Griffin* v. *Weatherby*, 9 B. & S. 726 ; 37 L. J., Q. B. 280 ; L. R. 3 Q. B. 753 ; 18 L. T. 881 ; 17 W. R. 8.

When bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And when the money realised by the sale is wrongfully applied by the agent, the remitter is entitled to recover the value of the bills, as money had and received to his use, from the purchaser of them, who has notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. *Muttyloll Seal* v. *Dent*, 5 Moore, Ind. App. 328 ; 8 Moore, P. C. 319.

A. employed B., a broker at Liverpool, to purchase a Hartlepool bond for 2,000*l.* for him, for which purpose he remitted him a letter of credit for 2,010*l.* on a bank there, payable to B. or order. C., who had had dealings with B., in the course of which the latter had become indebted to him in 1,940*l.*, under pretence of borrowing the money for a few days, and knowing that it was A.'s money, induced B. to part with it, and then insisted upon applying it in discharge of B.'s debt to him :—Held, that A. might recover the amount from C. *Litt* v. *Martindale*, 18 C. B. 314 ; 4 W. R. 465.

### 5. To try Title to Land or Profits.

The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question. *Moneypenny* v. *Bristow*, 2 Russ. & M. 117. S. P., *Newsome* v. *Graham*, 10 B. & C. 234.

An action for money had and received will not lie by one tenant against his co-tenant who has received more than his share of the profits. *Thomas* v. *Thomas*, 5 Ex. 28 ; 1 L. M. & P. 229 : 19 L. J., Ex. 175 ; 14 Jur. 180.

### 6. To try the Right to Offices.

An action for money had and received to recover fees, was introduced in lieu of an assize. *Boyter* v. *Dodsworth*, 6 Term Rep. 681 ; 3 R. R. 315.

Money given to A., and claimed by B., as perquisites of office, cannot be recovered by B. unless such perquisites are known and accustomed fees. *Ib.*

It will not lie by the nominee of a perpetual curacy for the profits thereof, against one who was in possession, and claimed likewise to be curate. *Powell* v. *Millbank*, 1 Term Rep. 399, n.

Nor does it lie in the case of a donative, because the party is in full possession immediately on the nomination. *Rex* v. *Chester* (*Bishop*), 1 Term Rep. 396, 403 ; 1 R. R. 237.

Where the plaintiff and defendant, both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that the defendant should act in the office and divide his fees with the plaintiff :—Held, that an action might be maintained to recover the moiety of the fees received, and that the defendant could not allege that he was legally entitled to all the fees. *Rowland* v. *Hall*, 1 Scott, 539 ; 1 Hodges, 111.

Where a corporation, under a claim that a particular office was vacant or that it had been abolished, had for some years wrongfully received the fees payable to the holder of such office :—Held, that an action for money had and received might be brought against the corporation ; for, as it would be absurd to suppose that a corporation would contract under seal to refund money which they claimed to be their own, the necessity of the case required such a remedy. *Hall* v. *Swansea Corporation*, D. & M. 475 ; 5 Q. B. 526 ; 13 L. J., Q. B. 107 ; 8 Jur. 213. See *Shoubridge* v. *Clark*, 12 C. B. 335.

### 7. For Money paid on Moral Obligation.

Where a man has actually paid what the law would not have compelled him to pay, but what

in equity and conscience he ought, he cannot recover it back. *Bize* v. *Dickason*, 1 Term Rep. 285.

Nor where a man has paid a debt which would otherwise have been barred by the Statute of Limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though not compellable by law, can he call on the payee to refund; but where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back again. *Ib.*

But money paid voluntarily cannot be recovered back. *Cartwright* v. *Rowley*, 2 Esp. 723.

Where a creditor refused to sign a composition deed without a bill of exchange for the remainder of his debt, which the debtor gave him, and the former then signed the deed; the debtor having subsequently paid the amount of the bill to his creditor:—Held, that it was a voluntary payment, and could not be recovered back. *Wilson* v. *Ray*, 2 P. & D. 253; 10 A. & E. 82; 8 L. J., Q. B. 224; 3 Jur. 384.

### 8. For Money paid under Compulsion of Law.

A voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (as to redeem or preserve his person or goods), is not the subject of an action for money had and received. *Fulham* v. *Down*, 6 Esp. 26, n.

Where judgment was obtained on an order which had not been duly filed, and execution was issued:—Held, that the defendant might recover from the plaintiff the amount paid to him under the execution, as money had and received to his use. *Farrow* v. *Mayes*, 18 Q. B. 816; 17 Jur. 132.

Voluntary payment, conclusive both in equity and at law, on the principle that litigation is not to be multiplied. *Goodman* v. *Sayers*, 2 Jac. & Walk. 263.

A. B. on a sale of certain lands covenanted with C. D., the purchaser, to protect him against "all judgments, charges, and incumbrances, &c." It subsequently appeared that the lands were liable to a judgment, confessed previously to the lands coming into the possession of C. D., and proceedings having been commenced by the conusee against the lands, and A. B. having been called upon by C. D. and having accordingly, and in fulfilment of his covenant, paid off the amount of the judgment:—Held, that this was not a voluntary payment. *Aicken* v. *Macklin*, 1 Dr. & Wal. 621.

If money is paid after judgment signed, it cannot be considered as a voluntary payment. *Garratt* v. *Hooper*, 1 D. P. C. 28.

Where money has been paid under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back. *Marriott* v. *Hampton*, 7 Term Rep. 269; 2 Esp. 546; 4 R. R. 439.

But an action lies to recover back money which has been obtained by compulsion under colour of process, by an excess of authority, although it has been paid over. *Snowdon* v. *Davis*, 1 Taunt. 359.

The plaintiff, being a foreigner, ignorant of the English language, was arrested at Falmouth, soon after his first arrival there from abroad, by the defendant, for 10,000*l.* The defendant and plaintiff then signed an agreement, by which, in consideration of 500*l.* paid by the plaintiff to the defendant, the plaintiff was to be discharged, and not to be again arrested; and the plaintiff was to put in bail in twelve days; the sum of 500*l.* was to be "as a payment in part of the writ"; and both parties were to abide the event of the action, the agreement containing no provision for refunding the money if the action should fail. The plaintiff paid the 500*l.*, and was released. No bail was put in, and the writ was afterwards set aside for irregularity. The plaintiff then sued the defendant for the 500*l.*, as money had and received; and the jury found that he knew that he had no claim upon the plaintiff:—Held, that the action lay, the payment having been made under compulsion of colourable legal process. *De Cadaval (Duke)* v. *Collins*, 4 A. & E. 858; 2 H. & W. 54; 6 N. & M. 324; 5 L. J., K. B. 171.

Where money has been paid under compulsion of legal process, the party paying it knowing the cause of action for which the process was sued out before he paid the money, and there being no fraud on the part of the payee, the money so paid cannot be recovered back, although it may afterwards be discovered to have been not really due. *Hamlet* v. *Richardson*, 2 M. & Scott, 811; 9 Bing. 644.

Where a party, sued on a claim which he knows to be unfounded, pays it voluntarily and with notice, it is not recoverable; he cannot recover it back, though at the time he pays it, he declares he pays it without prejudice to his right to recover. *Brown* v. *M'Kinally*, 1 Esp. 279; 5 R. R. 739.

A certificated bankrupt, being arrested for a debt provable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the court to have the money paid back:—Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne* v. *Chapman*, 4 A. & E. 364.

When a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or a concession in respect of which he is entitled to recover the excess by condictio indebiti, or by an action for money had and received. *G. W. Ry.* v. *Sutton*, 38 L. J., Ex. 177; L. R. 4 H. L. 249; 22 L. T. 43; 18 W. R. 92.

An action may be maintained to recover back money paid under a compromise, after another action had been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of inquiry executed thereon; where it appeared that there was no real consideration for the payment, and the money had in fact been paid under a compromise, and not under the judgment of a court. *Cobden* v. *Kendrick*, 4 Term Rep. 432, n.; 2 R. R. 424.

A party paid the sheriff the amount of a forfeited recognisance, in order to prevent a sale of his goods; the sessions afterwards mitigated the recognisance to a small sum, for which alone the sheriff rendered an account to the exchequer:—Held, that as the sessions were not authorised in mitigating the recognisance, the plaintiff could not recover against the sheriff for the surplus of the money, though he had made an express promise to repay it. *Haynes* v. *Hayton*, 7 B. & C. 293; 2 Car. & P. 621; 5 L. J. (o.s.) M. C. 136; 31 R. R. 205.

If one person obtains possession of goods intrusted to another to be sold at a fixed price, and at the time when the goods are to be delivered, or the price accounted for, refuses to do either, and the person to whom they were intrusted, being threatened with an action, pays the fixed price to the owner, such person may recover against him who took possession in an action for money had and received. *Longchamp* v. *Kenny*, 1 Dougl. 137.

Pending an ejectment by A. against B., A. was served with notice of B.'s intention to sue for certain statutable penalties incurred by A. An arrangement was made, under which the ejectment was discontinued, and B. received from A. 50*l.* towards the costs of B.'s defence in that action:—Held, that A. might recover back the 50*l.* as money received by B. to A.'s use, if the jury found that sum was paid with reference to and by coercion of the threatened penal actions, and not to have been paid voluntarily, and with reference to the ejectment only. *Unwin* v. *Leaper*, 1 Man. & G. 747; 1 Drink. 3; 10 L. J., C. P. 41; 4 Jur. 1037.

Money levied by a regular execution under a judgment, valid on the face of it, cannot be recovered back on the ground that judgment was signed or execution issued fraudulently for the whole sum named in the judgment, when part had been already paid. *De Medina* v. *Grove*, 10 Q. B. 152; 15 L. J., Q. B. 287; 10 Jur. 428.

A sheriff seized goods in the possession of S. to satisfy a fi. fa. issued against him upon a judgment of nonsuit for 67*l.* S. had previously conveyed all his estate and effects to H. by a deed which, it was contended, was fraudulent and void against creditors; and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them up, except on payment of 97*l.* (the additional 30*l.* being claimed for poundage, expenses, &c.), which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of 67*l.* In an action brought by S. against the sheriff to recover back the 30*l.*:—Held, that it was not necessary to prove a tender of the 67*l.* *Scarfe* v. *Halifax*, 7 M. & W. 288; 10 L. J., Ex. 332.

Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not; and that, if it was not, he was not entitled to recover; and that the sheriff was not estopped by his return to say, that the excess beyond the 67*l.* was not the money of S. *Ib.*

B.'s goods had been assigned to trustees for the benefit of creditors. While the goods were in the possession of the trustees, a sheriff's officer entered and claimed the goods under a fi. fa., but made no seizure; and the trustees remained in possession of the goods until a messenger took possession under a fiat of bankruptcy issued against B. Afterwards the sheriff's officer broke open the door, made an inventory of the goods, and threatened to sell. The assignees of B. having thereupon paid under protest the amount of the levy:—Held, that the payment was not voluntary, and might be recovered back. *Valpy* v. *Manley*, 1 C. B. 594; 14 L. J., C. P. 204; 9 Jur. 452.

The defendants, as sanitary authority for the borough of B., had demanded from the plaintiff, and the plaintiff had paid, a water-rate of 8*l.* 15*s.* 4*d.*, such rate being calculated on the "gross rental" of the plaintiff's premises. The plaintiff, contending that such rate ought to have been assessed on the "rateable value" only, brought an action in the county court to recover the difference overpaid. The defendants had no power to distrain for the rates, but they had a power to stop the water supply for nonpayment; they had not stopped the water supply, and had not threatened to do so. The county court judge held that the payment was not a voluntary one, and could be recovered back, on the ground that the defendants had a power to stop the water supply:—Held, that the payment was a voluntary one, and could not be recovered back. *Slater* v. *Burnley Corporation*, 59 L. T. 636; 36 W. R. 831; 53 J. P. 70; 53 J. P. 535.

### 9. For Money paid under a Distress.

**To Goods.**]—Where a party threatened with distress for rent pays money where he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand. *Knibbs* v. *Hall*, 1 Esp. 84.

A declaration alleged that the plaintiff was tenant of a house to the defendant, and the defendant wrongfully distrained for arrears of rent on goods of the plaintiff of much greater value than the arrears and the charges of the distress and appraisement and sale, although part of the goods was of sufficient value to have satisfied the arrears and charges, and thereby made an unreasonable distress contrary to the statute. There was a second count for money had and received. The plaintiff, before the distress, had assigned the goods seized to trustees, for the benefit of his wife. The plaintiff, his wife, and one of such trustees resided in the house. The sum of 9*l.* was in arrear for rent, when the defendant distrained for 18*l.* for rent in arrear and the costs, and seized goods to the value of 100*l.* The plaintiff offered to pay 9*l.* and costs and charges. This offer was refused, and the money distrained for, and the costs and charges were paid under protest. The plaintiff suffered annoyance from these proceedings:—Held, that the declaration disclosed a good cause of action, and that there was sufficient evidence of an interest in the goods, on the part of the plaintiff, to go to the jury in respect of the first count; and that the plaintiff was entitled to recover the excess of the money paid under protest, and damages for the annoyance which he had suffered. *Fell* v. *Whitaker*, 41 L. J., Q. B. 78; L. R. 7 Q. B. 120; 25 L. T. 880; 20 W. R. 317.

Where, rent being in arrear, the landlord takes goods of the tenant as a distress, and claims more than the amount of such arrears; and the tenant, in order to regain possession of the goods, pays the amount demanded, he cannot afterwards maintain an action to recover back the money so paid by him in excess of the amount really due. *Glynn* v. *Thomas*, 11 Ex. 870; 25 L. J., Ex. 125; 2 Jur. (N.S.) 378; 4 W. R. 363—Ex. Ch. S. P., *French* v. *Phillips*, 1 H. & N. 564; 26 L. J., Ex. 82; 2 Jur. (N.S.) 1169; 5 W. R. 114—Ex. Ch.

In order to render the detention of the goods in such a case unlawful, the tenant must tender the rent really due. *Ib.*

A landlord who has sold his tenant's goods under a distress for rent is not liable for money had and received, at the suit of the mortgagee of

the goods, to recover the overplus money in the landlord's hands, the proper remedy being by an action against him for not paying over the overplus to the sheriff, pursuant to 2 W. & M. sess. 1, c. 5, s. 2. *Yates* v. *Eastwood*, 6 Ex. 805; 20 L. J., Ex. 303.

A landlord or a bailiff who has distrained, even if not bound (as semble he is) to restore goods remaining unsold to the premises on which he distrained them, is at liberty to do so, and his doing so will not be a conversion, even although they are the goods of third parties, and the bailiff has had notice of this from them, after the impounding, and has promised to act on the notice, both as to goods unsold and the surplus proceeds of goods sold, for such a promise does not impose any duty on the bailiff to deliver the goods to the right owner, neither will it sustain an action to recover the surplus proceeds of the goods sold. *Evans* v. *Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.

Where goods, distrained by the plaintiff, are delivered by him to the defendant on his promising to pay the rent, an action for money had and received will not lie for the value of the goods, though the defendant does not pay the rent. *Leery* v. *Goodson*, 4 Term Rep. 687.

Where a broker who distrained on a tenant for rent was requested not to sell, and promised his charges in consideration of such forbearance, and time was given and the charges paid, but the tenant objected to the amount of the charges:—Held, that this was not a voluntary payment; and that if the charges were irregular, they might be recovered back. *Hills* v. *Street*, 5 Bing. 37; 2 M. & P. 96; 6 L. J. (O.S.) C. P. 215.

A tenant to B. received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent due. A., notwithstanding the notice, paid the rent to B. (under an indemnity, which turned out to be unauthorised), and was afterwards compelled by distress to pay the amount over to C.:—Held, that the payment to B. was a voluntary payment, with full knowledge of the circumstances, and therefore not recoverable back. *Higgs* v. *Scott*, 7 C. B. 63.

**To Animals.**]—Where cattle are distrained as damage feasant, the owner cannot, without tendering amends, pay under protest an excessive sum demanded for damage, and recover the amount as money received to his use. *Gulliver* v. *Cosens*, 1 C. B. 788; 14 L. J., C. P. 215; 9 Jur. 666.

If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress (and before the impounding), detinue. *Ib.*

And this action will not lie to recover back money paid for the release of cattle damage feasant, though the distress was wrongful. *Lindon* v. *Hooper*, Cowp. 414.

Where an animal distrained as damage feasant is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good; and if the distrainor, by demanding an excessive sum for the damage as the condition of his release of the animal, obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received. *Green* v. *Duckett*, 52 L. J., Q. B. 435; 11 Q. B. D. 275; 48 L. T. 677; 31 W. R. 607; 47 J. P. 487.

### 10. For Money paid on Claim of Lien or Pressure.

Money paid, as the only means of recovering possession of property to which a party is entitled, constitutes a compulsory payment, and may be recovered back. *Shaw* v. *Woodcock*, 9 D. & R. 889; 7 B. & C. 73; 5 L. J. (O.S.) K. B. 294; 31 R. R. 158.

An action will lie to recover back money paid to release goods wrongfully detained on a claim of lien. *Ashmole* v. *Wainwright*, 2 G. & D. 217; 2 Q. B. 837; 11 L. J., Q. B. 79; 6 Jur. 729.

Goods had been delivered to a carrier to be carried, without any bargain as to the price; the carrier refused to give them up at the end of the journey without payment of a certain sum for the carriage, which the plaintiff paid under protest; the plaintiff then brought an action for money had and received, and delivered a bill of particulars, stating that the action was brought to recover the whole of the sum or such part as was an overcharge; the jury found that a smaller sum than that demanded and paid was due:—Held, that a tender of the smaller sum was not necessary to enable the plaintiff to maintain the action. *Ib.*

A lease was about to be granted to the plaintiff, to which it was necessary that C. should be a concurring party. The attorney of the proposed lessors applied to him for that purpose, and the defendant, as C.'s attorney, answered the application, requiring certain documents to be furnished; for which business the defendant had a claim on C. It was ultimately agreed that C. should concur in the lease, on the terms, as the defendant contended, that all the past costs, as well as those to be occasioned by his joining in the lease, should be paid by the lessors; as the plaintiff contended that the latter costs only should be paid. The lease, having been engrossed and executed by the lessors, was sent to the defendant to procure C.'s execution; the defendant sent an account of his costs against C. to the attorney of the lessors, who complained of the amount, on which the defendant said that C. should not execute unless that amount was paid. The attorney of the lessors, after tendering a smaller sum to the defendant, paid him the larger sum under protest, for the plaintiff, to obtain possession of the lease:—Held, that an action to recover the overplus was rightly brought by the plaintiff against the defendant, although the latter merely acted as C.'s attorney, and that such action was maintainable. *Smith* v. *Sleap*, 12 M. & W. 585.

The plaintiff and defendant, on the 21st of August, 1856, contracted through brokers on the Stock Exchange for the sale by the defendant to the plaintiff of ten shares in the Royal British Bank, the deed of settlement of which required seven days' notice of any intended transfer, as well as consent thereto on the part of the directors. No such notice was given in the present instance, but it had never been the practice of the bank to require it in the case of sales through the Stock Exchange, and no consent was obtained unless that was to be inferred from the transfer clerk at the bank giving a blank form of transfer to the defendant's broker, to be filled up by him. The defendant executed the transfer on the 2nd of

September, and on the 3rd the bank stopped payment. On that day, the stoppage being then known to both parties, the defendant's broker tendered to the plaintiff's broker the transfer so executed, although unstamped, but he refused to accept it, or to pay the money, and on the same day the plaintiff desired him not to pay it under any circumstances. On the following day, in consequence of a decision of a committee of the Stock Exchange, to whom the matter was referred, the plaintiff's broker paid the amount to the defendant's broker, and the plaintiff being then threatened by his broker with legal proceedings, reimbursed him :—Held, that the plaintiff was not entitled to recover from the defendant as for money received to his use. *Remfry* v. *Butler*, El. Bl. & El. 887 ; 5 Jur. (N.S.) 1298, n. ; 6 W. R. 782—Ex. Ch.

A. mortgaged, with a proviso for repayment and a covenant for conveyance at the costs and charges of the mortgagor. Upon notice to repay the sum borrowed, the mortgagor's solicitor sent the solicitors for the mortgagee a draft reconveyance, which was approved by them ; but they refused to redeliver up the title deeds unless their bill of costs was paid. One of the charges in the bill was in respect of the reconveyance ; the others arose exclusively from the relation of the mortgagee and the defendants, as client and solicitor. In an action by A. to recover the money so paid :—Held, that the mortgagor might maintain this action against the defendants for money extorted under duress of his goods, and paid by him under protest to the defendants for their own benefit. *Wakefield* v. *Newbon*, 6 Q. B. 276 ; 13 L. J., Q. B. 258 ; 8 Jur. 735.

The attorney for a mortgagee, who had advertised a sale of the mortgaged property, under a power reserved to him for nonpayment of interest, having extorted from the administratrix of the mortgagor money exceeding the sum due for principal, interest and costs, under a threat that he would proceed with the sale unless his demand were complied with :—Held, that the administratrix might recover it as money had and received. *Close* v. *Phipps*, 7 Man. & G. 586; 8 Scott (N.R.) 381.

Deeds of the plaintiff were placed by A. in the hands of the defendant, her attorney, and upon application A. declined to give any information about them unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to give them up ; and the plaintiff, in order to obtain them, paid the amount claimed, saying at the same time to the defendant, "You shall hear of this again" : —Held, that this was not a voluntary payment, and that the amount was recoverable as money had and received. *Oates* v. *Hudson*, 6 Ex. 346 ; 20 L. J., Ex. 284.

A testator gave to A. "all my interest and claim on household property in W., on which I have a mortgage of 1,500*l*." At the time of his death, debts were due in respect of repairs done in his lifetime to the mortgaged premises ; these were paid by the executrix :—Held, that she was not entitled to be reimbursed by A. the sums so paid. The executrix having compelled A. to pay her the interest, and the debts above mentioned, before she would give up the title deeds of the mortgaged premises to him :—Held, that (assuming the executrix to have assented to the bequest) A. was entitled to recover back the amount. *Gibbon* v. *Gibbon*, 13 C. B. 205 ; 22 L. J., C. P. 131 ; 17 Jur. 416.

A mortgagee having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled. The assignee, on the mortgagee refusing to execute the assignment on any other terms, by the direction of the mortgagor paid the sum claimed under protest :—Held, that the mortgagor might recover the excess, not as money paid under duress in the strict legal sense of the term, but as a payment made involuntarily under undue pressure. *Fraser* v. *Pendlebury*, 31 L. J., C. P. 1 ; 10 W. R. 104.

11. Overcharges by Railway Companies.

Where a railway company exacted from a carrier more than they charged to other carriers, for the conveyance of goods for him on their line, in breach of their acts of parliament :—Held, that the sums thus obtained, being payments not made voluntarily, but in order to induce the company to do that which they were bound to do without requiring such payments, were recoverable back as money had and received. *Parker* v. *G. W. Ry.*, 7 Man. & G. 253 ; 7 Scott (N.R.) 835 ; 13 L. J., C. P. 105 ; 8 Jur. 194. S. P., *Baxendale* v. *Eastern Counties Ry.*, 4 C. B. (N.S.) 63 ; 27 L. J., C. P. 137. *Ashmole* v. *Wainwright*, 2 Q. B. 837 ; 2 G. & D. 217 ; 11 L. J., Q. B. 79 ; 6 Jur. 729. *Piddington* v. *S. E. Ry.*, 5 C. B. (N.S.) 111 ; 27 L. J., C. P. 295 ; 4 Jur. (N.S.) 953.

The Bristol and Exeter Railway and Great Western Railway are continuous lines, but are worked by independent companies, and by their acts of parliament are bound to charge all persons under the same circumstances for the carriage of goods, &c. By the scale bills issued by each of the companies, certain sums were specified as the charges for the carriage of goods, where the goods were to be collected and delivered by the companies, and a smaller sum was specified as chargeable where the goods were to be collected and delivered by the parties themselves. A carrier sent certain goods, which he had undertaken to collect and deliver on his own account, by the Bristol and Exeter Railway Company, to be carried upon both lines of railway ; but he objected to the charges as being excessive, and paid the whole amount claimed under protest :—Held, first, that he was entitled to recover back the amount so paid in excess of what was a fair and reasonable charge, although he had not made any tender of any specific sum as a fair and reasonable charge. *Parker* v. *Bristol and Exeter Ry.*, 6 Ex. 702 ; 6 Railw. Cas. 776.

Held, secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter Railway Company, although they had received a portion of it as agents only of the Great Western Railway Company. *Ib.*

Money paid in excess, in disregard of the equality clauses of railway acts, can be recovered back in an action for money had and received. *G. W. Ry.* v. *Sutton*, 38 L. J., Ex. 177 ; L. R. 4 H. L. 226 ; 22 L. T. 43 ; 18 W. R. 92.

The Great Western Railway Company, before the 7 & 8 Vict. c. iii. came into operation, was obliged by the 2 & 3 Vict. c. xxvii. s. 24, to charge for carriage to all persons equally ; but they charged a carrier differently from, and more than, the public :—Held, that the overcharge was recoverable as money received to the carrier's

use. *Edwards* v. *G. W. Ry.*, 11 C. B. 588; 21 L. J., C. P. 72.

Quære, whether money overpaid in case of an overcharge by a railway company can be recovered back as money received to the use of the party paying. *Finnie* v. *Glasgow & S. W. Ry.*, 2 Macq. H. L. 177.

### 12. On Payment of Illegal Fees.

The payment of illegal fees cannot generally be considered as voluntary, so as to preclude a plaintiff from recovering them back in an action for money had and received. *Morgan* v. *Palmer*, 4 D. & R. 283; 2 B. & C. 729; 2 L. J. (O.S.) K. B. 145; 26 R. R. 537. S. P., *Dew* v. *Parsons*, 2 B. & Ald. 562; 1 Chit. 295; 21 R. R. 404.

The plaintiff applied to the defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years, and made twenty-five extracts, for which the defendant charged him 3*s.* 6*d.* each, and he accordingly paid the defendant 4*l.* 7*s.* 6*d.*:—Held, that the charge for extracts was illegal, since 6 & 7 Will. 4, c 86, s. 35, only authorised a charge for a search, and for a certified copy; and that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess; and that the defendant was the proper person to be sued. *Steele* v. *Williams*, 8 Ex. 625; 22 L. J., Ex. 225; 17 Jur. 464.

When money is paid under an illegal demand, colore officii, the payment can never be voluntary. *Ib.*

Upon the plaintiffs claiming, as joint tenants of four separate copyhold tenements, to be admitted by one admission, the steward refused to admit unless four admittance fines, four sets of steward's fees, and four stamps were paid. The plaintiffs then claimed to be admitted by two separate admissions — one to two tenements formerly Delabere's, the other to two tenements formerly Edwards's—but insisting on the right to a single admission. In order to avoid a forfeiture, one of the plaintiffs was admitted, on behalf of himself and his joint tenant, by four admissions. On the bill of fees being presented, the solicitor for the plaintiffs said, "I protest against them," but paid them, delivering a written protest, which extended only to a claim to be admitted by two admissions:—Held, that the steward having no right to a separate fee upon the admission of each joint tenant, the plaintiffs were entitled to recover the excess as money paid under compulsion. *Traherne* v. *Gardner*, 5 El. & Bl. 913; 25 L. J., Q. B. 201; 2 Jur. (N.S.) 394.

### 13. For Money paid under Mistake of Facts or of Law.

**Principles.**]—Money paid by one, with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered on account of such payment having been made under an ignorance of the law. *Bilbie* v. *Lumley*, 2 East, 469; 6 R. R. 479. S. P., *Brisbane* v. *Dacres*, 5 Taunt. 143; *Dew* v. *Parsons*, 2 B. & Ald. 562; 1 Chit. 295; 21 R. R. 404.

But money paid by a person under a forgetfulness of facts which were within his knowledge, may be recovered. *Lucas* v. *Worswick*, 1 M. & Rob. 293.

So, money paid under a mistake of facts, there being no laches on the part of the payer in not availing himself of the means within his power of knowing those facts, may be recovered. *Milnes* v. *Duncan*, 6 B. & C. 671; 9 D. & R. 731; 5 L. J. (O.S.) K. B. 239; 30 R. R. 498.

Money paid by mistake cannot be recovered back, if the party paying had the means of knowing all the facts, and no fraud has been practised upon him. *Davis* v. *Watson*, 2 N. & M. 109; 2 L. J., K. B. 175.

Money paid under a bonâ fide forgetfulness of facts, which disentitled the party to receive it, may be recovered. *Kelly* v. *Solari*, 9 M. & W. 54; 11 L. J., Ex. 10; 6 Jur. 107.

It is not sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact. *Ib.*

In such cases, it is a question for the jury to say whether the money was paid in bonâ fide ignorance or forgetfulness, or whether with a previous determination not to inquire into the facts, and to pay it under any circumstances. *Ib.*

Money paid under a mistake of law is not recoverable. *Ib.*

When a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself. *Townsend* v. *Crowdy*, 8 C. B. (N.S.) 477; 29 L. J., C. P. 300; 7 Jur. (N.S.) 71; 2 L. T. 537.

If execution is by mistake issued for a larger sum than is really due, the party aggrieved should apply to the court. Money had and received does not lie. *Holdway* v. *Ray*, 1 N. R. 273.

**By Mistake.**]—When money has been voluntarily paid under a mistake, the remedy used to be at law and not in equity. *Lamb* v. *Cranfield*, 43 L. J., Ch. 408.

The plaintiff, by mistake, paid to the defendants, who were owners of the tithes of a parish, tithe rent-charge in respect of lands not in his occupation. The plaintiff did not discover the mistake until the two years limited by 6 & 7 Will. 4, c. 71, for the recovery of a tithe rent-charge, had expired, and the defendants had lost their remedy for the arrears against the lands actually chargeable:—Held, that there was no duty cast on the plaintiff in relation to the defendants which made his delay in discovering the mistake laches on his part; and that he was entitled to recover back the amount paid as money paid under a mistake of fact. *Durrant* v. *Ecclesiastical Commissioners*, 50 L. J., Q. B. 30; 6 Q. B. D. 234; 44 L. T. 348; 29 W. R. 443; 45 J. P. 270.

A court of equity will not direct payments made under a mistaken construction of doubtful clause in a settlement to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction. *Clifton* v. *Cockburn*, 3 Myl. & K. 76.

Where money, which there was no ground to claim in conscience, is paid under a mistake, the party may recover it back again. *Bize* v. *Dickason*, 1 Term Rep. 285.

Money having been paid by the plaintiff, in ignorance of the facts, he can recover it back although the defendant could not in every respect be placed in statu quo. *Standish* v. *Ross*, 3 Ex. 527; 19 L. J., Ex. 185.

The corporation of E. exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption:—Held, that the plaintiff was entitled to recover back the money so paid. *Hooper* v. *Exeter Corporation*, 56 L. J., Q. B. 457.

**Illustrations.**]—A bill bearing several indorsements was dishonoured, but was taken up for the honour of one of the supposed indorsers by the plaintiff, who struck out the subsequent indorsements. The plaintiff having discovered that the signatures of the drawer, the acceptor, and the supposed indorser to the bill were forgeries, communicated the same to the defendant, and demanded the money back; notice of the dishonour was in time to have been sent to the prior indorsers by the same day's post:—Held, that the erasure of the indorsements did not deprive the defendant of his remedy against the prior indorsers, and that the plaintiff, having paid the money in mistake, was entitled to recover it from the defendant. *Wilkinson* v. *Johnston*, 5 D. & R. 403; 3 B. & C. 429; 3 L. J. (o.s.) K. B. 58.

Where the captain of a king's ship brought home in her public treasure upon the public service, and treasure of individuals for his own emolument; and received freight for both, and paid over one-third of it, according to the usage theretofore established in the navy, to the admiral under whose command he sailed; discovering that the law did not compel captains to pay to admirals one-third of the freight, the captain brought an action to recover it from the admiral's executrix:—Held, that he could not recover back the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it. *Brisbane* v. *Dacres*, 5 Taunt. 143; 14 R. R. 718.

Where the agents for the grantor and grantee of an annuity rendered an account to the latter, in which they gave him credit for instalments due from the former, stating at the same time that the money had not been received, and allowed the grantee to draw upon them for the amount; and the agents having, in about twelve months afterwards, become bankrupts, and neglected to apprise the grantee in the interval that the instalments still remained unpaid by the grantor, who had become insolvent:—Held, that the money so advanced to the grantee was not recoverable back by the assignees of the agents. *Shaw* v. *Picton*, 7 D. & R. 201; 4 B. & C. 715; 4 L. J. (o.s.) K. B. 29; 28 R. R. 445.

So, army agents, who allowed an officer to draw for what they conceived were increased allowances due to him in the shape of pay (but which allowances were not in fact intended by government to be given to officers in that situation), and had sent in an account admitting the receipt of the full amount, were not allowed after a lapse of time, when they found out the mistake, to retain the surplus from the representatives of the officer. *Skyring* v. *Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 Car. & P. 517; 28 R. R. 264.

The plaintiff paid to a dock company dock dues estimated by the plaintiff according to an erroneous scale of measurement promulgated by the commissioners of customs:—Held, that the excess could not be recovered back. *Moss* v. *Mersey Dock and Harbour Board*, 26 L. T. 425; 20 W. R. 700.

An executor, acting, as he believed, in accordance with the true construction of the testator's will, paid money to the plaintiff. Afterwards, the executor having died, his administrator was advised by counsel that the money had been wrongly paid to the plaintiff, and ought to have been paid to another legatee. An independent opinion of counsel obtained by the plaintiff took the same view as to the construction of the will, and, accordingly, in winding up the testator's estate, the administrator debited the plaintiff with the money which was supposed to have been wrongly received by her, and paid over that amount and the balance of the same fund, which had been retained in the executor's hands, to the other legatee. Two years later the plaintiff filed a bill against the administrator and the other legatee for repayment of the money, on the ground that it had been paid under a mistaken construction of the will:—Held, that the suit was, in fact, merely an action for money had and received, and could not be maintained. *Rogers* v. *Ingham*, 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338—C. A.

By an agreement between the outgoing tenant of a farm and the incoming tenant, the amount to be paid by the latter to the former was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting 2,000*l.* paid on account) was given by the plaintiff to the defendant; and the plaintiff entered into possession. On the occasion of his selling his interest in the farm to a third person, the plaintiff discovered that errors had been made in the former valuation, by including items that ought not by the custom of the country to have been valued to him, and items that did not exist. He nevertheless paid the promissory note at maturity without objection. Afterwards, without having given the defendant any information as to the nature of his complaint of the valuation, and without having made any demand, he brought an action for money had and received:—Held, that the plaintiff could not recover. *Freeman* v. *Jeffries*, 38 L. J., Ex. 116; L. R. 4 Ex. 189; 20 L. T. 533.

The plaintiff was co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into B. was a member of a banking firm, into which the moneys of the union were afterwards paid and drawn out by the guardians by cheques in their names. The firm became bankrupt, and B. having ceased to be the treasurer, the guardians demanded of the plaintiff, as such surety, the balance due from B., the late treasurer. The plaintiff, in ignorance of the facts, paid the money:—Held, that the sureties were not liable on the bond, and that the plaintiff having paid the money in ignorance of the facts, was entitled to recover it. *Mills* v. *Alderbury Union*, 3 Ex. 590; 18 L. J., Ex. 252.

When a party to secure advances made to him assigned to his creditor his present and also his after-acquired property, and, the former being insufficient to pay the debt, the creditor sold the present and also the after-acquired property with the assent of the debtor, who probably thought that the after-acquired property passed by assignment:—Held, that the proceeds of the after-

acquired property, which had been sold under a mistake as to the law but without fraud, could not be recovered back. *Platt* v. *Bromage*, 24 L. J., Ex. 63.

An executrix being entitled to 200*l.* lent by her testator in his lifetime, and secured to him by bond and an equitable mortgage, applied to C., the debtor, for payment. C. referred her to a bank which had purchased of him the mortgaged property subject to the charges thereon. The bank paid the 200*l.* It turned out that by a will prepared and attested by the testator, and made subsequently to that under which C. had claimed, but which had been suppressed by the family of C., C. had no title to the property so charged:—Held, that the bank could not recover back the money as having been paid under a mistake of facts. *Aiken* v. *Short*, 1 H. & N. 210; 25 L. J., Ex. 321; 4 W. R. 645.

The defendant supplied the plaintiff with goods to the amount of 71*l.*; the plaintiff authorised M. to pay the defendant that sum. M. paid the defendant 50*l.*, and applied the remaining 21*l.* to his own use. M. also owed the defendant 24*l.*; and the defendant drew on him a bill for 45*l.*, the amount of these two sums, which he accepted, but which was dishonoured when due, and M. subsequently became a bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had been left unpaid on the plaintiff's account by M., and the plaintiff on such representation paid the 45*l.*, and took possession of the bill. In an action to recover back the balance of 24*l.*, as having been paid under a misrepresentation of the facts:—Held, that the plaintiff was not bound to prove that before action brought he tendered back the bill to the defendant. *Pope* v. *Wray*, 4 M. & W. 451.

In 1811 L., being possessed of premises under leases which would expire at Midsummer, 1854, granted to T. and E. an annuity of 222*l.* 4*s.* 5*d.* for three lives, to secure which he granted to each of them an underlease of the premises for forty-three years, if the lives, or the survivor of them, should so long endure. In 1827 the premises were assigned to the plaintiff for the residue of the terms granted to L., subject to the annuities, and to the underleases for securing the same. In 1825 T. and E. were let into possession of the premises, at the rent of 550*l.*, payable to them in equal moieties. T., the last survivor of the cestuis que vie, died in 1851, and from his death, down to the expiration of the leases granted to L., E., as their agent, applied for and received the rent from the plaintiff for them and the representative of E., and accounted for a moiety to each of them, deducting payments thereout in respect of ground rent, rates, taxes, insurance, repairs, and commission:—Held, that the plaintiff was entitled to recover back the sum so paid by him under the mistaken impression that the right to receive it still continued, deducting only the sums paid by the agent in respect to ground rent, rates, and taxes. *Barber* v. *Brown*, 1 C. B. (N.S.) 121; 26 L. J., C. P. 41; 3 Jur. (N.S.) 18; 5 W. R. 79.

**On Settlement of Accounts.**]—There being mutual accounts between A. and B., the latter met C., A.'s brother, to settle them. Two accounts were brought by C. The first contained various items of money received by B. for A. B. settled and signed this account. C. then produced another account between the parties respecting other items, which B. disputed, and refused to settle. No evidence was given of money had and received but the above:—Held, that A. was entitled to recover upon the count for money had and received. *Lorymer* v. *Stephens*, 1 C. M. & R. 62; 4 Tyr. 869; 3 L. J., Ex. 312.

A sum of money allowed in account by mistake on a settlement between the plaintiff and the defendant, when the defendant paid the balance after deduction of that sum, cannot be recovered, the sum allowed never having passed between the parties otherwise than by such allowance. *Lee* v. *Merrett*, 8 Q. B. 820; 15 L. J., Q. B. 289; 10 Jur. 916.

**Against Agents on Payment over to Principal.**]—Where a defendant received from his principal abroad a bar of silver, and took it to the plaintiff, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number:—Held, that the plaintiff might, after having offered to return the bar, maintain an action against the defendant for the price thus paid to him under a mistake, although he had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. *Cox* v. *Prentice*, 3 M. & S. 344; 16 R. R. 288. And see *Gomery* v. *Bond*, 3 M. & S. 378.

But when money has been paid to an agent under a mistake of fact, and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money. *Holland* v. *Russell*, 4 B. & S. 4; 32 L. J., Q. B. 297; 8 L. T. 468; 11 W. R. 757—Ex. Ch.

Certain bales of cotton were consigned by merchants at Madras to London for the account of their correspondents, the plaintiffs, who were merchants at Liverpool, under bills of lading having in the margin, pursuant to the course of business at Madras, a note of the measurement and the amount of freight. On the ship's arrival, the plaintiffs' brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to the plaintiffs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it, and sent a note of the measurement to the defendants, who were the ship's brokers (one of them also being the owner). The defendants as brokers made out a freight-note, adopting the measurement from the wharfinger's note, which in consequence of the swelling of the bales on the voyage was considerably more than the Madras measurement in the margin of the bills of lading. The freight-note so made out was sent by the defendants to the plaintiffs' brokers, who, assuming it to be correct, paid the amount, and received credit for it in their account with their principals; and the defendants settled the ship's accounts upon the supposition that all was right. The plaintiffs, on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had overpaid the defendants to the extent of 88*l.* 8*s.* 3*d.*, and brought an action to recover it back:—Held, that the money having been paid under a mistake of fact, the plaintiffs were entitled to recover it back from the owner of the

ship, but not as against the two defendants as ship's brokers, who had settled accounts with the owner in the bonâ fide belief that the payment had been rightly made. *Shand* v. *Grant*, 15 C. B. (N.S.) 324; 9 L. T. 390.

A. bought cotton of B., both being cotton-brokers at Liverpool, and each acting for an undisclosed principal. Weight-lists of the cotton were in the usual course delivered to each party from the warehouse-keeper at the dock; but by a mistake made by a clerk of B. in adding up the figures, the quantity appeared to be 100 cwt. more than it really was, and A., in ignorance of the mistake, paid B. 509*l.* 15*s.* too much. The mistake was not discovered by either party until several months afterwards. In the meantime, B. had allowed the money so received by him to be settled in account between himself and his principals, to whom he had made advances; and at the close of the transactions between them there was a large balance owing by his principals to B.:—Held, that A. was entitled to recover back from B. the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bonâ fide paid over money received by him on account of his principals. *Newall* v. *Tomlinson*, L. R. 6 C. P. 405; 25 L. T. 382.

### 14. For Money paid on Illegal Contracts.

An action will not lie to recover back money paid for doing an illegal act. *Webb* v. *Bishop*, Bull. N. P. 132.

But where A. receives money to the use of B., on an illegal agreement between B. and C., in an action by B. for money received, he cannot be allowed to set up the illegality of the contract as a defence. *Tennant* v. *Elliott*, 1 Bos. & P. 3; 4 R. R. 755.

If a party knowingly engages with another in an illegal transaction, the money advanced by him in such business is not recoverable: aliter, where a party has been ignorantly drawn in by the craft or imposition of such person. *Drummond* v. *Deey*, 1 Esp. 152.

Money paid or goods delivered for an illegal purpose may be recovered back before that purpose is carried out, notwithstanding that the party seeking to recover may be compelled to allege that his purpose in making such payment or delivery was illegal. If, however, the illegal purpose has been carried out, he cannot recover by alleging its illegality. *Taylor* v. *Bowers*, 46 L. J., Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499—C. A.

Where money has actually been paid upon an immoral or illegal consideration, fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected. *Wilson* v. *Strugnell*, 50 L. J., M. C. 145; 7 Q. B. D. 548; 45 L. T. 218; 14 Cox, C. C. 624; 45 J. P. 831.

Where a person is, upon conviction of a criminal offence, required to find a surety for his good behaviour, and by agreement with his surety deposits money with him, he cannot afterwards sue for the amount as money had and received. The illegal object is sufficiently complete where the deposit has been made and the security executed, and the principal cannot, by repudiating the transaction before the security is forfeited and the money applied as an indemnity, recover the money. *Herman* v. *Jeuchner*, 54 L. J., Q. B. 340; 15 Q. B. D. 561; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502—C. A.

The defendants, acting as solicitors for a petitioning creditor, and with his authority, entered into an agreement with the plaintiff that in consideration of a payment to them of 40*l.* by him they waived their claim for costs, and undertook not to appear at the bankrupt's public examination and not to oppose his order of discharge. The money was paid to the defendants, and they did not appear at the public examination of the bankrupt. Before any application by the bankrupt for an order of discharge, the plaintiff demanded the return of the money paid, but the defendants refused to return it:—Held, that the plaintiff was not entitled to recover the money back, because the contract was an illegal contract, and, where there has been a partial carrying into effect of an illegal purpose in a substantial manner, and something still remains to be performed, it is impossible for money paid under that illegal contract to be recovered back. *Kearley* v. *Thomson*, 59 L. J., Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804—C. A.

If A. receives money of B., to the use of C., it may be recovered by C., though the consideration on which B. paid it was illegal. *Farmer* v. *Russel*, 1 Bos. & P. 296.

The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon under the name of the defendant, a Portuguese, shipped a cargo thence for a port of France, which cargo being captured by a British cruiser, and libelled for condemnation in the court of admiralty, as French and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property:—Held, that the plaintiffs were, by thus colluding with the defendant to withdraw from the admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action against the defendant for the proceeds, by showing the true fact, that the property was their own, and that the defendant was their agent. *De Metton* v. *De Mello*, 12 East, 234; 2 Camp. 420.

A testator having borrowed money on a respondentia contract prohibited by the laws of this country, his executors refunded the money to the lenders:—Held, that the executors could not maintain an action to recover back this money, notwithstanding the lenders could not have compelled them to pay it. *Munt* v. *Stokes*, 4 Term Rep. 561; 2 R. R. 459.

But where A., in consideration of 210*l.* paid by B., gave a bond for the payment of an annuity to the latter of 103 guineas, till the hop duties should amount to a certain sum: before this event had taken place, B. brought an action to recover back the 210*l.* of A.:—Held, that the action was maintainable. *Tappenden* v. *Randall*, 2 Bos. & P. 467; 5 R. R. 662.

Guardians of a poor law union indicted the plaintiff for disobeying an order of sessions for maintenance of a bastard. Before trial, he offered a compromise, and the clerk to the guardians, on their behalf, agreed with him for a sum on account of costs and maintenance, which

he paid and the indictment was dropped. Afterwards the plaintiff discovered that the order of sessions was defective and void, and he brought an action against the clerk for money had and received:—Held, that if the compromise was illegal, the plaintiff being in pari delicto with the other parties offending, could not sue them for the money he had paid. *Goodall* v. *Lowndes*, 6 Q. B. 464; 9 Jur. 177.

Where the captain of a king's ship brought home in her public treasure upon the public service, and treasure of individuals for his own emolument; and received freight for both, and paid over one-third of it, according to the usage theretofore established in the navy, to the admiral under whose command he sailed. He afterwards discovered that the law did not compel captains to pay to admirals one-third of the freight, and brought an action to recover it from the admiral's executrix:—Held, that he could not recover back the private freight because the whole of that transaction was illegal. *Brisbane* v. *Dacres*, 5 Taunt. 143; 14 R. R. 718.

A person who has authorised the application of his money to an illegal purpose can recover it before it has been paid over for or applied to such purpose. *Bone* v. *Ekless*, 5 H. & N. 925; 29 L. J., Ex. 438.

E., being an owner of a ship or a vessel, in order to effect a sale of it to the Turkish Government, authorised B., his agent, to bribe the officials of that government. B. accordingly sold the ship for 6,500*l.*; 6,000*l.* to be paid to E. and 500*l.* to the officials, and received the whole sum of 6,500*l.* from the government. It appeared that the whole transaction was a fraud on the government. B. paid over to the officials 300*l.*, but did not pay over the remaining 200*l.*:—Held, that E. was entitled to recover the 200*l.* from B. *Ib.*

To an action for money had and received the defendant pleaded, that a race was about to be run, and that an illegal game called a lottery was set up by the defendant for subscribers of 1*l.* each; to be paid to him under regulations, in substance, that the subscriber whose name should be drawn out of a box next after the name of the horse, drawn from another box, which horse should be placed first in the race, should be entitled to receive from the defendant 100*l.* The plea alleged that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff, under the regulations, was entitled to the 100*l.*:—Held, that the plea disclosing a transaction within the prohibition of 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119, was good in form, as setting up illegality of consideration by statute, and did not amount to the general issue. *Allport* v. *Nutt*, 1 C. B. 974; 3 D. & L. 233; 14 L. J., C. P. 272; 9 Jur. 900. S. P., *Gatty* v. *Field*, 9 Q. B. 431; 15 L. J., Q. B. 408; 10 Jur. 980.

### 15. When Paid or Received under a Deed.

An action will not lie to recover back a sum of money paid as a deposit on the purchase of an estate, when the instrument under which the deposit was made was under seal. *English* v. *Blundell*, 8 Car. & P. 332.

The defendant being indebted to the plaintiff in 150*l.*, and being employed by T. to perform works, for which he was receiving a percentage, wrote an order to T. to pay the plaintiff 150*l.* out of the first moneys due to the defendant. Afterwards, being indebted to B. in 997*l.*, he executed a deed, reciting the above acts, assigning to B. such sums as then were or should become due to him the defendant, from T., in trust—first, to pay the plaintiff; and, secondly, to pay the 997*l.* The defendant afterwards received 150*l.* from T., and the plaintiff sued him for money had and received:—Held, that the action lay for the 150*l.*, though no proof was given of T.'s assent to the order; and though, at the time of making the deed, there was not 150*l.* due from T. *Pooley* v. *Goodwin*, 4 A. & E. 94; 5 N. & M. 466; 1 H. & W. 567.

In an action for money had and received, if the defendant shews a deed of assignment of the money to himself, and a receipt for the consideration-money indorsed, it is a good discharge, though there is pregnant evidence of suspicion that the consideration is falsely recited, and that the money never was paid. *Rowntree* v. *Jacob*, 2 Taunt. 141.

The relief on the ground of imposition is in equity. *Ib.*

If A. agrees to sell an estate to B. and is afterwards disabled from doing so, B. may recover back the money deposited in an action for money had and received although the contract be under seal. *Greville* v. *Da Costa*, Peake's Add. Cas. 113.

### 16. For Money Paid on Failure of Consideration.

A., a loan contractor, delivered to B. certain scrip receipts, stating that B. had paid him 10*l.* per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance the bearer would be entitled to certificates for that amount of stock. B. transferred the receipts to C. for a valuable consideration; A., by advertisement, offered the holders of the receipts, upon certain conditions, an extension of time for payment of the balance due on them; requiring also that the receipts should be left at his office for the purpose of being marked, as holden under the new conditions. The receipts transferred by B. to C. were by him sent to A.'s office, when indorsed by A. with C.'s name. The latter having failed to comply with the new conditions, A. refused to deliver the certificates or return the deposit. C. claimed the return of the deposit as being retained by A. without consideration:—Held, that C. was not entitled to recover the same, because B. had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the price, on the day named. *Rothschild* v. *Hennings*, 9 B. & C. 470; 4 M. & Ry. 349; 7 L. J. (O.S.) K. B. 230, overruling *Hennings* v. *Rothschild*, 4 Bing. 315; 12 Moore, 559.

A contract was made for new machinery for a ship to be paid for by instalments on certificates of the plaintiffs' surveyor. Two instalments were paid when the ship was lost at sea:—Held, that the plaintiffs could not recover back the amount of the instalments in an action for money had and received. *Anglo-Egyptian Navigation Co.* v. *Rennie*, 44 L. J., C. P. 130; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626.

A stockbroker sold for the defendant four Guatemala bonds, and paid him the amount. The bonds, after they had been in the hands of the purchaser two days, were discovered not to

be marketable; whereupon the broker, without communicating with the defendant, took them back, and reimbursed the purchaser. The defendant, on being applied to, wrote to say that he was only an agent as to part of the bonds, but that if payment had been made on his part, he would reimburse the broker. The defendant failed to prove that all the bonds were not his. It was proved that brokers on the stock exchange do business as principals in dealing in foreign stock:—Held, that an action for money had and received was maintainable against the defendant. *Young* v. *Cole*, 3 Bing. (N.C.) 724; 4 Scott, 489; 3 Hodges, 126; 6 L. J., C. P. 201.

The plaintiff remitted to the defendant the price of some hay which he had sold for the defendant, before the money had been paid by the purchaser, and then sent the defendant's servant with the hay to the purchaser. The servant having been cheated of the hay before he arrived at the purchaser's:—Held, that the defendant was liable to refund the money remitted. *Gingell* v. *Glascock*, 8 Bing. 86; 1 M. & Scott, 125; 1 L. J., C. P. 41.

On the 14th August the defendants, share brokers at Liverpool, bought for the plaintiff, in their own names, thirty railway scrip shares, to be delivered on the next account-day, which was the 29th August, at the price, including their commission, of 148*l.* 10*s.* This sum the plaintiff transmitted to the defendants on the 26th August, and requested them to forward to him the scrip. On the 22nd August the railway company called in the scrip for registration, and before it was reissued, which was not till the middle of December, made a call of 5*l.* per share. The plaintiff was aware of the circumstances. The call was necessarily paid by the party selling to the defendants, and he presented the shares to them, with the additional demand for the call. The plaintiff repudiating the transaction, they declined to accept, and the shares were resold at a loss of 226*l.*, which the defendants paid to the original seller:—Held, that the 148*l.* 10*s.* was not money received in the first instance to the use of the plaintiff; and that it had not become money had and received to the use of the plaintiff, by a failure of consideration produced by misconduct of the defendants, inasmuch as it was the duty of the plaintiff to supply the funds for meeting the call. *M'Ewen* v. *Woods*, 11 Q. B. 13; 17 L. J., Q. B. 206; 12 Jur. 329.

The defendant having sold to T., through the agency of the plaintiffs, who were factors, some bark, which he agreed should be equal to the sample, drew a bill on them for the price of the bark, which they accepted. The bark not being equal to the sample, and being rejected by the buyer:—Held, that the consideration of the bill having failed, the plaintiffs were entitled to recover the amount of it from the defendant. *Hooper* v. *Tuffry*, 1 Ex. 17; 16 L. J., Ex. 233.

The plaintiffs in London ordered from the defendant, at Singapore, first, 25 tons, and then 150 tons of gum, at 18*s.* per cwt. all charges included. The defendant sent invoices and bills of lading of these two quantities, as shipped at Singapore, which invoices and bills were handed to the plaintiffs in exchange for their acceptances for the respective amounts according to the invoices, and before the arrival of the goods the plaintiffs paid the amount of their acceptances. When the goods arrived, they were found to be four-and-a-half per cent. deficient in weight, part of which deficiency was attributable to evaporation during the voyage, and the rest to the fact that the weight of the baskets and leaves in which the gum was packed was included in the invoice weight. At Singapore, the gum in question is usually purchased by gross weight, including the baskets and leaves; but in the London market it is bought at the net weight, deducting packages:—Held, that there was a failure of consideration, and that the plaintiffs were entitled to recover the excess above the price of the net weight of the gum at 18*s.* per cwt. from the defendant. *Devaux* v. *Conolly*, 8 C. B. 640; 19 L. J., C. P. 71.

The plaintiff was the holder of a licence to use a patented invention from the patentee. The patentee intending to apply for a prolongation of this patent, and also for a patent for a new invention of a similar description, the plaintiff agreed to give him 150*l.* for the free use for ever of the former patent, as well as for the free use for three years of the new patent which the patentee was about to take out. The money was paid to the patentee, but he died almost immediately afterwards, and in consequence of his death no application was ever made for a renewal of the former patent, or the grant of one for the new invention. The plaintiff brought an action against the patentee's executors to recover back the 150*l.*, on the ground that the consideration for it had totally failed:—Held, that he was entitled to maintain the action, on the ground that on the true construction of the contract between the parties he had bought the right to have an application for the patents made, not merely the right to have the benefit of it if it should happen to be made, and the consideration had, therefore, wholly failed. *Knowles* v. *Bovill*, 22 L. T. 70.

An English company, being possessed of a patent (taken out and valid in England, but not valid in Berlin) for a process of utilising sewage, agreed to sell to B. for 15,000*l.* the sole and exclusive right to use and exercise the patent process in Berlin. B. was really acting on behalf of H., a large shareholder and director in the English company, and his object was to form a company for using the process in Berlin and to induce persons to take shares in the Berlin company, under the belief that the company, having bought the right sold to B. by the English company, would be entitled to the exclusive use of the process in Berlin. The scheme was carried out in the following manner:—B. conveyed his interest to L. for 30,000*l.* L. then conveyed his interest so acquired for 30,000*l.* to M., a clerk in H.'s office, as trustee for the intended company at Berlin. The 30,000*l.* was, in fact, paid to H. and not to B. B. and H. and L. all knew, but the English company did not know, that by the law existing at Berlin no exclusive right to use the process there could be obtained. B. brought an action to recover the 15,000*l.* from the English company, on the ground that, as there was no exclusive right to use the process in Berlin, the consideration had failed:—Held, that no action could be maintained, first, because B. had in fact obtained that for which he had paid the 15,000*l.*, namely, an ostensible grant of the exclusive right in order to float the Berlin company; and, secondly, because B. had paid the money for the purpose of defrauding the shareholders of the intended company at Berlin. *Begbie* v. *Phosphate Sewage Co.*, 1 Q. B. D. 679; 35 L. T. 350; 25 W. R. 85—C. A. Affirming, 44 L. J., Q. B. 233.

The plaintiff had employed P. as his agent to purchase goods, which P. bought in his own name, of W. & Co., and others, and invoiced in his own name to the plaintiff, taking from him his acceptances in payment. One of these acceptances, partly for goods which had been purchased of W. & Co., remained in the hands of P. until his bankruptcy, when it was taken possession of by the official assignee, and the amount received and carried to the credit of the estate. Before the bankruptcy W. & Co. had applied to the plaintiff for payment; and after the bankruptcy and after payment of the bill by the plaintiff they sued him and he settled their claim:—Held, that he was not entitled to recover the amount of the bill from the official assignee, as even assuming that he was liable to W. & Co. for the goods bought of them, there was only a partial failure of consideration, and the payment to them was voluntary, with full knowledge of the facts. *Barber* v. *Pott*, 4 H. & N. 759; 28 L. J., Ex. 381.

A. purchased from B. an ustamped bill of exchange, which purported on the face of it to be drawn at Sierra Leone. B. declined to endorse it, but allowed A. to have it to make inquiries as to the solvency of the parties. The acceptor became bankrupt, and on proof against his estate being tendered, it turned out that the bill was drawn in London and proof of it was rejected:—Held, that A. was entitled to maintain an action for the recovery of his purchase-money against B., on the ground that there had been a total failure of consideration. *Gompertz* v. *Bartlett*, 2 El. & Bl. 849; 2 C. L. R. 395; 23 L. J., Q. B. 65; 18 Jur. 266; 2 W. R. 43.

A broker having an order to buy fifty bales of cotton executed it by buying them along with 250 other bales in a single contract with one vendor:—Held, that money given to the broker to pay for the fifty bales, in the belief that the order had been duly executed, might be recovered back as paid on a total failure of consideration. *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L. J., Ex. 142; 11 Jur. (N.S.) 586; 12 L. T. 577; 13 W. R. 970.

A. agreed to take a house at a certain rent, and to pay a premium on the completion of the lease. He entered into possession and paid part of the premium, but refused to take the lease on the ground of a difference as to the terms of the agreement:—Held, that he could not recover the part of the premium as there had not been a total failure of consideration. *Colton* v. *Dorrell*, 17 W. R. 672. See *Wright* v. *Newton*, 2 C. M. & R. 124.

A., who resided in New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence with the trustees upon the subject of the purchase; and the terms of the purchase were not finally determined upon and settled until the 28th February, 1849. Upon the 6th of that month the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased:—Held, that as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. *Strickland* v. *Turner*, 7 Ex. 208; 22 L. J., Ex. 115.

17. On Rescission of Special Contract.

To entitle a purchaser to maintain an action to recover back a deposit paid on a contract for the sale of goods, there must be either an agreement to rescind or circumstances upon which a special action for a breach of the contract would lie. *Fitt* v. *Cassanet*, 5 Scott (N.R.) 902; 4 Man. & G. 898; 12 L. J., C. P. 70; 6 Jur. 1125.

The plaintiff contracted to buy of the defendant shares in a company, the deed of settlement of which provided that the assent of the directors to a transfer should be necessary in order to complete the title of the purchaser. The plaintiff's broker made out the transfers, and procured the signature of the defendant to them, and the plaintiff paid the price contracted to be given for the shares. The directors, however, in consequence of some dispute with the defendant, refused to assent:—Held, first, that it was the duty of the defendant to procure the assent of the directors, and to do all that was necessary to invest the plaintiff with the property in the shares; and that, on his failure to do this, an action might be maintained against him by the plaintiff to recover the price he had paid for the shares; and, secondly, that the return of the transfer was collateral to the contract of purchase, and not a condition precedent to the right to recover the purchase-money. *Leeman* v. *Lloyd*, 7 Q. B. 27; 14 L. J., Q. B. 165; 9 Jur. 328.

The defendant being employed by the owner to sell a farm, agreed by a written memorandum to sell the farm to the plaintiff for 2,700*l.*, without naming the seller. The plaintiff paid the defendant 100*l.* deposit in part of the purchase-money, and two days after signed a contract for sale by S. (the owner) to himself, whereby he agreed to pay on its execution 100*l.* as a deposit, for which S. undertook to pay interest till the completion of the purchase. The contract was afterwards rescinded for want of title in S.; but the defendant, before he had notice of the rescission, paid S. 50*l.*, retaining the other 50*l.* under an agreement with S. to give him (the defendant) half of any amount he might get for the farm above 2,600*l.*, but the retention of the 50*l.* was without the consent of S.:—Held, that the plaintiff could not recover in an action against the defendant for any part of the 100*l.* *Hurley* v. *Baker*, 16 M. & W. 26; 16 L. J., Ex. 273.

An action for money had and received lies when a payment has been made on a contract which is put an end to; but if it continues open, the plaintiff can only recover damages, and then he must state the special contract and the breach of it. *Towers* v. *Barrett*, 1 Term Rep. 133. S. P., *Weston* v. *Downes*, 1 Dougl. 23; *Davis* v. *Street*, 1 Car. & P. 18.

When some act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff from carrying the contract into execution, the plaintiff may recover back any money paid under it. *Giles* v. *Edwards*, 7 Term Rep. 181; 4 R. R. 414.

On a deposit of money by one person with another as security upon his becoming bail for the depositor, the money to be returned when the liability as bail has ceased: the question for the jury is, whether the proceedings have in effect terminated, and the rescission of an order for the institution of proceedings, with the fact that none have in fact been since instituted,

coupled with lapse of time, is evidence that the proceedings have terminated. *Batson* v. *Trance*, 3 F. & F. 320.

The purchaser of a mare at an auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price, and was casually told that the description was untrue. Nevertheless, he removed the mare to his own stables, and while being so removed, she ran away and injured herself severely, without any negligence on the purchaser's part. The description was, in fact, untrue, and on that ground the purchaser returned her to the seller within the specified time :—Held, that since the purchaser had in removing her done no more than he was entitled to do under the contract, and since the injuries were not owing to any negligence on his part, he had not lost his right to rescind the contract, and could recover the price from the seller as money had and received. *Head* v. *Tattersall*, 41 L. J., Ex. 4 ; L. R. 7 Ex. 7 ; 25 L. T. 631 ; 20 W. R. 115.

### 18. On Abortive or Abandoned Undertakings.

An allottee of shares, who has paid his money for shares in a concern which never came into existence, or which is abandoned, may recover it back as money had and received to his use, unless shewn to have consented to or acquiesced in the application of the money. *Ashpitel* v. *Sercombe*, 6 Railw. Cas. 224 ; 5 Ex. 147 ; 19 L. J., Ex. 82—Ex. Ch. S. P., *Kempson* v. *Saunders*, 4 Bing. 5 ; 12 Moore, 44 ; 2 Car. & P. 366 ; 5 L. J. (o.s.) C. P. 6.

An allottee of shares in a mine worked on the cost-book principle is entitled to recover back deposits paid by him on the shares, where the working of the mine is abandoned before all the shares mentioned in the prospectuses are subscribed for, or the amount of deposits on all the shares paid up, the deposits not being proved to have been spent upon liabilities incurred with the plaintiff's knowledge. *Johnson* v. *Goslett*, 18 C. B. 728 ; 25 L. J., C. P. 274 ; 4 W. R. 655. Affirmed, 3 C. B. (N.S.) 69 ; 27 L. J., C. P. 122 ; 4 Jur. (N.S.) 50 ; 6 W. R. 127—Ex. Ch.

Where deposits were paid, according to a rule of the company, to certain bankers, and the account with them was kept in the name of five directors :—Held, that other directors who had interfered in the management were liable along with those five. *Ib.*

The defendant, being one of the provisional directors of a projected railway company, issued with them circulars, stating that, "in the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction." The plaintiff applied in writing for shares. The directors, by the authority of the defendant, answered in writing, inclosing the circular, stating that shares were allotted to the plaintiff, that he must pay the deposit by a given day, and that, on his doing so, and presenting that letter, a receipt would be given him, which would be exchanged for scrip on his executing the parliamentary contract. He paid the deposits, and executed a deed, which was a deed between the shareholders and two trustees ; and in terms authorised the directors to expend the deposits for the purpose of obtaining an act. The circulars were sent by the defendant to induce the plaintiff to believe that if the deposits were paid and the deed executed, the deposits would be returned by the defendant and the other directors to the plaintiff, in the event of failure to obtain the act ; and the plaintiff was induced to pay the deposit on those terms. No act was obtained :—Held, that it sufficiently appeared that the defendant agreed to return an amount equivalent to the deposits, and that it was not any objection to an action for money had and received, that by the agreement the specific money deposited might lawfully be spent, and an equivalent amount paid. *Londesborough (Lord)* v. *Mowatt*, 4 El. & Bl. 1 ; 2 C. L. R. 1181 ; 23 L. J., Q. B. 38 ; 18 Jur. 1094 ; 2 W. R. 568.

### 19. For Money Paid on Failure of Title.

Rent paid by A. to B., claiming as devisee, the amount of which A. is afterwards compelled to pay to the heir, may be recovered by A. as money had and received to his use, B. setting up no title to the lands when the action is brought, or at the trial. *Newsome* v. *Graham*, 5 M. & Ry. 64 ; 10 B. & C. 234.

A defendant supposing himself the legal representative of a lessee for years, sold the term, and delivered the lease to the plaintiff, but without any assignment or formal conveyance, saying "the premises were his, and if anything happened he would see the then plaintiff righted" :—Held, that the plaintiff might maintain an action against him for money had and received, the rightful administrator of the tenant for years having ousted the plaintiff by ejectment. *Cripps* v. *Reade*, 6 Term Rep. 606 ; 3 R. R. 273.

A devised to B., C., D. and E., two parcels of land upon trust, to sell and divide the money amongst his brothers' and sisters' children : B., C., D. and E., the last being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees, and the twenty-three other persons entitled to the money, that E. should become purchaser of the two parcels of land, paying 300*l.* for one and 700*l.* for the other ; a conveyance was accordingly prepared and executed by B. and C. only, upon which E. took possession of the lands, and paid the purchase-money, which was divided among the several persons entitled under the will ; E., being afterwards evicted from the smaller parcel, in consequence of a defect in the title derived under the will, brought an action against one of the twenty-three persons to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid :—Held, that he was entitled to recover. *Johnson* v. *Johnson*, 3 Bos. & P. 162 ; 6 R. R. 736.

An action will lie to recover the expenses of the conveyances, and interest of the money procured to purchase an annuity, where the grantor has misrepresented the charges affecting the estate to be charged with the annuity. *Richards* v. *Barton*, 1 Esp. 267.

When a person, bonâ fide, believing he has a title, sells to another property to which in reality he has no title, and the conveyance is duly executed, the purchaser cannot afterwards on discovery of the defect recover back the price paid as money had and received. *Clare* v. *Lamb*,

44 L. J., C. P. 177; L. R. 10 C. P. 334; 32 L. T. 196; 23 W. R. 389.

A lease for three lives, or thirty-one years, contained a clause of forfeiture if any writ of execution should issue by virtue of which it should be liable to be taken in execution or sold. Under a fieri facias issued against the lessee, the sheriff sold and conveyed his interest under the lease, "if any," to the plaintiff, who, before he bid at the auction, knew it was a freehold lease, and was aware of the clause of forfeiture; the purchaser having got possession, and having been evicted:—Held, that he could not recover the purchase-money in an action against the sheriff for money had and received. *Griffin* v. *Cuddell*, Ir. R. 9 C. L. 488.

The defendant having bought a personal chattel at a sheriff's sale, the plaintiff afterwards offered the defendant, and the defendant accepted, 5*l.* for his bargain, and the plaintiff paid the advanced price to the defendant; afterwards, the chattel was claimed by a third party under a superior title, and the plaintiff was prevented from taking possession of it; both parties knew that the sale took place under an execution:—Held, that there was no implied warranty of title by the defendant, and that the plaintiff could not recover back the price paid by him, as upon a failure of consideration. *Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239; 14 Jur. 652.

An agreement recited that the defendant had, as he was advised, legally put an end to a lease granted to A. of a farm by entering thereon by reason of the bankruptcy of A., pursuant to a power in the lease, and it was agreed that the defendant should grant a lease of the farm to the plaintiff at a yearly rent, payable quarterly. The lease was to commence on a day certain if the defendant could legally make it, or as soon as he was in a situation to do so, the rent to commence from the commencement of the term, or on possession being given, which should first happen. The plaintiff was to pay the defendant 500*l.* on possession being given to him, as a bonus for the lease to be granted. The plaintiff was admitted into possession, and occupied the farm for two years, and paid 250*l.* in respect of the bonus. The defendant was unable to grant the lease, the commission of bankruptcy of A. having been superseded. The plaintiff brought an action against the defendant for not granting the lease:—Held, that the recital in the agreement was primâ facie evidence against the defendant that he had power to grant the lease, but such recital purporting to be founded on the supposed bankruptcy of A., the evidence was answered by proof that the commission against him had been superseded, and that the granting of the lease, being the consideration for the bonus, the plaintiff was entitled to recover the 250*l.* as money paid on a consideration which had failed, although he had a beneficial occupation for two years. *Wright* v. *Collis*, 8 C. B. 150; 19 L. J., C. P. 60.

### 20. For Money obtained by Fraud or Wrong.

If money has been obtained by fraud, an action for money had and received lies to recover it back, to which it is no answer that the defendant is really entitled to the money, if his right to it depends upon a question which is not of common law jurisdiction. *Crockford* v. *Winter*, 1 Camp. 124.

So, if one recovers money malâ fide, by suit in an inferior court, an action for money had and received will lie to make him refund. *Moses* v. *Macpherlan*, 2 Burr. 1005; 1 W. Bl. 219.

If a bill is filed to compel the performance of a contract and payment of money, and the defendant puts in no answer, and is obliged to pay the money, and he afterwards discovers that he was deceived in the contract, he will not be barred from his action by having paid the money, if he comes immediately after discovering the fraud. *Jendwine* v. *Slade*, 2 Esp. 572; 5 R. R. 754.

Where a party, knowing a cheque to be post dated, and that the drawers were insolvent, presented it for payment to the bankers upon whom it was drawn, who, without knowledge of these facts, paid it, although they had no funds of the drawers in their hands at the time, but expected some in a few days:—Held, that they were entitled to recover it back. *Martin* v. *Morgan*, 3 Moore, 635; 1 Br. & B. 289; Gow, 122; 21 R. R. 603.

A. placed in the plaintiff's hands a fund, out of which the plaintiff was directed to satisfy certain acceptances. The defendant falsely represented to the plaintiff that he held one such acceptance, and thereby induced the plaintiff to pay him the amount of the alleged acceptance out of the fund:—Held, that the plaintiff might maintain an action for money had and received against the defendant. *Holt* v. *Ely*, 1 El. & Bl. 795; 17 Jur. 892.

An action will lie against an infant, to recover money which he has embezzled. *Bristow* v. *Eastman*, 1 Esp. 172; Peake, 223; 5 R. R. 728.

If a person undertakes to procure for another an appointment, which he knows at the time he is unable to do, and receives in consideration a sum of money to be paid back in three months if he failed in his undertaking; the other person may immediately commence an action to recover it back, without waiting till the end of the three months. *Hogan* v. *Shee*, 2 Esp. 522.

A sale of goods effected by fraud does not change the property in them: therefore, where the defendant fraudulently induced the plaintiff to sell goods to S., who could not pay for them, and on a nominal re-sale of those goods by S., in which the defendant was concerned, obtained the money paid on such re-sale:—Held, that the plaintiff might recover from the defendant the value of the goods unpaid for by S. in an action for money had and received. *Abbotts* v. *Barry*, 5 Moore, 98; 2 Br. & B. 369.

If A. fraudulently procures a bill of exchange from B., and afterwards becomes bankrupt, and his assignees receive the money for the bill, B. may recover it from them. *Harrison* v. *Walker*, Peake, 111.

The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker. Six days after the date of the cheques the defendant, acting bonâ fide, gave cash for them to a third person (who had not given value for them), and presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money:—Held, that the cheques could not be treated as bills overdue, and therefore taken by the defendant at his peril, but that the real question in the cause was whether the defendant acted bonâ fide and with due caution. *Rothschild* v. *Corney*, 9 B. & C. 388; 7 L. J. (O.S.) K. B. 270.

A. drew a bill on B. in the country, making it payable at the house of C. in London, without

authority from C.; and B. accepted the bill in this form, without giving notice to C. or providing for the payment of the bill at C.'s house. A. negotiated the bill, which, upon becoming due, was presented by the holder to C., who paid it under a supposition that the bill so presented was another bill of a different amount and date, drawn by B. on and accepted by himself, and did not discover his mistake until a fortnight afterwards, when the other bill was presented. B. became bankrupt:—Held, that C. could not recover against A. for money had and received. *Davis* v. *Watson*, 2 N. & M. 709; 2 L. J., K. B. 175.

The plaintiffs' agent abroad in fraud of his principals drew bills and discounted them with the defendant:—Held, that the plaintiffs could not recover without some evidence of knowledge on the part of the defendant of a fraud committed by the agent. *Davies* v. *Willats*, 5 L. J., K. B. 94.

A., acting for B., a foreign principal, but in his own name, bought of C., in London, a cargo of wheat on board a vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, and the bill was duly paid. B. afterwards came to London, saw the contract, and ratified all that A. had done. It turned out that the cargo had been fraudulently disposed of by the captain, prior to the date of the contract of sale by C. to A.:—Held, that B. could not maintain an action against A. to recover back the money paid, upon a failure of consideration, but that his only remedy, whether in his own name or in that of A., was against C., the seller. *Risbourg* v. *Bruckner*, 3 C. B. (N.S.) 812; 27 L. J., C. P. 90; 6 W. R. 215.

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract, on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray* v. *Mann*, 2 Ex. 538; 17 L. J., Ex. 256; 12 Jur. 634.

The plaintiff became a purchaser of shares in a mining company, which carried on business upon the cost-book principle, and he paid deposits upon the shares. The mine was worked, dividends were declared, and he received additional shares as an equivalent for such dividends as were due to him afterwards, and while he continued to hold the shares, the company was registered as a company with limited liability, and was subsequently wound up under an order in chancery. While the proceedings for winding-up were going on, the plaintiff discovered, as he alleged, that he had been deceived by the fraudulent representations of the defendants, who were three of the directors of the company and who by fraud had induced him to become a shareholder, and he therefore brought an action to recover back the money which he had paid on account of the shares which had been allotted to him, claiming to recover it as money received by the defendants for his use:—Held, that he could not maintain the action. *Clarke* v. *Dickson*, El. Bl. & El. 148; 27 L. J., Q. B. 223; 4 Jur. (N.S.) 832.

The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5*s.* in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50*l.*, and gave him a bill of exchange for 108*l.* The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50*l.*, and gave him the bill of exchange, and the defendant executed the composition deed:—Held, that the plaintiff might recover back the 50*l.* in an action for money had and received. *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L. J., Ex. 362; 8 Jur. (N.S.) 1012; 7 L. T. 93; 10 W. R. 389—Ex. Ch.

21. On Payment, Sale, Discount or Exchange of Forged or Worthless Securities.

If a forged bill is accepted and paid by the drawee, he cannot recover the money back from the indorsee to whom he paid it. *Price* v. *Neale*, 3 Burr. 1354; 1 W. Bl. 390.

If the banker of a supposed acceptor of a forged bill discounts it for the agent of one of the indorsers, on the discovery of the forgery, he may recover back the sum paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting. *Fuller* v. *Smith*, 1 Car. & P. 197; R. & M. 49; 28 R. R. 772.

A Bank of England note, which had been materially altered in number and date, was paid to the plaintiffs' bank for value by the defendant, both parties believing the note to be good. The plaintiffs paid away the note, which was afterwards presented at the Bank of England, where the alteration was perceived and payment was refused. The note was returned to the plaintiffs as a bad one, and, after a fortnight spent in tracing the note to the defendant, the plaintiffs demanded payment of it from him, and on the 21st of July, 1882, sued him for the amount:—Held, that the plaintiffs having received from the defendant a worthless note, on which no one could be sued, were entitled to recover in the action for money had and received. *Leeds & County Bank* v. *Walker*, 52 L. J., Q. B. 590; 11 Q. B. D. 84; 47 J. P. 502.

A. deposited with a banking company 80*l.*, consisting partly of the notes of a country bank payable either at that bank or in London, and representing 65*l.* The company gave a receipt as follows: "Received of A. 80*l.*, for which we are accountable; 80*l.* at 3 per cent. interest, with fourteen days' notice." The company sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the company, who, on the following day, gave notice of dishonour to A., and on A.'s giving fourteen days' notice of withdrawal, tendered the notes back, which he refused. The company refused to pay the amount of the notes. The country bank, which was about five miles from the office of the company, had stopped payment from the close of the day on which the notes were deposited:—Held, that A. could not recover the amount of the notes from the company as money had and received. *Timmins* v. *Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403.

A person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, may recover the money as had and received to his own use, upon the failure of

the consideration. *Jones* v. *Ryde*, 5 Taunt. 488 ; 1 Marsh. 157 ; 15 R. R. 561.

So, a person who receives forged bank notes in payment. *Ib.*

So of a victualling bill, although the full apparent amount has been paid by the office on presentment. *Bruce* v. *Bruce*, 1 Marsh. 165 ; 5 Taunt. 495, n. ; 15 R. R. 566, n.

A bill of exchange with a forged acceptance, purporting to be payable at the house of A. & Co., bankers in London, with whom the supposed acceptor kept cash, was indorsed to B. for a valuable consideration : B. indorsed it to his agent in London, who presented it on the 23rd of April at the house of A. & Co. for payment ; A. & Co. paid it, and sent it on the 30th April to the supposed acceptor, who disavowed it : A. & Co. immediately gave notice of the forgery to B. and demanded repayment, which B. refused ; all parties were ignorant of the fraud : —Held, that A. & Co. by paying the bill, without ascertaining that the acceptance was genuine, were precluded from recovering the amount from B. *Smith* v. *Mercer*, 1 Marsh. 453 ; 6 Taunt. 76 ; 16 R. R. 576.

Fauntleroy, being one of three co-trustees, proprietors of stock and also one of three co-partners in a banking-house, forged the names of his co-trustees to a power of attorney, under which he sold the stock and paid the money into his banking-house. Neither of his co-trustees was privy to the transaction. Fauntleroy was executed for forgery. The surviving trustees sued the surviving partners for the money. On an issue from chancery, directing that no objection should be taken that Fauntleroy had been interested both as a trustee and a partner in the banking-house :—Held, that the money constituted a debt due from the bankers to the trustees. *Stone* v. *Marsh*, 9 D. & R. 643 ; 6 B. & C. 551 ; R. & M. 364 ; 5 L. J. (O.S.) K. B. 201 ; 30 R. R. 420.

A cheque being drawn upon the G. branch of a banking company by H., who kept an account at that branch, was presented by the defendant at the B. branch of the company, where it was cashed in the usual way across the counter, and the same day sent to G., but H. having no funds there, it was returned to the branch, who gave notice of dishonour to the defendant. H. had no account with the B. branch ; and the two branches were distinct in respect of the accounts kept, and issued cheques denoting the particular branch upon which they were drawn :—Held, that this did not amount to payment of the cheque by the B. branch as the bankers of H., or on his credit, but on the credit of the defendant, and that the cheque proving to be worthless, the bank was entitled to recover back the money paid. *Woodland* v. *Fear*, 7 El. & Bl. 519 ; 26 L. J., Q. B. 202 ; 3 Jur. (N.S.) 587 ; 5 W. R. 624.

A vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness, and if it turns out that the name of one of the parties is forged and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. *Gurney* v. *Womersley*, 4 El. & Bl. 139 ; 3 C. L. R. 3 ; 24 L. J., Q. B. 46 ; 1 Jur (N.S.) 328.

### 22. For Foreign Money and Securities.

An action for money had and received will not lie to recover the value of foreign securities paid to the defendant, where it appears that he had no opportunity of converting such securities into British money. *M'Lachlan* v. *Evans*, 1 Y. & J. 380.

But a debt incurred in foreign coin is recoverable as for lawful money of Great Britain. *Harington* v. *Macmorris*, 1 Marsh. 33 ; 5 Taunt. 228.

Where money has been received by an agent in India, on account of goods sold by him for his principal in England, the latter on the agent's coming to England is not prevented from recovering in an action for money had and received, by reason of the proceeds having been received not in English but in foreign money. *Ehrensperger* v. *Anderson*, 3 Ex. 148 ; 18 L. J., Ex. 132.

### 23. By Owners of Lost Securities.

An action for money had and received will lie by the true owner of money or notes against a third person, into whose hands they have come malâ fide ; provided their identity can be traced and ascertained. *Clarke* v. *Shee*, Cowp. 197, 334 ; 2 Dougl. 698, n.

An agent for the sale of goods was authorised to draw bills on the purchasers at the usual credit ; and by the terms of his employment he was to transmit them indorsed to his principals. He sold goods at a credit beyond the usual period, and drew for the amount ; but instead of transmitting the bills to his principals, he used them for his own purposes. They got into the hands of a bill-broker who discounted them :—Held, that proof of these facts alone did not afford sufficient evidence of fraud, connected with the bill-broker, to give the principals a primâ facie right to recover the amount of the bills from him as money had and received, and make it incumbent on him to shew that he gave full value for the bills. *Davis* v. *Willis*, 1 H. & W. 679.

To an action by an indorsee for value of a bill which had been lost, it is no defence that the bill was taken under circumstances which ought to have excited the suspicion of a prudent and cautious man. *Crook* v. *Jadis*, 3 N. & M. 257 ; 5 B. & Ad. 909 ; 3 L. J., K. B. 87.

Unless the circumstances are such that mala fides can be inferred. *Backhouse* v. *Harrison*, 3 N. & M. 188 ; 5 B. & Ad. 1098.

L. & Co., being the bankers of K., received on his account a cheque for 100*l.* from T., drawn by him upon the Bank of England, which cheque was lost by L. & Co. T., at the request of L. & Co., wrote to the Bank of England, requesting them not to pay the cheque, if presented. T. was afterwards requested by L. & Co. to give them another cheque for the same amount, upon receiving an indemnity for all loss which he might sustain from so doing, which he promised to do, and the indemnity was accordingly sent. T. subsequently wrote to L. & Co., to say that he could not conveniently send the cheque, but that he would take the earliest opportunity of handing them the amount. L. & Co. were called upon and obliged to pay the amount of the lost cheque to K :—Held, that an action by L. & Co. against T. for money paid, or on an account stated, could not be supported ; and that L. & Co.'s remedy was by an action of special assumpsit. *Lubbock* v. *Tribe*, 3 M. & W. 607 ; 1 H. & H. 160 ; 7 L. J., Ex. 158.

### 24. By Husbands.

A husband having received a sum of money, which had been bequeathed to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest:—Held, that the bankers were liable to the husband for the amount, in an action for money had and received. *Calland* v. *Loyd*, 6 M. & W. 26; 9 L. J., Ex. 56.

Action for money had and received. Plea, by way of defence on equitable grounds, that the money had been bequeathed to the separate use of the plaintiff's late wife, who, during the coverture, assigned the money to the defendant, on trusts in which the plaintiff took no interest. Replication, that before this assignment the plaintiff's wife assigned the money to the plaintiff, and that the receipt by the defendant was as agent for the wife, in order to give a discharge to the executors:—Held, that the plea was good, admitting a receipt of the money primâ facie to the use of the husband, and avoiding it by shewing that in equity the receipt was on trusts in which the husband took no interest, thereby sufficiently negativing any marital right arising on her death. *Sloper* v. *Cottrell*, 6 El. & Bl. 497; 26 L. J., Q. B. 7; 2 Jur. (N.S.) 1046.

Held, also, that the replication was good as shewing a prior equitable assignment for the husband's benefit. *Ib.*

### 25. Against Stakeholders, Trustees, Bailees and Others.

**Stakeholders.**]—An action will not lie between two parties who have by consent deposited money with a stakeholder, unless it is proved that the defendant refused to permit the plaintiff to receive the money. *Robson* v. *Hall*, Peake, 127.

In order to recover a share of a stake from a stakeholder, the plaintiff must shew his exact proportion of the sum deposited. *Robson* v. *Andrade*, 2 Chit. 263; 1 Stark. 372.

The particulars stated the cause of action to be for the amount of stakes deposited in the defendants' hands by the plaintiff and R., and won by the plaintiff of R.:—Held, that he could not recover the amount of his own stake, on proof that he had re-demanded it from the defendant before it was paid over. *Davenport* v. *Davies*, 1 M. & W. 570; 1 Tyr. & G. 931; 5 L. J., Ex. 214.

Where money in litigation between two parties has by mutual consent been paid over to a trustee in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted, though he agreed to waive all objections to form. *Ker* v. *Osborne*, 9 East, 378.

By an agreement A. undertook to procure for B. a licence for an hotel, then in the occupation of B., or to forfeit a sum of money deposited with a stakeholder. Notice was given to both to attend before the magistrates on the licensing-day; but B. would not attend, and the licence was refused:—Held, that B. could not maintain an action for the deposit. *Bryant* v. *Beattie*, 4 Bing. (N.C.) 254; 5 Scott, 751; 1 Arn. 65; 7 L. J., C. P. 78; 2 Jur. 276.

A. took from the board of works a piece of ground at Westminster for the erection of galleries at the king's coronation, and underlet part of it to B. on the same terms. The rent was paid by B. to A., who deposited it in the hands of his bankers, with a condition, that if the coronation did not take place, and the rent was in consequence remitted by the board of works, the money was to be returned to B. The coronation took place; but, in consequence of the speculation being unprofitable to the parties, the crown remitted the whole rent to A., who refused to return the money paid him by B.:—Held, that B. might maintain an action for money had and received against the bankers as stakeholders. *Truscott* v. *Marsh*, 2 D. & R. 712; 1 L. J. (O.S.) K. B. 164.

In an action to recover sums deposited with the defendant, as the treasurer of a money club, it appeared that the money had been deposited, not by the plaintiff, but by his son, a minor, who was a member of the club, and who had made several payments himself, but had afterwards run away from his service, and the payments were then continued by his sister, from money furnished by her mother. There was no evidence that the defendant knew anything of the plaintiff:—Held, that the proper question for the jury was, whether there was any privity of contract between the defendant and the plaintiff; and that a direction, that if the money deposited was the money of the plaintiff he was entitled to recover, was wrong. *Bluck* v. *Siddaway*, 15 L. J., Q. B. 359.

A., a subscriber to a lottery for the Derby stakes established by the defendant, drew a ticket and sold it to the plaintiff. The agreement was, that the holders of the tickets having on them the names of the first and second horses should have prizes. The ticket which A. drew had on it the name of the second horse. The defendant had no notice of the transfer of the ticket to the plaintiff till after the race was run:—Held, that the plaintiff could not maintain an action for money had and received against the defendant. *Jones* v. *Carter*, 8 Q. B. 134; 15 L. J., Q. B. 96; 10 Jur. 33.

A dispute having arisen as to whether B. was entitled, in respect of 200 shares, to be registered as a shareholder in a company, it was arranged between him and the company that he should deposit 400*l.*, on account of such shares, with the secretary, which was to be repaid if B. failed to make out his claim. The following minute of the transaction was made by the defendant:—"26th April, 1838. E. C. R. Company. B. has deposited with me 400*l.*, on account of 200 shares, for which he claims to be registered, on condition that B. is to accept back the money so deposited, if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same. (Signed) J. C. N., Secretary." The 400*l.* being paid to the secretary in a cheque, he paid it into his bankers, on his private account. He quitted the employment of the company in February, 1839. B. was never registered in the books as a shareholder:—Held, first, that an action for money had and received, and which was not commenced until more than two years after the money was so deposited, was rightly brought against the secretary; and, secondly, that B. was entitled to recover the 400*l.* without shewing that he ever attempted to substantiate his claim to be registered as a shareholder. *Baird* v. *Robertson*, 1 Man. & G. 981.

On a sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney subscribing himself as "agent for the said S. S., the vendor." The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself, as "agent for S. S." The sale going off through the vendor's default, and the deposit money not being returned:—Held, that the purchaser could not bring an action for it against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. *Bamford* v. *Shuttleworth*, 11 A. & E. 926.

A party who repudiates a wager before the result of it is ascertained is not precluded from recovering his deposit from the stakeholder by 8 & 9 Vict. c. 109, s. 18, which avoids contracts by way of gaming and wagering, and prohibits the maintenance of an action for the recovery of money won upon any wager, or deposited in the hands of a stakeholder to abide the event of any wager. *Martin* v. *Hewson*, 10 Ex. 737; 24 L. J., Ex. 174; 1 Jur. (N.S.) 214.

Agents in London of a foreign government, having money in their hands for the payment of a dividend on a loan, on the 22nd May advertised that the coupon due on the 1st June would be paid in full; but on the 1st June, being advised by the foreign government, they advertised that the payment would be made less 5 per cent. An action having been brought by a bondholder against the agents:—Held, that the announcement was not an admission of assets which gave the bondholders a right of action for money had and received. *Henderson* v. *Rothschild*, 56 L. J., Ch. 471; 56 L. T. 98; 35 W. R. 485—C. A. Affirming 33 Ch. D. 459.

**Trustees.**]—Where money is paid into the hands of a trustee for a specific purpose, it cannot be recovered back, until it is shewn that the trust is closed, and that a balance is left. *Case* v. *Roberts*, Holt, 500.

The defendant's son agreed to communicate to the plaintiff a secret for a dye, and the plaintiff agreed to pay him 25*l.* if a colour should be produced to the satisfaction of B., and the plaintiff handed over to the defendant a cheque for 25*l.*, to be paid to his son in that case; but if the colour was not good, the money was to be returned. On the 2nd September an experiment was commenced as to the dye, and on the 3rd, before it was concluded, the defendant got the cheque cashed; on the 4th the experiment was finished, and the dye turned out a failure, and was disapproved of by B. The plaintiff demanded the money of the defendant, but without mentioning the decision of B.:—Held, that as the cheque had been treated throughout as money, the defendant had not committed any breach of his duty by getting it cashed, so as to make him liable for money had and received. *Wilkinson* v. *Godefroy*, 3 P. & D. 411; 9 A. & E. 536.

By the deed of consecration of a chapel built by subscription, of which the plaintiff was one of the founders, the chapel-wardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expenses, was to go towards the repayment of the expense of building the chapel. S. and G., the chapel-wardens for 1838, at the close of their year of office, had in their hands a surplus, payable to the plaintiff as one of the founders. The plaintiff and the defendant were the succeeding chapel-wardens. G. handed over the money to the defendant together with his accounts, with a direction not to pay it over to the plaintiff, until the determination of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expenses of building of the chapel:—Held, that the plaintiff could not sue the defendant for the amount before the determination of that cause. *Sewell* v. *Raby*, 6 M. & W. 22.

Administrator receiving a sum of money and, with the beneficiaries' consent, promising to pay it to the plaintiff for funeral expenses incurred by him, is liable in an action for money had and received. *Meert* v. *Moessard*, 1 M. & P. 8; 6 L. J. (O.S.) C. P. 3.

Where money has been received by A. upon trust to make payments of an unascertained amount, and to pay the surplus to B., B. cannot sue A. for money had and received while the trusts remain open. *Edwards* v. *Bates*, 7 Man. & G. 590; 2 D. & L. 299; 8 Scott (N.R.) 406; 13 L. J., C. P. 156; 8 Jur. 539.

D. was appointed by deed by the plaintiff, the mortgagor of an estate, and P., the mortgagee, the receiver of the rents of the estate; and by the terms of the deed he was, after allowing for taxes and repairs, to hold all the remaining rents in trust for certain purposes: viz. first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of insurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July in each year, of the accruing interest on the principal money secured, and to pay the ultimate surplus, if any, to the plaintiff, with a proviso, that if, on the 6th January or 6th July, he should have rents and profits in hand, it should be lawful for him to retain the whole or part for the purpose of paying the premiums in that year on the policy of insurance. D. did not execute the deed:—Held, that D. was not bound by the terms of this deed to pay the surplus existing on each 6th January and 6th July to the plaintiff; and, therefore, that although he had a balance in his hands on either of those days after payment of the half-yearly interest, he was not liable, the trust still continuing, to be sued by the plaintiff for money had and received. *Bartlett* v. *Dimond*, 14 M. & W. 49; 14 L. J., Ex. 372.

Stock was bequeathed in trust to pay H., a married woman, the accruing dividends for her sole use, her receipts to be the only good discharges to the trustees. The trustees received a dividend, and informed H. that the sum was lodged with their agents, and would be paid to her on her signing a receipt, and on execution by her and her husband of a deed prepared under an order of the court of chancery relating to the trust affairs. H. and her husband did not give the receipt or sign the deed, and, the dividend not being paid, they brought an action for money had and received:—Held, that the deposit with the agents, and notice to H., were not such an appropriation and admission of a balance as made the amount demandable from the trustees without giving H.'s receipt, and that the refusal to give such receipt justified them in withholding the dividend, though they had also demanded, as a condition of payment, execution of the deed, which they had no right so to enforce. *Bond* v. *Nurse*, 10 Q. B. 244; 16 L. J., Q. B. 196; 11 Jur. 655.

A paper as follows: "I hold of M. T. 37*l.* to

put into a savings bank for her," signed and dated, is evidence of a legal debt of 37*l.* from the party signing to M. T., the money not having been put into a savings bank, but partly paid to the use of M. T., and does not shew a mere trust: and M. T. may recover, though parol evidence is given that the party signing received the money to be applied, at his direction, to the use of M. T. *Remar* v. *Hayward*, 2 A. & E. 666; 4 L. J., K. B. 64.

**Bailees.**]—An action for money had and received does not lie against the bailee of a bill of exchange not due at the time of action brought, which he has wrongfully deposited with his own bankers, although he has obtained money upon the joint credit of that and other bills. *Atkins* v. *Owen*, 6 N. & M. 309; 4 Ad. & E. 819; 6 L. J., K. B. 267. See *Palmer* v. *Jarmain*, 2 M. & W. 282.

A sum of money was handed by the plaintiff to the defendant to carry to a particular place, and there to pay to a certain person for the plaintiff. The defendant took the money, but in answer to the inquiries of the plaintiff on the subject, said that he had lost it:—Held, that an action for money had and received was maintainable on proof of these facts merely; though it was objected that the proper form of action was a special action for the negligence. *Parry* v. *Roberts*, 5 N. & M. 669; 3 A. & E. 118; 1 H. & W. 242; 4 L. J., K. B. 189.

**Agents.**]—A person who has received money as agent is bound not only to account for the same, but also to pay it over to his principal when requested so to do; and, in an action for money had and received, is chargeable with interest on the amount so received from the date of the refusal to pay it over. *Pearse* v. *Green* (1 Jac. & W. 135) followed. *Harsant* v. *Blaine*, 56 L. J., Q. B. 511—C. A.

The brokers to a ship charged their employers certain sums of money for work done to their ship under the head of "stevedore." The labour of a stovedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the shipowners were aware that the brokers charged them more than they paid the workmen, but made no objection, on account of their zeal and diligence:—Held, that one of the workmen under such circumstances could not maintain an action for the larger sums received by the brokers, as money received to his use. *Wilson* v. *Cohen*, 2 Car. & P. 363.

The plaintiff authorised the defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of 9,000*l.*, but eventually the ship was purchased through the defendant for 9,250*l.* Prior to the sale, an arrangement had been made between the vendor and a broker, S., that if S. could sell the ship for more than 8,500*l.* he might retain to himself the excess; and it was arranged between S. and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from S. a portion of such excess; and accordingly the defendant received 225*l.*, part of the excess over 8,500*l.* On discovering this, the plaintiff brought an action for money had and received for the 225*l.* In addition to the above facts, the jury found that the defendant was the agent of the plaintiff to purchase the ship as cheaply as she could be got, and that the plaintiff could have got her cheaper but for the arrangement between the vendor and S.:—Held, that the action would lie. *Morison* v. *Thompson*, 43 L. J., Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.

Three shipbrokers agreed in writing with a shipowner to freight his vessel at a certain commission, dividing profits of commission. One of the brokers alone paid and received money on account of the ship; and delivered to the owners an account, charging a liquidated sum for commission. The owner acquiesced in the accuracy of the account, but objected to the charge for commission, but which the broker retained in his hands. There was no adjustment of account between the brokers:—Held, that an action for money had and received would not lie by the two brokers against the third for their share of the commission. *Borill* v. *Hammond*, 9 D. & R. 186; 6 B. & C. 149; 5 L. J. (o.s.) K. B. 145.

Where agents in England effected a policy of insurance for a correspondent abroad, on which a loss happened, and he drew a bill upon them, which was presented for acceptance by an indorsee, but they said they could not accept it, having no funds in hand, but that on a settlement taking place with the underwriters it should be paid:—Held, that after they had received a sum from the underwriters less than the amount of the bill, it might be recovered from them by the indorsee as money received to his use. *Langston* v. *Corney*, 4 Camp. 176.

The plaintiff in Calcutta wrote to his agent in England, to transmit to him a sum of money through the defendants' house, to be placed to his credit there. His agent shewed his instructions to the defendants, and paid them the money, who placed it in their books to the credit of their correspondents in Calcutta, and sent them a letter of advice to account for it to the plaintiff. Before this letter reached Calcutta their correspondence failed, but the defendants had, between the date of the letter and the failure, accepted bills, drawn by their correspondents before the receipt of such letter, to an amount exceeding the money paid in by the plaintiff:—Held, that the money could not be recovered from the defendants, for that they had done all they were instructed or were bound to do, and the situation in which they stood towards their correspondents had been thereby altered. *M'Carthy* v. *Colvin*, 1 P. & D. 429; 9 A. & E. 607; 8 L. J., Q. B. 158.

R., possessed of a licensed house, mortgaged the premises, together with the licence. After the licence had been suspended for irregular conduct on the part of R., the mortgagee sold the premises, under a power of sale contained in the deed. The defendant, the assignee of R., who had in the meantime become bankrupt, obtained a new licence in the name of the purchaser, for which the latter paid him 150*l.*:—Held, that this was not money had and received to the use of the plaintiffs. *Manifold* v. *Morris*, 7 Scott, 404; 5 Bing. (N.C.) 420; 2 Arn. 19; 8 L. J., C. P. 218; 3 Jur. 362.

**Partners.**]—A., B. and C., being separate traders, agreed to a joint speculation in importing corn. The agent for buying the corn abroad knew that the speculation was on the joint account of A., B. and C., and was to consign to A., drawing on him at two or three months. Corn was bought, and bills for the value drawn on and accepted by A., payable at a bankers' in London, the correspondents of the plaintiffs, who were bankers at Hull. A. had a banking account

with the latter, who, being in the habit of paying his acceptances at the house of their London correspondents, paid the above among other acceptances, not then knowing of the joint speculation of A., B. and C. A., by way of part security to the plaintiffs, indorsed to them two accommodation bills drawn by himself on B.; these were unpaid, and A. and B. became bankrupts; C. had contributed his third of the purchase, but did not appear to have known from what source A. obtained his funds for that purpose:—Held, that the Hull bankers could not recover against C., as for money lent, or had and received, the amount of the bills drawn by A. on B., though they had given A. credit for them in his account, as partly liquidating their advances to pay for the corn bought for A., B. and C., at their joint profit or loss. *Smith* v. *Craven*, 1 Tyr. 308; 1 C. & J. 500; 9 L. J. (O.S.) Ex. 174.

A., a manufacturer, contracted with B., C. and D., who were partners, occupying a mill, the property of B., for the drying of his wool in a room in the mill. B., C. and D. effected an insurance on the mill, covering wool in the room. D. retired from the partnership, after which C. and D. had no interest in the room. B. and C. effected another insurance, also covering goods in the room. A dissolution of partnership took place between B. and C., which was not communicated to A., and C. afterwards effected an insurance in his sole name; and A.'s wool being damaged by fire, the insurance office paid the proceeds of the damaged wool to A., and the amount of loss on the wool, to the extent of the sum insured thereon, to C. Similar losses had been paid by the partnership to A., under the former policies:—Held, that as it was not shewn that B. had authorised the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by A. against B. and C. jointly. *Armitage* v. *Winterbottom*, 1 Man. & G. 130; 1 Scott (N.R.) 23.

*And see* PARTNERSHIP.

**Sale by Sheriff.**]—After the death of a sheriff and before the appointment of his successor, the under-sheriff sold goods under a writ delivered to him before the death of the sheriff. He did not pay over all the proceeds to the execution creditor, who more than six months after the death of the under-sheriff, and also more than six months after they had undertaken administration, sued his executors for money had and received and also for the tort:—Held, that the action for money had and received would lie; and that as that action did not require the same evidence to support it as the action for tort, it was not necessary to waive the tort. *Gloucestershire Banking Co.* v. *Edwards*, 56 L. J., Q. B. 514; 19 Q. B. D. 575; 35 W. R. 842.

**Privity.**]—The plaintiff, having married a lady possessed of funded property, to which she was entitled by the settlement on her marriage with a former husband, they employed the defendant to dispose of it, and out of the proceeds, first to pay off a mortgage of the former husband, and then to prepare a settlement of the residue, the interest to be secured for the wife for life, with remainder to the plaintiff for life if he survived her, with reversion to her children; the defendant and two other persons to be trustees:—Held, that although the defendant had paid over to the plaintiff certain sums out of the proceeds of the sale (after payment of the mortgage), the plaintiff could not sue him for the residue, as money had and received to his use. *Mileham* v. *Eicke*, 3 M. & W. 407; 1 H. & H. 102; 7 L. J., Ex. 151.

A seizure of spirits having been made on the plaintiff's premises by an excise officer, and a writ of appraisement issued, the commissioners afterwards, upon the application of the plaintiffs, restored the spirits to them at the appraised value, under an agreement that "they (the plaintiffs) gave up all claim to the seizure, and held themselves responsible for such proceedings for penalties as the board might think fit to institute." The appraised value was paid by the plaintiffs to the defendant, the receiver-general of excise. Penalties were subsequently recovered of the plaintiffs. The plaintiffs then gave the defendant notice of action, and re-demanded the money:—Held, that the plaintiffs could not recover back the money so paid, inasmuch as it was paid on a binding agreement, made upon good consideration, whereby the plaintiffs agreed that it should not be recoverable back; and further, that they were precluded from recovering by the provisions of the 7 & 8 Geo. 4, c. 53, s. 98:—Held, also, that, at all events, the action could not be maintained against the defendant, inasmuch as the money was received by him only for the purpose of its being paid over pursuant to act of parliament, and it was not shewn that it remained in his hands till he had notice to retain it. *Atlee* v. *Backhouse*, 3 M. & W. 633; 1 H. & H. 135; 7 L. J., Ex. 234.

### 26. PROOF OF RECEIPT.

The defendant, captain of the plaintiff's ship, drew a bill on the plaintiff's agent for expenses incurred on account of the ship; and the plaintiff's agent having paid the bill, the plaintiff afterwards brought an action for money had and received to his use against the captain; and, at the trial, proved payment only of the bill by his agent, without giving evidence that any of the sum for which the bill was drawn had ever reached the defendant's hands:—Held, that the bill of exchange was not evidence of money had and received to the plaintiff's use. *Scott* v. *Miller*, 3 Bing. (N.C.) 811; 5 Scott, 11; 3 Hodges, 169; 6 L. J., C. P. 314.

By 5 & 6 Will. 4, c. 76, s. 48, an overseer neglecting to sign the burgess list of a borough is liable to a penalty of 50*l.*, to be recovered by any person suing within three calendar months, and the money so recovered, after payment of the costs and expenses attending the recovery, is to be paid and apportioned, one moiety to the person suing, and the other moiety to the treasurer of the borough. The defendant recovered a penalty against an overseer with taxed costs, as between party and party, and received the amount:—Held, that in an action against the defendant by the corporation for money had and received, it was sufficient primâ facie for the corporation to prove the recovery and receipt of the penalty and the taxed costs; and that, in default of proof by the defendant of extra expenses, the corporation was entitled to a verdict for half the penalty. *Harwich Corporation* v. *Gant*, 5 El. & Bl. 182; 1 Jur. (N.S.) 708; 3 W. R. 493.

Upon the reading of the will of A. in the presence of her family, B., who had resided with

her, produced a parcel containing bank notes, and stated that A. had given it to her about a fortnight before her death; upon which C., the brother of B., took up the notes, and said that he would keep them until B. required them, or, as stated by other witnesses, until the claims of the executors were disposed of:—Held, that in an action by B. against C. for money had and received, evidence of what had been stated by B. was admissible to shew her title to the notes. *Hayslip* v. *Gymer*, 3 N. & M. 479; 1 A. & E. 162; 3 L. J., K. B. 149.

Held, also, that such statement, coupled with evidence of possession, of B.'s conduct at the time of the reading of the will, of her having told her sister some days before the death of A. of the gift having been made to her, and of the circumstance of other money of A.'s being untouched, although B. had had opportunities of possessing herself dishonestly of the notes, was sufficient evidence to go to the jury, upon a question raised whether B. was justly entitled to the notes. *Ib.*

The executor of B., the survivor of A. and B., had, by instituting legal process, obtained payment of a promissory note, purporting to be payable to A. and B. The administrator of A. brought an action for money had and received, and adduced evidence to shew that the note had been made payable to A. and had been altered so as to make it payable to A. and B.:—Held, that there was no evidence to go to the jury in support of the count for money had and received to the use of the administrator, because, assuming his case to be correct, the money was not received in discharge of the genuine note which belonged to him. *Vaughan* v. *Matthews*, 13 Q. B. 187; 18 L. J., Q. B. 191; 13 Jur. 470.

Where a party sued for money had and received, rested his defence on his having obtained the money bonâ fide, in satisfaction of an equitable claim, and the plaintiff at the trial merely endeavoured to impeach the fairness of the receipt, and the claim generally, and the jury found for the defendant; the court refused to entertain a motion for a new trial, made on the ground that, admitting the fairness of the transaction, the defendant appeared, upon the plaintiff's case at the trial, to be not entitled to retain more than a part. *Moore* v. *Eddowes*, 2 A. & E. 133.

Where an action was brought in the name of A. against B. on a bill of exchange, but it appeared that C., the drawer of the bill, was the real plaintiff, and that A. only lent his name, because C. was unwilling that his should appear, and that A. gave no instructions to, and had no communication with, the attorney; and the attorney received a sum of money from B., on the settlement of that action:—Held, in an action by A. against the attorney to recover such sum, the jury having found that it was received for C. and not for A., that the plaintiff could not recover. *Clark* v. *Dignam*, 3 M. & W. 478; 1 H. & H. 166; 7 L. J., Ex. 195; 2 Jur. 419.

An action for money received for the use of a plaintiff cannot be maintained unless there has been an actual receipt of money by the defendant, or something equivalent to it, or unless the defendant is estopped by representations made to the plaintiff from denying the receipt. *Prince* v. *Oriental Bank Corporation*, 47 L. J., P. C. 42: 3 App. Cas. 325; 38 L. T. 41; 26 W. R. 543.

## IV. ACCOUNT STATED.

### 1. What Amounts to.

A plaintiff cannot recover on an account stated, without shewing some item, to a specific amount, agreed upon as due, though a single item would be sufficient. *Lane* v. *Hill*, 18 Q. B. 252; 21 L. J., Q. B. 318; 16 Jur. 496. S. P., *Highmore* v. *Primrose*, 5 M. & S. 65; *Kirton* v. *Wood*, 1 M. & Rob. 253.

In order to support an account stated, there must be an admission of a debt due. *Lemere* v. *Elliott*, 6 H. & N. 656; 30 L. J., Ex. 350; 7 Jur. (N.S.) 1206; 4 L. T. 304.

Therefore where a defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and on being asked for a deposit, gave an I O U for 25*l.*, but afterwards refused to complete the purchase:—Held, that the I O U was evidence of an account stated. *Ib.*

There must be an acknowledgment of a subsisting debt. *Tucker* v. *Barrow*, 1 M. & Ry. 518; 7 B. & C. 623; M. & M. 139; 3 Car. & P. 85, 89; 6 L. J. (O.S.) K. B. 121. S. P., *Burgh* v. *Legg*, 5 M. & W. 418; 7 D. P. C. 814; 8 L. J., Ex. 258.

The plaintiff demanded 40*l.* upon an agreement by the defendant, an incoming tenant, to pay for growing crops; he offered to pay 17*l.*:—Held, no evidence to support an account stated. *Wayman* v. *Hilliard*, 7 Bing. 101; 4 M. & P. 729; 9 L. J. (O.S.) C. P. 30.

Whether a conversation between the defendant and a witness is sufficient to entitle a plaintiff to recover on an account stated, is a question of law and not of fact. *Bishop* v. *Chambre*, 3 Car. & P. 55; M. & M. 116.

Where A. was shewn an account, and he objected to one of the items, but made no remark with respect to the rest:—Held, evidence of an account stated by him of the items of the account to which no objection was made. *Chisman* v. *Court*, 2 Man. & G. 317; 2 Scott (N.R.) 569; 10 L. J., C. P. 124.

An offer to pay a sum less than the sum claimed, if not accepted, is no evidence against a defendant for the larger sum on an account stated. *Atkinson* v. *Woodhall*, 1 H. & C. 170; 31 L. J., M. C. 174; 8 Jur. (N.S.) 720; 6 L. T. 361; 10 W. R. 671.

A landlord being in possession of premises lately held by his insolvent tenant, in which were fixtures belonging to the latter, agreed to give up possession on his assignees paying 7*l.* for the rent due. They entered and sold the fixtures, but no occupation by them was proved:—Held, that the 7*l.* could not be recovered on an account stated, the agreement to pay that sum not being bottomed on any previous transaction between the parties. *Clarke* v. *Webb*, 1 C. M. & R. 29; 2 D. P. C. 671; 4 Tyr. 673; 3 L. J., Ex. 300.

In an action by indorsee against indorser evidence of an acknowledgment of an existing debt and of a promise to pay by the defendant is admissible, and sufficient to support an account stated. *Wagstaffe* v. *Boardman*, 9 D. & R. 248; 5 L. J. (O.S.) K. B. 139.

An admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support an account stated, though not for goods sold and delivered. *Knowles* v. *Michel*, 13 East, 249. S. P., *Pinchon* v. *Chilcott*, 3 Car. & P. 236.

In an action for goods sold, and on an account

stated, to recover the value of growing poles purchased from the plaintiff by the defendant, and afterwards carried away by him; it appeared that, at the time of the bargain, some memoranda in writing had been made, but which were neither stamped nor signed by the parties; and that the defendant, after the poles were carried away, admitted that a balance was due to the plaintiff, who, under these circumstances, was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendant had admitted a precise and definite sum to be due to the plaintiff; and, therefore, that he could not recover on the account stated, without reference to the memoranda, which were not admissible. *Teall* v. *Auty*, 4 Moore, 542; 2 Br. & B. 99; 22 R. R. 656.

A qualified acknowledgment of a sum due to the plaintiff will not entitle him to recover on an account stated. *Evans* v. *Verity*, R. & M. 230.

An acceptor of a bill of exchange, on application to him for payment, answered that the bill had been altered as to the acceptance, by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house; and that he should take such steps as the law would authorise on the subject; that he had been prepared for payment, and the party might have had the money by calling at his house:—Held, that this was no acknowledgment of a subsisting debt. *Calvert* v. *Baker*, 4 M. & W. 417; 1 H. & H. 404; 7 D. P. C. 17; 8 L. J., Ex. 40; 2 Jur. 1020.

The defendant agreed to buy a piece of land, and to pay the purchase-money on the 1st January, 1845, and the plaintiff agreed, upon payment of the purchase-money, to convey the land to the defendant. The plaintiff, in support of an account stated, put in a document, dated the 19th January, 1849, in these terms: "I acknowledge the above account to be correct, the amount owing by me as cash the 12th January, 1849, being 1,053*l.* 7*s.* 1*d.*" Signed by the defendant. The jury found a verdict for the plaintiff:—Held, that the defendant became bound to pay the purchase-money on the 1st of January without a conveyance, and that the plaintiff was entitled to recover upon the account stated. *Yates* v. *Gardiner*, 20 L. J., Ex. 327.

It is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill of costs was delivered. *Scadding* v. *Eyles*, 9 Q. B. 858; 15 L. J., Q. B. 364.

In an action by an attorney for business for which no signed bills have been delivered, an admission by the defendant, in an examination before the commissioners under a commission of bankruptcy since superseded, that the sum claimed was due, is not sufficient evidence of an account stated. *Eicke* v. *Nokes*, 4 M. & Scott, 585; 1 Bing. (N.C.) 69; 3 L. J., C. P. 256; 1 M. & Rob. 359.

A member of a banking company wrote to the manager of it, respecting a mistake which had been made, in not debiting his account and crediting the bank for the payment of the several calls due from him, and added, "Please debit me with the amount of the calls due on my 200 shares. I think it will be 500*l.*, the second call, on the first hundred shares, and 1,000*l.* on the two calls on the second hundred shares; and advise me in a private letter. Your bank shall be credited here upon that date." To this letter no answer was sent:—Held, not sufficient evidence of an account stated. *Hughes* v. *Thorpe*, 5 M. & W. 656; 9 L. J., Ex. 109. And see *Newhall* v. *Holt*, 6 M. & W. 662; 9 L. J., Ex. 293.

### 2. Where a Deed Exists or has been Executed.

Where money is secured by a deed, and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it, an action on an account stated will not lie, but the action must be brought on the deed. *Middleditch* v. *Ellis*, 2 Ex. 523.

In an action for dividends sold and assigned it appeared that the plaintiff, being entitled to the dividends on bank stock, agreed to sell them to the defendant for 175*l.* After the bargain was made, it was found that the stock was standing in the name of the accountant-general, and that it required an order of the court to enable the defendant to receive the dividends. It was then agreed that the deed of transfer should be executed, and the question as to the costs of obtaining the order should be referred to two solicitors. The deed was accordingly executed, and 125*l.* paid by the defendant to the plaintiff at the time of its execution. The deed stated that the whole purchase-money was paid, and released it, but in pursuance of a previous arrangement the defendant retained 50*l.* to abide the event of the reference. The plaintiff's evidence consisted of a paper signed by the defendant, in which credit was given for 125*l.* and 50*l.* stated as remaining due. The defendant gave in evidence the deed of transfer, and also an agreement signed by the parties at the time of signing the paper, to refer the question as to the costs, and an arrangement whereby the 50*l.* was to abide the decision of that question:—Held, that the plaintiff could not recover the remainder of the purchase-money, inasmuch as there was no debt until the deed was executed, and upon its execution the debt was released, and that there was no evidence of an account stated. *Baker* v. *Heard*, 5 Ex. 959; 20 L. J., Ex. 444.

### 3. Consideration to Support.

A plaintiff was allowed to recover on a subsequent promise, under a count on an account stated, where the original agreement was void by the statute of frauds. *Seago* v. *Deane*, 4 Bing. 459; 1 M. & P. 227; 3 Car. & P. 170; 6 L. J. (O.S.) C. P. 66; 29 R. R. 599.

An agreement respecting the transfer of an interest in land, required by the Statute of Frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected, and nothing remains to be done but to pay the consideration; but when, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered as money due upon an account stated. *Cocking* v. *Ward*, 1 C. B. 858; 15 L. J., C. P. 245.

The defendant promised the plaintiff, orally, that if certain goods were supplied to A., a third party, he would see the plaintiff paid for them. The plaintiff accordingly supplied the goods, and A. left the country without having paid for them. The defendant subsequently orally acknowledged his liability to the plaintiff for the price of the goods:—Held, that the plaintiff was not entitled

to recover, upon the account stated founded upon the acknowledgment; for, although the admission of a liability to pay a liquidated sum is primâ facie evidence of an account stated, evidence had been properly given to shew the nature of the consideration upon which it was founded; and, it appearing that the sum acknowledged was not the subject of a direct liability from the defendant to the plaintiff, a verdict for the defendant had been rightly entered. *Marshall* v. *Wilson*, Ir. R. 2 C. L. 356; 14 W. R. 699—Ex. Ch.

Although an account stated may be founded upon a mere equitable liability, it must be a direct liability from the defendant to the plaintiff. *Ib.*

The circumstance that the statute of frauds bars a party from recovering upon a mere parol contract does not prevent the liability created thereby from forming a good ground for an action founded upon a subsequent statement of accounts between the parties. *Ib.*

A plaintiff put in evidence an account signed by the defendant, shewing a balance of 321*l.* 5*s.* to be due. The first item in this account was, "To principal and interest of old account with Dr. J. French, transferred as per letter, 146*l.* 3*s.* 6*d.*" The letter was as follows:—"I hereby acknowledge to have received from J. M. French, Esq., 321*l.* 5*s.*, and should I die during my absence from England, or at any time before the said debt is liquidated, it is my desire that he should be paid out of whatever property I might possess at the time of my death, with legal interest on the same":—Held, that the plaintiff was not entitled to recover the 146*l.* 3*s.* 6*d.*, the evidence shewing a mere promise, without consideration, to pay the debt of a third person. *French* v. *French*, 3 Scott (N.R.) 121; 2 Man. & G. 644; 10 L. J., C. P. 220; 5 Jur. 410.

A widow, being pressed to pay M. a debt owing from her deceased husband to the deceased husband of M., signed and gave to M.'s attorney the following note, addressed to the attorney: "I beg you will not proceed against me for M. for the 100*l.* and interest which I owe her; I will pay the interest amounting to 9*l.* due on the 23rd December, and the principal as soon as I am able":—Held, that this did not support a count for money found to be due from the widow to M. on an account stated between them. *Petch* v. *Lyon*, 9 Q. B. 147; 15 L. J., Q. B. 393.

A company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers. While the attachment was in force, the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done: "As director of the company, I have to request you will accept 50*l.* on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree on the part of myself, and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.*":—Held, that this letter, coupled with the facts, was evidence of an account stated, and that it was no answer to shew that the defendant was not a member of the company when the original debt was contracted. *Barker* v. *Birt*, 10 M. & W. 61; 11 L. J., Ex. 375; 6 Jur. 736.

A plaintiff signed a contract of sale of goods to the defendant; he afterwards sued the defendant for a sum which he contended was due to him out of the proceeds of the goods as a balance, after repaying the amount advanced by the defendant on their security. The plaintiff gave evidence that on the sum being demanded by his agent as the balance out of the proceeds, the defendant admitted the correctness of the amount, and said he would pay it over:—Held, that though the sale was absolute in law, there was evidence that it was accompanied by a trust that the defendant should account for the proceeds, and that the facts shewed a sufficient consideration for the account stated by the defendant to entitle the plaintiff to recover the balance, as money due upon an account stated. *Howard* v. *Brownhill*, 2 C. L. R. 125; 23 L. J., Q. B. 23.

A plaintiff, having a claim for work and materials against the defendant, to the amount of 67*l.*, was indebted to him in 111*l.* The defendant, as security for 100*l.*, held an equitable mortgage upon land of the plaintiff. The parties having met together, ascertained the value of the plaintiff's interest in the land to be 70*l.*; and it was verbally agreed that the defendant should have the plaintiff's equity of redemption, and that the plaintiff should be credited with 70*l.*, which being added to the 67*l.*, the debt of 111*l.* was to be wiped out, and a balance of 26*l.* left in his favour; but it was finally agreed that it should be taken at 22*l.* The plaintiff, before action, sold the land to the defendant:—Held, that the plaintiff was entitled to recover the balance of 22*l.* as money due upon an account stated. *Laycock* v. *Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43; 10 Jur. (N.S.) 336; 9 L. T. 378; 12 W. R. 76.

A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be relied on in support of a count upon an account stated. *Kennedy* v. *Brown*, 13 C. B. (N.S.) 677; 32 L. J., C. P. 137; 9 Jur. (N.S.) 119; 7 L. T. 626; 11 W. R. 284.

A promise by a client to pay money to a counsel for his advocacy, or for other services incidentally connected with litigation, whether made before, during, or after the litigation, has no binding effect, and therefore such a promise is not sufficient to support an account stated. *Ib.*

### 4. By or Against what Persons.

**Agents.**]—To connect B. with A., who had stated an account with the plaintiffs as a co-promisor, it was shewn that they were the trustees of an insolvent estate, in respect of which the debt arose; that A. and B. were at the counting-house of the plaintiffs on several occasions together; and at a meeting of the creditors of the insolvent estate the amount of the plaintiff's debt was stated by one of the defendants in the presence of the other, and that B. had admitted in a letter that there was a debt due to the plaintiffs:—Held, that the jury was justified in coming to the conclusion that A., in stating the account with the plaintiffs, had authority to bind B. *Chisman* v. *Court*, 2 Man. & G. 317; 2 Scott (N.R.) 569; 10 L. J., C. P. 124.

In order to constitute an account stated, the admission of liability must be made to the opposite party or his agent. *Bates* v. *Townley*, 2 Ex. 152; 19 L. J., Ex. 399; 12 Jur. 606.

The particulars in an action were, "to a beast sold and delivered, 13*l.* 10*s.*" The only evidence

was that the plaintiff admitted, in a conversation with a third person, not shewn to be an agent of the plaintiff, that he owed the latter 13*l.* 10*s.* :—Held, that this was no evidence of an account stated, and that it was not evidence on the count for goods, as it was not shewn to be applicable to the particulars. *Breckon* v. *Smith*, 1 A. & E. 488.

The plaintiff's solicitor, who carried on business within the jurisdiction of the mayor's court, wrote to the defendant demanding payment of 7*l.* 6*s.* 6*d.* for goods sold and delivered to him by the plaintiff. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. The defendant, in a letter written to the plaintiff's solicitor—posted outside, but received within the jurisdiction—admitted that he owed 5*l.* 6*s.* 6*d.* to the plaintiff. The plaintiff having brought an action in the mayor's court to recover 5*l.* 6*s.* 6*d.* on an account stated, the defendant obtained a writ of prohibition :—Held, that the admission of the defendant and the bringing of the action amounted to an account stated; that the account was stated within the jurisdiction of the mayor's court, and that the plaintiff's solicitor was his agent to receive the admission and to state the account, and that therefore the mayor's court had jurisdiction to try the action. *Grundy* v. *Townsend*, 36 W. R. 531—C. A.

**Executors.**]—Among the papers of a testator were found two letters sealed and directed, "For G., my late servant." G. had been in his service as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money; and one of the letters stated that the testator inclosed 200*l.* as a mark of respect, and the other letter stated that the inclosed was for her long and faithful services. G. applied to the executors for payment of the notes, and upon seeing the notes they paid her a portion, and promised to pay the remainder, but afterwards refused to do so :—Held, as an action was not maintainable by G. upon the notes, which were in effect a legacy, and an informal one, in not being duly attested as required by 7 Will. 4 & 1 Vict. c. 26, and therefore void, that the action was not maintainable on an account stated, inasmuch as the promise of the executors was made on a supposed debt which in fact was not due. *Gough* v. *Findon* or *Tindon*, 7 Ex. 48; 21 L. J., Ex. 58.

In an action by the executors of the payee of a note, against the makers, the executors proved the note, with the following indorsement upon it, signed by the makers and one of the executors :—"Hull, 1838.—Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thomas Purdon" :—Held, sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death. *Purdon* v. *Purdon*, 10 M. & W. 562; 12 L. J., Ex. 3.

**Husband and Wife.**]—A count by husband and wife for money found to be due from the defendant to the wife before her marriage on accounts stated between them, and for money found to be due from the defendant to the plaintiffs since their intermarriage on accounts stated between them since the intermarriage, is a bad count, for not averring that the accounts were stated in respect of money due in right of the wife, or otherwise showing her interest in the money. *Johnson* v. *Lucas*, 1 El. & Bl. 659; 22 L. J., Q. B. 174; 17 Jur. 1066.

Semble, that a count by husband and wife on an account stated with them in respect of a debt averred to be due in right of the wife, or for which she had been the meritorious cause of action, would be good. *Ib.*

**Lunatics.**]—A. kept cash with a banker, and the balances to his credit were stated from time to time in a pass-book. He became a lunatic, but the account continued to be kept by his family; and, in the pass-book, the entries in which were in the banker's handwriting, a balance was stated to the credit of A. :—Held, that this was not evidence to support a count on an account stated with A., in an action by his representative against the banker, to recover the amount of such balance. *Tarbuck* v. *Bispham*, 2 M. & W. 2; 6 L. J., Ex. 49.

**Partners.**]—A., B. and C. were railway contractors in partnership, and had entered into a contract to do work for a railway company. D. had entered into a sub-contract to do part of the work, for which part bricks were required, and it was necessary that D. should have coals to burn the bricks. In order to induce the plaintiff to supply D. with coals, A., without the previous knowledge or subsequent assent of his copartners, entered into a guarantee, in the name of the firm, to secure the payment of the price of the coals to be supplied to D. by the plaintiff. The managing clerk of the firm, without the knowledge of B. and C., wrote letters to the plaintiff containing evidence of an account stated respecting the amount due under the guarantee :—Held, that as the giving the guarantee was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B. and C. *Brettel* v. *Williams*, 4 Ex. 623; 19 L. J., Ex. 121.

### 5. Evidence to Support.

In an action to recover sums received by the defendant, as servant to the plaintiff, the defendant put in the following memorandum, written by the plaintiff on the back of an unstamped receipt, "Balanced up to this day as per cash book, 19th November, 1845, S. F." :—Held, that this memorandum was admissible without a stamp, though the receipt on which it was written was not; and that in the absence of any evidence by the plaintiff to the contrary, it was evidence that up to the day of its date the account between the parties had been adjusted, and that nothing was then due from the defendant. *Finney* v. *Tootel*, 5 C. B. 504; 17 L. J., C. P. 158; 12 Jur. 291.

When the particulars of demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for the want of a promissory note stamp :—Held, that the account stated might be proved by other evidence than the memorandum. *Singleton* v. *Barrett*, 2 C. & J. 368; 2 Tyr. 409; 1 L. J., Ex. 134.

Held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it. *Ib.*

In August, 1844, the defendant gave the plaintiff a promissory note for 23*l.* 2*s.* 8*d.*, which the note described as being the amount of interest due on a note for 117*l.* 4*s.*, dated 6th July, 1838, up to 6th July, 1844 :—Held, to be evidence of an account stated in August, 1844, of a subsisting debt of 117*l.* 4*s.* *Perry* or *Penny* v. *Slade*, 8 Q. B. 115 ; 15 L. J., Q. B. 10 ; 10 Jur. 31.

A note payable five years after date, for value received, is evidence of an account stated against which the statute of limitations does not commence running until the maturity of the note. *Fryer* v. *Roe*, 12 C. B. 437.

In an action on a bill or note against an indorser by an indorsee, the bill will not be evidence of an account stated, unless there is an admission of the money being due. *Bird* v. *Legge*, 7 D. P. C. 814 ; 5 M. & W. 418 ; 3 Jur. 823. See also *Jardine* v. *Payne*, 1 B. & Ad. 663 ; 9 L. J. (O.S.) K. B. 129.

In an action for use and occupation, 4*l.* was paid into court on the account stated. The plaintiffs proved that the defendant being indebted to them as surviving executors, and having no other account with them, was called upon by them for payment, and refused, saying he had a cross-demand on the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4*l.*, and contended that these facts with the admission implied by the payment into court entitled them to recover the larger sum on the account stated, the other accounts being inapplicable :—Held, that they could not so recover, for that the averment of an account stated could only refer to a single occasion ; and the answer of the defendant, with the subsequent payment into court, merely showed that upon that accounting, which alone was in question, the defendant was found indebted 4*l.* *Kennedy* v. *Withers*, 3 B. & Ad. 767 ; 1 L. J., K. B. 260.

Evidence of an account stated, whereby the defendant admitted a balance due to the plaintiff, is not done away, but confirmed by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter-demand, if he had any. *Hall* v. *Odber*, 11 East, 118 ; 10 R. R. 443.

T., by will, desired that 500*l.* lent by her to the defendant should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister, but that on her sister's death T.'s executors should collect the 500*l.* and divide it between her two nieces, one of whom was the plaintiff and the other the defendant's wife, the same to be for their sole and separate use, free from the control and debts of any husband, with benefit of survivorship. During the lifetime of the tenant for life, the plaintiff's husband took from the defendant his acceptance for 242*l.* payable in twelve months, and as for the share of the plaintiff's wife in the legacy. The plaintiff and her husband, and the defendant and his wife, signed a receipt to the executor of T.'s will as and for a receipt of the legacy of 500*l.* But no money ever in fact passed ; the 500*l.* was never collected from the defendant ; the acceptance was never negotiated ; and on the death of the plaintiff's husband the defendant procured a return of it to him. Again : the plaintiff's father bequeathed to her the proceeds of a life policy, and made the defendant his executor, who, acting in that capacity, received 200*l.* upon the policy. Afterwards, and after the death of the plaintiff's husband and the defendant's wife, the plaintiff claimed from the defendant payment of the two sums of 242*l.* and 200*l.*, and a further sum for money lent by her to him. At an interview between them, in the presence of the plaintiff's attorney, the defendant dictated, and the attorney wrote out, a memorandum, by which the defendant charged himself with the 242*l.* and 200*l.*, and the item for money lent, and with interest from the date of the death of the plaintiff's husband. At the same interview he mentioned certain claims of his against the plaintiff's husband, and asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay the plaintiff the amount due to her out of any moneys that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off. It was objected that the 242*l.* had been reduced into possession by the plaintiff's husband, and therefore she had no right of action in her personal capacity ; and that the 200*l.* was held by the defendant as executor, and therefore he could not properly be sued in his personal capacity ; and that the memorandum and authority, taken together, were not, under the circumstances, a statement of an account as due in præsenti :—Held, that the jury was justified in finding that the memorandum was a statement of account sufficient to entitle the plaintiff to maintain her action in respect of both the sums. *Topham* v. *Morecraft*, 8 El. & Bl. 972 ; 4 Jur. (N.S.) 611 ; 6 W. R. 294.

In an action on an attorney's bill of costs, if he fails on the count for work and labour, because no bill has been delivered, he cannot recover upon an account stated, though he proves that the charges were assented to by the client. *Brooks* v. *Bockett*, 9 Q. B. 847 ; 16 L. J., Q. B. 178 ; 11 Jur. 284.

B. lent money to A. upon C.'s promise to become surety for its repayment ; and on the money being advanced, A. and C. signed and delivered to B. the following memorandum : "We, jointly and severally, owe you 60*l.*" :—Held, evidence of an account stated by A. & C. jointly. *Buck* v. *Hurst*, L. R. 1 C. P. 297 ; 12 Jur. (N.S.) 704.

An acknowledgment by a defendant, after action, of money being due to the plaintiff, when there is no debtor account between them proved to have existed before action, is not evidence on an account stated. *Allen* v. *Cook*, 2 D. P. C. 546.

Nor is an offer of a cognovit after action brought. *Spencer* v. *Parry*, 4 N. & M. 770 ; 3 A. & E. 331 ; 4 L. J., K. B. 186.

A plaintiff sued upon an account rendered by the defendant :—Held, that the plaintiff might impeach an item in the account by which the defendant sought to retain money under an illegal contract, notwithstanding that account was the only evidence in the action. *Rose* v. *Savory*, 2 Bing. (N.C.) 145 ; 1 Hodges, 269 ; 2 Scott, 199.

**I O U's.**] — C. joined in giving a joint and several promissory note for a debt due to the plaintiff from another of the makers, for which C. was not previously liable. The note was afterwards returned to the makers to have another maker's name added (which was afterwards done), and an I O U for value received, signed by C. and another of the makers, was in

the meantime left with the plaintiff as a security. Semble, that such a document given for a debt for which C. was not primarily liable would not support an action on an account stated against C. *Gould* v. *Coombs*, 1 C. B. 543; 14 L. J., C. P. 175; 9 Jur. 494.

Held, that, even if the note was for want of a stamp in consequence of the addition of a new maker void, it was admissible upon the account stated, to show that, before the alteration, and at the time when the I O U was given, there was a debt due to the plaintiff upon the note, to which C. was primarily liable. *Ib.*

An I O U in the defendant's writing, not addressed to anyone, but produced by the plaintiff, is primâ facie evidence of an account stated with him. *Douglas* v. *Holme*, 4 P. & D. 685; 12 A. & E. 641; 10 L. J., Q. B. 43. *S. P.*, *Payne* v. *Jenkins*, 4 Car. & P. 324; *Lemere* v. *Elliott*, 6 H. & N. 656; 30 L. J., Ex. 350; 7 Jur. (N.S.) 1206; 4 L. T. 304.

But not of money lent. *Fesenmayer* v. *Adcock*, 16 M. & W. 449.

If the defendant wishes to rebut the inference arising from its production by the plaintiff, he should show that it has been in the hands of some other party. *Curtis* v. *Richards*, 1 Man. & G. 46; 1 Scott (N.R.) 155; 9 L. J., C. P. 240; 4 Jur. 508.

The directors of a mine, conducted on the cost-book principle, wanting money to work the mine, entered into an agreement that they should each take 100 shares in it, at 1*l.* per share, and each of them accordingly gave his I O U to the secretary for 100*l.*:—Held, evidence of an account stated between the secretary and a director who had given his I O U pursuant to the agreement. *Graves* v. *Cook*, 2 Jur. (N.S.) 475.

Upon a sale of a leasehold, the vendee agreed to pay a deposit of 50*l.*, and the residue on completion. Instead of actually paying the 50*l.* he gave the vendor 5*l.* and an I O U for 45*l.*:—Held, that the vendor, failing to make a good title, was not entitled to recover the 45*l.*, as money due upon an account stated, and that the defence was admissible under the plea of never indebted. *Wilson* v. *Wilson*, 2 C. L. R. 818; 14 C. B. 616; 23 L. J., C. P. 137; 18 Jur. 581; 2 W. R. 421.

At the sale of an estate, one of the conditions being that a deposit should be paid immediately, a lot was knocked down to a person, who having no money with him, an arrangement was entered into, with the sanction of the vendor's solicitor, in virtue of which the vendee gave his I O U, addressed to the auctioneer, for the deposit, and signed a memorandum that he had purchased the property, and paid the deposit, and bound himself to complete the purchase, which memorandum was also signed by the auctioneer as agent of the vendor. The bargain having afterwards gone off:—Held, that the auctioneer might recover the amount of the I O U under an account stated. *Cleave* v. *Moors*, 3 Jur. (N.S.) 48; 5 W. R. 234.

The premium stated in an indenture of apprenticeship was 50*l.*, but at the time of execution the defendant agreed to give the plaintiff (the master) four I O U's for 20*l.* more, for which instruments the defendant, on the application of the plaintiff, who feared that they were void promissory notes, afterwards substituted a single I O U in a proper form, and on that the action was brought. The jury found that the deed of apprenticeship, though void, was the very deed which the defendant bargained for:—Held, that the plaintiff was entitled to recover. *Westlake* v. *Adams*, 5 C. B. (N.S.) 248; 27 L. J., C. P. 271; 4 Jur. (N.S.) 1021. *S. C.*, at nisi prius, 1 F. & F. 183.

A., in January, 1853, gave to B. his I O U for 65*l.* After A.'s death, B. having claimed the amount, his receipt for the amount was produced. B. swore positively that the amount had never been received. A court of equity held, that it could not act on his unsupported testimony against the written evidence. *Farrow, In re*, 22 Beav. 400.

An agreement for the purchase of a public-house contained the following stipulations:—"And, as earnest of this agreement, the purchaser has paid into the hands of the vendor 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated; and, if the purchaser shall fail to perform his part of the agreement, then the deposit-money shall become forfeited, in part of the following damages; and if either of the parties neglects or refuses to comply with any part of this agreement, he shall pay to the other 50*l.*, mutually agreed upon to be the damages ascertained and fixed, on breach hereof." Instead of depositing the 50*l.* the purchaser gave an I O U for the amount. The purchaser failed to complete the purchase, and the vendor sold the public-house for 10*l.* less than the purchaser agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement:—Held, that he was entitled to recover the 50*l.*, and was not limited to the amount of damage which he had actually sustained. *Hinton* v. *Sparks*, 37 L. J., C. P. 81; L. R. 3 C. P. 161; 17 L. T. 600; 16 W. R. 360.

The plaintiff, the grantee of a bill of sale, having taken possession of the goods, the defendant, the brother of a grantee under a subsequent bill of sale, reimbursed the plaintiff part of the money he had paid to satisfy a distress for rent on the goods, and gave him an I O U for the residue, upon an undertaking by the plaintiff not to remove or sell the goods:—Held that the plaintiff was entitled to recover upon the I O U, on an account stated. *Bain* v. *Harris*, 1 L. T. 40; 8 W. R. 79.

J. M.

## MONEY PAID INTO COURT.

*See* PRACTICE.

## MONITION.

*See* ECCLESIASTICAL LAW.

## MONOPOLY.

*See* PATENT.

# MONTH.

*See* TIME.

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# MORTGAGE.

[BY A. LAWRENCE.]


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1. IN GENERAL.

**Whether Mortgage or not.**]—The fair criterion in equity to decide whether a deed be a mortgage or not, is, are remedies mutual and reciprocal? Has the grantor all the remedies a mortgage is entitled to? *Goodman* v. *Grierson*, 2 Ball & B. 278; 12 R. R. 82.

In equity, the rule is, once a mortgage always a mortgage. *Ib.*

**By way of Trust.**]—Whether a security by way of conveyance to a trustee, on trust to sell and pay out of the proceeds the sum secured, is a legal mortgage within Lord Loughborough's Order, quære. *Barnett, Ex parte, Allen, In re*, 3 Mont. D. & D. 662.

Mortgagee, under a trust to raise money by sale or mortgage, has only the remedies of a mortgagee, and cannot call upon the trustees for execution of the trust. *Palk* v. *Clinton* (*Lord*), 12 Ves. 48; 8 R. R. 283.

A mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favour of the mortgagor within 3 & 4 Will. 4, c. 27, s. 25. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113.

A conveyance of an estate in trust, that the same should stand charged with payment of a sum of money and interest, with a power of sale on default in payment after notice, is not a mortgage, but the trustee is entitled to the aid of the court in effecting a sale. *Sampson* v. *Pattison*, 1 Hare, 533.

A. being indebted to B. conveys lands to a trustee, in trust "out of the interest, proceeds, or annual rent, to pay the head rent, and also the premiums of insurance on the life of A. for 500*l.*; and also to pay over to B. the sum of 400*l.* with legal interest at six per cent. for every year until the same shall be paid off and discharged; and from and after the payment thereof to reconvey to A. or his assignees." The policy was assigned by a separate deed to the trustee to secure the 400*l.*:—Held, that B. was not a mortgagee under this deed, and was not, therefore, entitled to have the land sold, but should be paid out of the rents and profits, and have a continuing receiver appointed for that purpose. *Taylor* v. *Emerson*, 2 Con. & L. 558; 6 Ir. Eq. R. 224; 4 Dr. & War. 117.

**Charge on Lands Purchased.**]—S., being indebted to E. in 15,000*l.*, and having covenanted to secure it on land, agreed to purchase lands from E., and, for part of the consideration, to give a mortgage of those lands, "subject however to a prior mortgage for 15,000*l.*":—Held, that these words did not charge the 15,000*l.* debt upon the purchased lands. *Eyre* v. *Sadlier*, 15 Ir. Ch. R. 10.

**Personal Assets.**]—A mortgage in fee is considered as personal assets. *Casborne* v. *Scarfe*, 1 Atk. 605.

2. PARTIES.

**Mortgagor—Position of.**]—In a court of law a mortgagor, in the actual possession of the mortgaged premises, may properly be described as tenant of the mortgagee. *Partridge* v. *Bere*, 1 D. & R. 272; 5 B. & Ald. 604; 24 R. R. 487.

Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only, and may be treated either as a tenant or a trespasser, at the election of the mortgagee. *Doe* d. *Roby* v. *Maisey*, 8 B. & C. 767; 3 M. & Ry. 107. S. P., *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; 2 M. & P. 749; 7 L. J. (O.S.) C. P. 134; 30 R. R. 686.

A deed, after the usual power of sale by public auction or private contract in the event of the nonpayment of the mortgage money, contained a proviso and covenant by the mortgagee that no sale or public notice or advertisement for any sale should be made or given, or any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. There was likewise a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent, by two equal half-yearly payments, but no livery of seisin was made to the mortgagor:—Held, that the mortgagor was only tenant at will to the mortgagee, and that those clauses in the deed did not create in him a tenancy from year to year. *Doe* d. *Dixie* v. *Davis*, 7 Ex. 89; 21 L. J., Ex. 60; 16 Jur. 44.

A mortgagor will never be permitted to dispute the title of his mortgagee. *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 601. S. P., *Doe* d. *Bristowe* v. *Pegge*, 1 Term Rep. 760, n.; 4 Dougl. 309.

—— **After Default.**]—By indenture of mortgage A. released premises to the mortgagee in fee, and demised to him other premises for years, provided that, if A., the mortgagor, should pay the mortgage money on the 5th October next, the deed should be void; but, if the mortgagor should not then pay, it should be lawful for the mortgagee, after giving one month's notice, as after mentioned, to enter, and, whether in or out of possession, to lease and sell. Covenant by mortgagee not to sell or lease until he had given one month's notice demanding payment, and the mortgagor should have made default:—Held, that, inasmuch as after the 5th October the time, if any, during which the mortgagor was to hold was uncertain, and there was no affirmative covenant that he should hold at all, this was a covenant only, and not a redemise to the mortgagor; and that, on default by the mortgagor, the mortgagee might, after that day, bring ejectment against him without notice. *Doe* d. *Parsley* v.

*Day*, 2 Q. B. 147 ; 2 G. & D. 757 ; 12 L. J., Q. B. 86 ; 6 Jur. 913.

A mortgage deed contained a provision by which the mortgagor "did attorn tenant to the mortgagee," at a rent "payable quarterly," to be recoverable by distress and sale, action of "debt and otherwise howsoever" :—Held, that, after default made in payment of the principal, the mortgagee might eject the mortgagor without any notice to quit. *Doe* d. *Snell* v. *Short* or *Thom*, 4 Q. B. 615 ; 3 G. & D. 637 ; 12 L. J., Q. B. 264 ; 7 Jur. 847.

—— **Covenant not to Call in Principal.**]—Land was mortgaged in fee, with a proviso for redemption, on payment of the principal in June. 1833 ; but it was agreed that the mortgagee should not call in the principal till 1840, if interest was regularly paid in the meantime, and that the mortgagor should hold the premises, and take the rents, issues and profits for his own use, until default should be made in payment of principal and interest :—Held, that, although, by the first part of the deed, the fee was vested in the mortgagee, the subsequent part operated as a redemise of the premises to the mortgagor till 1840, provided the interest was regularly paid in the meantime. *Wilkinson* v. *Hall*, 4 Scott, 301 ; 3 Bing. (N.C.) 508 ; 3 Hodges, 56 ; 6 L. J., C. P. 82.

—— **Insanity of.**]—The mere insanity of a mortgagor to whom or to whose agent the mortgage money has been honestly paid, and of whose insanity no advantage was taken in the transaction, does not annul the rights of the mortgagee. *Campbell* v. *Hooper*, 3 Sm. & G. 153 ; 3 Eq. R. 727 ; 24 L. J., Ch. 644 ; 1 Jur. (N.S.) 670 ; 3 W. R. 528.

### 3. Form, Validity and Effect.

**Deed—Alteration.**]—A mortgagor executed a mortgage deed to A., the solicitor who prepared it. On the following morning A. filled in the date, the names of the tenants, and the date of the proviso for redemption :—Held, that this alteration did not render the deed void. *Adsetts* v. *Hives*, 33 Beav. 52.

—— **Description.**]—B., in consideration of a sum of money lent to him by parties who carried on business under the name of "The City Investment and Advance Co.," assigned by deed certain goods of his to the company by way of mortgage to secure the loan :—Held, that the parties need not be described in the deed by their christian names or surnames, and that the conveyance of the property to the company operated as a conveyance to the company, on its being ascertained that they were the persons described under the name of such company. *Maughan* v. *Sharpe*, 17 C. B. (N.S.) 443 ; 34 L. J., C. P. 19 ; 10 Jur. (N.S.) 989 ; 10 L. T. 870 ; 12 W. R. 1057.

—— **Delivery.**]—A., being indebted to his bankers, executed a deed purporting to be a mortgage to them for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A.'s bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagees :—Held, that this was a good delivery by A. to the mortgagees. *Grugeon* v. *Gerrard*, 4 Y. & C. 115.

—— **Delivering up.**]—A delivery up of mortgage deeds does not cancel the debt. *Hurst* v. *Beach*, 5 Madd. 351 ; 21 R. R. 304.

Purchase for value without notice is not an absolute defence to a suit to set aside on equitable grounds a mortgage of a fund in court ; the court will determine the rights to the fund as between the parties, without waiting till it becomes distributable, and according to such determination will declare a deed under which the purchaser claims as mortgagee to be void as against one of the parties thereto whose property was thereby mortgaged. *Tabor* v. *Cunningham*, 24 W. R. 153.

—— **Proof of.**]—A mortgage deed could not be produced, and a copy purporting to have been furnished by the solicitor who held the deed was produced on behalf of the plaintiff as evidence of the deed ; the plaintiff also deposed to the existence of the mortgage. The defendants had in their answers not expressly challenged the mortgage deed, and had admitted that there had been a reconveyance of part of the property comprised in the mortgage :—Held, that as against them the mortgage deed was sufficiently proved. *Heath* v. *Crealock*, 44 L. J., Ch. 157 ; L. R. 10 Ch. 22 ; 31 L. T. 650 ; 23 W. R. 95 —C. A.

**Validity.**]—A harbour company was empowered by its acts of incorporation to raise money on mortgages of the works and tolls, which were not to be effectual until they were entered in the company's books by its clerk, and a memorial of the entry was indorsed on them :—Held, that an unindorsed mortgage, regular in other respects, was effectual. *Jortin* v. *S. E. Ry.*, 6 De G. M. & G. 270 ; 3 Eq. R. 281 ; 24 L. J., Ch. 343 ; 1 Jur. (N.S.) 433 ; 3 W. R. 190.

Such provisions as these respecting the indorsement depend on the purpose of the act. If it be one of public concern, they are construed largely, as in the Annuity Acts, Shipping Acts, and the modern statutory provisions for registering judgments ; but, if not, the effect is limited by the purposes of the act. *Ib.*

A subscriber to the Customs Annuity and Benevolent Fund, which was established by act of parliament for the benefit of widows, children, and other relatives of officers of the customs, by instrument duly executed and deposited with the directors, irrevocably assigned two-thirds of the portion payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees :—Held that the mortgage was valid as against the widow, children, and relations of the subscriber. *Maclean*, *In re*, 44 L. J., Ch. 145 ; L. R. 19 Eq. 274 ; 31 L. T. 632 ; 23 W. R. 206.

A debt, secured by an assignment by way of mortgage of an interest in a legacy charged on land, expectant upon the death of a tenant for life, became barred or extinguished by the Statute of Limitations before the death of the tenant for life :—Held, that the assignment did not thereupon cease to operate as a valid security. *Seager* v. *Aston*, 26 L. J., Ch. 809 ; 3 Jur. (N.S.) 481 ; 5 W. R. 548.

**Fraud of Solicitor.**]—A. B. is induced to intrust C. D., his co-trustee and a solicitor, with trust moneys, upon his representation that E. F. wishes to obtain the amount upon mortgage. C. D., who is also confidential solicitor of E. F.,

induces him to execute a mortgage to A. B. and C. D. of certain property of which C. D., as his solicitor, holds the title deeds. E. F. executes this deed in ignorance of its contents and effect from his confidence in C. D. The money advanced by A. B. is retained by C. D., nor is any part of it ever received by E. F. Two years afterwards C. D. becomes bankrupt, and is subsequently struck off the rolls. Mortgage deed set aside as fraudulent and void as against E. F., and an action upon the covenant by A. B. restrained, the money not having been advanced by him upon the execution of the mortgage deed, but upon the false representation of C. D., who retained the money in his own possession. *Rushout* v. *Turner*, 5 W. R. 670.

**Usury Law.**]—A mortgagee, before the repeal of the Usury Acts, advanced to a mortgagor the sum of 342*l.* 0*s.* 10*d.*, being the produce of a sale of stock; and the mortgagor agreed that the sum so advanced to him should be regarded as 360*l.*, so as to protect the mortgagee against loss on reinvestment, and to pay interest on 360*l.* at 5*l.* per cent.:—Held, that this was a fair bargain, and, therefore, not void within the Usury Acts. *Baskett* v. *Skeel*, 2 N. R. 547; 11 W. R. 1019.

**Condition Precedent.**]—By a mortgage deed between the mortgagor and two others, as sureties, and the mortgagee, after reciting that the mortgagor was possessed of certain hereditaments, and of a policy of insurance on his life for ——*l.*, and that the mortgagee had agreed to lend him 1,000*l.* to be secured as therein provided, and that "upon treaty for the loan it was agreed that the repayment should be further secured by the sureties joining in the deed"; the mortgagor mortgaged the hereditaments and the policy of insurance for ——*l.*, and all moneys assured or to become payable under it, as security for the debt. There were covenants by the mortgagor and the two other sureties to pay the interest and to pay the premiums on the policy and any sums necessary for effecting another, if it should become void. There was a power of sale by the mortgagee of the hereditaments and the policy. The mortgagor covenanted that, if the mortgagee should be unable to execute the power of sale, or if the proceeds should not be sufficient, he would pay the deficiency to the amount of 300*l.* To an action on this covenant it was pleaded that no policy was effected; and that one of the sureties had not executed the deed:—Held, first, that it was a condition precedent that a policy should have been effected. *Coyte* v. *Elphick*, 22 W. R. 541.

Held, secondly, that in the absence of express provision it was not a condition precedent that the other surety had signed. *Ib.*

**Mortgage after Contract for Sale.**]—A mortgage made subsequently to a contract for the sale of an estate conveys to the mortgagee only that which the vendor is entitled to under that contract. If the mortgagee gives no notice of an intention to interfere with the contract, its stipulations remain as before, and affect the mortgagee as they would have affected the mortgagor. *Rose* v. *Watson*, 10 H. L. Cas. 672; 33 L. J., Ch. 385; 3 N. R. 673; 10 Jur. (N.S.) 297; 10 L. T. 106; 12 W. R. 585.

**Usual Provisions Omitted.**]—Although no day was fixed in the mortgage deed for repayment, yet, there being a covenant by the borrower to pay when required to do so, and a covenant by the lender to reconvey upon being repaid, it was held that a bill for foreclosure and sale was maintainable. *Balfe* v. *Lord*, 1 Con. & L. 519; 2 Dr. & War. 480; 4 Ir. Eq. R. 468.

A court of equity will presume an instrument of this nature, intended as a security for money advanced, to be an ordinary mortgage accompanied with the usual remedies, unless the term of the instrument exclude such a construction. *Ib.*

Freehold property was conveyed to A. B. in trust for sale, and to pay himself his debt. The deed contained a proviso for reconveyance, on payment of principal and interest, and a covenant by A. B. not to sell under the trust until six months after notice to pay:—Held, that the object of the trust being to secure money, it was in the nature of a mortgage, though no equity of redemption was expressly reserved; and that A. B. was not entitled to a decree for an immediate sale, but that the debtor ought to have six months to redeem. *Bell* v. *Carter*, 17 Beav. 11; 22 L. J., Ch. 933; 17 Jur. 478; 1 W. R. 270.

**Unusual Provisions.**]—Unusual provisions in a mortgage had been stipulated for by the mortgagee, who was a solicitor, but had been fully explained to the mortgagor:—Held, that they were binding upon him, except that, as to certain additional property, which had been included solely for the mortgagee's own protection, an additional rate of interest must be disallowed. *Jones* v. *Linton*, 44 L. T. 601.

**Power of Attorney.**]—In 1841 a client, before going abroad, gave a power of attorney to his solicitor in England to manage the whole of the client's property and concerns in England while he was abroad, and, generally, to do all other acts, deeds, matters or things whatsoever in or about the estates, property and affairs of the client, as amply as the client could do or have done. In the year 1849 the attorney, professing to act under the power, borrowed 500*l.* upon deposit of a policy of assurance belonging to the client, and afterwards misapplied the money:—Held, that, whether the power of attorney per se authorised the raising of the money upon the security of the policy or not, yet, when coupled with a correspondence beween the attorney and client, showing that the latter, believing the power to have that effect, desired it to be so exercised when occasion should require, it precluded the client from disputing the validity of the mortgage. *Perry* v. *Holl*, 2 De G. F. & J. 38; 29 L. J., Ch. 677; 6 Jur. (N.S.) 661; 2 L. T. 585; 8 W. R. 570.

**Estate to be Absolute on Default.**]—Proviso in mortgage, that, if mortgagor fails in payment by certain day, estate shall be absolute in law and equity:—Held, a good condition, and no relief against it. *Tasburgh* v. *Ecklin*, 2 Bro. P. C. 265.

**Inequitable Condition for Loan.**]—The purchase of a piece of land, at an exorbitant price, will not be allowed to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow. A mortgage of a fund in court, in a suit of *Collett* v. *Maude*, by W. G. C., the purchaser of the land, to secure 6,000*l.*, the purchase-money, to G. W. F.,

the vendor, set aside on the ground that the transaction was fraudulent. An assignment of a chose in action must be taken subject to all prior claims. Sub-mortgages of the fund in court, made without noticing G. W. F., were therefore set aside; or his title was either void or subject to the prior equity of W. G. C., notwithstanding he had been induced to create or countenance such sub-mortgages. The acts of W. G. C. in joining to create the sub-mortgages were not a recognition of, or an acquiescence in, the sub-mortgages, as they were done in entire ignorance of his rights, and under the idea that the original transaction with G. W. F. was unimpeachable. *Cockell* v. *Taylor*, 15 Beav. 147; 21 L. J., Ch. 545.

**Absence of Independent Advice—High Rate of Interest—Unrestricted Power of Sale.**]—The plaintiff, who had only just attained his majority, and his sister and brother, being entitled in remainder under a will of which R., who was their father, and P. were trustees, and under which R. was tenant for life, joined with R. in mortgaging the property to secure advances, with interest thereon at 10 per cent., which was made for R.'s benefit. The power of sale was exercisable without notice, and the mortgage contained a clause providing that, if the power of sale should arise in the lifetime of R., it should be lawful for P. to postpone the sale, or to await R.'s death, and then obtain payment of the shares of the children. P. was a certificated conveyancer, and prepared the deeds for all parties. In an action by the plaintiff against R. and P. and the other mortgagors, claiming to have the deeds set aside on the ground of undue influence and want of proper advice, or that R. might indemnify the plaintiff, the judge being satisfied that the plaintiff had, on his own evidence, acted voluntarily and with full understanding, the plaintiff was refused relief against P., but R., having used the trust funds for his own benefit, was ordered to indemnify the plaintiff against his liability to P.:—Held (on appeal against the judgment in favour of P.), that, the court being dissatisfied with the mortgage (1) on account of the interest being 10 per cent.; (2) on the ground that the exercise of the power of sale could be postponed; and (3) on the ground that the power of sale was unrestricted, the judgment would only be affirmed on the terms of (1) P. asking for no costs in the court below or on appeal; (2) P. undertaking to press for no interest against the plaintiff which had accrued due in R.'s lifetime; (3) P. allowing the plaintiff to redeem his share on payment of a sum proportionate to his share of the property mortgaged. *Readdy* v. *Pendergast*, 56 L. T. 790—C. A.

**Presumed Intention to Keep Alive after Reconveyance.**]—Where a person who claims to be owner of an equity of redemption, but whose title to a share of the property is disputed in a pending action, pays off the mortgage and takes a reconveyance, the court will presume an intention to keep the mortgage alive as against the share in dispute. *Pride, In re, Shackell* v. *Colnett*, 61 L. J., Ch. 9; [1891] 2 Ch. 135; 64 L. T. 768; 39 W. R. 471.

**Whether Mortgage Extinguished or Kept Alive is Question of Intention.**]—Where the question is whether a mortgage security is to be considered as extinguished by merger, or kept alive for the benefit of a transferee, it is in every case a question of the intention of the parties. Such intention may be found in the mortgage deed or in the circumstances attending the transaction, or it may be presumed from the fact that it is for the benefit of the transferee that the charge should be kept alive. *Adams* v. *Angell* (5 Ch. D. 634) followed; *Toulmin* v. *Steere* (3 Mer. 210) distinguished. *Thorne* v. *Cann*, 64 L. J., Ch. 1; [1895] A. C. 11; 11 R. 67; 71 L. T. 852—H. L. (E.)

**Payment off by Purchaser of Mortgaged Property—Merger—Intention to keep Charge Alive—Presumption.**]—Where a purchaser of a property pays off a mortgage on it without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. But the opportunity of making a very doubtful claim against third parties is not such a benefit as is meant in this enunciation of the doctrine; and, if an intention to keep alive a charge of property is inconsistent with the real intention of the parties to the deed by which the property was assigned to the purchaser, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive (Kay, L.J., dissentiente). *Toulmin* v. *Steere* (3 Mer. 210) discussed. *Liquidation Estates Purchase Co.* v. *Willoughby*, 65 L. J., Ch. 486; [1896] 1 Ch. 726; 74 L. T. 228; 44 W. R. 612—C. A.

**Payment off by Tenant for Life—Merger—Intention to keep Charge Alive—Presumption—Relationship of Parent and Child.**]—When a tenant for life pays off a mortgage on the estate, the fact that he is the parent of those entitled in remainder is not of itself sufficient to rebut the presumption that he intends to keep the charge alive for his own benefit. *Harrey, In re, Harrey* v. *Hobday*, 65 L. J., Ch. 370; [1896] 1 Ch. 137; 73 L. T. 613; 44 W. R. 242—C. A.

**Grant of Annuity by Grantee's Attorney—Annuity charged on Estate of less Value than Annuity—Bankruptcy, Proof in.**]—Grant of annuity void for want of a memorial registered, being charged on an estate of less annual value than the annuity, the grantor being the grantee's attorney, preparing the security and depositing the title deeds, but misrepresenting the value of the estate; proof admitted under his bankruptcy only for the money advanced, with liberty to file a bill to establish an equitable lien, upon the ground of fraud, and the deposit of the deeds. *Wright, Ex parte*, 19 Ves. 255.

**Mortgage by Legal Personal Representative.**]—A mortgage of a term of years by a legal personal representative solely for his own benefit, which is bad as being a breach of trust, cannot be treated as, at all events, operating on such estate as he can pass in his character of legal personal representative. *Scott* v. *Alvarez*, 64 L. J., Ch. 376; [1895] 1 Ch. 596; 72 L. T. 455.

**Practice—Setting Aside—Insolvency of Mortgagor—Evidence.**]—In proceedings to set aside

a mortgage on the ground of the insolvency of the mortgagor at the time of the mortgage, the fact of the insolvency must be proved by legal evidence, and in case of doubt the mortgagee is entitled to an issue. *Jones* v. *Mackenzie*, 7 W. R. 717—P. C.

### 4. Mortgage or Purchase.

**Generally.**]—The court leans against the contract for liberty to repurchase, where made at the same time as the grant, and endeavours to make it a redemption. *Longuet* v. *Scawen*, 1 Ves. 405.

A mortgage will not easily be presumed against an absolute conveyance; especially where possession has gone along with the conveyance, and an acquiescence for many years, although there be an incongruous covenant in the deed. A defeasance contained in a separate deed is suspicious, and ought to be discouraged. *Cotterell* v. *Purchase*, Cases t. Talbot, 61.

If a mortgagee afterwards gets an absolute deed, but suffers possession to go some time contrary to it, it will again make it but a mortgage. *Harris* v. *Horwell*, Gilb. 11.

**Mortgage.**]—W., being indebted to M., made an absolute assignment of a reversion, but took a memorandum from M. that M. would reconvey, on repayment, with interest, by W., in six months, W. paying part of the costs. Nothing further was done for eighteen years:—Held, that the transaction was a mortgage. *Waters* v. *Mynn*, 14 Jur. 341.

A security for money lent was made in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than twenty years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount then due for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited:—Held, that such a security is simply a mortgage. *Alison, In re, Johnson* v. *Mounsey*, 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537.

An absolute conveyance from A. to B., dated 4th August, 1814, without any statement of consideration, was held to constitute a mortgage,—the evidence chiefly consisting of a draft bond from B. to A. to reconvey on payment by A. or C. of a debt due to him from the latter, and a lease of part of the premises by A. and B., in which it was stated that the premises were in mortgage to the latter. *Gordon* v. *Selby*, 11 Bligh (N.S.) 351.

An absolute conveyance of a reversionary interest to a solicitor reduced by decree to a mortgage, the solicitor standing in a quasi though not an absolute relationship of trustee and solicitor, and failing to prove that the transaction was clearly understood, and that full value was given. *Denton* v. *Donner*, 23 Beav. 285.

Case where, under the circumstances, a transaction was held to be a mortgage and not a conditional sale. *Fee* v. *Cobine*, 11 Ir. Eq. R. 406.

**Sale or Purchase—Conditional.**]—Where the grantee of lands subject to a limited power of redemption has not all the remedies of a mortgagee, the conveyance is not a mortgage but a conditional sale. *Goodman* v. *Grierson*, 2 Ball & B. 275; 12 R. R. 82.

A., having contracted to purchase some freehold hereditaments, which he was not able to pay for, entered into an agreement with B., that the hereditaments should be conveyed to B., in consideration of certain moneys advanced by B. to A., some of which was applied to pay the deposit in respect of the purchase, and part applied to other purposes; and it was provided that, if A. should, by a given day, repay to B. the purchase-money, and the advances by him, A. being at liberty in the meantime to make sale of the hereditaments with the approval of B., then the agreement was to be void, but otherwise the sale was thereby confirmed absolutely to B. The money was not repaid to B., and he afterwards paid the whole purchase-money and was let into possession. A. became bankrupt:—Held, that this agreement constituted a conditional purchase, and not an equitable mortgage: and that, as the money was not paid at the appointed time, B. was entitled to retain the estate. *Perry* v. *Meddowcroft*, 4 Beav. 197; 12 L. J., Ch. 104.

The owner of an equity of redemption conveyed it by a conveyance, absolute on the face of it, to the mortgagee. A contemporaneous memorandum was executed, declaring that, if he repaid the consideration at any time within three years, the mortgagee would reconvey. The purchase-money was the amount at which the lands were valued, and possession followed the deed, and there was parol evidence to show that the transaction was a purchase, and not a mortgage:—Held, a conditional purchase, and not redeemable. *Neal* v. *Morris*, Beat. 597.

A. conveyed a life estate to B., in consideration of 4,739*l*. By a deed of even date B. contracted that if A. should at any time desire to repurchase the life estate for 4,739*l*., B. would reconvey it to him for that sum. All the expenses of this transaction were paid by A. B. took possession, insured A.'s life for 4,739*l*., and after payment of premiums the surplus rent was between 6*l*. and 6*l*. 10*s*. per cent. on the purchase-money. B. left a will, by which he spoke of the life estate as redeemable on payment of 4,739*l*. and interest, and spoke of his interest as a security. A., after a lapse of nearly thirty years, and many years after the death of the solicitor who conducted the transaction, filed a bill to redeem, and failed in proving by direct evidence that the parties intended a mortgage:—Held, that the transaction was to be treated as a conditional sale, and not as a mortgage, and that A. had no right to an account of rents and profits. *Alderson* v. *White*, 2 De G. & J. 97; 4 Jur. (N.S.) 125; 6 W. R. 242.

—— **Lapse of Time.**]—Held, that if the transaction, considered as a purchase, had been so grossly oppressive that the court would, on that ground, have treated it as intended to be a mortgage, the right to have it so treated would not have been enforced after such a lapse of time, and after the death of the other parties concerned in the transaction. *Ib.*

—— **Presumption of Adverse Possession.**]—Conditional sales are to be regarded in the same light as mortgages, and adverse possession is not, therefore, to be presumed against a mortgagee under such a conditional sale. *Prannath Roy Chowdry* v. *Ramrutton Roy*, 8 W. R. 29—P. C.

—— **Absolute.**]—By an agreement it was recited that the defendant was entitled to two leasehold farms, and that the plaintiff had lent to

him a certain sum, and had agreed to make him further advances, in consideration of the agreement thereinafter contained; and it was agreed that the sum and such further sums as should be thereafter advanced, with interest, should be repaid at the time therein mentioned; but, if default should be made in payment, the defendant agreed to assign to the plaintiff the leasehold farms for the residue of the terms, without any further consideration, together with the furniture, and growing crops, at a valuation. The plaintiff agreed to pay the amount of such valuation, less the moneys advanced. A valuation was taken, and a further payment was made by the plaintiff to the defendant, and the former entered into possession of the property, and tendered the amount of the valuation, but the defendant refused to receive the same, alleging that the agreement was for a mortgage, and not for a sale:—Held, that the relation of vendor and purchaser, and not that of mortgagor and mortgagee, was constituted by the agreement. *Tapply* v. *Sheather*, 8 Jur. (N.S.) 1163; 7 L. T. 298; 11 W. R. 12.

When a mortgagor conveyed to his mortgagee by a deed which was in form an absolute conveyance with a right of redemption within a limited time, and that time expired without such right being exercised, and where it was clear that such was the intention of the parties, and that the mortgagor had had sufficient professional assistance:—Held, that the transaction was an absolute conveyance by sale, and not of the nature of a mortgage. *Gossip* v. *Wright*, 21 L. T. 271; 17 W. R. 1137—H. L.

—— **Right of Repurchase.**]—In circumstances, held upon the construction of certain instruments that, taken together, they did not operate as a mortgage, but as an absolute sale, to which was attached a conditional right of repurchase to be exercised on the happening of a given event. *Shaw* v. *Jeffery*, 13 Moore, P. C. 432.

A conveyance, as upon an absolute sale, accompanied by a contemporaneous agreement for reconveyance, upon payment, on a day certain, of the purchase-money with interest, and of the expense of the present conveyance, which had been paid by the purchaser:—Held, on a bill for redemption brought after the day certain had passed, to have been a sale, with a proviso for repurchase, and not a mortgage. *Williams* v. *Owen*, 5 Myl. & Cr. 305; 12 L. J., Ch. 207; 5 Jur. 114. Reversing 10 Sim. 386.

A., who held under a lease from Trinity College customarily renewable, demised to B., who subdemised to C. In 1861 B., being 160*l.* in C.'s debt, assigned by deed all his interest in the premises to C., who wrote the following letter: "At any time within the next ten years you come forward and pay 160*l.*, provided you want it for yourself or any of your children, or satisfactorily arrange the 160*l.* by three or four instalments, (that is to say) the house I have purchased this day in [&c.], I will hand you the possession of same with pleasure, and become your yearly tenant":—Held, that the transaction was not a mortgage, but a sale with an agreement for repurchase. *O'Reilly* v. *O'Donoghue*, Ir. R. 10 Eq. 73.

Five years afterwards, A.'s interest was evicted by the college, who adopted C. as their yearly tenant. B. tendered the 160*l.* within the ten years:—Held, that he had no equity under his right of repurchase to get the new interest acquired by C., or to have it declared a graft on the old interest. *Ib.*

**Right to Repurchase.**]—Where a vendor is entitled to repurchase on payment of a sum of money by a given day, and such sum of money can only be ascertained by accounts to be rendered by the purchaser in possession, such purchaser cannot, by rendering such account so late as to preclude the possibility of a settlement within the time, deprive the vendor of his right to repurchase. *Ponsford* v. *Hankey*, 7 Jur. (N.S.) 938; 5 L. T. 226; 9 W. R. 510—L.JJ.

—— **Account.**]—A contract provided for repurchase by the plaintiff from the defendant of hereditaments, upon payment to him of a stipulated sum within a certain time, but deducting the net proceeds of all sales, if any, which should have been previously made by him, including all moneys laid out in repairs or improvements of the property. The right to purchase was in no case to be exercised after the time fixed. Several proceedings were had between the parties on the footing of the contract, but the defendant never furnished to the plaintiff any proper account of the property. A bill was accordingly filed to obtain the benefit of the contract, for an account, an injunction, and a receiver. The defendant demurred to the bill:—Held, that the terms of the contract threw on him the obligation of rendering an account to the plaintiff, and that the demurrer must be overruled. *S. C.*, 2 Giff. 604; 7 Jur. (N.S.) 929; 9 W. R. 358. Affirmed, supra.

**Statute of Frauds.**]—A., a mortgagee with power of sale of real estate, informed L., the mortgagor, that he should sell it for 220*l.*, unless more were offered. It was thereupon verbally agreed between L. and W. that W. should buy it on L.'s behalf for 230*l.*, and have a lien on it for that sum; that L. should pay interest, and continue to occupy the part he then occupied, and that W. should receive the rents of the rest to reduce the principal. An offer by W. to purchase for 230*l.* was then sent by L.'s agent to the mortgagee, who accepted it, and under his power of sale conveyed to W.'s infant daughter by W.'s direction. L. continued in occupation of the part he was to occupy, and paid interest, W. receiving the rents of the rest. This continued for about ten months, when W. died. After his death the daughter brought ejectment, claiming to be absolute owner:—Held, that the transaction was a mortgage and not a sale, and that the Statute of Frauds was no defence to a bill by L. to enforce the agreement, the parol agreement having been in part performed by A. continuing in possession of a portion of the property conveyed. *Lincoln* v. *Wright*, 4 De G. & J. 16; 5 Jur. (N.S.) 1142; 7 W. R. 350.

—— **Part Performance.**]—L.'s continuance in possession after the conveyance, being referable only to the verbal agreement, amounted to part performance of that agreement, and excluded the operation of the statute. Semble. *Ib.*

—— **Fraud.**]—Without reference to part performance, the Statute of Frauds was no defence, because W.'s insisting on the conveyance as absolute, when it had been agreed that it should

be a mortgage, was a fraud, and the Statute of Frauds is not allowed by courts of equity to cover fraud. Semble. *Ib.*

**Specific Performance.**]—Case of a contract for sale and not a mortgage to secure a debt, and to be specifically performed. *Bunning* v. *Bunning*, 1 L. J. (O.S.) Ch. 56.

**Evidence of Recitals—Lapse of Time.**]—A. and wife, by lease and release, dated in 1792, and a fine levied in 1793, conveyed two estates, M. and F., belonging to the wife, to O. in fee. By deeds of July, 1798, A. and wife conveyed M. alone to O. in fee, and covenanted that the fine of 1793, and all other fines, &c., should enure to the uses of this second deed. This deed was executed by all the parties, but no other fine was levied. It appeared that O. did not take possession of M. till the execution of this deed. By another deed of November, 1798, reciting that the transaction of 1792 was a mortgage, and that it had been discovered that the wife's interest in F. was for life only, and that part of the mortgage debt was satisfied by the conveyance of M., and that the remainder, with a further sum, was to be the value of the wife's interest in F., A. and wife conveyed to O. the wife's life estate in F. This deed was not executed by O., though he entered under it. On the death of the wife in 1834, F., with the deed, was given up to her son. On a bill filed by the heir of the wife, after the death of A., in 1836, against the devisee of O., to recover the estate of M., either absolutely or by way of redemption :—Held, that, as O. never signed the deed of November, 1798, though he entered under it, the recitals therein were not conclusive evidence against him, so as to contradict the conveyance of 1792, and as the other circumstances of the case were connected with the transaction being a purchase, and a considerable time had elapsed, the bill was dismissed. *Tull* v. *Owen*, 4 Y. & C. 192 ; 9 L. J., Ex. Eq. 33.

**Proof in Bankruptcy.**]—H., a money broker, was in the habit of depositing bills of exchange with B. & Co. as a security for advances, but he did not indorse the bills, nor were they negotiated by B. & Co., or ever presented for payment. Amongst the bills so deposited was one for 1,000*l.*, accepted by C., who became bankrupt on the 5th of March, 1824, which was some time after the bill fell due. H. also became bankrupt on the 12th December, 1825, when B. & Co. proved the amount of the balance he owed them, excepting this bill as a security, but made no attempt to prove the bill under C.'s commission until January, 1826, when the commissioners rejected the proof :—Held, that the delivery of the bill by H. to B. & Co. must be taken to have been by way of pledge, to secure the amount of the advance then due from H. to B. & Co., and not with an intention to transfer the property in it, and that the amount of those advances having been since paid, B. & Co. could not, under these circumstances, prove the bill under C.'s commission. *Britten, Ex parte*, 3 Deac. & C. 35.

**Trust.**] — The plaintiff for 80*l.* conveys an estate absolutely to the defendant, and brings a bill to redeem ; defendant insists the conveyance was absolute, but confesses that, after the 80*l.* paid with interest, it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust, yet decreed the trust for the benefit of the wife and children. *Hampton* v. *Spencer*, 2 Vern. 287.

**Resettlement.**]—A wife's property was limited upon such trusts as the husband and wife should jointly appoint ; and in default to the use of the husband for life, with remainder to the wife for life, remainder to the children of the marriage, with an ultimate remainder to the wife in fee. Two days later a joint appointment was made by the husband and wife to A. and B., to such uses as the husband should appoint ; and, in default, upon the same limitations before mentioned. Four months afterwards the husband appointed, and the trustees conveyed, the estate to C., upon trust to sell, and pay a sum of money advanced to the husband, and to pay the residue to the husband, "his executors, administrators or assigns," and to convey the unsold estate to the husband, his heirs or assigns, or as he or they should direct :—Held, that the two deeds could not be regarded as one transaction, and that the last deed was not merely a mortgage, but a resettlement to new uses. *Heather* v. *O'Neill*, 27 L. J., Ch. 512 ; 4 Jur. (N.S.) 957 ; 6 W. R. 484—L.JJ.

**Redemption and Reconveyance.**]—What circumstances may induce the court to make an absolute conveyance redeemable or not. Where there is a clause or provision in the conveyance, for the vendor to purchase, the time limited for that purpose ought to be precisely observed. *Barrell* v. *Sabine*, 1 Vern. 268, 269 ; 3 Salk. 241.

A deed of absolute conveyance, dated in August, 1842, of property of the alleged value of more than 1,000*l.*, to the defendant, for 101*l.*, subject to a prior mortgage to F. for the repayment of 150*l.*, was in 1860 set aside, and a reconveyance directed on terms, on the ground that the defendant knew the plaintiff's object was to borrow money, and not to sell the property, and that the solicitor, who was employed by both parties in the transaction, betrayed the plaintiff's interest, and made himself the tool of the defendant to obtain the execution of an absolute conveyance at an undervalue. *Douglas* v. *Culverwell*, 3 Giff. 251 ; 31 L. J., Ch. 65 ; 8 Jur. (N.S.) 29. Affirmed, 4 De G. F. & J. 20 ; 6 L. T. 272 ; 10 W. R. 327.

This court having jurisdiction in personam, upon equity arising out of transactions concerning lands abroad (particularly if in the British dominions), a purchase of an estate in the West Indies by a creditor under his own execution, was, upon the circumstances, held only a security for the debt ; the expenses of the proceeding and incumbrances paid by him with interest ; and subject thereto, a reconveyance was decreed. *Cranstown* (*Lord*) v. *Johnston*, 3 Ves. 170 ; 3 R. R. 80.

A. having granted a mortgage of anticipation to B., of a West India estate, being found, upon an account taken, to be greatly indebted to him, releases the equity of redemption to B. and his heirs ; it not appearing, however, at the time, to have been intended as an absolute sale, and B. having, both by letter and in conversation, stated himself as being only mortgagee in possession, a redemption was decreed. *Vernon* v. *Bethell*, 2 Eden, 110.

Absolute conveyance, and a deed of defeasance, on payment of mortgage money, during the joint

lives of mortgagor and mortgagee :—Held, a restraint upon mortgagor, and a redemption decreed, there being also fraudulent and oppressive conduct on the part of the mortgagee. *Spurgeon* v. *Collier*, 1 Eden, 55.

A., for 500*l.*, makes an absolute assignment of a lease for three lives to B., and B., by a writing under his hand, agrees that, if A. pays B. 600*l.* at the end of the year, B. will reconvey ; B. dies, leaving C. his son and heir ; money was not paid, and two of the lives die, and the lease is twice renewed ; yet redemption decreed on payment of the 500*l.*, and the two fines with interest ; and, during the life of B., the profits to be set against the interest of the 500*l.* *Manlove* v. *Bale*, 2 Vern. 84.

Conveyances held upon the circumstances and answer of defendant, to be mortgages, and not absolute conveyances ; and, defendant having insisted upon their being absolute conveyances, plaintiffs were allowed to redeem with costs. *England* v. *Codrington*, 1 Eden, 169.

R. M. being possessed of a leasehold interest in the premises of G. B. and D., in 1815 mortgaged the same (subject to a prior mortgage) to L., and executed a bond and warrant as a collateral security, and by deed of 1821, reciting that the mortgage money was equal to the value of the premises, released to L. the equity of redemption in all the premises except D., but the bond and covenants in the mortgage deed were suffered to remain outstanding. In a letter from L. to R. M., written subsequently to these transactions, he stated that he considered he held the premises merely as a pledge for the money due to him :—Held, that, notwithstanding the deed of 1821, the creditors of R. M. were entitled to redeem. *Willis* v. *Latham*, Ll. & G. t. Plunk. 69.

A. mortgaged land to B. worth 15*l.* per annum, to secure 200*l.*, and gave a bond that, if the principal and interest were not paid within a year, then he should pay to A., his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises. A. died, and the 78*l.* was paid the day after the mortgage was forfeited :—Held, that A.'s heir may redeem, paying the 200*l.* together with the 78*l.* that was paid to the administrator of A. *Willett* v. *Winnell*, 1 Vern. 488.

One for 300*l.* grants a rent of 60*l.* per annum for seven years ; whether redeemable. *Fawcet* v. *Bowers*, 2 Vern. 287.

A rent-charge of 20*l.* granted in consideration of 240*l.*, redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money. *Stokes* v. *Verrier*, 3 Swanst. 634.

**Practice.**]—An original bill sought relief against mortgagee in possession. He, by his answer, claimed under a conveyance from the plaintiff. By amendment, the plaintiff, abandoning the relief under the mortgage title, sought to avoid the conveyance. A motion by the mortgagee that the amended bill might be taken off the file, or that the plaintiff might pay the costs up to the amendment, was refused. *Allen* v. *Spring*, 22 Beav. 615.

—— **Question for Jury.**]—In ejectment, the plaintiff and the defendant claiming to have purchased the premises, and the defendant having, in fact, had them knocked down to him at an auction, but the plaintiff having paid the deposit and the purchase-money, and had the estate conveyed to him ; the case for the defendant being that the plaintiff was to advance the money to him for the purchase, and that the estate should be conveyed to the plaintiff only by way of mortgage, the question was left to the jury whether this was so understood by or agreed on between the parties. *Braddock* v. *Derisley*, 1 F. & F. 60.

### 5. Subject-Matter.

**Real Property.**]—A mortgagor, by the deed of mortgage, charged the property by a description in several particulars, and the deed continued, "all which said several closes, pieces or parcels of land had been then lately thrown together . . . and were situate in . . . and were then in the occupation of S. as tenant thereof to the mortgagor, or by whatever other name or names, description or descriptions, the said lands had been theretofore or were then called or known, with the appurtenances, and all the estate and interest of the mortgagor in the same, with the repayment . . ." of the money lent. The parts particularised were freehold, but part of the other property in the occupation of S. as tenant of the mortgagor was leasehold. In an action against a solicitor for misrepresentation, it was part of the case of misrepresentation that the solicitor had told the mortgagor that he had a charge upon freehold land, when, in fact, part of the land was leasehold. In the defence, it was contended that the mortgage did not extend, and was never intended to extend, beyond the parts particularised :—Held, that the charge was not confined to the parcels particularised, but comprised all the estate and interest, whatever it might be, of the mortgagor in the property then in the occupation of S. as his tenant. *Young* v. *Wallingford*, 52 L. J., Ch. 590 ; 48 L. T. 756 ; 31 W. R. 838.

A lord of a manor, which was situated in the parish of K., in the county of M., being entitled also to other real estate in K., not parcel of the manor, mortgaged this last-mentioned estate, not including the manor, to A. Afterwards, by a deed reciting that he was seised of or entitled to the messuages, lands, hereditaments and premises thereinafter intended to be conveyed, subject to the mortgage to A., he conveyed to B., by way of mortgage, all the property comprised in the mortgage to A., "and all other the lands, tenements and hereditaments in the county of M., whereof or whereto the mortgagor is seised or entitled for any estate of inheritance" :—Held, that the manor of K. was not included in this mortgage to B. *Rooke* v. *Kensington* (*Lord*), 2 K. & J. 753 ; 25 L. J., Ch. 795 ; 2 Jur. (N.S.) 755 ; 4 W. R. 829.

A mortgage was expressed to comprise by way of grant in fee "all and every the estate, right, title, property and interest of the mortgagor of and in all and every those two fields or parcels of land, containing together about twenty-two acres or thereabouts, situate at and abutting upon the main road at" H., and "bounded upon one side by" B. lane, "and also of and in all and every other, if any, the lands, hereditaments and premises at H. aforesaid of, in or to which the mortgagor hath any estate, right, title, property or interest." All of the mortgagor's property at H. was freehold, except a strip of land of about three-quarters of an acre which lay between the

freeholds and B. lane, and which was of copyhold tenure :—Held, that the copyhold strip passed under the general words and was included in the mortgage. *Rooke* v. *Kensington* (2 K. & J. 753), and *Crompton* v. *Jarratt* (30 Ch. D. 298) distinguished. *Early* v. *Rathbone*, 57 L. J., Ch. 652 ; 58 L. T. 517.

Semble, having regard to the position of the property and the description in the deed, the copyhold strip was included in the parcels themselves. *Ib.*

A. being possessed of an undivided moiety of a messuage in Ratcliffe highway, in fee, and having a lease of the other moiety with covenants to repair and to insure and not to assign without licence, by a deed—reciting that he was seised in fee of the messuage in Ratcliffe highway, and also of two leaseholds, one in Newgate street, the other in Crawford street—granted to C., by way of mortgage in fee, all his estate and interest in the messuage in Ratcliffe highway, in the most general words, and also granted to C. an underlease of the premises in Crawford street, and covenanted to assign to her the premises in Newgate street, to secure payment of a debt :—Held, that the undivided moiety in fee which A. had in the messuage in Ratcliffe highway alone passed by this deed, and not his leasehold interest in the other moiety. *Francis* v. *Minton*, 36 L. J., C. P. 201 ; L. R. 2 C. P. 543 ; 16 L. T. 352 ; 15 W. R. 788.

A party being seised in fee of a piece of land called "the Lydes," built thereon a row of houses called "Somerset place." While this row was yet unfinished, he agreed to charge with the repayment of a certain sum four houses which were part of such row, and which were particularly specified, and "also all and every other the messuages or dwelling-houses, lands, hereditaments and fee farm ground-rents, also situate and lying in Somerset place, adjoining the said unfinished dwelling-houses." Subsequently to the date of this agreement, he constructed a reservoir in the lawn before the houses, and let out the water to different persons at a rent. He also built a house, called "Ivy House," on a further corner of the land called "the Lydes," and which was separated from the lawn by the road which ran round the lawn, and which led to the houses :—Held, that the reservoir (which had not been noticed in an agreement of further charge made subsequent to its construction) and "Ivy House" were charged by the agreement first mentioned. *Turner* v. *Dickenson*, 3 Cl. & F. 593.

**Colliery.**]—Primâ facie a mortgage of a colliery is a mortgage of the colliery business as a going concern, and passes the right to work the mines. A mortgage of the land and beds and seams of coal, so construed. *Whitley* v. *Challis*. ([1892] 1 Ch. 64) distinguished. *County of Gloucester Bank* v. *Rudry Merthyr Steam, &c., Co.*, 64 L. J., Ch. 451 ; [1895] 1 Ch. 629 ; 12 R. 183 ; 72 L. T. 375 ; 43 W. R. 486 ; 2 Manson, 223—C. A.

**Chattels.**]—A mortgage of chattels, without delivery of possession to the mortgagee, is valid, if the mortgagor's continuing in possession is consistent with the terms of the deed. *Reed* v. *Willmott*, 5 M. & P. 553 ; 7 Bing. 577.

A mortgage of a personal chattel may be made without deed. *Flory* v. *Denny*, 7 Ex. 581 ; 21 L. J., Ex. 223.

**Goodwill.**]—Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to the case when the goodwill depends on the personal skill of the owner. *Cooper* v. *Metropolitan Board of Works*, 53 L. J., Ch. 109 ; 25 Ch. D. 472 ; 50 L. T. 602 ; 32 W. R. 709—C. A.

The goodwill of a mortgaged public-house belongs to the mortgagor's trustee in liquidation as against the mortgagee. *Punnett, Ex parte, Kitchin, In re*, 50 L. J., Ch. 212 ; 16 Ch. D. 226 ; 44 L. T. 226 ; 29 W. R. 129—C. A.

**Stock.**]—A mortgagee who has advanced money on the security of stock for a fixed period is bound, in the absence of express stipulation to the contrary, to return the identical stock pledged at the expiration of the loan, and for this purpose stock is as capable of identification as any other security. If he sells the stock in pledge during the currency of the loan, he is accountable to the mortgagor for any profit made by the sale. *Langton* v. *Waite*, 37 L. J., Ch. 345 ; L. R. 6 Eq. 165. See *S. C.* on appeal, L. R. 4 Ch. 402 ; 17 W. R. 475.

**Insurance Policy.**]—In a second mortgage of personal estate, whether in possession or expectancy, "except book debts and securities for money" :—Held, that a policy of insurance was a security for money, and therefore excepted. *Lawrance* v. *Galsworthy*, 3 Jur. (N.S.) 1049.

**Bills of Exchange.**]—Bills of exchange are not proper subjects of mortgage, and are primâ facie presumed to be given in part payment as they become due. *Hills* v. *Parker*, 14 L. T. 107 —H. L.

**Fixtures.**]—A house fitted up for and intended to be used as a club was mortgaged with all fixtures therein :—Held, that, in determining what articles were included as "fixtures," regard must be had to the intention of the parties, the one in mortgaging and the other in taking a security for the sum advanced ; and that such things as were substantially part of the house so that they could not be removed without depriving the house of what was intended to be used with it must be regarded as fixtures. *Smith* v. *Maclure*, 32 W. R. 459.

A mortgage of premises will pass the fixtures upon the premises. *Meux* v. *Jacobs*, 44 L. J., Ch. 481 ; L. R. 7 H. L. 481 ; 32 L. T. 171 ; 23 W. R. 526.

A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. *Ib.*

Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee. *Ib.*

There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder. *Ib.*

—— **Mortgage by Sub-demise.**]—Words, which are sufficient when used in a conveyance in fee to pass trade fixtures, are also sufficient to pass them when used in a demise. *Southport Banking Company* v. *Thompson*, 57 L. J., Ch. 114 ; 37 Ch. D. 64 ; 58 L. T. 143 ; 36 W. R. 113—C. A.

By a mortgage by sub-demise, a corn-mill and other leasehold premises, together with certain fixtures specifically mentioned, and constituting the motive power of the mill, were conveyed by sub-demise to the mortgagees, to secure a sum due to them by the mortgagors. The deed contained the following general words:—"Together with all buildings, fixtures, rights, lights, easements," &c.:—Held, that the word "fixtures" in the general words was not restricted to fixtures ejusdem generis with those previously specifically mentioned, but was intended to extend and enlarge that class; and that, therefore, the trade fixtures in the mill passed by the sub-demise to the mortgagees. The observations of Blackburn, J., in *Hawtry* v. *Butlin* (L. R. 8 Q. B. 293) explained. *Ib.*

**Trade Fixtures and Machinery.**]—A mortgagor in possession of premises let them to a tenant who brought on to them certain trade fixtures. The mortgagee subsequently entered and sold the premises under the power of sale contained in the mortgage:—Held, that the fixtures did not pass under the mortgage, but remained the property of the tenant. *Sanders* v. *Davis*, 54 L. J., Q. B. 576; 15 Q. B. D. 218; 33 W. R. 655.

A limited company, lessees of a colliery, in 1883 demised it to their bankers, by way of mortgage, together with all fixed machinery and machines then standing and being, or thereafter to stand and be, upon the mortgaged premises. In July, 1889, the company entered into an agreement with certain vendors for the erection by them at the colliery of a machine. The purchase-money was to be paid by monthly instalments; and it was also provided that, immediately on the vendors receiving payment of the balance, the machine should become the property of the company; but that, until fully paid for, it should remain the property of the vendors. The machine was erected, and commenced working in August, 1890. The company paid the first two instalments of the purchase-money, but failed to pay any further instalments. In February, 1891, the bankers brought an action to enforce their security, and a receiver was appointed, who took possession of the colliery. Shortly afterwards the company resolved to wind up voluntarily; and, in May, a supervision order was made. The receiver now desired to give up possession of the colliery:—Held, that the provision in the agreement that the machine, until fully paid, should remain the property of the vendors was valid; that, notwithstanding the form of the mortgage deed, the company could not confer on their mortgagees a better title to the machine than they themselves had; and that, consequently, the vendors were now entitled to remove the machine. *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.*, 61 L. J., Ch. 227; [1892] 1 Ch. 415; 66 L. T. 108; 40 W. R. 280.

The defendants supplied and fixed for E., a nurseryman, on his premises, which were mortgaged to the plaintiff, a trade fixture, which, according to a hire-and-purchase agreement between E., E.'s landlord and the defendants prior to the mortgage, was to remain the property of the defendants till the instalments of purchase-money were paid. The plaintiff took the mortgage without notice of the agreement. E. having made default in payment of the instalments, the defendants removed the fixture before the plaintiff entered into possession:—Held, that the defendants were entitled to remove the fixture. *Sanders* v. *Davis* (15 Q. B. D. 218) and *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415) followed. *Gough* v. *Wood*, 63 L. J., Q. B. 564; [1894] 1 Q. B. 713; 9 R. 509; 70 L. T. 297; 42 W. R. 469—C. A.

A mortgagee, as against the assignees of the tenant of the mortgagor, is entitled to trade fixtures affixed to the freehold by such tenant subsequently to the date of the mortgage. *Cullwick* v. *Swindell*, 36 L. J., Ch. 173; L. R. 3 Eq. 249; 15 W. R. 216.

A lessee erected trade fixtures, firmly attached to the freehold, but removable as between himself and the landlord. He then mortgaged the premises by way of demise by the same description as that in the lease, and without referring to the new erections, the sum secured being a floating balance limited to an amount greater than the premises would be worth without the fixtures. He became bankrupt:—Held, that the mortgagee was entitled to the fixtures. *Bentley, Ex parte*, 2 Mont. D. & D. 591; 6 Jur. 719.

The S. company carried on the business of manufacturing zinc and spelter, sulphuric acid, and zinc oxide on leasehold premises. They had erected a number of cupola and other furnaces for the purposes of their manufacture, which as between them and their landlord, were admitted to be trade fixtures. In 1880 the company conveyed the land and buildings comprised in its lease to trustees for debenture-holders upon trust, to permit the company to carry on business until default in payment of the debentures or winding-up, and then to sell. In 1883 the company executed a second mortgage to trustees, for a second set of debenture holders, which comprised, besides the land and buildings, all stock-in-trade, stock of ores, and loose plant and material. It appeared that, in the course of smelting metals for the company's business, small quantities of gold and silver were given off in the form of vapour, and become imbedded in the bricks lining the furnaces. The company having been ordered to be wound up, the trustees of the first mortgage deed entered and sold. The second mortgagees took out a summons that they might be allowed to enter, and remove the gold, silver, and other metal imbedded in the said bricks, claiming that it was included in their mortgage and not in the first. It was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks:—Held, that the doctrine of trade fixtures has no application as between mortgagee and mortgagor; that, whatever might have been the case between landlord and tenant, the mortgagee was entitled to everything which his mortgagor, intentionally or not, for trade fixtures or otherwise, had fixed to the mortgaged premises; and that the summons must be dismissed. *Tottenham* v. *Swansea Zinc Ore Co.*, 52 L. T. 738.

Mortgage of iron works and rolling-mills with the machinery specified in schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the premises, whether in addition or substitution":—Held, that the words "fastened in or upon the premises" governed the sentence, and that subsequent additions, consisting of an engine for turning a lathe, a steam-hammer and an anvil, a boiler and a furnace, passed to the mortgagees; but that cutters, bed plate,

straightening plate, and the metal flooring of the mill, did not. *Metropolitan Counties Insurance Society* v. *Brown*, 26 Beav. 454; 28 L. J., Ch. 581; 5 Jur. (N.S.) 378; 7 W. R. 303.

Under an assignment of the machinery, fastened in or upon a mill, an anvil, though not fastened or fixed to it, passes, as essential to a fixed steam-hammer. *Ib.*

By a registered deed made in 1875, the owners of a mill mortgaged in fee to the plaintiffs, the mill, together with all the engines, plant, machinery, and gear described in the schedule. The schedule included certain driving belts which connected the power machinery with certain machines, which were so affixed as to be part of the realty. The machines could not be worked without the belts, which would only fit other machines of nearly the same size. These belts were passed round the shafting and then laced together and could not be removed from the shafting without being unlaced. They could be slipped off the machines when the machines and shafting were not in motion. The mortgage contained no power to deal with the belts separately from the freehold. The defendant, a trustee in bankruptcy of one of the mortgagors, removed the belts. In an action against him by the plaintiffs to recover the value:—Held, that the belts being essential parts of the fixed machines formed part of the realty, and as such passed under the mortgage deed, which, therefore, did not require registration under the Bills of Sale Act, 1854. *Sheffield and South Yorkshire Permanent Building Society* v. *Harrison*, 54 L. J., Q. B. 15; 15 Q. B. D. 358; 51 L. T. 649; 33 W. R. 144—C. A.

Two persons, carrying on business in copartnership as copper roller manufacturers, executed a mortgage of the land, mills or factories on which the business was carried on, and of which they were seised in fee, and all and singular the steam-engine, steam-boilers, mill-gear, millwright work and machinery then or thereafter to be fixed to the said lands, hereditaments and premises, together with all outhouses, edifices, fixtures, &c. The partners having become bankrupts:—Held, that the mortgagees were entitled, as against the assignees, to all machinery which was fixed to the freehold. *Mather* v. *Fraser*, 2 K. & J. 536; 25 L. J., Ch. 361; 2 Jur. (N.S.) 900; 4 W. R. 387.

A mortgage was effected of certain plots of land, and "also all that silk-mill then erected, or in the course of erection, and all other buildings then or thereafter to be erected thereon, and also all those the steam-engines or steam-engine boilers, steam-pipes, main shafting, mill-gearing, millwrights' work, and other machinery and fixtures whatsoever, then erected or set up, or standing or being, or which should at any time thereafter be erected or set up, or stand or be, in or upon the land, mill and premises, or any part thereof":—Held, that all the machinery and fixtures used in the manufacturing of silk within the mill were included in the mortgage. *Haley* v. *Hammersley*, 3 De G., F. & J. 587; 30 L. J., Ch. 771; 7 Jur. (N.S.) 765; 4 L. T. 269; 9 W. R. 562.

A banking company entered into an agreement dated the 29th May, 1886, to sell certain paper-mills and machinery to the L. Company for 20,000*l.* to be paid by instalments. By clause 2 of the agreement it was provided that upon payment of the first two instalments the bank should convey the premises to the L. Company, upon their executing a mortgage for the balance of the purchase-money, and that the mortgage should contain a clause enabling the bank, in case the business of the L. Company should be suspended, to re-enter and take possession of the premises, and of everything which should have been built or placed thereon, and which should not require registration within the Bills of Sale Act, 1878, and to hold the same for their own use and benefit absolutely, but without prejudice to the liability of the L. Company for the unpaid balance of the purchase-money. This agreement was not registered as a bill of sale. The first two instalments of the purchase-money were paid, but no conveyance or mortgage of the property was executed in pursuance of the agreement. The L. Company entered into and held possession of the property until a winding-up order was made on the 7th February, 1887. The bank thereupon re-entered on the property. The official liquidator of the L. Company asked by summons for delivery up of a paper-making machine and all other trade machinery attached to the mills. The bank claimed possession of the fixtures and trade machinery under their vendors' lien:—Held, that the position of the parties under the agreement was the same as if a conveyance and mortgage of the property had been actually executed; and that the agreement to mortgage did not extend to any property which required registration under the Bills of Sale Acts, and the trade machinery was therefore not included in the security; and must be delivered up to the liquidator of the L. Company, but in other respects the agreement remained valid. *London and Lancashire Paper Mills Co., In re*, 58 L. T. 798.

**Stock-in-Trade.**]—A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast-iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors:—Held, that the stock-in-trade was not included in the mortgage. *Jardine, Ex parte, McManus, In re*, 44 L. J., Bk. 58; L. R. 10 Ch. 322; 32 L. T. 681; 23 W. R. 736.

A trader (being solvent) mortgaged his furniture, shop-fittings and stock-in-trade and book debts for securing a debt due and a new advance. The bankrupt being permitted to have possession of those goods, and being in possession also

of other personal chattels to which the creditor's security did not extend, the bankrupt's landlord distrained for rent, not upon the former only, but upon both sets of goods. The person in possession under this distress was requested by the mortgagee, and consented, to hold possession of the goods for him, as well as for the landlord, without prejudice to the landlord's rights. A sale took place under the distress. The goods which were the subject of the distress were not all sold, but they included some of those which were the subject of the mortgagee's security, while the goods to which the security did not extend remained unsold. A fiat having issued against the mortgagor, the mortgagee petitioned to have his security declared as against the remaining furniture, the stock-in-trade at present existing and the book debts:—Held, that the mortgagee's security extended only to such of the furniture, fixtures and stock-in-trade and property purporting to be included in the assignment as were in the house and shop at its date, and remained at the time of the bankruptcy. *Stephenson, Ex parte*, 1 De G. 586; 17 L. J., Bk. 5; 12 Jur. 6.

**Sheep and their Increase.**]—By an indenture of mortgage made between B. & W., certain flocks of sheep and certain herds branded B., then depasturing on a station in the colony of Victoria, "together with all and singular the issue, increase and produce of the sheep and cattle respectively," were assigned by B. to W. by way of mortgage. By a subsequent indenture of mortgage reciting the former indenture, B. assigned "all the issue, increase and progeny of the sheep" on the station to P. and D., with a power of sale. Previously and subsequently to the latter indenture, B. purchased and brought upon the station large additions to the flock of sheep, and branded them with the letter B. B. also obtained a lease of the station, and deposited it with P. and D. as additional security:—Held, on a bill filed by W., after a sale by P. and D. both of the sheep and the lease, praying for payment of advances out of the proceeds of the sale of all the sheep and the lease, first, that by the words "increase of the sheep" in the first indenture was meant the natural increase or offspring of the original sheep mortgaged, and that such words did not include additions made to the flock by purchase. *Webster* v. *Power*, 5 Moore, P. C. (N.S.) 92; 37 L. J., P. C. 9; L. R. 2 P. C. 69.

Held, secondly, that the mortgagees under the first indenture of mortgage were precluded from claiming the proceeds of the sale of the lease or any personal equity to have the sheep purchased substituted for the original sheep, no such claim having been raised by the original bill. *Ib.*

**Harbour Dues.**]—By virtue of an act mortgages were granted by harbour trustees of the tonnage rates and duties of the harbour. By subsequent acts the rates and dues had been altered and changed in substitution of the rates and duties so mortgaged:—Held, that the present rates and dues were virtually mortgaged, the subsequent acts not extinguishing the mortgagees' rights or remedies, and a decree was made for account and payment of principal and interest accordingly. *Postlethwaite* v. *Maryport Harbour Trustees*, 20 L. T. 138.

6. Extent of Security and Charge.

a. Security.

**Generally.**]—As to the extent and priority of a mortgage security, see the case of *Fournier* v. *Paine*, 9 Bligh (N.S.) 282. *S. C.*, nom. *Fournier* v. *Dickenson*, 3 Cl. & F. 593.

**In Fee—Subsequent Allotment.**]—A man mortgages an estate in fee without noticing rights of common. Afterwards allotments made to him in respect of his rights of common by virtue of an inclosure act, which enacts that the allotted lands shall be subject to the same uses as the lands in respect of which they are allotted. Semble, the legal estate in the allotments passes to the mortgagor, and not the mortgagee. *Lloyd* v. *Douglas*, 4 Y. & C. 448; 10 L. J., Ex. Eq. 34.

**By Tenant for Life.**]—A tenant for life in possession of settled estates, with power to charge them with a principal sum and interest for his own benefit, exercised the power and mortgaged the principal and interest thus charged, together with property of his own, for a larger amount than that of the charge, and kept down the interest on the whole mortgage moneys. The rents and profits of the settled estates were insufficient to pay the interest of the sum charged under the power:—Held, after the death of the tenant for life, that his mortgagees were not entitled to a charge on the inheritance for the deficiency. *Kensington (Lord)* v. *Bouverie*, 7 H. L. Cas. 559; 6 Jur. (N.S.) 105—H. L. Reversing 7 De G. M. & G. 134.

By a private act, lands and stock were vested in trustees, upon trust to pay the yearly income to C., or for his benefit, as by the act provided; and the court of chancery, on the application of C. or the trustees, might, in accordance with the act, and so far as the rules of law and equity and the jurisdiction of the court would admit, make orders and give directions so as to ensure that the life estate of C. should be inalienable, and be applied solely for his exclusive personal enjoyment. An order in conformity with this last provision was made by Romilly, M. R., subsequently to which C. became indebted for money lent to the plaintiff, to whom he mortgaged his life-estate, as a security for the loan, in respect of which he gave a judgment. The plaintiff applied to the trustees, who resisted payment on the ground of the act and order, and the bill was filed by the plaintiff to enforce his security against C.'s life estate. To this bill a demurrer by the trustees was overruled. *Green* v. *Mortimer*, 3 L. T. 642—L.JJ.

**Contingent Remainder—Destruction of—Acquisition of New Interest.**]—A contingent remainderman conveyed his interest to secure a debt. The remainder was afterwards destroyed by the tenant of the prior estate: the remainderman afterwards acquired a new interest in the property under the will of that tenant:—Held, that it was available to the creditor. *Noel* v. *Bewley*, 3 Sim. 103.

**Reversionary Interest.**]—A. mortgaged to B. his reversionary interest in 3,681*l.* stock, which the deed represented as standing in the names of two executors of a testator to secure three annuities. A. gave notice to the executors. There was no such sum standing in the names of the executors, but there was a sum of 2,080*l.* standing in the name of the testator, and a

second sum of 2,451*l.* in the name of one of the executors, to answer the annuities. A subsequent incumbrancer on the whole fund also gave notice to the executors :—Held, that A.'s security was limited to 3,681*l.* stock. *Woodburn* v. *Grant*, 22 Beav. 483.

**Share of Residue.**]—A residuary legatee, having an option of purchase of real property of a testator, elected to purchase, and afterwards, by a voluntary deed, assigned his share of the moneys to arise from the testator's estate to trustees to secure 3,000*l.* thereby settled. The purchase-money of the real property was afterwards deducted from the purchaser's share of residue :—Held, that the 3,000*l.* was charged, not merely on the balance of the residuary share, but also upon the purchased realty. *Harrison* v. *Barton*, 1 John. & H. 287.

**After-acquired Property.**]—A mortgagor by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will or other document, either in his own right, or as the devisee, legatee, or next of kin of any person"; and also all real and personal property "of, in, or to which he was or during that security should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest." The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator :—Held, that the assignment of after-acquired property was divisible; and that, although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the court gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under any will operated as a contract which the court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security. *Belding* v. *Read* (3 H. & C. 955) questioned. *Clarke, In re, Coombe* v. *Carter*, 56 L. J., Ch. 981; 36 Ch. D. 348; 57 L. T. 823; 36 W. R. 293—C. A.

**By Trustee beneficially Interested.**]—A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2,000*l.* for her benefit, and subject thereto in trust to convey the estates as the testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of a mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustee to make such conveyance as was thereinafter contained, the widow and her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will :—Held, firstly, that the mortgage did not pass the beneficial interest of the widow; secondly, that, nevertheless, her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority. *Stronge* v. *Hawkes*, 4 De G. M. & G. 186.

**By Executor.**]—An executor, who was also a legatee, borrowed 5,000*l.*, and gave the lender a memorandum reciting that the money was borrowed for the purposes of the will, and agreeing to charge the trust estate, "so far as he could and lawfully might," and his legacy, and a policy, which was part of the assets, with the repayment, and to execute a mortgage. Afterwards the executor borrowed from the same person 400*l.*, and by a deed reciting the will and stating certain sums to be due from the estate to the executor, and that the executor owed the lender 900*l.*, the executor assigned to the lender all the sums mentioned to be due from the estate to the executor by way of security for the 900*l.*, with interest :—Held, that the lender had by this deed given up such claim, if any, against the testator's estate, as he had under the memorandum, and could only establish a security upon the executor's beneficial interest. *Brettle, In re, Brettle* v. *Burdett*, 2 De G. J. & S. 244.

**Leaseholds.**]—Where, after a mortgage of leasehold for a term, the mortgagor and mortgagee joined in a lease of part of the premises for the residue of the term, at a rent of 3*l.* per annum, payable to the mortgagor, his executors, &c., with a clause reserving a right of entry to him, &c., in case of nonpayment of the rent, and declaring that nothing should affect the rights of the mortgagee under the mortgage deed so far as affected the entirety of the premises. On the mortgagor becoming bankrupt :—Held, that the tenant was entitled to his lease, exempt from the mortgage, but that the mortgagee and not the assignees was entitled to the rent of 3*l.* *Edwards* v. *Jones*, 1 Coll. C. C. 247; 13 L. J., Ch. 371; 8 Jur. 416.

A new lease obtained by a mortgagee of a leasehold interest, which had been evicted for nonpayment of rent, taken after the expiration of the six and nine months allowed to the lessee and mortgagee to redeem by statute 3 Geo. 1, c. 2, s. 4, but in pursuance of a contract entered into in the period between the six and nine months, if the parties interested did not redeem, is not a graft upon the former lease, nor a trust for the lessee, the mortgagee not being in possession, nor procuring the lease behind the back of the lessee. The principles on which courts of equity, in considering renewed interests obtained by mortgagees, trustees, &c., to be grafts, are, that the advantage was procured either by being in possession, or, when out of it, by contrivance to oust the lessee of the benefit of renewal. *Nesbitt* v. *Tredennick*, 1 Ball & B. 29, 46; 12 R. R. 1.

One possessed of a renewable term, mortgages to J. S., who gains a new term from the original landlord, to commence after the old one; this new term shall be subject to the old equity of redemption. *Rakestraw* v. *Brewer*, 2 P. Wms. 511; Sel. Ch. Ca. 55; Moseley, 189.

The defendants, who were entitled to the equity of redemption of leaseholds charged with a mortgage, attempted to get rid of it by fraudulently incurring a forfeiture, which they induced the lessor to take advantage of. They afterwards obtained a new lease from him, which they sold :—Held, that the new lease was subject to the mortgage, notwithstanding the 15 & 16 Vict. c. 76, ss. 2, 10, and a decree

was made for payment by the defendants of the mortgage, with costs. *Hughes* v. *Howard*, 25 Beav. 575.

**Attendant Term.**]—Right of mortgagees to the benefit of a term attendant on the inheritance, though the term was not assigned, nor the inheritance conveyed to them. *Buckinghamshire* (*Earl*) v. *Hobart*, 3 Swanst. 201; 19 R. R. 197.

**Mortgage after Contract for Sale.**]—A mortgage made subsequently to a contract for the sale of an estate conveys to the mortgagees only that which the vendor is entitled to under that contract. If the mortgagee gives no notice of an intention to interfere with the contract, its stipulations remain as before, and affect the mortgagee as they would have affected the mortgagor. *Rose* v. *Watson*, 10 H. L. Cas. 672.

**Lapse of Time.**]—Where there is a mortgage over several denominations of land, and the mortgagor subsequently sells some of the denominations to a purchaser for valuable consideration, without the concurrence of the mortgagee, and the interest due under the mortgage is regularly paid out of the remaining denominations, the lands sold are not discharged from the mortgage, although no proceedings have been taken against them within twenty years (3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28). *Muskerry, In re*, 9 Ir. Ch. R. 94.

**Recital notwithstanding.**]—Mortgagee held, notwithstanding a recital in the declaration of trust, to have obtained a security to the extent of the interest of mortgagor in the premises. *Sheldon* v. *Cox*, 2 Eden, 224.

By a deed, dated in 1847, entered into between A. and his son B., and C., after reciting that A. and B. were indebted to C. in 10,000*l.* advanced by him, and that C. was then liable, as surety on behalf of A. and B., to R. B. and J. T. for a further sum of 3,000*l.* advanced by them, it was further recited that the deed was executed in favour of C. "as well to give further security for the 10,000*l.* as to secure him from all sums of money which he might pay, or become liable to pay in discharge of his liability to R. B. and J. T." At the time the deed was executed it was asserted by C., and understood and believed by A. and B., that C. was under legal liability to repay R. B. and J. T. the 3,000*l.*; whereas, in fact, he was only morally liable to see that their debt was discharged. A. in his examination stated that, had the real facts been known at the time of the execution of the deed, this debt would have been included therein. In 1849 B. executed a creditors' deed in favour of L., as trustee, for the benefit of the creditors of A. and B. L. filed a bill against C., praying an account of what was due to C. under the deed of 1847, and contesting his right to be allowed the 3,000*l.*:—Held, that C. not being legally liable for the repayment of the 3,000*l.*, the plaintiff was, notwithstanding the recital in the deed of 1847, in taking the account entitled to have the 3,000*l.* disallowed. *Lake* v. *Bruton*, 25 L. J., Ch. 842; 2 Jur. (N.S.) 839—L.JJ.

**Practice.**]—In suits for redemption and foreclosure, F., a third mortgagee (who was also first mortgagee), on taking the accounts, raised a question as to the validity of the security in regard to certain chattels expressed to be comprised in it. The court being of opinion that the question ought to have been raised at the hearing, and could not be raised afterwards:—Held, consequently, that the respective mortgages must be taken to comprise what was expressed to be included in them. *Begbie* v. *Fenwick*, *Fenwick* v. *Begbie*, L. R. 6 Ch. 869; 25 L. T. 441; 20 W. R. 67.

**Order to Execute Disentailing Deed.**]—In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to the plaintiff's charge. *Lewis* v. *Duncombe*, 20 Beav. 398.

### b. Charge.

**Contingent Liability.**]—A security to be held as long as any debt shall be due or growing due cannot be retained to answer the contingent liability of the mortgagor as drawer or indorser of a current bill. *Merchants' Bank of London* v. *Maud*, 18 W. R. 312.

**Attorney's Charges.**]—Attorney acting as agent for mortgagor and mortgagee, and as agent and quasi banker for mortgagor, will not be allowed to charge the mortgaged premises with a greater sum (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by mortgagees on account of, and as agent for, mortgagor; nor will the most minute fraction advanced by him to make up the integral sum of mortgaged money, be allowed to stand as a charge on the estate. *Lewis* v. *Morgan*, 5 Price, 42; 4 R. R. 860.

**Mortgage to secure Balance with Bank—Reduction by Sale.**]—A. mortgaged an estate to a banking company with which he dealt, for the purpose of securing the balance that might at any time be due from him, so as the whole amount of principal to be ultimately recovered by virtue of the security should not exceed 5,800*l.* Afterwards three portions of the estate were sold with the concurrence of the banking company, and the money paid directly to them, but credit was given to A. for them in his account:—Held, that the moneys recoverable under the mortgage were reduced by these payments as far as they went. *Johnson* v. *Bourne*, 2 Y. & C. C. C. 268.

**Mortgage to Surety—Further Bond by Heir of Surety.**]—A. was bound as surety for B. in 4,000*l.*, and then B. conveyed a manor to him as a counter-security. A. died, and then his son D., and heir, became bound with B. for 2,000*l.* more, but there was no agreement that the mortgage should extend to secure the latter bond. Yet held, that the heir of B. (who died) shall not redeem without paying the whole. *St. John* v. *Holford*, 1 Ch. Ca. 97.

**Money advanced for Investment.**]—In 1875 L. advanced 800*l.* to C., his solicitor, to be invested by the latter. On the 12th February, 1876, L. asked C. for some evidence of the investment, and C. wrote and gave him a memorandum stating that the 800*l.* was in C.'s hand at interest at 5*l.* per cent., "being part of a large sum advanced to P. on security of freehold houses at K." C. afterwards died insolvent, and it then appeared that there was no mortgage by P., but

that in 1873 P. and Y. had entered into a partnership arrangement for the purchase of houses at K.; C. by himself or his clients providing the purchase-money; P. executing the mortgages necessary to raise the money; P. paying back half the money provided by C. personally by the 1st November, 1876, and paying interest at 5*l.* per cent. in the meantime; and either party having the right to demand a sale after that date. A sum of nearly 7,000*l.* was due to C. on the 1st January, 1876:—Held, that L. was entitled to a charge on C.'s share of the proceeds of the sale of the houses to the extent of the 800*l.* and interest. *Crowdy, In re, Burges* v. *Crowdy*, 46 L. T. 71—C. A.

**Defective Title.**]—A., tenant for life, remainder to his son B. in tail. A. mortgaged to S., who, finding his title defective, sent 100*l.* to B., and took a mortgage from him of the same land. The son shall redeem, paying the 100*l.* only. *Bromley* v. *Hamond*, 2 Ch. Ca. 23.

**Bonus.**]—A mortgage was executed for 1,000*l.*, but the sum of 700*l.* only was advanced. The mortgagee alleged that, in consequence of the unsatisfactory nature of the security, he had agreed to advance only 700*l.*, the remaining 300*l.* being a bonus for the risk and hazard. The evidence supported this allegation. Upon a bill to redeem, upon payment of 700*l.*:—Held, that the mortgagor could only be entitled to a decree upon payment of the full sum of 1,000*l.* *Potter* v. *Edwards*, 26 L. J., Ch. 468.

**Proviso limiting Amount recoverable.**]—The mortgage of a leasehold public-house was to secure 700*l.*, and such further sums as might become due from the mortgagor to the mortgagees for money advanced, goods sold, or otherwise. The mortgage contained a power of sale, and it was declared that the sale moneys should, after payment of the costs of sale, or in anywise consequent on the mortgagor's default, and the reimbursement to the mortgagees of all moneys paid by them for insurance or repairs, or for keeping on foot the lease and the licences, be applied in payment of the principal and interest due on the mortgage, and, subject thereto, in payment of the principal and interest due to a second mortgagee, and that the surplus should be paid to the mortgagor, "Provided always that the total amount to be recovered by the mortgagee under these presents shall not exceed 900*l.*" The property was sold under the power, and on the account being taken by the court it was certified that at the time of the completion of the sale there was due to the mortgagees 1,415*l.* principal and 615*l.* interest, and that they had or might have received 396*l.* for rents and profits. The property sold for 2,650*l.* The 1,415*l.* included the 700*l.* lent and 88*l.* for goods supplied; the rest of it was made up of payments of rent and fire insurance:—Held, that the proviso limiting the amount recoverable did not apply to interest, or to outgoings incident to the possession of the premises which the mortgagor was bound to reimburse to the mortgagees, and that, as the sum due for moneys lent and goods supplied did not exceed the limit, the mortgagees were entitled to retain out of the proceeds of sale the balance due to them. *White* v. *City of London Brewery*, 58 L. J., Ch. 855; 42 Ch. D. 237; 61 L. T. 741; 38 W. R. 82—C. A.

**Payment off by Third Person—Mortgage kept alive—Subrogation.**]—The plaintiffs, at the request of trustees of a marriage settlement, and of the tenant for life under the settlement, paid off 600*l.*, part of a mortgage debt of 1,000*l.* on a leasehold house comprised in the settlement. There was no transfer of the 600*l.* of the mortgage debt to the plaintiffs, but interest was paid to them. On the death of the tenant for life the appointees of the leasehold house obtained a transfer to themselves from the mortgagee of the remaining mortgage debt of 400*l.*, and of the premises, but subject to the equity of redemption, and they also obtained the title deeds. The plaintiffs advanced 600*l.* out of the trust money. On action:—Held, that the mortgage was not discharged, but was kept alive to the extent of 600*l.*, that the doctrine of subrogation applied to the case, and the plaintiffs had a right to stand in the shoes of the trustees of the settlement. *Patten* v. *Bond* or *Boyd*, 60 L. T. 583; 37 W. R. 373.

**Money entrusted to Solicitor for Investment.**]—W. intrusted to P., his solicitor, 7,700*l.*, and verbally arranged with a clerk of P. for its investment on a mortgage of leaseholds at C., which investment P., by letter, informed him had been made as arranged with the clerk. P. having died insolvent, it was found that no mortgage in favour of W. existed, but that P. had advanced upwards of 100,000*l.* in his own name on mortgage of the property at C. Of this sum considerably more than 7,700*l.* had been advanced by P. between the date at which W. had intrusted that amount to him, and the date of the letter informing W. of the investment. Under an order of the court in a suit for the administration of the estate of P., the mortgage property was sold, and the proceeds carried to a separate account:—Held, that the advances made by P. on mortgage of the property at C. included the moneys intrusted to him by W., and that W. was entitled to repayment of such moneys out of the fund in court. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39; 4 Ch. D. 49; 35 L. T. 608; 25 W. R. 94.

**Misconduct of Solicitor.**]—B. borrowed 4,000*l.* of the trustees of H., and executed the mortgage deed, with a receipt for 4,000*l.* endorsed. 500*l.* was allowed by B.'s solicitor to be retained by W., solicitor for the mortgagees, and a bill being taken from W. for that amount by B.'s solicitor, without his knowledge. The money was lost, B.'s solicitor stating falsely to B.'s agent that it had been paid into his (B.'s) bankers. On a bill by B. to redeem, on the footing that 3,500*l.* and interest only was due, decree made in the usual way. *Boyd* v. *Craster*, 10 L. T. 480; 12 W. R. 787.

**Bond for Arrears of Interest, not Paid.**]—A mortgagee takes a bond from the assignee of the devisee for the arrears of interest then due, and gives a receipt; the bond is still unpaid; the interest is still secured by the mortgage. *Hardwick* v. *Mynd*, 1 Anst. 111; 3 R. R. 562.

**Mistake.**]—C., believing himself and three others to be entitled, under a will, to four-eighths of freehold and copyhold estates, joined them in a mortgage of his estates in the four-eighths to P. Subsequently it was discovered that the supposed last will had been revoked by a later will, by

which the estates were devised to C. for life, but subject to several annuities, with remainders over:—Held, that the mortgage passed C.'s life interest in the entire four-eighths, and was the first incumbrance on one one-eighth of the copyholds to which P. had been admitted. *Carter* v. *Carter*, 3 K. & J. 618; 27 L. J., Ch. 74; 4 Jur. (N.S.) 63.

Held, also, that although P. had acquired the legal estate in this one-eighth for valuable consideration, as it were, by accident, and without notice that the former will had been revoked, so that his conscience was not affected by any of the trusts to which, by the subsequent will, the estate was subjected, he must hold subject to those trusts, since the will by which they were created was the very instrument upon which his title to the legal estate depended. *Ib.*

B. mortgaged certain premises to C., and covenanted to insure, and, in the event of fire, to apply the insurance moneys in rebuilding the mortgaged premises. A fire took place, and B. rebuilt, but the premises so erected extended beyond the boundary line of the mortgaged property on to an adjoining slip of land belonging to the mortgagor. B. subsequently mortgaged this slip of land to H., and also gave him a second mortgage on the premises in mortgage to C.; and H. afterwards joined with C. in a demise of the whole of the property, the rent being made payable to C., all parties being under the impression that the premises originally mortgaged to C. comprehended the property subsequently mortgaged to H. Upon a bill filed by H., praying an apportionment of the rent:—Held, that it was a mistake of facts, against which the court would relieve; and an apportionment of the rent was decreed accordingly. *Harryman* v. *Collins*, 18 Beav. 11; 18 Jur. 501; 2 W. R. 189.

**Other Cases.**]—W., the owner and occupier of a public-house, gave to H. & Co., brewers, a mortgage to secure 1,300*l.*, and also all sums which should at any time be owing to them from W., "his executors, administrators, or assigns," on any account whatsoever. W. gave, by will, all his property to his wife for life, without any directions as to carrying on his business. Letters of administration, with the will annexed, were granted to the widow. The widow carried on the business, and was supplied with beer by H. & Co., to whom she from time to time made payments which discharged the moneys due to them from W. at his decease other than the 1,300*l.*, but a balance of 138*l.* was due from her to them at her decease for beer supplied. H. & Co. sold the property under a power of sale, and claimed to retain not only the 1,300*l.* but the 138*l.*:—Held, that, as the widow was assign of the public-house, the 138*l.* was covered by the security, and H. & Co. were entitled to retain it. *Watts, In re, Smith* v. *Watts*, 52 L. J., Ch. 209; 22 Ch. D. 5; 48 L. T. 167; 31 W. R. 262—C. A.

A. gave an undertaking to pay C. 35*l.* upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgages, by assigning it to him in trust to sell it, and for B. to pay himself the sum advanced, and to pay 22*l.* to C. as part of his claim, and after other payments, which were specified, to pay the surplus to S. C. was not only aware of this arrangement, but was at one time intended to have been a trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking, but that C. could not recover, in an action upon the undertaking, the 22*l.* mentioned in the deed, as he had allowed that to become a subject of the trusts. *Crook* v. *Beetham*, 6 Car. & P. 761.

B., the owner of a lease of a house, assigned it to D. for the residue of the term by way of mortgage to secure 3,000*l.* and interest. D. submortgaged the debt, and assigned the house for the residue of the term, less three days, to E., to secure 1,200*l.* and interest. B. died, and, in an administration suit against his executors, D. and E. brought in a claim for 3,000*l.* B.'s executors assigned their equity of redemption to D. D. further sub-mortgaged the debt, and assigned the house for the residue of the term, less three days, to L., to secure 1,000*l.* and interest. D., by registered deed, assigned all his estate to trustees for the benefit of creditors. E. filed a bill against D.'s trustees and L. for foreclosure; B.'s executors not being parties. D.'s trustees disclaimed by answer, and L. was foreclosed. E., who had been paying the ground rent for some years, at length ceased, and the original lessors entered:—Held, that E. was entitled to prove against B.'s estate, which was insufficient, for the whole sum of 3,000*l.*; but that he was not to receive more than the amount due to him for principal, interest and costs on the 1,200*l.* mortgage debt. *Burrell, In re, Burrell* v. *Smith*, 38 L. J., Ch. 382; L. R. 7 Eq. 399; 17 W. R. 516.

Held, also, that the disclaimer by D.'s trustees extended only to matters in issue in the suit, and did not operate so as to enlarge the estate of E. *Ib.*

A. gave his acceptance to B. for 18,700*l.*, payable (six months after date) on the 5th of February, 1867, and it was discounted by a bank. A. mortgaged a station, and also mortgaged the stock upon it to B. to secure the repayment of 18,700*l.*, with interest at 12½ per cent., on the day above mentioned, and to secure the payment of any bill which the mortgagee might receive, take, make, or endorse by way of renewal or in substitution for the acceptance, or on account of all or any part of the sum therein mentioned, or on any other account incidental thereto. It was also stipulated in the mortgage of the stock that, if default should be made in payment by the mortgagor of the licence fees, or rent charges, fines, penalties and other charges which should become payable in respect of the station or run, or the stock thereon, or in relation thereto, the mortgagee might pay it, and the run, stock, &c., should be chargeable therewith. The bill was renewed from time to time, B. paying the discounts to the bank on A.'s behalf, and debiting A. with the amount in an account current rendered to A., in which he charged A. with interest and mercantile commissions:—Held, that, notwithstanding this mode of keeping the accounts, the amount of the advances for discounts was secured by the mortgage. *Fenton* v. *Blackwood*, L. R. 5 P. C. 167; 22 W. R. 562.

Held, also, that advances for payment of government rent due and for scab licences for sheep might be charged to the mortgage, but that sheep-wash could not. *Ib.*

K. & Co. accepted bills for L. & Co., and L. & Co. mortgaged to K. & Co. an estate to secure a cash credit, granted by K. & Co. to the extent of 75,000 dollars. There was a general current account between the two firms, both of whom became insolvent:—Held, that the mortgage was security for money advanced to meet

the bills. *City Bank* v. *Luckie*, L. R. 5 Ch. 773; 23 L. T. 376; 18 W. R. 1181.

**Account—Charge for Amount found Due.**]—The tenant for life of property held by a mortgagee in possession filed a bill to redeem all the charges on the property, including a legacy charged upon it by the will of an ancestor of her testator; for an account of what was due to herself in respect of the excess of the rents received by the mortgagee beyond interest on the mortgage debt; for a charge upon the property in respect of what was so due; and for consequential relief:—Held, first, that she had a right to a charge upon the property for the excess. *Colyer* v. *Colyer*, *Pawley* v. *Colyer*, 3 De G. J. & S. 676; 11 W. R. 1051.

Held, secondly, that she had a right in case she redeemed, to all the costs of the suit as against the parties taking in remainder under her testator's will. *Ib.*

—— **Disallowance—Construction of Recital and Covenant.**]—In taking the mortgagees' accounts in a foreclosure action the following charges were disallowed—(1) for the costs of an order, made subsequent to the mortgage, appointing trustees under the Settled Land Act, 1882, for the purpose of leasing part of the mortgaged property; (2) for costs incurred by one of the mortgagors to the solicitor-mortgagee, as her solicitor, subsequently to the mortgage and in matters unconnected with it; and (3) a fee paid by the solicitor-mortgagee to the auctioneer-mortgagee for his valuation; the court holding that a recital and covenant in the mortgage deed read together, did not cover any of these charges. *Field* v. *Hopkins*, 44 Ch. D. 524; 62 L. T. 774—C. A. Affirming 59 L. J., Ch. 174.

**Evidence.**]—An indenture of mortgage contained a borrowing clause, and subsequently small sums were from time to time advanced by the mortgagee to the mortgagor; in a suit for the general administration of the estate of the mortgagor, the master, in taking the accounts, refused to report that the cash advances had been made on the security of the borrowing clause, or to allow interest thereon:—Held, on exceptions, that the report was wrong, and that the mortgagee was justified in referring these payments to the borrowing clause. *Cairncross* v. *Bradley*, 2 Dr. & Wal. 482.

**Practice.**]—A., being entitled to a remainder for his own life, after the decease of B., and to a remainder in tail, contingent on his having no male issue, in 1837, in consideration of 4,000*l.*, granted all his estate and interest, with a clause of redemption, on payment of 9,500*l.* All parties were under the impression that A.'s estate was for his life only. B. died in 1841. A. afterwards, by a deed, under the statute, converted his estate tail into a fee. The mortgage was in form for all A.'s interest, and the mortgagee filed the bill, praying for relief against all his interest:—Held, that in this suit A. could not rely on the nature of the transaction as a defence, without filing a cross bill. *Richards* v. *Bayly*, 6 Ir. Eq. R. 545; 1 Jo. & Lat. 120.

But, semble, the transaction would be impeachable within the rules relating to post obit securities, although A.'s remainder for life was contingent. *Ib.*

It was admitted that the contract for the mortgage was for the life estate only, and relief beyond that was waived. There was a judgment to secure the same sum:—Held, that the relief under the judgment, as well as the mortgage, must be confined to the life estate. *Ib.*

### 7. Further Advances.

**New Security — Effect on old.**]—A new security of as high an order for old debt and further advances does not necessarily prejudice the old security. *Tenison* v. *Sweeny*, 1 Jo. & Lat. 710; 7 Ir. Eq. R. 511.

**Priority.**]—Where there is a mortgage for present and future advances, and a subsequent mortgage of the same description, further advances made by the prior mortgagee, with notice of the subsequent mortgage, have no priority over antecedent advances made by the subsequent mortgagee. *Rolt* v. *Hopkinson*, 3 De G. & J. 177. Affirmed *S. C.*, nom. *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; 34 L. J., Ch. 468; 7 Jur. (N.S.) 1209; 5 L. T. 90; 9 W. R. 900.

—— **Further Advances by first Mortgagee after Notice of Second Mortgage.**]—The principle of the decision in the case of *Hopkinson* v. *Rolt* (9 H. L. Cas. 514), is not confined in its application to the law of England, but it is applicable also to the law of Scotland. M., who was indebted to the respondent bank, conveyed certain freehold property in Greenock to them to hold in accordance with the terms of a "back letter" "in security and until full and final payment of all sums of money due or which may hereafter become due by me to you." Some time afterwards she assigned all her remaining interest in the property to the appellant bank, as security for the balance due under two bills of exchange, and notice of this assignment was given to the respondents. After notice of the assignment the respondents made further advances to M. She afterwards became bankrupt, and the security proved insufficient to meet the claims of both banks:—Held, that the respondent bank had no power to bind the security by further advances after they had notice of the assignment to the appellant bank, notwithstanding the terms of the back letter. *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53; 56 L. T. 208—H. L. (Sc.) *See also Lloyd's Banking Co.* v. *Jones*, 54 L. J., Ch. 931; 29 Ch. D. 221; 52 L. T. 469; 33 W. R. 781; and *Macnamara's Estate*, *In re*, 13 L. R., Ir. 158.

**Costs.**]—A mortgage to secure future advances will not operate as a security for costs subsequently incurred. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

Mortgage by N. to R., a solicitor, to secure present "and future advances," with subsequent registered judgment in favour of S., without notice of the mortgage. N. became indebted to R. for costs:—Held, that those costs were not bonâ fide advances, and that, upon S. redeeming R., the latter was not entitled to have those costs included in the account. *Ib.*

**Evidence.**]—A mortgagee having advanced to the mortgagor a further sum upon his bond:—Held, that the bond, though obscurely worded, was evidence of an agreement for a further charge upon the mortgaged premises. *Hearn, Ex parte*, Buck, 165.

8. COVENANTS.

a. To pay Money.

**Who liable.**]—A covenant to pay the mortgage money not suable in equity, unless covenantor receives the money; as, where a feme sole seised of lands, subject to a mortgage, marries B., and the mortgage is assigned, and B., in the deed of assignment, covenants to pay the money, and dies, his personal estate not liable in equity to pay the mortgage money. *Bagot* v. *Oughton*, 1 P. Wms. 347.

If A. borrows money for B. on a mortgage of his estate, the covenant in the mortgage deed to pay the money will bind him for whom it is borrowed. The mortgagor may file a bill against his debtor, to have his estate disencumbered; and so may every surety against his principal; for he shall not be put to his indebitatus assumpsit. *Lee* v. *Rook*, Moseley, 318.

Where father and son join in mortgage of father's estate, and father receives the money, and son conveys in consideration of 10*s.*, and there is no covenant in mortgage for payment of money, neither the real nor personal assets of son are bound. *Lloyd* v. *Thursby*, 9 Mod. 463.

**Absence of.**]—In a mortgage, the absence of a covenant of repayment, and of a collateral bond, cannot vary the transaction. *Goodman* v. *Grierson*, 2 Ball. & B. 278; 12 R. R. 82.

**Usual.**]—A debtor covenanted to execute a mortgage of some property to secure a debt, and covenanted that the deed should contain all the covenants usually inserted in a mortgage. The instrument of charge was under seal:—Held, that, as a covenant to pay is a usual covenant in a mortgage deed, the debt became a specialty debt. *Saunders* v. *Milsome*, L. R. 2 Eq. 573; 14 L. T. 788; 15 W. R. 2.

**Conditional.**]—Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action. Secus, where there is a promise to pay a collateral sum on demand. *Birks* v. *Trippet* (1 Wms. Saund. 32), followed. Where a mortgage contained joint and several covenants by a surety and the mortgagor to pay the debt "on demand," and "in the meantime from the date" of the deed to pay interest, and a proviso for redemption if the mortgagor should "on demand" pay the debt and interest from the date of the deed:—Held, that the demand was a condition precedent, and that no right of action accrued against the surety until demand made. *Brown's Estate, In re, Brown* v. *Brown*, 62 L. J., Ch. 695; [1893] 2 Ch. 300; 3 R. 463; 69 L. T. 12; 41 W. R. 440.

**To pay Commission if debt paid off—Validity.**]—Mortgagor covenanted, in case mortgage were paid off, to pay mortgagee a commission of 5 per cent. upon the sum advanced, and interest upon that commission from date of the advance:—Held, illegal and void, as contrary to the nature of a mortgage security and a clog on redemption. *Chapple* v. *Mahon*, Ir. R. 5 Eq. 225.

b. Penal.

**What are.**]—In a mortgage bond, given to secure the due payment by instalments of a sum due, a provision making the total sum due enforceable on any default is not to be considered a penalty. *Wallingford* v. *Mutual Society*, 50 L. J., Q. B. 49; 5 App. Cas. 685; 43 L. T. 258; 29 W. R. 81.

A mortgagee agreed to advance to a mortgagor a sum to be repaid at specified dates by instalments, with interest at 6*l.* per cent. per annum, and, if the bank rate should exceed 4*l.* per cent., additional interest equal to the excess. If default was made in payment of any instalment at due date, there was also to be paid a "commission" of 1*l.* per cent. for every month or part of a month from the due date to the date of payment of such instalment:—Held, that this "commission" was not in the nature of a penalty, and that the mortgagee was entitled to charge for it in taking the account. *General Credit and Discount Co.* v. *Glegg*, 52 L. J., Ch. 297; 22 Ch. D. 549; 48 L. T. 182; 31 W. R. 421.

Where a mortgage to secure an existing debt, payable by instalments, with interest to the times of payment, contained a proviso that, in the event of the debt not being punctually paid by instalments as specified in the deed, the full amount of the debt should immediately become payable:—Held, that the proviso was not in the nature of a penalty, and that relief could not be granted to the mortgagor against it. *Sterne* v. *Beck*, 2 N. R. 346; 1 De G. J. & S. 595; 32 L. J., Ch. 682; 8 L. T. 588; 11 W. R. 791.

In a mortgage of chattels, which was duly registered as a bill of sale, to secure the repayment of 400*l.* then advanced, and a further sum of 144*l.* for interest and expenses, by instalments payable every three months, and in default of payment of any one instalment the whole amount remaining unpaid to become immediately due, followed by a proviso that, in default of payment of the moneys secured, or any part thereof, or if the mortgagor should become a liquidating debtor or bankrupt, or upon the happening of certain other contingencies, the mortgagee might enter, sell, and repay himself the whole of the sums due to him upon the security of the mortgage. The mortgagor having become a liquidating debtor:—Held, that the provisions of this mortgage were not in the nature of a penalty, and that the mortgagee was entitled to possession of the property comprised in the mortgage deed. *Cochrane, Ex parte, Sendall, In re*, 48 L. J., Bk. 31; 9 Ch. D. 698; 38 L. T. 820; 26 W. R. 818.

**Default of Payment.**] — A creditor having agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time, the debtor executed a mortgage for such balance, containing a proviso that, if the mortgage debt was not paid within the two years, the whole of the original debt should be recovered. The debt was not paid within the two years:—Held, that the proviso was not of the nature of a penalty, from which the mortgagor was entitled to be relieved in equity, and that the mortgagee was not entitled only to recover the smaller sum. *Thompson* v. *Hudson*, 38 L. J., Ch. 431; L. R. 4 H. L. 1. Reversing, L. R. 2 Eq. 612.

**Against Redemption.**]—A covenant in mortgage not to redeem is unreasonable. *East India Co.* v. *Atkyns*, 1 Comyn. 348.

**For Sale.**]—A mortgagor, by a proviso in a mortgage deed, agreed in a certain event to sell to B., the mortgagee, for a fixed sum, part of the mortgaged premises:—Held, that the proviso was totally void, as being an onerous engagement entered into at the time of the mortgage. *Edward, In re*, 11 Ir. Ch. R. 367.

**Collateral Advantage.**] — A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it, or clog the redemption with any by agreement. *Jennings* v. *Ward*, 2 Vern. 520.

**Rights of Third Party involved.**]—A. mortgaged his property to D. to secure 700*l.*, agreed by D. to be taken in lieu of a judgment debt of 3,000*l.*, and the 700*l.* was to be payable by instalments at certain times, and, if not punctually so paid, D. was to be remitted to his original rights, and to have the mortgage security also. The judgments were assigned, by a contemporaneous deed, to trustees for D., and on punctual payment of the 700*l.* for A. and B. A. had previously mortgaged his property to B. as a counter security, and for other debts. The instalments were not paid punctually, and the 3,000*l.* was therefore claimed in full:—Held, that, though the court would not interfere if the arrangement were between him and D. only, yet, as the rights of B. were involved, the condition in default of punctual payment should be treated as a penalty, and relieved against, and this equity could be enforced by A. as well as by B. *Carroll* v. *O'Connor*, 11 Ir. Eq. R. 200.

### c. For Title.

**Further Assurance.**] — Mortgagor compelled under the covenant for further assurance, to supply a defect in a mortgage against judgment creditors. *Burgh* v. *Francis*, 3 Swanst. 536, n. 19 R. R. 275.

Tenant in tail makes a mortgage, with covenant for further assurance, and becomes bankrupt; his assignees are bound by the covenant. *Pye* v. *Daubuz*, 3 Bro. C. C. 595.

A., in November, 1841, mortgaged estates of which he was tenant in tail in remainder, and the indenture contained the usual covenant for further assurance. In September, 1842, A. was adjudicated a bankrupt, and subsequently received his certificate. In July, 1855, an order was made which declared that A. was entitled to two parts of the estates in S., and that they were comprised in the mortgage deed. A disentailing assurance was in February, 1856, tendered by the mortgagee to A. for execution, but he refused to execute it; and thereupon a bill was filed against A. and his assignees in bankruptcy, praying that it might be decreed pursuant to his covenant for further assurance, to execute and deliver to the plaintiff a proper disentailing assurance of all the hereditaments in S. to which he was entitled for an estate in tail male. A demurrer to the bill by A. was allowed, and the bill was subsequently dismissed. *Davis* v. *Tollemache*, 2 Jur. (N.S.) 1181.

Semble, unless there be words in a conveyance to show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the court will not resort to its extraordinary jurisdiction for specific performance, to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made. *Ib.*

**Freedom from Incumbrances.**] — H. having mortgaged an estate to the defendant, H., as mortgagor, and the defendant as mortgagee, conveyed a part of the same to A. for building a house thereon, by deed, in which A. was empowered to erect a "porte cochère or projection" on one side of her proposed house, such projection to extend over the foot pavement of a certain road, and the plan thereof to be submitted to and approved of by H. Afterwards H. and the defendant conveyed other part of the same estate to the plaintiff by deed, in which was granted to the plaintiff and his friends, servants, &c., and all other persons for the benefit of the plaintiff, the right to pass and repass over and along certain roads, of which the road over which A. had been allowed to build the projection was one; and by the same deed the defendant for himself covenanted with the plaintiff that he, the defendant, "had not done, omitted, or knowingly suffered, or been party or privy to anything whereby the premises were or might be impeached, affected, or incumbered":—Held, first, that upon the construction of the deeds the covenant of non-incumbrance was not broken by the defendant having been party to the deed whereby A. was allowed to erect the porte cochère or projection. *Clifford* v. *Hoare*, 43 L. J., C. P. 225; L. R. 9 C. P. 362; 30 L. T. 465; 22 W. R. 828.

Held, secondly, that the defendant, having joined as mortgagee only, would not have diminished his liability upon the deeds if the court had construed them against him. *Ib.*

## 9. Fraud or Improper Conduct.

### a. By Mortgagee or his Agents.

**Generally.**]—A person who will take advantage of the statute against Clandestine Mortgages, 4 & 5 Will. & M., c. 16, must be an honest mortgagee, and, therefore, if a man has used any fraud or ill practice in obtaining a second mortgage, he shall not have the benefit of the statute. *Stafford* v. *Selby*, 2 Vern. 589.

A. mortgages certain premises to B.; and B. assigns the mortgage to C. subject to redemption. C. files a bill of foreclosure against A. and B., and A. files a cross bill against B. and C., impeaching the mortgage from himself to B.: this bill will be dismissed as against C. with costs. *Darcy* v. *Callan*, 1 Jones, 614.

C. cannot tack those costs to his demand on foot of his mortgage. *Ib.*

**Antedating.**] — If mortgagee fraudulently antedate mortgage for purpose of over-reaching marriage settlement, mortgage is void, but fact must be first tried at law. *Osborn* v. *Lea*, 9 Mod. 96.

**Restraint on Mortgagor.**]—Where mortgagee by agreement, either in the mortgage deed or a separate one, fetters the redemption with a fraudulent design to get the estate, it will not avail. *Mellor* v. *Lees*, 2 Atk. 495.

Absolute conveyance and a deed of defeasance, on payment of mortgage money, during the joint lives of mortgagor and mortgagee:—Held, a restraint upon mortgagor; and a redemption decreed, there being also fraudulent and oppres-

sive conduct on the part of the mortgagee. *Spurgeon* v. *Collier*, 1 Eden, 55.

**Suspicion.**]—A father, having a power of appointment among his children, appointed a large portion of the property to one son, and by deed bearing date shortly after the son mortgaged it. Both deeds were prepared by the mortgagee's solicitor, but were both altered by the family solicitor of the father and son. The mortgage and receipt indorsed treated the money as paid to the son, but the father, who had a legal estate, was a party to the mortgage, and the mortgagee wrote a letter of the same date to the father, promising not to call in the money for three years. Both father and son joined in a collateral bond. The draft mortgage furnished to the family solicitor differed in date from that executed. An underhand agreement was alleged, but not proved to have been made by the mortgagee's solicitor, against whom the bill was dismissed by consent. There was no proof that the father received the money, except a transfer to his credit at a banker's a considerable time after :—Held, that, although the transaction was suspicious, it must be supported in favour of the mortgagee. *Hamilton* v. *Kirwan*, 8 Ir. Eq. R. 278 ; 2 Jo. & Lat. 393.

**Undue Influence.**] — A bill impeaching a security upon charges of actual fraud which were not sustained, dismissed with costs so far as related to the charges of fraud, although the security was set aside on the ground of undue influence. *Tabor* v. *Cunningham*, 24 W. R. 153.

Where unfair advantage was taken of the necessities of one who wished only to raise money upon mortgage, but was induced to execute an absolute conveyance at a considerable undervalue by his solicitor, who betrayed his interests to serve the purposes of the purchaser, the court set aside the transaction as an absolute sale. *Douglas* v. *Culverwell*, 3 Giff. 251 ; 31 L. J., Ch. 65 ; 10 W. R. 189. Affirmed, 6 L. T. 272.

When a solicitor and mortgagee took a conveyance from the mortgagor, a day labourer, who had no independent legal advice :—Held, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of showing that this was done lay on the solicitor. *Prees* v. *Coke*, L. R. 6 Ch. 645.

**Immoral Purpose.**]—A., being requested by B. (in consequence of reports that he was paying improper attentions to a daughter of the latter) to discontinue visiting at his house, in order to lay B. under obligation to him, and so, by obtaining permission to continue his intercourse with B.'s family, to gain free access to the daughter, whom he had in fact secretly seduced, advanced to B. a sum of money on mortgage. Upon a bill by A. to foreclose, and by B. to set aside the deed :—Held, that, notwithstanding the pecuniary consideration, the immoral purpose vitiated the whole deed : and a decree was made for its cancellation, leaving A. to sue at law, if he thought fit, for the money lent. *Willyams* v. *Bullmore*, *Bullmore* v. *Willyams*, 32 Beav. 574 ; 33 L. J., Ch. 461. *S. C.*, 9 Jur. (N.S.) 1115 ; 9 L. T. 216 ; 11 W. R. 506.

In a suit by a father and his two daughters, seeking to be relieved from a mortgage deed which, as to the daughters, was voluntary, it is not irrelevant and scandalous to state that the money was advanced by the mortgagee spontaneously, in order that he might be able to continue his visits to, and obtain an influence over, the family, and by that means attain his object, which was the seduction of one of the daughters. *W.* v. *B.*, 31 L. J., Ch. 755 ; 8 Jur. (N.S.) 1141 ; 10 W. R. 617.

**Consideration—Improperly stated.**]—Where a mortgage professes to be made in consideration of a sum down, and which is, by the deed, made immediately payable, whereas the contract was for an annuity, and the consideration was not to be payable until after the death of a person named, such mortgage is fraudulent and void as against a mortgagor who joins therein as surety only. *Spaight* v. *Cowne*, 1 H. & M. 359.

—— **Absent.**]—A. obtained a mortgage of real and personal estate from B., without consideration. It was afterwards deposited with C. as a security, who had no notice of the circumstances under which it had been obtained :—Held, that C. could stand in no better position than A., and the deed being void as against A., was equally void as against C. *Parker* v. *Clarke*, 30 Beav. 54.

—— **Unconscionable Bargain.**]—Persons in a humble position, being entitled in reversion expectant on the death of a tenant for life, to a sum of 1,500*l.* charged on land, purported to mortgage this interest to B. as security for 500*l.*, though 250*l.* only was actually advanced. B. subsequently advanced 150*l.* more, for which a further charge for 300*l.* on the same reversionary interest was taken as security. The securities were prepared by B.'s solicitor, acting for all parties, and the borrowers had no independent adviee. Only one year's interest was ever paid. On the death of the tenant for life :—Held, that the mortgage and further charge could stand as security only for the sums actually advanced, with six years' arrears of interest only. *Slater's Trusts*, *In re*, 48 L. J., Ch. 473 ; 11 Ch. D. 227 ; 40 L. T. 184 ; 27 W. R. 448.

Semble, the court will, upon petition for payment out of court, hear and decide questions of this nature without directing the issue of a writ. *Ib.*

**Collateral Advantage taken by Mortgagee—Bonus Payable on gaining Action.**]—The plaintiff and G. were co-heirs of M., and in that capacity were parties to a probate action in which a will of M. was propounded. Being at the time in poor circumstances, the plaintiff by deed in consideration of 60*l.* then advanced by the mortgagees, agreed to give a promissory note for that amount and for any further advances (which the mortgagees were not bound to make, but did make to the extent of 40*l.*), with interest at five per cent. per annum ; and the plaintiff thereby agreed to employ the solicitor in the probate action, who was then acting for G., and not to remove him without the mortgagees' consent ; and also, if the plaintiff's title should be established, to pay to the mortgagees within three months thereafter by way of "bonus" 225*l.* ; and the advances, interest, and bonus were thereby charged on the plaintiff's interest in the real estate of M. The plaintiff's title was ultimately established in the probate action, whereupon he claimed to redeem without payment of the bonus :—Held that he was entitled

to do so, since the stipulation for the bonus was a collateral advantage stipulated for by mortgagees contrary to law. *James* v. *Kerr*, 58 L. J., Ch. 355 ; 40 Ch. D. 449 ; 60 L. T. 212 ; 37 W. R. 279 ; 53 J. P. 628.

**Extent of Charge.**]—A., and B., a solicitor, raised 2,500*l*., by sale of a sum of stock, of which they were trustees. A. enabled B. to receive the 2,500*l*. for the purpose of lending it, on mortgage, to C., and intrusted him with the conduct of the transaction. B. prepared the mortgage-deed ; and procured C. (who knew that the money was in B.'s hands) to execute it, and to sign a receipt, on the back of it, for the 2,500*l*. It was then executed by A. and sent to B., who paid to C. 1,563*l*., in part of the 2,500*l*., and died insolvent : —Held, that, as between A. and C., A. was to be treated as mortgagee for the whole 2,500*l*. *West* v. *Jones*, 1 Sim. (N.S.) 205 ; 20 L. J., Ch. 362.

**Validity.**]—Where, under the pretence that it was a deed of covenant to produce title deeds, a solicitor procured his client to execute a deed of mortgage to himself, to secure payment of a debt, the existence of which was not shown ; the deed thus fraudulently procured to be executed :—Held, to be false and fictitious, and wholly void. *Vorley* v. *Cooke*, 1 Giff. 230 ; 27 L. J., Ch. 185 ; 4 Jur. (N.S.) 3.

—— **Partly Valid.**]—A bill prayed that a mortgage might be cancelled and for further relief, but it proved to be valid to some extent. The court refused the relief asked, or to make a decree for redemption on payment of what was properly due, and dismissed the bill with costs. *Crenver Mining Co.* v. *Willyams*, 35 Beav. 533.

Where a mortgage was taken in part in respect of a sum for which the mortgagee represented himself to the mortgagor as being liable as a surety for the latter, and such representation was erroneous, to the knowledge of the mortgagee :—Held, that to that extent the security could not be supported. *Lake* v. *Brutton*, 8 De G. M. & G. 440 ; 2 Jur. (N.S.) 839.

—— **After Payment of Interest.**]—Notwithstanding payment for twenty-three years, by a widow, of the interest on a void mortgage, created by her while coverte :—Held, that her representatives were not precluded from disputing its validity. *Blandy* v. *Kimber*, 24 Beav. 148.

—— **As against Sub-mortgagee.**]—A purchaser of a chose in action takes it subject to all equities ; and, therefore, where A. mortgaged a fund in court to B., and after joined B. in a sub-mortgage to C., and it was decided that the mortgage to B. was fraudulent and void :—Held, that it was void also as to C., and that neither A.'s concurrence in the first nor second mortgage prevented him from insisting on the invalidity of the transaction with B., he, A., not being cognizant of his rights. *Cockell* v. *Taylor*, 15 Beav. 103 ; 21 L. J., Ch. 545.

**Setting Aside.**]—The solicitor and confidential friend of a father and son, being a large creditor of the father on a mortgage of his life estate, with certain policies of assurance on the father's life, induced the son, who was immediate tenant in tail in remainder, to concur in executing a disentailing deed a month after the son came of age, and to execute a mortgage charging this debt of the father on the inheritance, the policies of assurance being at the same time assigned for the benefit of the son. The counsel employed to prepare the deeds cautioned the solicitor that the transaction might be impeached ; and, by his advice, another solicitor was consulted on behalf of the son, who declined to advise the son to enter into the transaction :—Held, that the son was entitled to set aside the mortgage on the terms of restoring the policies of assurance. Held, also, that one of the policies having been sold by the son, by advice of the solicitor, to pay the premiums on the others, the restoration of the money produced by that sale was sufficient. *King* v. *Savery*, 1 Sm. & G. 271 ; 1 W. R. 141.

Three subsequent mortgages, one to the solicitor, and the two others to strangers, the moneys advanced on which were applied or invested in land, of which the son had the benefit :—Held, not to be a sufficient confirmation. *Ib.*

Four years after the first mortgage, the solicitor, after an ineffectual attempt to sell on behalf of the father and son, himself became the purchaser of the family estate, on an apportionment of a part of the purchase-money to the son, which was less than the fair value of his remainder in fee :—Held, that the sale was invalid, and that the conveyance as against the son could only stand as a security for the amount of purchase-money appointed to the son. *Ib.*

The plaintiff, relying upon a false representation of her solicitor that it was necessary to raise money to pay off an old mortgage on her sister's estate, and that she herself would not incur any liability by so doing, executed a mortgage of her estate in favour of the defendant. The solicitor applied the mortgage-money for his own purposes, and the fraudulent nature of the transaction was not discovered until his death :—Held, that the mortgage must be set aside. *Lee* v. *Angus*, 15 L. T. 380 ; 15 W. R. 119.

**Solicitor—For both Parties.**]—An equitable mortgagee, by deposit of title deeds, at the instance of the solicitor who had acted for both mortgagee and mortgagor, handed him the title deeds for the purpose of preparing a legal mortgage. The solicitor, in fraud, and upon misrepresentations made to the mortgagor, procured a legal mortgage to be executed to himself. He afterwards gave to the equitable mortgagee forged documents purporting to be a legal mortgage, and subsequently transferred the valid mortgage to purchasers without notice : —Held, that the loss occasioned by the fraud must fall upon the mortgagor, and not upon the equitable mortgagee. *Adsetts* v. *Hives*, 33 Beav. 52 ; 2 N. R. 474 ; 9 Jur. (N.S.) 1063 ; 9 L. T. 110 ; 11 W. R. 1092.

—— **Of Mortgagee.**]—Trustees placed money in the hands of their solicitors for investment, and the solicitors, by means of a fraud practised on A., induced him to execute a mortgage of property to the trustees, handed to them the deeds, and appropriated the money to their own use. No part of the consideration was paid to A. The solicitors became bankrupt. The trustees brought an action against A. on the covenant, who, in ignorance of the facts, allowed judgment to go by default. A bill was filed for the delivery up of the deeds to be cancelled :—Held, that A. was entitled to the relief prayed. *Wall* v. *Cockerell* 10 H. L. Cas. 229 ; 1 N. R.

486 ; 32 L. J., Ch. 276 ; 9 Jur. (N.S.) 447 ; 8 L. T. 1 ; 11 W. R. 442. Reversing 3 De G. F. & J. 737.

—— **Acquiescence — Press.**]—The onus of proving a case of acquiescence was on the mortgagee, and could not be discharged, except by proving that the mortgagor was aware of the time and manner in which the mortgagee's money was deposited with the solicitors, and of the fact that no part of it had been applied for the use and benefit of the mortgagor. *Ib.*

**Trustee—Right of Beneficiary.**]—A fund, the property of A., was, together with moneys the property of a third party, lent to X., who secured the same by a legal mortgage to B. as A.'s trustee. B.'s trusteeship not appearing on the face of the mortgage, he, by a separate instrument, declared the trusts of A.'s fund in favour of A. B. afterwards wrongfully deposited the mortgage deeds with C. to secure an advance to himself. The fund being paid into court by arrangement on paying off the mortgage :—Held, that A. was entitled to receive his portion to the exclusion of C.'s right as depositee. *Stackhouse* v. *Jersey (Countess)*, 1 J. & H. 721 ; 7 Jur. (N.S.) 359 ; 4 L. T. 204 ; 9 W. R. 453.

The mere possession of the deeds by C. gave him no advantage which he could actively assert. *Ib.*

**Notice.**] — Circumstances under which an assignee of a security may be held to be put upon inquiry by the terms of the security itself as to matter of equitable fraud affecting its validity. *Tabor* v. *Cunningham*, 24 W. R. 153.

Where the solicitor employed by mortgagor and mortgagee obtained the execution of the deed in such an irregular and informal manner as ought to have excited the suspicion of the mortgagee, and to have put him upon making inquiries :—Held, to amount to constructive notice of the fraud by which it was obtained, and a reassignment decreed : decree affirmed upon appeal, but as there was no actual knowledge, without costs. *Kennedy* v. *Green*, 3 Myl. & K. 699.

**Practice.**]—Where a suit was instituted by a mortgagor to set aside the mortgage deed, on the ground that it was obtained by the mortgagee under circumstances of pressure and surprise, which, however, the mortgagee denied, the court, upon motion, ordered the production of the deed, it appearing that the mortgagee was a solicitor, and that he had been the mortgagor's only professional adviser in the transaction. *Davis* v. *Parry*, 27 L. J., Ch. 294 ; 4 Jur. (N.S.) 431 ; 6 W. R. 171.

### b. By Mortgagor or his Agents.

**Generally.**]—Mortgagors cannot impeach a mortgage when by their own conduct they have enabled their managers and bankers to mislead the mortgagees by fraudulent misrepresentations that their money was invested as stated in the mortgage-deed. *Wall* v. *Cockerell* (10 H. L. Cas. 229 ; 32 L. J., Ch. 276 ; 9 Jur. (N.S.) 447 ; 1 N. R. 486 ; 8 L. T. 1 ; 11 W. R. 442) explained and distinguished. *London Freehold and Leasehold Property Co.* v. *Suffield (Baron)*, 66 L. J., Ch. 790 ; [1897] 2 Ch. 608 ; 77 L. T. 445 ; 46 W. R. 102—C. A.

**Preference.**]—A bill by assignees of a bankrupt prayed to set aside a mortgage executed to a creditor by a bankrupt on the eve of bankruptcy, as being in fraud of his general body of creditors, and it also prayed general relief. The bill failing on the ground of fraud :—Held, that they were not entitled to a decree for redemption. *Johnson* v. *Fesenmeyer*, 25 Beav. 88 ; 3 De G. & J. 13.

**Executor, Personation by.**]—A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage-money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds. The other beneficiaries under the will were made defendants :—Held, that the son in executing the mortgage deeds was personating his father ; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will ; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862 ; 20 Ch. D. 611 ; 47 L. T. 89 ; 30 W. R. 648—C. A.

—— **Forgery.**]—Semble, the son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

—— **Delivery of Deeds.**]—Held, also, that the mortgagees must deliver up the title deeds to the plaintiffs. Since the Judicature Act the chancery division has jurisdiction on the application of the legal owner of title deeds to order them to be delivered up by a purchaser for value without notice. *McLeod* v. *Drummond* (14 Ves. 353 ; 17 Ves. 152 ; 11 R. R. 41) distinguished. *Ib.*

**Privity to.**]—A testatrix died in 1837, and all her debts were paid in 1838. In 1850 H. advanced 850*l.* in cash, and 150*l.* in wine, to the surviving trustee of the will, on the deposit of the deeds of the testatrix's real estate. This money was paid off, and in 1854 H. again advanced 1,000*l.* on a deposit of the deeds and a memorandum of deposit, the trustee at the same time buying some wine. T. paid off H., and in 1858 a mortgage in fee was made to T. for securing the 1,000*l.*:—Held, that H. could not have supposed the money to have been advanced for the payment of the debts of the testatrix, and that T. was in no better position than H.,

and could not maintain the mortgage. *Burt* v. *Trueman*, 6 Jur. (N.S.) 721 ; 8 W. R. 635.

**Solicitor.**]—A mortgagee of leasehold premises was induced by the mortgagor (his solicitor) to execute deeds, represented as being leases, but by which, in consideration of a sum, never in fact paid, the mortgagee was made to assign the premises, by way of sale, to a female servant, by whom they were afterwards mortgaged for value to the defendant. On a bill by the first mortgagee to set aside these deeds :—Held, that they were wholly void, and were decreed to be delivered up to be cancelled. *Ogilvie* v. *Jeaffreson*, 2 Giff. 353 ; 6 Jur. (N.S.) 970 ; 8 W. R. 745.

**Liability of Trustees for.**]—A voluntary settlement was suppressed by A., the settlor, who was tenant for life, with the privity of B. and C., the trustees, and under the advice of D., a solicitor, in order to facilitate the obtaining from a person not aware of the settlement, and to whom A. represented herself as absolute owner, of advances of money on the mortgage of the trust estate. Two former trustees, X. and Y., on an application being made to them either to raise the money under certain powers in the settlement, or to relinquish their trust, refused to raise the money, but consented to retire from the trust in favour of B. and C. :—Held, that A., B., C. and D., as having all joined in the suppression of the settlement, were liable to the mortgagee, for the advances made by him ; but that X. and Y. were, in the absence of any proof that they were accessory to, or contemplated the suppression of the settlement which resulted from their retirement, not liable to the mortgagee. *Clark* v. *Hoskins*, 37 L. J., Ch. 561. Affirming, 16 L. T. 730.

**Relief against.**]—Tenant for life, remainder to his first son, assures the mortgagee that he had no son, whereas he had a son, born five days before, and delivers the settlement to the mortgagee. The mortgagee, being advised that before the birth of a son the tenant for life might destroy the contingent remainder, lends his money, having no notice a son was born. The son of the mortgagor shall not be relieved against this mortgage. *Hitchcock* v. *Sedgwick*, 2 Vern. 159.

Defendant representing that his estate was encumbered only to the amount of 18,000*l.*, borrowed that sum, agreeing to mortgage the estate as a security, paying off the incumbrances out of the money. The lender's solicitor being very negligent, the mortgage was executed and great part of the money paid, when it was discovered that the incumbrances exceeded 30,000*l.* : —Held, it was not too late to relieve the lender in equity. *Brown* v. *Stepney*, Beat. 588.

—— **Negligence.**]—The mortgagee in possession of certain copyhold property was, by the fraud of her solicitor, induced to sign, without knowing the contents thereof, a deed which, after falsely reciting that the solicitor had agreed to pay to the mortgagee the amount due to her upon the mortgage, purported to transfer the mortgage debt and the securities for the same to the solicitor. The solicitor then deposited the deeds of the property with the plaintiff as security for money lent to him. The solicitor absconded, and the trustee of his estate executed a deed mortgaging the property to the plaintiff. The original mortgagee thought, when she signed the deed, that she was only signing a lease of the property, and she did not intend to deal with her mortgage or with her possession thereunder : —Held, that the mind of the mortgagee did not go with the deed which she signed, and as she had not been guilty of any negligence the deed was void. *Favell* v. *Wright*, 64 L. T. 85.

—— **Forgetfulness no Defence.**]—S., on the request of H., agreed to lend to him a sum of money upon the security of four houses which were being erected on a site belonging to C., and of a lease to which H. represented himself to be entitled, at a peppercorn rent, from C., if an assurance could be obtained from C. that he would grant a lease of the houses to H. C. gave the required assurance to H., and he also wrote a letter to the solicitors of S., stating that he was quite ready to grant a lease of the houses, at a peppercorn rent to H. Underleases of the same houses, dated in January, 1857, were thereupon prepared by the solicitors of S., and executed by C. to H., and he, on the 2nd May, 1857, executed a mortgage of the underleases to the plaintiff, in consideration of moneys advanced by him to the mortgagor. H. afterwards became involved in pecuniary difficulties, and left the country. S. then discovered that C. had, in August, 1856, granted to H. a lease, for ninety-nine years, of property which included the same four houses as were comprised in the underleases of January, 1857. A bill was filed by S. against C. and H., praying for a declaration that the plaintiff had been induced to lend his money by fraud, misrepresentation and concealment on the part of both C. and H., and that each might be decreed to repay the money and interest. It was on behalf of C. contended that he had acted in good faith, and in forgetfulness of the former lease, and that there was no fiduciary relation between him and the plaintiff. The vice-chancellor held (6 Jur. (N.S.) 190) that the forgetfulness of C. was no justification, and that, as he had suggested what was false to, and concealed what was true from, the plaintiff, he must repay the whole of the mortgage-money, with interest, and the costs of the suit. On appeal, the decision was affirmed. *Slim* v. *Croucher*, 1 De G. F. & J. 518 ; 29 L. J., Ch. 273 ; 6 Jur. (N.S.) 437 ; 8 W. R. 347.

**Jurisdiction.**]—Held, also, a case in which the courts of law and equity had a common jurisdiction, but a court of equity was the more proper tribunal. *Ib.*

**Mortgage of Railway Stock—Conversion by Broker of Mortgagor — Negligence of Mortgagor.**]—The plaintiff, through the agency of his broker, obtained a loan from an insurance company upon the security of railway stock, which the plaintiff transferred to the insurance company. Afterwards, at the broker's suggestion, the plaintiff agreed to have the security transferred to the broker's bank, and the transfer was carried out through the agency of the broker, and executed by the insurance company to the bank. A nominal consideration only was expressed in this transfer. The plaintiff gave no notice of his interest to the bank, and placed no distringas on the stock. Subsequently the stock was sold on the market by the broker, and the bank at his request, believing him to be the owner, executed transfers to the purchasers, and, after payment of the amount of the advance, the

broker received the balance and converted it to his own use. In an action by the plaintiff against the bank to recover the difference between the amount of the advance and actual proceeds of sale :—Held, that the bank were not put upon inquiry as to the plaintiff's title ; that the plaintiff's loss was attributable to his own negligence, and that he could not recover against the bank. *Marshall* v. *National Provincial Bank*, 61 L. J., Ch. 465 ; 66 L. T. 525 ; 40 W. R. 328.

**Notice.**]—Solicitors for trustees for sale purchased part of the trust property, and mortgaged it to A. and B. The purchase was set aside :—Held, that A. and B., who had notice of the relation in which their mortgagors stood to the vendors, could claim no better title than their mortgagors. *Cookson* v. *Lee*, 23 L. J., Ch. 473.

W., a solicitor, being indebted to E., and being pressed for payment or further security, proposed to give him a second mortgage on the G. estate. This estate had been bought in the name of the plaintiff, who was, however, only a trustee for W., a fact which did not appear in the deeds. The proposal being acceded to, W. sent to E.'s solicitors the draft of a mortgage deed, which was in the common form of a mortgage from the plaintiff to E., for money advanced at the time. The draft being approved by E.'s solicitor, the deed was engrossed, and was executed by the plaintiff, and handed to W., who delivered it to E., no communication taking place between E. or his solicitors and the plaintiff. The security of the estate proved deficient. E. sued the plaintiff on the covenant in the deed, and the plaintiff thereupon filed a bill to be relieved, on the ground that he had been defrauded by W. into executing a deed containing a covenant to pay :—Held, that E. was not bound to inquire whether the plaintiff, who was not the real borrower, had agreed to enter into a covenant for payment, and that the frame of the deed did not affect E. with notice of any fraud that might have been practised by W. on inducing the plaintiff to execute such deed. *Greenfield* v. *Edwards*, 2 De G. J. & S. 582 ; 11 Jur. (N.S.) 419 ; 12 L. T. 411 ; 13 W. R. 668.

—— **Purchase for Value without.**] — The defendant, who was in possession of a piece of land, under an agreement for sale, upon which he had built a granary, allowed his sons, who were partners, to have the occupation of the land and premises. The sons erected other buildings of considerable value upon the land, and supplied the father with goods for the amount of the cost of the granary erected by him. The sons afterwards applied to bankers, for a loan upon the security of the land and premises, and having obtained surreptitious possession of the agreement for the sale of the land to the father, without his knowledge, deposited the agreement with the bankers, alleging that the father had given up to them all his interest in the land, and would execute a conveyance to the bankers when required. The father had previously to this transaction become surety for the sons to another bank, and was called upon to pay a large debt in respect of this surety. The father alleged that he had never given the land to the sons, and had never intended to do so until he was released from his liability as surety. The bankers filed a bill to establish, as against the father, a charge on the land for the advances to the sons :—Held, that the sons had an equitable charge upon the land, as against the father, for the amount paid by them to the father, and for their own expenditure on the land ; that, although the deposit was made under false representations, and did not bind the father, yet the bankers were purchasers for value without notice, and were entitled to a charge on the land to the full extent of the lien of the sons ; and that, although the father, in respect of his suretyship, had a right to set-off against his sons, yet it could not be enforced against the bankers, whose right accrued without notice of any claim of the father. *Unity Joint Stock Banking Association* v. *King*, 25 Beav. 72 ; 27 L. J., Ch. 585 ; 4 Jur. (N.S.) 470 ; 6 W. R. 264.

—— **Constructive.**] — Husband and wife in treaty for a loan on the security of her real estate, informed the mortgagee's solicitor of the existence of a settlement executed on their marriage, whereby, on her attaining twenty-one, the property was to be conveyed to trustees upon the usual trusts, although no such conveyance was ever executed. The solicitor told them that he should not mention this to the mortgagee, lest he should refuse to make the advance :—Held, that this was not constructive notice to the mortgagee, for husband and wife were bound, upon the statement of the solicitor's intention, themselves to bring the facts to the knowledge of the mortgagee, and by omitting to do so had become parties to the fraud upon him. *Sharpe* v. *Foy*, L. R. 4 Ch. 35 ; 19 L. T. 541 ; 17 W. R. 65.

### 10. Agreements for, and Specific Performance.

**Generally.**]—Title deeds were deposited by the defendant with the plaintiff as an indemnity against contingent payments, but there was no agreement to execute a formal mortgage. Before the plaintiff had made any payment, he filed a bill to have a formal mortgage executed : —Held, that he was not entitled thereto, but only to a memorandum, signed by the defendant, specifying the terms of the deposit. *Sporle* v. *Whayman*, 20 Beav. 607 ; 24 L. J., Ch. 789.

A. enters into an agreement to the following effect : That he should execute a mortgage, payable, with interest at 5*l.* per cent., in four years to B. and C., to secure to them an amount awarded, viz. 3,120*l.*, with interest at 5*l.* per cent. on the principal, and 2,600*l.* from the date of the award, A. giving reasonable proof that he has power to grant such mortgage, and that the property to be mortgaged is adequate security for it :—Held, that such an agreement (though not sufficient to ground a decree for immediate specific performance) would authorise the court to order A. to select a sufficient portion of his estates, and make it a security in compliance with the agreement. *Humble, In re*, 11 Ir. Ch. R. 132.

Held, also, that after the lapse of four years and A.'s death, it could not be specifically enforced against the heirs and devisees of A., but would enable B. and C. to institute an administration suit, and claim that a sufficient portion of A.'s real estate should be applied in payment of the debt. *Ib.*

De T., being given up to the authorities of a foreign country, under an extradition treaty, to be tried on a charge of murder, assigned all his property to P., and executed a general power of attorney in favour of P. and T. The object of these instruments was, as the court held, to enable money to be raised for his defence. T. was co-trustee with the plaintiff of a marriage settlement, and proposed to him that consols belonging to the trust should be sold out, and the proceeds advanced on the security of a charge on De T.'s property. The plaintiff assented, and the consols were sold and the proceeds paid to T., who produced to the plaintiff a document purporting to be a memorandum of deposit of the assignment and power of attorney, and an equitable charge to secure the advance. The court held on the evidence that B. knew of the charge, and either actually authorised it or left T. to do as he liked:—Held, that the money had been advanced upon the faith of an agreement to charge the property of De T., that such agreement was within the powers of P. and T., and that, if the agreement had not been fully carried out, the plaintiff was entitled to have the charge carried into effect. *Parish* v. *Poole*, 53 L. T. 35. Affirmed in C. A.

Specific performance decreed of articles of agreement to grant a mortgage for money to be lent, a small part being already advanced, and a voluntary deed, creating a term to secure an annuity for the wife of the borrower, declared fraudulent and void as against the articles and against the mortgage agreed to be executed under the circumstances; but, subject to the mortgage, the decree to be without prejudice to the deed. *Hunter* v. *Langford* (*Lord*), 2 Moll. 272.

**Agreement to Borrow.**] — An agreement to borrow a sum of money is not such a contract as the court can compel the specific performance of. *Rogers* v. *Challis*, 27 Beav. 175; 29 L. J., Ch. 240; 7 W. R. 710.

—— **Immediate Power of Sale.**]—The court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale. *Hermann* v. *Hodges*, 43 L. J., Ch. 192; L. R. 16 Eq. 18; 21 W. R. 571.

—— **Effect of.**]—An agreement to give a legal mortgage, superadded upon an agreement to charge land, gives a right to have that contract enforced in equity, and by the same decree to foreclose, unless the money is paid. *Matthews* v. *Goodday*, 31 L. J., Ch. 282; 8 Jur. (N.S.) 90; 5 L. T. 572; 10 W. R. 148.

—— **Absolute Power of Sale.**]—When a person had agreed to execute a mortgage of leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—The court made a decree for specific performance. *Ashton* v. *Corrigan*, 41 L. J., Ch. 96; L. R. 13 Eq. 76.

—— **On Future Property.**]—A. granted an annuity to B., and covenanted to charge any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity. A. became bankrupt, and afterwards obtained his certificate, and then his wife died, having, under a power in her settlement, bequeathed to him an annuity of 700*l.* A. was decreed to execute a proper deed to charge the annuity of 700*l.* with payment of the annuity granted to B. *Lyde* v. *Mynn*, 4 Sim. 505; 1 Myl. & K. 683; Coop. t. Brough. 123.

**Agreement to Lend—Not to call for Title.**]—Where A. agreed to lend 2,000*l.* on mortgage of leaseholds, and not to call for the lessor's title; and afterwards called for the title, and filed a bill for specific performance, or a sale of the premises: specific performance was decreed, but with costs to the defendant. *Bass* v. *Clivley*, Tam. 80; 31 R. R. 71.

—— **Not to call in Money.**]—When, default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired; an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest. *Seaton* v. *Twyford*, 40 L. J., Ch. 122; L. R. 11 Eq. 591; 23 L. T. 648; 19 W. R. 200.

**Locus Pœnitentiæ.**]—A gentleman, who had a valuable collection of historical books, paintings, &c., applied to auctioneers to undertake the sale of the same, and to advance him money on account of the proceeds. An agreement was come to in writing between the parties, by which, in consideration of the advance, the owner of the collection agreed to deposit the whole of the collection with the auctioneers for sale. A portion was deposited with and sold by them, but realised much less than was anticipated and did not amount to more than one-half of their advance. Upon his refusal to deposit the remainder of the collection, a bill was filed by the auctioneers against the owner, and prayed specific performance of the agreement. To this a demurrer was filed for want of equity:—Held, that the court would allow the defendant a locus pœnitentiæ, and that, subject to the satisfaction of the auctioneers' claim for what they had done (which was a matter to be decided in a court of law), the defendant had not, by the agreement, lost the control over that portion of his property which he had retained. *Chinnock* v. *Sainsbury*, 6 Jur. (N.S.) 1318; 3 L. T. 258; 9 W. R. 7.

**Signing by some of several.**]—A number of persons having an interest in an estate, which was the subject of litigation, some of them executed an undertaking, to the town agent of their country solicitor, to mortgage the estate to secure the present and future costs; but it was not signed by the other parties. A bill for specific performance was brought by the town agent against such of the parties as had signed the undertaking. The Master of the Rolls, being

of opinion that it was part of the agreement that all should sign, dismissed the bill with costs. *Jones* v. *Williams*, 5 L. J., Ch. 253.

**Damages for not Executing or Completing.**]—The owner of building land, upon which he had erected houses, mortgaged it, first, to a building society, for 4,300*l.*, with a power of sale in default of payment; secondly, to the defendant for 350*l.*, and afterwards to several other persons for various sums. Being unable to proceed with the building, by deed, to which he, the building society, the defendant, and other mortgagees, were parties, the premises were conveyed to the plaintiff in fee, discharged from all equity of redemption, but subject to the mortgage of the building society, in trust, in his discretion, to sell the same, and out of the proceeds to pay, first, expenses; secondly, the building society; thirdly, the defendant; fourthly, advances made by the plaintiff; and afterwards the other mortgagees in the order of their priority; with liberty for the plaintiff to raise a sum not exceeding 5,000*l.*, for the purpose of carrying into effect the trusts of the indenture. The defendant covenanted that he would execute all assurances reasonably required for enabling the plaintiff to execute the trusts of the deed. The plaintiff had made advances to the extent of 1,150*l.* He had also arranged with the building society to accept 4,100*l.* in satisfaction of their claim; and he had contracted for a loan of 5,000*l.* on mortgage of the premises. The mortgage deed was prepared and all parties attended, when the defendant refused to execute it unless he was paid his debt of 350*l.*, and in consequence the building society sold the premises for 4,510*l.*, which was not more than sufficient to pay their mortgage and expenses:—Held, per Pollock, C.B., and Bramwell, B., that the plaintiff was only entitled to recover as damages the costs of the abortive mortgage. Per Martin, B., that the plaintiff was entitled to recover, in addition to the costs of the abortive mortgage, the difference between 5,000*l.* and the value of the land as building land; or, at all events, 900*l.*, the residue of the 5,000*l.*, after paying the 4,100*l.* to the building society. *Duckworth* v. *Ewart*, 2 H. & C. 129; 33 L. J., Ex. 24; 9 L. T. 297; 12 W. R. 608.

### 11. Rectification.

**Generally.**]—W. H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of A. J. was entitled absolutely. W. H., being largely indebted to A. J., executed an indenture assigning to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill, which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund, by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument. *Hawkins* v. *Jackson*, 2 Mac. & G. 372; 2 Hall & Tw. 301; 19 L. J., Ch. 451.

**Feoffment without Livery.**]—If a defective conveyance be made, as a mortgage in fee by way of feoffment without livery, equity will make good this conveyance; and this though, after such incomplete feoffment, a judgment is confessed to a third person, whose debt did not originally affect the land. *Burgh* v. *Francis*, 1 Eq. Abr. 320.

**Omission—Of Covenant for Redemption.**]—A mortgagee, in an agreement for a mortgage, omits to insert a covenant for redemption; the mortgagor shall be permitted to read evidence, to show the omission. *Joynes* v. *Statham*, 3 Atk. 389. And see *Walker* v. *Walker*, 2 Atk. 99.

—— **Of Execution.**]—So a mortgage drawn in two deeds, one an absolute conveyance, and the other a defeasance, which the mortgagee omits to execute, the mortgagor shall be admitted to show the mistake. *Ib.*

**Mortgagee's Valuation.**]—Prior to a mortgage the mortgagee's valuer included several articles in his valuation, and which the mortgagees expected would be comprised in their mortgage, but they were omitted from the deed. A bill to rectify the deed by including them was dismissed, there being no proof of a common mistake of mortgagor and mortgagees. *Metropolitan Counties Assurance Society* v. *Brown*, 26 Beav. 454; 28 L. J., Ch. 581; 5 Jur. (N.S.) 378; 7 W. R. 303.

**Agreement for Mortgage.**]—B., having verbally agreed to give his bankers an equitable charge on three leasehold houses, which he pointed out to their manager, signed a document which was intended to create a charge on such houses, but by a mistake in the parcels three houses were charged, being described as comprised in a certain lease, which in fact comprised only one house, and which had been sold by A. prior to the date of the document. On his bankruptcy:—Held, that the bank was entitled to have the document rectified by the insertion of the property intended to be comprised in it. *National Provincial Bank of England, Ex parte, Boulter, In re*, 46 L. J., Bk. 11; 4 Ch. D. 241; 35 L. T. 673; 25 W. R. 100.

—— **Stipulation against calling in.**]—When an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, the court, in settling the form of the deed, will, although the agreement is silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, and, if the property is leasehold, on observance of the covenant; so that, if the mortgagor should make default in either of these respects, the mortgagee's remedies by sale or foreclosure will immediately arise. *Seaton* v. *Twyford*, 40 L. J., Ch. 122; L. R. 11 Eq. 591; 23 L. T. 648; 19 W. R. 200.

—— **Evidence explaining.**]—An agreement for an equitable mortgage was held to be explainable by other memoranda of agreement. *Glyn, Ex parte, Medley, In re*, 1 Mont. D. & D. 29.

12. VARIATION BY PAROL EVIDENCE.

**Of Further Advances.**]—Parol evidence of subsequent advances made on the security of a prior equitable mortgage by deposit of deeds, and memorandum in writing not under seal. *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

**To Vary Amount.**]—Parol evidence admitted to increase the amount secured by the deposit beyond the sum stated in a memorandum accompanying the deposit. *Nettleship, Ex parte, Buskill, In re*, 2 Mont. D. & D. 124; 10 L. J., Bk. 67; 5 Jur. 733.

A. lends money on mortgage at 8 per cent., and afterwards by parol agrees to reduce it. Agreement, though verbal, held binding though the fact is first triable by issue. *Milton* v. *Edgworth*, 5 Bro. P. C. 313.

Parol evidence admitted at law that, though a bond on mortgage was for 150*l.* per annum, yet the agreement was for 100*l.* The bill dismissed as founded on a private agreement, calculated to deceive a material party. It was dismissed, however, without costs. *Pitcairne* v. *Ogbourne*, 2 Ves. 375.

Parol evidence admitted to prevent fraud. *Ib.*

**To prove Agreement for Redemption.**]—Parol evidence not admitted to prove an agreement, made upon the purchase of an annuity, that it should be redeemable. *Hare* v. *Shearwood*, 1 Ves. J. 241; 3 Bro. C. C. 186.

On a written agreement parol evidence admissible in equity in cases of fraud, and where party will admit there was some agreement. *Ib.*, 243.

Parol evidence that it was part of the agreement for an annuity that it should be redeemable, although not made part of the contract in writing, refused to be admitted. *Portmore* v. *Morris*, 2 Bro. C. C. 219.

Grant of an annuity; a bill filed to redeem, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed on the idea that, if inserted, the transaction would be usurious. Parol evidence offered to this, but not admitted to contradict the deed, not being charged to have been omitted by fraud. *Irnham* v. *Child*, 1 Bro. C. C. 92; Dick 554.

B. PARTICULAR MORTGAGES AND INCUMBRANCES.

1. *Equitable Mortgages.*
   - *a.* By Deposit of Title Deeds.
     - i. Creation of, 1438.
     - ii. What Deeds, 1442.
     - iii. To Prepare Legal Mortgage, 1443.
     - iv. Extent of Security and Charge, 1444.
     - v. Further Advances, 1445.
   - *b.* Without Deposit, 1446.
2. *Loan for a Period*, 1449.
3. *Welsh Mortgages*, 1452.
4. *Stock Mortgages*, 1453.
5. *Charges*, 1454.
6. *Liens.*
   - *a.* Creation and Extent, 1457.
   - *b.* How Lost, 1462.
7. *Of Colonial Estates.*
   - *a.* West Indies, 1462.
   - *b.* British Guiana, 1465.
   - *c.* Canada, 1466.
   - *d.* Australia, 1467.
8. *Stamping—See* REVENUE.

1. EQUITABLE MORTGAGES.

**a. By Deposit of Title Deeds.**

i. *Creation of.*

**In General.**]—Equitable mortgage, by deposit of deeds. *Mountfort, Ex parte*, 14 Ves. 606; 9 R. R. 359.

A deposit of title deeds as a security is an equitable mortgage. *Hankey* v. *Vernon*, 2 Cox, 12.

If mortgagor and mortgagee deposit deeds with A., A. is a trustee for mortgagor before condition is broken, and for mortgagee afterwards. *Anon.*, 2 Eq. Abr. 284.

**Without Words.**]—Mere deposit without more will give equitable mortgage. *Kensington, Ex parte*, 2 V. & B. 79; G. Cooper, 96; 13 R. R. 32.

Equitable mortgage, by a deposit of deeds, upon an advance of money without a word passing. *Langston, Ex parte*, 17 Ves. 230; 11 R. R. 66.

A deposit of title deeds as security for a debt, will, without more, create in equity a charge upon the property. *Shaw* v. *Foster*, 42 L. J., Ch. 49; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907.

A mere deposit of deeds, even without a word, may constitute an equitable mortgage, but it can only occur, as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands. *Bozon* v. *Williams*, 3 Y. & J. 150.

**Without Memorandum.**]—An equitable mortgage by deposit is not taken out of the operation of 17 & 18 Vict. c. 113 (Locke King's Act), because it is unaccompanied by a memorandum. *Davis* v. *Davis*, 24 W. R. 962.

**Not Favoured.**] — Equitable mortgage by deposit of deeds, not favoured, especially when contradicting a written instrument. *Coombe, Ex parte*, 17 Ves. 369; 1 Rose, 268.

**With Agreement to Mortgage.**]—An agreement to mortgage, with a subsequent delivery of the title deeds, will amount, in equity, to a mortgage, and will be effectual from the time of the agreement. *Edge* v. *Worthington*, 1 Cox, 211; 1 R. R. 20.

An equitable mortgage by the deposit of title deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgagee a purchaser for good consideration within 27 Eliz. c. 4, in respect of such balance. *Lister* v. *Turner*, 5 Hare, 281; 15 L. J., Ch. 336; 10 Jur. 751.

The bankrupt agreed with A. to execute a mortgage of certain premises for the security of a debt, and he sent, in order that A. might prepare the mortgage, all the title deeds except the immediate conveyance to himself: the bankrupt, being also indebted to B., took that conveyance and deposited it with him as a

security for his debt, at the same time promising to send him the remainder of the title deeds :—Held, that A. and B. had not, either separately or collectively, an equitable mortgage upon the premises. *Pearse, Ex parte*, Buck, 525.

—— **Usury.**]—Where title deeds were originally deposited to secure an advance of money at usurious interest, but without any written memorandum, and afterwards a further advance was made upon the promissory note of the depositor, also at usurious interest, and it was subsequently agreed by parol that a mortgage should be executed of the premises comprised in the deeds for both debts, with interest at 5*l.* per cent. per annum :—Held, upon motion ex parte, the defendant not appearing, to take pro confesso a bill praying a foreclosure or sale of the premises comprised in the deeds, that, though the original deposit was void under the usury statutes, and the deeds had henceforth remained in the possession of the plaintiff, yet the subsequent parol agreement constituted a valid equitable mortgage by deposit to secure both debts, just as if the deeds had been returned to the defendant, and re-delivered by him to the plaintiff upon the occasion of such agreement being entered into. *James* v. *Rice*, 5 De G. M. & G. 461 ; 23 L. J., Ch. 819 ; 18 Jur. 818 ; 2 W. R. 542.

**With Wife of Debtor.**]—No equitable mortgage by deposit of deeds with wife of debtor. *Coming, Ex parte*, 9 Ves. 115 ; 7 R. R. 149.

**By Debtor of Crown.**]—Deposit of title deeds by a simple contract debtor of crown, for securing part of purchase money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the crown ; and that although purchaser has also given his bond to vendor for whole amount. As to what constitutes such an equitable deposit, quære. *Casberd* v. *Att.-Gen.*, 6 Price, 411 ; 20 R. R. 671.

**By Trustee having Beneficial Interest.**]—A trustee having a partial beneficial interest in the trust property may, by deposit of the title deeds for a debt of his own, create a good equitable mortgage. *Smith, Ex parte, Hildyard, In re*, 2 Mont. D. & D. 587 ; 11 L. J., Bk. 16 ; 6 Jur. 610.

**By Executor for Payment of Debts.**]—There being a charge of debt in a will, and an executor, according to a direction therein contained, having invested the produce of the personal estate in the purchase of lands, directed by the will to be subjected to the trusts thereof, deposited the deeds of the purchased estate as a security for money borrowed professedly for the payment of debts :—Held, a good equitable mortgage by deposit against the devisees in trust. *Ball* v. *Harris*, 3 Jur. 140.

**Mortgage included in Settlement.**]—A person gave a bond for 5,000*l.* to his sister, but, failing to pay the interest due on that bond, gave her another bond to secure the arrears of interest. He afterwards deposited with his sister the title deeds of his real estates "as a collateral security for the bond debts." Subsequently in contemplation of the marriage of the sister, the two bonds were, with the consent and privity of the obligor, settled upon trusts for the benefit of the intended husband and wife, no reference, however, being made in the settlement to the deposit of title deeds. The marriage took effect, and about four years after the obligor became bankrupt :—Held, that, assuming the consideration for the first bond to have been voluntary, yet, there being no fraud suggested against any party or insolvency proved against the obligor, the settlement was a valuable security, and that by virtue of the bonds, the instrument of deposit, and the settlement, the trustee of the settlement was equitable mortgagee of the real estate for the moneys due on the bonds. *Meggison* v. *Foster*, 2 Y. & C. C. C. 336 ; 12 L. J., Ch. 415 ; 7 Jur. 546.

**Rights of Third Parties.**]—A trader executes a mortgage of real estate, with a borrowing clause, and deposits the title deeds with the mortgagee. He subsequently accepts a bill drawn by third parties, and, being unable to pay the bill when at maturity, writes to the drawers to say that it shall be paid out of the produce of the mortgagor's premises, and that he will not take his title deeds out of the mortgagee's hands until the bill is paid. The mortgagee communicates to the drawers his assent to the arrangement :—Held, that the drawers were entitled to an equitable mortgage. *Crossfield, Ex parte*, 3 Ir. Eq. R. 67.

Where A. accepted bills for the accommodation of B., and B. deposited title deeds of A.'s with C., the holder of the bills, as security for their payment, a letter from A. to C. referring to the existence of the debt, and saying, "The security you hold is a great deal more than you hold acceptances for on my account ; my real account is not more than half you hold, but you have full security for all and more" :—Held, a sufficient acknowledgment of the security to the full amount of bills, though B. had no direct authority to pledge. *Skinner, Ex parte, Bell, In re*, 1 Deac. & C. 403.

**Sub-mortgage by Re-deposit.**]—To create an equitable sub-mortgage by re-deposit of deeds originally deposited by way of equitable mortgage, it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second. *Smith, Ex parte, Hildyard, In re*, 2 Mont. D. & D. 587 ; 11 L. J., Bk. 16 ; 6 Jur. 610.

**Sub-mortgage by deposit of Bonds and Bills —No Notice to Obligor.**]—A bond which is executed for the payment of bills of exchange, is mortgaged together with the bills, which are indorsed. Afterwards the mortgagor deposits the bonds and the bills by way of sub-mortgage, and becomes bankrupt, no notice of the sub-mortgage having been given to the obligor :—Held, that the sub-mortgage was good against the assignees. *Barnett, Ex parte, Reay, In re*, 1 De G. 194.

Deposit, by way of mortgage, of a land-order of the New Zealand Company held to be good, without notice having been given to the company of the deposit. *Ib.*

**Construction.**]—The expression "may advance," in the written memorandum accompanying an equitable mortgage, does not necessarily prevent the deposit from being a security for past advances. *Smith, Ex parte, Hildyard, In re*, 2 Mont. D. & D. 587 ; 11 L. J., Bk. 16 ; 6 Jur. 610.

**Effect.**]—Whether a deposit of title deeds, in pursuance of a contract to charge real estate,

is a sufficient part performance to take a case out of the statute of frauds, quære. *Whitmore* v. *Farley*, 45 L. T. 99; 29 W. R. 825; 14 Cox C. C. 617.

An equitable deposit with memorandum of charge by a devisee is an alienation which pro tanto prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104. *British Mutual Investment Co.* v. *Smart*, 44 L. J., Ch. 695; L. R. 10 Ch. 567; 32 L. T 849; 23 W. R. 800.

Semble, that an equitable mortgage by deposit of title deeds made by an heir-at-law or a devisee of a legal estate would be good as against creditors of the ancestor or testator who had not obtained any judgment or decree binding the land before the mortgage was made. *Ib.*

A simple deposit of deeds is a charge enforceable in equity, but gives no right to have a legal mortgage, although, in the view of a court of equity, it is a contract to charge the land, and the remedies are the same. *Matthews* v. *Goodday*, 31 L. J., Ch. 282; 8 Jur. (N.S.) 90; 5 L. T. 572; 10 W. R. 148.

**Presumption of Intention.**]—An intention of charging an estate may be presumed, where the proprietor deposits all or part of the title-deeds. *Richards* v. *Borrett*, 3 Esp. 102.

**Evidence.**]—In order to constitute an equitable mortgage by deposit, there must be proof, either of the actual deposit or of the loan being made. *Kebell* v. *Philpot*, 7 L. J., Ch. 237; 2 Jur. 739.

—— **Production.**]—The mere production by a bond creditor of the title deeds to the obligor's real estate, without explanation, constitutes neither an equitable mortgage nor a sufficient ground for an inquiry before the master. *Chapman* v. *Chapman*, 13 Beav. 308; 20 L. J., Ch. 465; 15 Jur. 265.

—— **Possession.**]—Possession of title deeds by a bond creditor is not of itself sufficient evidence of a deposit by way of equitable mortgage. *Ib.*

——**Of Intention.**]—In 1878 A. entered into a contract for the sale to him of two freehold houses at the price of 650*l.* The deposit of 50*l.* was paid by him, and 360*l.*, part of the balance, was obtained from his niece B., to whom he gave his I O U. On the 21st August, 1878, the wife of A., by his direction, wrote to B. as follows: "A. bought two houses yesterday, and he is going to have them settled and signed in your name, and give them to you. I send you the conditions of sale for you to look at, and I should like you to come and see A. . . . Bring your bank book with you, as what you have might as well go into them as for us to pay interest. It is all right, I can assure you. I sent the 50*l.* by cheque last night, on deposit." On the 25th October, 1878, the two houses were duly conveyed to A., and he directed his wife to hand over the title deeds to B., and he also said to his wife that the deeds belonged to B., and were of no use to his wife. The deeds were sent to B., by A.'s wife. Subsequently A. died intestate, and his eldest brother and heir-at-law commenced an action against B., claiming a declaration that he, the plaintiff, was entitled to the rents and profits of the two houses and the delivery up of the title deeds:—Held, that there was evidence of an intention on the part of A. to give the property to B.; but that no gift of it had in point of law been made; but held, that there was sufficient evidence of a contract to create an equitable mortgage in favour of B., and upon which the possession of the title deeds by B. originated; and that there should be a redemption decree upon that footing, the costs of B. being added to her security. *McMahon, In re, McMahon* v. *McMahon*, 55 L. T. 763.

—— **Onus.**]—A. filed a bill against a stock and share broker for the recovery of indentures, which, as alleged, had been deposited with B. for safe custody. B. claimed to hold the indentures as having been deposited with him by A., his customer, as a collateral security, by way of equitable mortgage, to secure the payment of a balance of an account found due to him; and, in support of this claim, produced a memorandum signed by A., but not dated, containing a statement to the effect that A. was agreeable to deposit the indentures with B. as security for the amount he owed to him. In answer, A. alleged that the indentures were left with B. for safe custody merely, and he denied that they were deposited by way of security, and he further denied that a balance of account had been ascertained:—Held, that, under the circumstances, the burden of proof lay upon A., who sought to recover the deeds; and that B. was entitled to hold the deeds by way of equitable mortgage to secure the balance due. *Burgess* v. *Moxon*, 2 Jur. (N.S) 1059.

The case of *Chapman* v. *Chapman* (13 Beav. 308; 20 L. J., Ch. 465; 15 Jur. 265) observed upon. *Ib.*

ii. *What Deeds.*

**What Title to be shewn.**]—To constitute a good equitable mortgage, it is necessary that the deeds deposited should shew a good title in the depositor. *Roberts* v. *Croft*, 24 Beav. 223.

To constitute a good equitable mortgage, it is not necessary that the deeds deposited should shew a complete title in the depositor, provided they are material to the title. *Dixon* v. *Muckleston*, 26 L. T. 752; 20 W. R. 619.

**Whether all necessary.**]—It is not necessary to create an equitable mortgage that all the title deeds, or even all the material title deeds, should be deposited. It is sufficient if the deeds deposited are material evidences of title, and are shewn to have been deposited with the intention of creating a mortgage. *Lacon* v. *Allen*, 3 Drew. 579; 26 L. J., Ch. 18; 4 W. R. 693.

Where a mortgagor had previously borrowed money upon copyhold property by depositing the conveyance to himself:—Held, that a subsequent deposit of the remaining documents in the mortgagor's possession constituted a good equitable mortgage. *Ib.*

Equitable mortgage, from a deposit of part of the title deeds, with evidence, not merely parol, but in writing, that the object was to create a security upon the whole. *Wetherell, Ex parte* 11 Ves. 398. S. P., *Haigh, Ex parte, Id.* 403; 8 R. R. 189. *See* 6 Price, 434; 1 Bro. C. C. 269.

Equitable mortgage may be created by deposit of one of the title deeds, where the others are in the hands of the depositor's solicitors, but not as equitable mortgagees. *Chippendale, Ex parte, Potter, In re*, 2 Mont. & Ayr. 299; 1 Deac. 67.

**Partition.**]—Held, that, on a deposit of deeds by a joint tenant after partition, the omission of the partition deed, as it did not belong to him solely, did not impeach the security. *Farley, Ex parte, New, In re*, 1 Mont. D. & D. 683; 10 L. J., Bk. 55; 5 Jur. 512.

iii. *To Prepare Legal Mortgage.*

**Generally.**]—Equitable mortgage held to be created by delivery of deeds for the purpose of preparing a legal mortgage. *Bruce, Ex parte*, 1 Rose, 374.

The delivery of title deeds to an attorney to prepare a mortgage deed does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt. *Bulteel, Ex parte*, 2 Cox, 243; 2 R. R. 39.

Where a mortgagor deposits the title deeds of his estate with his solicitor, by way of equitable security to the mortgagee, until the completion of a legal mortgage, the solicitor is thereby constituted trustee for the mortgagee, and an equitable charge upon the estate will be created by such deposit. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

Lien by possession of title-deeds disapproved, and not to be extended with reference to the statute of frauds. In this instance it failed, the deeds being delivered not as a present immediate security, but for the purpose of having a mortgage security created. *Norris* v. *Wilkinson*, 12 Ves. 192. See *id.* 200, n.

**Past and Future Advances.**]—A deposit of title deeds, to be delivered to a solicitor for the purpose of preparing a legal mortgage to secure an antecedent debt and future advances, though there is no agreement in writing for a mortgage, constitutes a valid equitable mortgage. *Bulfin* v. *Dunne*, 11 Ir. Ch. R. 198.

Where title deeds are left in the hands of an attorney, for the purpose of preparing a mortgage, as a security for money previously advanced, this is an equitable mortgage by deposit of title deeds. *Keys* v. *Williams*, 3 Y. & C. 55; 7 L. J., Ex. Eq. 59; 2 Jur. 611.

Where, in order to prevent immediate proceedings against a debtor, the title deeds of an intestate were deposited by him with his creditor's attorney, for the purposes of preparing a mortgage of the property:—Held, that this transaction amounted to an equitable mortgage by deposit of title deeds. *Ib.*

**Evidence.**]—Deposit of deeds until a mortgage, as evidence of an agreement for a mortgage, a good equitable title. *Wright, Ex parte*, 19 Ves. 258.

**Bankruptcy Intervening.**]—B., having contracted a debt with defendant, proposed to mortgage his estate to him as a security, and left his title deeds with his attorney to prepare the mortgage; but the attorney died before it was done. Afterwards defendant carried the deeds to another scrivener for the same purpose; but, before he had prepared the mortgage, B. became bankrupt, and plaintiff, as his assignee, brought a bill to have the deeds delivered up, and the estate sold for the benefit of the creditors; which was decreed. *Brander* v. *Boles*, Pre. Ch. 375; Gilb. Eq. Rep. 35.

iv. *Extent of Security and Charge.*

**Security.**]—A deposit of title deeds primâ facie creates an equitable mortgage upon the whole property comprised in them. *Ashton* v. *Dalton*, 2 Coll. C. C. 565; 10 Jur. 451.

A. and B. (brothers) were tenants in common in tail of copyhold property, with cross remainders between them. B. obtained a loan for A. from C., for which A. gave his promissory note, and deposited the title deeds with C. as a collateral security, and gave a written memorandum, by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required"; and B. wrote at the foot, "I join in the deposit." A. died unmarried, and without having surrendered to C. or barred the remainders. Upon a bill by C. against B., seeking to foreclose the entirety:—Held, first, that this was a good equitable charge, not merely upon A.s "interest" in his moiety, but also upon B.'s estate in remainder, and that B. must bear the expense of surrendering that moiety; secondly that the charge extended only to the moiety of the estate which originally belonged to A. *Pryce* v. *Bury*, 2 Drew. 11; 23 L. J., Ch. 676; 18 Jur. 967.

Adjoining premises (X. and Y.) were respectively conveyed to a testator by deeds of 1840 and 1843, and then united. He devised them to his sons, who made an equitable mortgage by deposit of the deeds of Y. and the probate of the will. The mortgagee believed, from the son's statement, that the whole property was comprised:—Held, that the property X. was not comprised in the equitable mortgage. *Jones* v. *Williams*, 24 Beav. 47; 3 Jur. (N.S.) 1066; 5 W. R. 775.

—— **Fixtures.**]—Under an equitable mortgage by the simple deposit of a lease, unaccompanied by any memorandum, the tenant's fixtures will be included. *Williams* v. *Evans*, 23 Beav. 239.

Leases were deposited by way of equitable mortgage, accompanied by a memorandum of deposit. Tenant's fixtures were included in the security, although they were not mentioned in the memorandum. *Cowell, Ex parte*, 17 L. J., Bk. 16; 12 Jur. 411.

A lessee annexed tenant's fixtures, and then deposited the lease by way of mortgage, with a memorandum, not noticing the fixtures:—Held, on his becoming bankrupt, that the security extended to the fixtures. *Tagart, Ex parte*, 1 De G. 531.

Where the memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited "the deeds and documents under which he held the steam-mills, cottages, land, buildings and premises at L.":—Held, upon construction of the contract, the point of "order and disposition" not having been taken, that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including tenant's fixtures. *Price, Ex parte, Stead, In re*, 2 Mont. D. & D. 518; 11 L. J., Bk. 27; 6 Jur. 327.

—— **Intention.**]—Copyhold property not otherwise subject to any charge, held to be within the meaning of the security in an equitable mortgage, the recital describing the property as freehold estates at Iver, subject to the charge

affecting the same, but the operative part describing it merely as "lands, tenements and hereditaments at or near Iver":—Held, also, that freehold property at Iver, which was not subject to any charge, was within the mortgagee's security; the intention, from other written memoranda, being clearly to give a general charge. *Glynn, Ex parte, Medley, In re*, 1 Mont. D. & D. 29; 9 L. J., Bk. 41; 4 Jur. 395.

—— **Evidence of Memorandum.**]—Where freehold title deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were accordingly specified in the memorandum of deposit, the freehold property was included in the order for sale. *Leathes, Ex parte*, 3 Deac. & C. 112.

Where on the deposit of a deed, by one part of which a house was conveyed to the bankrupt, and by another part, and for a distinct consideration, the furniture was assigned, the memorandum of deposit spoke of the deeds deposited (being the lease and release) "as the title deeds of my Bognor estate":—Held, that the house only was charged. *Hunt, Ex parte*, 1 Mont. D. & D. 139; 4 Jur. 342.

**Charge.**]—A. and B. being seised of estate for life of A., C. advances them a sum of money to pay off a mortgage thereon, and for other purposes, it being agreed estate should be mortgaged to C. for the whole sum lent. C. receives the title deeds; B. refuses to execute mortgage deed. On bill against A. and B.'s infant heir-at-law, C. held only entitled to mortgage to amount of former mortgage paid off with his money, and that the rest was not charged on the land, the proof of B.'s assent to the deposit of the deeds not being satisfactory. *Williams* v. *Medlicot*, 6 Price, 495.

A. B. voluntarily assigned to trustees bonds and promissory notes amounting to 600*l.*, in trust for himself and his wife and children, and he handed over the securities. The trustee gave no notice to the debtors. A. B. received 200*l.*, part of the 600*l.* (the securities for which had been returned to him), and the remainder was lost by the insolvency of the debtors. A. B. invested the 200*l.* with other moneys of his own on freeholds, and by writing acknowledged the 200*l.* to be trust property. He afterwards deposited the title deeds with the trustees as a security for the whole 600*l.*:—Held, that the equitable mortgage was valid to the extent of 200*l.* but no further. *James* v. *Bydder*, 4 Beav. 600; 5 Jur. 1076.

—— **Evidence cf.**]—When a deposit of title deeds is accompanied with a memorandum in writing, the kind and amount of charge intended to be created by the deposit must be ascertained solely by reference to the written document. *Shaw* v. *Foster*, 42 L. J., Ch. 49; L. R. 5 H. L. 321; 27 L. T. 281; 20 W. R. 907.

### v. *Further Advances.*

**Extension to.**]—Equitable mortgage by deposit of deeds extended beyond original purpose to advances subsequent by implication or parol. *Kensington, Ex parte*, 2 V. & B. 79; G. Cooper, 66; 2 Rose, 138; 13 R. R. 32.

Equitable mortgage by deposit of deeds, though not now to be disturbed, disapproved, and not extended by inference from a legal mortgage to a subsequent advance. *Hooper, Ex parte*, 9 Ves. 477; 13 R. R. 244.

Equitable mortgage by agreement, for a farther advance upon a former deposit of a deed, continued. *Ib.*

Though an equitable deposit may be extended to subsequent advances, where an agreement for the extension is proved, yet it cannot be so extended, if the proof of both the original deposit and loan fails. *Kebell* v. *Philpot*, 7 L. J., Ch. 237; 2 Jur. 739.

An agreement in writing, accompanying the deposit of title deeds to secure a specific sum, may be extended as a security beyond that sum by a subsequent verbal agreement. *Nettleship, Ex parte, Buskill, In re*, 2 Mont. D. & D. 124; 10 L. J., Bk. 67; 5 Jur. 733.

Equitable mortgage, by a deposit of title deeds, established, but disapproved; extended to a subsequent advance by the same person only upon clear proof that it was upon security of the deposit, not to an advance by a third person unless connected with some dealing with the estate; and the person holding the deposit, a mere trustee, having made no advance. *Whitbread, Ex parte*, 19 Ves. 209.

A further debt, agreed to be secured by pledge of property equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second. *Fector* v. *Philpott*, 12 Price, 197; 26 R. R. 650.

### b. Without Deposit.

**By Parol.**]—Parol agreement to deposit lease, when granted as security for money advanced, does not constitute equitable mortgage. *Coombe, Ex parte*, 4 Madd. 249; 20 R. R. 294.

The bankrupt, being indebted to a banking company, made an oral promise to the directors to give them, when required, security for the debt. He was then entitled to a reversionary interest in one-fifth of a farm, to come into possession on the death of his mother, who was tenant for life, and who held the title deeds. The mother afterwards died, and the title deeds came into the possession of the respondent, who was manager of the bank, and who was also entitled to one-fifth of the property. The respondent told the bankrupt that he had possession of the deeds, and that he held his (the bankrupt's) one-fifth for the bank. The bankrupt expressed his assent:—Held, that the company had not a valid equitable mortgage of the bankrupt's share in the farm, for there was no memorandum in writing to satisfy the statute of frauds, and the conversation which took place between the bankrupt and the respondent as to the custody of the deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute. *Broderick, Ex parte, Beetham, In re*, 56 L. J., Q. B. 635; 18 Q. B. D. 766; 35 W. R. 613—C. A.

**By order on Third Party.**]—There must be some actual deposit to constitute an equitable mortgage. An order on a third party to deposit a lease, when executed, is not sufficient. *Perry, Ex parte, Collins, In re*, 3 Mont. D. & D. 252.

A. being entitled to three properties, the title deeds of one of which were held by his bankers as a security, deposited the title deeds of the

other two with B. as a security for a debt, and he gave him an order to the bankers (written by himself, but not signed) to deliver over the deeds of the third property when their lien had been satisfied : — Held, that this gave B. a valid equitable mortgage on the property mortgaged to the bankers. *Daw* v. *Terrell*, 33 Beav. 218 ; 3 N. R. 285.

An equitable mortgage may be created by an agreement to assign the interest in securities, although in the hands of third parties : and the obtaining a security for an antecedent debt, three weeks only before the issuing the fiat, is not of itself sufficient to prevent the creditor obtaining the usual order at once without a preliminary inquiry. *Heathcote, Ex parte*, 2 Mont. D. & D. 711 ; 6 Jur. 1001.

**By Memorandum or Agreement.**]—A memorandum or an agreement shewing an intention to deposit title deeds by way of equitable mortgage, or to charge the property comprised in those deeds with the payment of the debt, is sufficient to create an equitable charge without actual deposit. *Sheffield Union Banking Co., Ex parte, Carter and Justins, In re*, 13 L. T. 477.

T. agreed to let to B. premises in Holborn, which B. was to fit up forthwith as a luncheon-bar and restaurant, such fittings to be of the value of 500*l.* and to T.'s satisfaction, and B. was to pay a premium of 1,000*l.*, upon payment of which, "the premises being fitted up as aforesaid," T. was to grant B., and B. agreed to take, a lease for twenty-one years ; and T. further agreed to lend or obtain for B., "upon security of the premises as fitted and licensed," 1,000*l.* for two years at 5 per cent. Before any lease was granted or any money paid, B. became bankrupt, and his assignee seized and sold the fittings and fixtures under an order of the court : —Held, that, until the execution of the proposed lease, the agreement constituted an equitable contract between T. and B. that "the premises as fitted and licensed" should stand as a security for the 1,000*l.* premium, and consequently that T. was entitled to them as equitable mortgagee. *Tebb* v. *Hodge*, 39 L. J., C. P. 56 ; L. R. 5 C. P. 73 ; 21 L. T. 499—Ex. Ch.

John S. entered into an agreement with E. for securing payment of sums of money owing by him to E. In this agreement there was a covenant that John S. would give to E., as part of the securities, a mortgage on the lots of a particular estate, and James S., the brother of John, and therein described as being the owner of lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which John S., E. and James S., were parties, after reciting the first agreement, John covenanted that he would, before a certain time, convey, or cause to be conveyed, to E., lot 1, to be held by E. in fee ; "And it is agreed by and between the parties hereto" that, if John S. shall pay E. the moneys due to him, E. shall re-transfer "all securities of whatever nature or kind." Provided that, if payment shall not be made, E. may, by "entry, foreclosure, sale, or mortgage of any part or parts of the lands," levy the deficiency. "And each of them, John S. and James S., for himself, his executors, &c.," covenanted to pay any deficiency, so that out of the interest or dividends on railways shares (previously deposited), or by cash payments of John S. or James S., there should be received a certain sum every year. All the three parties duly executed this agreement : —Held, that this amounted to an equitable mortgage binding on the estate of James S. *Eyre* v. *M'Dowell*, 9 H. L. Cas. 619.

Agreement by A. with C. as follows :—"In case I fail to pay you any promissory note or bill of exchange of mine, when due, I agree to execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums of money you may advance me on my promissory notes or bills of exchange, with interest, till paid, at such rate as may be provided by such promissory note or bill of exchange" :—Held, to create a valid equitable mortgage on lands, the property of A. at the time of the agreement, for the amount of notes or bills remaining unpaid at maturity. *Hurley's Estate, In re*, [1894] 1 Ir. R. 488.

Agreement by B. with C. as follows :—"In consideration of the advance this day made by you to me I hereby agree that, in case I fail to pay you any promissory note or bill of exchange of mine when due, I shall, upon demand, execute to you a mortgage on all my houses and lands, to secure to you the payment of all sums advanced, or to be advanced, by you to me on my promissory notes or bills of exchange, with interest till paid, at such rate as may, in each case, be provided by such promissory notes or bills of exchange" :—Held, to create, without any demand, a valid equitable mortgage on lands, the property of B. at the time of the agreement, for the amount of notes or bills unpaid at maturity, the words "on demand" having reference to the execution of a legal mortgage. *Ib.*

The bankrupt, being indebted to the petitioners as the acceptor of two bills of exchange, entered into an agreement with them and W. L. that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of W. L. for sale :—Held, that the petitioners might claim as equitable mortgagees, but subject to any prior lien of W. L. *Greenhill, Ex parte*, 3 Deac. & C. 334.

One of two executors and trustees, who had in their possession title deeds of an estate of which their testator and a debtor to his estate had been tenants in common, requested the debtor to allow the executor to retain the title deeds as a security for the debt. The debtor wrote an answer, that the executor might retain the deeds till the debtor got the whole of his affairs settled with the executors, and that he was endeavouring to arrange so as to buy or sell the property :—Held, a good equitable mortgage for the debt. *Fenwick* v. *Potts*, 8 De G. M. & G. 506.

—— **By Secretary of Bank, for Credit Account.**]—A secretary of a banking company had a credit account with the bank to the extent of 5,000*l.*, secured by a memorandum, specifying certain securities by way of equitable mortgage. On his dying a debtor to the bank in 4,000*l.*, there was found in his office in the banking-house the securities mentioned in the memorandum, with others, tied in a bundle and indorsed and labelled as securities. There was evidence that he had stated that the bank was secured in 5,000*l.* :—Held, that the bank was equitable mortgagee of all the securities. *Ferres* v. *Mullins*, 2 Sm. & G. 378 ; 2 Eq. R. 809 ; 18 Jur. 718 ; 2 W. R. 649.

—— **Power of Attorney.**]—P. being seised under a lease of lives renewable for ever of premises in Dublin, and being indebted to F. in 448*l.*, in order to secure the repayment executed

a power of attorney, whereby he authorised F. to mortgage the premises, and which power of attorney he declared to be "irrevocable until F. should have received the whole of his account against P., or payment of any bill, promissory notes or bills of exchange for which P. is or shall become liable to or on behalf of F." :—Held, that the power of attorney constituted an equitable mortgage of the premises. *Parkinson, In re*, 13 L. T. 26.

Upon the advance of a sum of money by K. to S., the latter executed her bond and warrant, and effected an assurance upon her life; and also perfected a letter of attorney, authorising K. to receive the rents of her estates; and, by contemporaneous instruments, stating that the letter of attorney was given for the repayment of the money borrowed, she agreed not to revoke it until the sum borrowed should be repaid, with interest; and authorised K. to apply the rents in payment of the premiums on the policy, and the interest on the debt:—Held, that this constituted an equitable mortgage of the lands. *Abbott* v. *Stratten*, 3 Jo. & Lat. 609; 9 Ir. Eq. R. 233.

**Sale.**]—Usual order for sale of equitable mortgage made, notwithstanding argument that, there being no deposit of deeds, the agreement was a mere executory agreement for a mortgage and gave no lien on the property. *Jones, Ex parte*, 4 Deac. & C. 750.

**Scotch Law.**]—According to English law, an equitable mortgage was effected of Scotch property. The special case found that, "by the law of Scotland, no lien or equitable mortgage on the estate in question was created by the deposit":—Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors being resident here, the property came to the hands of the assignees charged with the equity, and, therefore, they were bound to pay the mortgage-debt out of the proceeds of the particular property. *Pollard, Ex parte, Courtney, In re*, Mont. & C. 239; 4 Deac. 27. Reversing 3 Mont. & Ayr. 343; 6 L. J., Bk. 95; 1 Jur. 288.

**Evidence.**] — Equitable mortgage, established by means of written documents, coupled with parol evidence, against a prior voluntary settlement. Semble, a post-dated cheque is receivable in evidence, to prove its own invalidity. *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

An informal document, signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the trust, notwithstanding a denial by the answer. *Baynard* v. *Woolley*, 20 Beav. 583.

### 2. Loan for a Period.

**Form.**]—When an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, the court, in settling the form of the deed, will, although the agreement is silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, and, if the property is leasehold, on observance of the covenant; so that, if the mortgagor should make default in either of these respects, the mortgagee's remedies by sale or foreclosure will immediately arise. *Seaton* v. *Twyford*, 40 L. J., Ch. 122; L. R. 11 Eq. 591; 23 L. T. 648.

**Redemption.**]—A mortgagor in 1855 covenanted with the mortgagee that he would pay him the sum secured in May, 1875, and the mortgagee covenanted that the principal should remain on the security for the term of twenty years from the date of the deed, and that he would not proceed to a sale, or institute any proceedings, at law or in equity, until the expiration of that term, or until two months after default made in payment of interest; and it was declared that the mortgagor, his executors or administrators, should not nor would pay or tender the principal, nor institute any suit for redemption, until the expiration of twenty years, nor after the expiration of that period without giving twelve months' notice of his intention so to do. The mortgagee was solicitor of the mortgagor, and had been since 1846 in the habit of lending the mortgagor money on mortgage for terms of years certain, on the request of the mortgagor, and the term of twenty years was inserted in the draft by the mortgagor:—Held, that the mortgagor was entitled to a decree for redemption on the usual terms of paying principal, interest and costs of suit, considering that a great part of the costs had been occasioned by charges of an injurious kind against the mortgagee, which had, on amendment, been struck out of the bill, and although the costs had been increased by the mortgagee resisting that right to redeem. *Cowdry* v. *Day*, 1 Giff. 316; 29 L. J., Ch. 39; 5 Jur. (N.S.) 1200; 1 L. T. 88; 8 W. R. 55.

—— **Right of Second Mortgagee.**]—A. mortgaged some property to B.; he subsequently mortgaged it to C., who covenanted not to bring any suit, &c., within ten years, for obtaining possession or foreclosing:—Held, that by this covenant C. was precluded from redeeming B. within the ten years. *Ramsbottom* v. *Wallis*, 5 L. J., Ch. 92.

A mortgage deed contained a stipulation that the mortgagee should not be at liberty to foreclose, nor the mortgagor to redeem, within five years. The mortgagor, to secure a sum, part of which was for costs incurred and to be incurred, executed a second mortgage to the solicitor who acted for him in arranging the terms of the first, which became forfeited within the five years:—Held, that the second mortgagee was not at liberty to redeem the first during the five years; and, semble, he could not have a sale of the equity of redemption. *Lawless* v. *Mansfield*, 4 Ir. Eq. R. 113; 1 Dr. & War. 557.

Quære, as to the validity of the second mortgage and as to right to charge interest on the costs from date of deed. *Ib.*

**Foreclosure.**]—The proviso for redemption in a mortgage of a leasehold for years was that upon payment of the principal on a day mentioned, and interest thereon, and the head-rents in the meantime, the deed should be void. By deed of equal date, reciting that the agreement of the parties was that the principal should not be called in until after the decease of the mortgagor, but that by mistake it was not stated in the mortgage deed that the principal money should not be called in until after the decease of the mortgagor, anything in the deed of the mortgage to the contrary notwithstanding:—Held, that the mortgagee could not foreclose the mortgage during the life of the mortgagor, though the interest was in arrear, and the mortgagor

had not paid the head-rent. *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521 ; 8 Ir. Eq. R. 482.

Where, upon the whole mortgage deed, it appears that, although the redemption is expressed to be upon payment of the principal money and interest at the end of several years, yet the agreement of the parties is that the interest shall be paid half-yearly in the meantime, the mortgagee, upon non-payment of the interest, may foreclose within the period. *Roddy* v. *Williams*, 3 Jo. & Lat. 1.

**Sale.**]—A mortgage contained a covenant by the mortgagor not to redeem for eight years, and, five years being yet unexpired, the mortgagor presented a petition for sale in the usual form : —Held, that the covenant was cause against making an absolute order for sale. *Hone, In re*, Ir. R. 8 Eq. 65.

**Default—Waiver.**]—Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs :— Held, a waiver of the default ; and an injunction was granted to restrain an ejectment brought within the two years. *Langridge* v. *Payne*, 2 J. & H. 423 ; 7 L. T. 23 ; 10 W. R. 726.

A mortgagee agreed with the mortgagor that if the interest was duly and punctually paid the principal should remain for two years. Six months' interest became due and was demanded, but was not paid ; and the mortgagee then demanded payment of principal and interest. Three days afterwards the mortgagor paid the six months' interest, which was received by the mortgagee :—Held, that the mortgagee had not thereby, nor by a subsequent unaccepted offer to receive an instalment, waived his right to call in the principal. *Keene* v. *Biscoe*, 47 L. J., Ch. 644 ; 8 Ch. D. 201 ; 38 L. T. 286 ; 26 W. R. 552.

Proviso in a mortgage that, if the interest should be punctually paid, the principal should not be called in before a certain date ; the mortgagee might enter notwithstanding any subsequent acceptance of interest. The first half-year's interest was not paid within the time limited. During that time the mortgagee was out of the country. The interest was forwarded upon the mortgagee's sending instructions as to the mode of remittance. The next half-year's interest was liquidated in advance, by a bill of exchange accepted by the mortgagor for the mortgagee's convenience ; and the mutual relations of the parties were treated as subsisting unchanged :—Held, that there had been no default in the payment of the interest ; and that, if any default had been made, the subsequent conduct of the mortgagee would have amounted to a waiver of it. *Tuaffe, In re*, 14 Ir. Ch. R. 347.

**Practice—Injunction till Period Expired.**]—Written agreements relating to the working of some quarries contained the following provisions : That the defendants should allow and pay to the plaintiffs for two years, from the 7th of December, 1870, 400*l.* for each year, by equal quarterly sums of 100*l.* ; that the sums of money which should be paid to the plaintiffs under that clause should be added to a debt of 7,035*l.* then due from the plaintiffs, and that the whole amount of such debt should bear interest from time to time at the rate of 5*l.* per cent. per annum ; that the sum, meaning the 7,035*l.* and all additions thereto, whether by means of the two sums of 400*l.* above mentioned, and all interest upon the said debt, should be a first charge upon the purchase-money which should become payable to plaintiffs under the sixth clause of the last agreement. The defendants had advanced 7,035*l.* and other moneys to the plaintiffs on their personal account and also on the security of the working of the quarries which were managed by the plaintiffs. The defendants considered the workings were not successful ; and in June, 1872, they sued the plaintiffs at law for their debt. The plaintiffs then filed a bill for the specific performance of the agreements, an account, and an injunction to restrain the action :—Injunction granted until the expiration of the two years. *Curteis* v. *Fenning*, 41 L. J., Ch. 791.

### 3. Welsh Mortgages.

**Creation.**]—A., being entitled in fee to a freehold estate in remainder expectant on the decease of B., demised his interest to C. for a term of 500 years, subject to a proviso for redemption, on payment of the sum of 1,000*l.* and interest, without any time being fixed by the proviso for payment of the money. The deed contained a covenant by A. for payment of the money on demand, and also a covenant that it should be lawful for C. to enter into the property, and to hold and enjoy the same until the payment of the principal money and interest :— Held, that the mortgage was in the nature of a Welsh mortgage ; and a bill of foreclosure, filed by C. against a person to whom A. had conveyed his reversionary interest, was dismissed, but without costs. *Teulon* v. *Curtis*, Younge, 610 ; 2 L. J., Ex. Eq. 17.

Where mortgage is made in trust that mortgagee should continue in possession till, by perception of the rents and profits, he should be satisfied the principal and interest, the mortgagee is in the nature of a tenant by elegit, and, as soon as his principal and interest are satisfied, his estate ceases, and the mortgagor may maintain an ejectment ; nor, unless the mortgagee had continued in possession twenty years after the money had been paid off, could the statute of limitations have run. *Yates* v. *Hambly*, 2 Atk. 362.

The mortgagor may come into a court of equity for an account of the profits received, as in an elegit the conusor has a right to see if the conusee on the extended value has received a satisfaction of his whole debt, and to have the surplus paid to him. *Ib.*

**Redemption.**]—In common Welsh mortgages, on tendering principal and interest, the person entitled may come into this court for redemption at any time. *Ib.*

The mortgagor entitled to redeem on the common terms, and not obliged to bring ejectment for possession, but shall have decree for it here. *Ib.*

Time no bar to redemption in case of a Welsh mortgage, unless twenty years after principal and interest paid by perception of rents and profits. *Fenwick* v. *Reed*, 1 Mer. 114.

In a Welsh mortgage there is a perpetual

power of redemption in mortgagor, and mortgagee cannot compel a redemption or foreclosure. *Longuet* v. *Scawen*, 1 Ves. 406.

**Foreclosure and Sale.**]—The bill stated a mortgage made by the defendant in consideration of 219*l.*, and that the said mortgage contains a proviso for redemption, in favour of the said defendant, his heirs, executors and administrators, upon his or their at any time paying off the said 219*l.* with interest, as by said indenture in plaintiff's possession, and to which they crave leave to refer, when produced will appear; and prayed an account of the sum due, and that the defendant might be foreclosed of all equity of redemption, and for a sale; and that the defendant might be ordered to bring in the title deeds. To this bill a general demurrer was allowed, as it appeared by the bill that this was in the nature of a Welsh mortgage; and no case was shown entitling the plaintiffs to have a sale independently of a foreclosure; and it did not appear that the title deeds were sought otherwise than for the purposes of the foreclosure and sale, to neither of which were the plaintiffs entitled by their bill. *O'Connell* v. *Cummins*, 2 Ir. Eq. R. 251.

**Priority.**]—The true meaning of the Exchequer Loan Commissioners Acts is that the commissioners have power to sell property comprised in their securities as against all persons over whom they have an absolute priority, but not as against prior incumbrancers, except so far as these may have conceded their priority. *Jortin* v. *S. E. Ry.*, 6 De G. M. & G. 270; 24 L. J., Ch. 343; 1 Jur. (N.S.) 433; 3 Eq. R. 281; 3 W. R. 190.

Therefore, where prior mortgagees of the works and tolls of a harbour agreed that, on the commissioners making an advance, the tolls should be applied, first, in paying interest on the commissioners' advances; secondly, in paying interest on the prior mortgages; and, thirdly, in reduction of the principal of the commissioners' advances till it was paid off; and, the tolls being insufficient to keep down the interest on the commissioners' advances, they sold the subject of their security to a railway company with notice of the agreement:—Held, that the purchasers took subject to the charge of the prior mortgages, in respect of the interest on their securities. *Ib.*

**Practice.**]—The mortgages were in the nature of a Welsh mortgage, being in a form prescribed by the harbour act, whereby the works and tolls were demised until the mortgages were paid off:—Held, that, whether the mortgagees could proceed at law or not, they were entitled to sue in equity. *Ib.*

### 4. Stock Mortgages.

**Replacing Stock — After Discharge.**] — A. agreed to lend B. 500*l.* navy stock; he sold the stock for 522*l.*, which he paid to B.; a bond was drawn to repay "the sum of 522*l.* (being the produce of 500*l.* navy 5 per cents., or such other sum as would replace the stock) with lawful interest." B. on discharging the bond refused to replace the stock; A. received the money, and gave up the bond:—Held, that, after having received the money, he could not come to equity for relief. *Barnham* v. *Munn*, Tam. 86.

—— **After Depreciation.**]—Transfer of stock, by way of loan, upon bond, with condition to replace the stock six months after the date, and in the meantime to pay interest at 5 per cent.; the stock not being replaced, and being depreciated, the obligee is entitled to the value of the stock at the time of the transfer, with interest at 5 per cent. to the date of the report, credit being given for some payments on account of the principal. *Forrest* v. *Elwes*, 4 Ves. 492.

A stock mortgage was made for a term of years, for securing the retransfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan. The mortgage having been allowed to run after the end of the term, and the stock having fallen in price:—Held, that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on replacing the specific amount of stock originally sold. *Blyth* v. *Carpenter*, 35 L. J., Ch. 823; L. R. 2 Eq. 501; 12 Jur. (N.S.) 898; 15 L. T. 154; 15 W. R. 3.

—— **Deduction of Interest.**]—A borrower, who is bound to replace a certain amount of stock, and in the meantime to pay the lender the dividends, continues during many years to pay 5 per cent. interest on the sum which the stock had produced. He is entitled, when called upon to replace the stock, to deduct from it the excess of the interest thus paid beyond the amount of the dividends. *Tyler* v. *Manson*, 5 L. J. (O.S.) Ch. 34.

### 5. Charges.

**In General.**]—S. and N., having money of R. in their hands, wrote a letter to her, agreeing to give her a charge for the amount on a mortgage for 600*l.* due from M. on a mortgage of his share in an estate in Kent. S. and N. had formerly had a mortgage for 600*l.* on M.'s share of the estate, but before the date of the letter the estate had been sold, and the purchase-money invested in consols, in the names of trustees, of whom S. himself was one, in trust to indemnify the purchaser against certain claims, and subject thereto, as to M.'s share, upon trust for securing the debt to S. and N. S. and N. became bankrupt:—Held, that the letter created a valid charge on S. and N.'s interest in the consols. *Rogers, Ex parte, Selby, In re*, 8 De G. M. & G. 271; 25 L. J., Bk. 41; 2 Jur. (N.S.) 480.

Held, also, that, as S. was one of the trustees of the stock, there was notice sufficient to prevent the charge from being defeated on the ground of reputed ownership. *Ib.*

In 1875 L. advanced 800*l.* to C., his solicitor, to be invested by the latter. On the 12th February, 1876, L. asked C. for some evidence of the investment, and C. wrote and gave him a memorandum stating that the 800*l.* was in C.'s hands at interest at 5*l.* per cent., "being part of a large sum advanced to P. on security of freehold houses at K." C. afterwards died insolvent, and it then appeared that there was no mortgage by P., but that in 1873 P. and Y. had entered into a partnership arrangement for the purchase of houses at K.; C. by himself or his clients providing the purchase-money; P. executing the mortgages necessary to raise the money; P. paying back half the money provided by C. personally by the 1st November, 1876, and paying interest at 5*l* per cent. in the meantime; and either party

having the right to demand a sale after that date. A sum of nearly 7,000*l.* was due to C. on the 1st January, 1876 :—Held, that L. was entitled to a charge on C.'s share of the proceeds of the sale of the houses to the extent of the 800*l.* and interest. *Crowdy, In re, Burges* v. *Crowdy*, 46 L. T. 71.

**Creation of, through Existence of Condition.**]—A mortgagor having an equity of redemption, or an ultimate interest in a fund by the performance of some condition without which he cannot get at it, does not by that condition create a charge in his own favour as against his mortgagee. *Saunders* v. *Dunman*, 47 L. J., Ch. 338 ; 7 Ch. D. 825 ; 38 L. T. 416 ; 26 W. R. 397.

**Equitable.**]—An equitable charge upon land may be created by an instrument in writing which shews the intention of the parties that a security should be created, although it contains no general words of charge. *Cradock* v. *Scottish Provident Institution*, 63 L. J., Ch. 15. Affirmed, 70 L. T. 718—C. A.

A father, upon the marriage of his daughter, executed a deed whereby he covenanted to pay his daughter an annuity, and, for the purpose of securing the annuity, appointed a receiver of the rents and profits of lands in which he had an estate for life, with a direction to apply the moneys received as specified in the deed. The deed contained provisions that the appointment should not be revoked by the appointor, and for the appointment of subsequent receivers if necessary :—Held, that the deed created a charge upon the father's life estate in the lands. *Ib.*

L., on the 14th June, 1858, in consideration of the forbearance of the plaintiff in not requiring immediate repayment of the moneys he had advanced to or for him, signed an agreement undertaking to execute to the plaintiff a charge on the interests to which, by right of marriage with Mrs. L., he was or claimed to be entitled in the property settled on, or in or to which she might be interested or entitled in respect of, her former marriage, or the income arising therefrom, as a security to the plaintiff for the repayment of the moneys he had advanced to him ; and L. pledged himself not to incumber his interests in such property or income by way of settlement or otherwise. Notice of the agreement was on the following day sent by the plaintiff to A., one of the trustees. L., on the 18th June, 1858, with the knowledge, but without the consent of the plaintiff, executed a post-nuptial settlement, by which he conveyed all his interest, in right of his wife, in the property settled on her, on her first marriage, to trustees, for her for life, then for himself for life, and after the decease of the survivor, for the children of the marriage. On the 13th July, 1858, L. executed a deed whereby he charged all the dividends, interest and annual proceeds of the funds which were settled at the time of his wife's first marriage, and also his share in the funds themselves, with the payment of 800*l.* and interest from the 14th June, 1858, to the plaintiff. L. also assigned the same property to the plaintiff by way of mortgage, with a proviso for redemption on repayment of the sum and interest by him :—Held, that a valid equitable charge was created by the agreement of the 14th June, 1858, in favour of the plaintiff, as a creditor of L., upon the dividends to which the wife was entitled under her first marriage settlement ; that the deed of mortgage of the 13th July, 1858, bound the estate of L. only ; that, inasmuch as, by the post-nuptial settlement of the 18th June, 1858, the whole of the dividends had been, subject to the charge, settled to the separate use of the wife, and vested in trustees for her benefit, it was improper to reserve an equity of redemption to L., yet the deed operated as a recognition of the debt due to the plaintiff, and, coupled with the agreement of the 14th June, gave the plaintiff a right to an account and payment of what should be found due, and, in default of payment, a right of foreclosure against L. and his assignee in insolvency. *Carew* v. *Arundell*, 8 Jur. (N.S.) 71 ; 5 L. T. 498.

An agreement that a certain judgment debt and interest thereon should be paid to the plaintiff out of any moneys which might be recovered by the defendant in respect of certain claims which he had against third parties :—Held, to create a valid equitable charge upon these moneys when recovered. *Riccard* v. *Prichard*, 1 K. & J. 277 ; 1 Jur. (N.S.) 750.

The defendant having recovered the moneys so due to him in an action, and the same having been paid into the court of common pleas, the court of chancery, in a suit by the judgment creditor to establish his equitable charge on the fund, granted an injunction to restrain the defendant from receiving it until he should have paid the judgment debt and interest, and the costs of the suit. *Ib.*

Effect given to an equitable charge for valuable consideration upon expectant legacies. *Bennett* v. *Cooper*, 9 Beav. 252 ; 15 L. J., Ch. 315 ; 10 Jur. 507.

A., the owner of Blackacre, and B., the owner of Whiteacre, mutually covenanted to bear the expense of keeping in repair a private road, of which they had joint use, in proportion to the acreage of their respective properties, and the deed contained a proviso that, in addition to the covenants thereinbefore contained, it was contended that, by virtue of the deed, the expense of the repair of the road should be considered as a charge in equity, and, as far as circumstances would admit, at law also, upon the owners for the time being of Blackacre and Whiteacre, in the above proportions :—Held, that the proviso did not create a charge on the lands, and consequently that, upon the registration of Blackacre with an indefeasible title under the 25 & 26 Vict. c. 53, B. was not entitled to have a notice of the proviso entered on the record of title. *Mason, Ex parte, Drew, In re*, 35 Beav. 443 ; 35 L. J., Ch. 845 ; L. R. 2 Eq. 206 ; 12 Jur. (N.S.) 425 ; 14 L. T. 278.

—— **By Deposit.**]—A. writes word to B., that he has "inclosed the particulars of certain title deeds of property, which he has deposited with B. for the security of a debt," and in the schedule inclosed, among other entries, is the following : "9,000*l.*, buildings, houses, &c., at Titherington." A. sends B. a box containing the deeds and other securities, which B. does not examine until after A.'s bankruptcy, when he finds that the only deed relating to the Titherington estate is an old paid-off mortgage :—Held, nevertheless, that the letter and the schedule, taken together, created an equitable charge on the Titherington estate. *Arkwright, Ex parte, Daintry, In re*, 3 Mont. D. & D. 129.

Where a mortgagor deposits the title deeds of his estate with his solicitor, by way of equitable

security to a mortgagee, until the completion of a legal mortgage, the solicitor is thereby constituted trustee for the mortgagee, and an equitable charge upon the estate will be created by such deposit. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

The owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money due, writing at the same time a letter which stated that the deeds were the title deeds of the farm, and were to be a security. He afterwards deposited the subsequent title deeds of the farm, the earliest being dated 1787, with his bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:—Held, that the letter created an equitable charge on the farm, and that, under the circumstances, credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority. *Dixon* v. *Muckleston*, 42 L. J., Ch. 210; L. R. 8 Ch. 155; 27 L. T. 804; 21 W. R. 178.

**Extent of.**]—A reservoir of water made, and a house built, after an agreement to charge certain unfinished houses, and all other the messuages, lands, hereditaments, and fee farm or ground rents adjoining the said unfinished messuages, were held to be subject to the charge. *Turner* v. *Dickenson*, 3 Cl. & F. 593. *S. C.* nom. *Fournier* v. *Paine*, 9 Bligh (N.S.) 282.

**Rectification.**]—B., having verbally agreed to give his bankers an equitable charge on three leasehold houses, which he pointed out to their manager, signed a document which was intended to create a charge on such houses, but by a mistake in the parcels three houses were charged, being described as comprised in a certain lease, which in fact comprised only one house, and which had been sold by A. prior to the date of the document. On his bankruptcy:—Held, that the bank was entitled to have the document rectified by the insertion of the property intended to be comprised in it. *National Provincial Bank of England, Ex parte, Boulter, In re*, 46 L. J., Bk. 11; 4 Ch. D. 241; 35 L. T. 673; 25 W. R. 100.

### 6. Liens.

#### a. Creation and Extent.

**In General.**]—Agreement for a mortgage creates specific lien against creditors. *Burn* v. *Burn*, 4 Ves. 582.

A testator was in the habit of selling land to builders, and of advancing them money for the purpose of building on it; and, on the statement of an account between the parties for the balance of unpaid purchase-money and money lent, the builders, by a memorandum in writing, acknowledged that the balance agreed upon was a charge upon the land. The testator, by his will, authorised his executors to make such agreement with the purchasers of any part of his real estate, and to advance money to them for building in the manner he had been accustomed to do. The executors accordingly sell a portion of land for this purpose, leaving the purchase-money to remain a charge upon the land; and they also make advances to the purchaser to enable him to build thereon, but without taking any memorandum in writing, declaring that the advances were to be a charge upon the land. The purchaser becomes bankrupt:—Held, that the executors had a lien on the land so sold for the advances made by them since the death of the testator. *Linden, Ex parte, Baker, In re*, 1 Mont. D. & D. 428; 10 L. J., Bk. 22; 5 Jur. 57.

Plaintiff, by his bill, stated that J. G. and others, next of kin of R., agreed that he should have 300*l.* for his trouble and services in collecting evidence, &c., to establish their claim, which was disputed, and that they, and particularly J. G., promised he should have a lien for that sum on the assets; that, in consequence of his exertions, the parties were declared next of kin; and that J. G., and another of them, since deceased, took out administration. The bill prayed that the plaintiff might be decreed to have a lien on the assets:—Held, on demurrer, that the claim, so far as it was a personal claim, was a demand for work and labour, and was recoverable, if at all, at law; that the promise by J. G. to give a lien on the assets before administration could not be enforced against the assets when J. G. and another afterwards administered; and, even if she alone had administered, such previous promise was by a stranger, and could be of no avail. Quære, would such promise be binding, even after administration. A demurrer for want of equity will lie to a cross bill. *Kirwan* v. *Gorman*, 9 Ir. Eq. R. 154.

The rebuilding of a dissenting chapel was entrusted to three of the trustees in whom the estate was vested. There being a deficiency of money, they borrowed, on a deposit of the title deeds of the chapel, 500*l.*, which they personally engaged to pay. Interest was, for a long time, paid out of the chapel funds, but ultimately the representatives of the trustees were compelled to pay the money. The legal estate was vested in new trustees:—Held, that the representatives of the person who had paid the 500*l.* had a lien on the deeds, but they were not entitled to a decree for foreclosure or sale, as by granting such relief the trust would be altogether destroyed. *Darke* v. *Williamson*, 25 Beav. 622.

A solicitor, having in his possession the title deeds of an estate mortgaged to his client, deposited the deeds with his banker as security for an advance, which he applied in the purchase of an estate on his own behalf. When the mortgage was paid off, he applied that money in repaying the loan from his banker, and informed his client that he had reinvested the mortgage money upon other good security. His client thereupon executed a reassignment of the mortgage; but in fact the solicitor never reinvested the money, although he continued to pay interest upon it until his death:—Held, that the client was entitled to a lien upon the estate so purchased by the solicitor. *Hopper* v. *Conyers*, L. R. 2 Eq. 549; 12 Jur. (N.S.) 328; 14 W. R. 628.

Where a bankrupt held a bond from a debtor, with a warrant of attorney to secure the same debt, and he deposited the bond only:—Held, that a lien was thereby created on the debt, but that a policy of assurance referred to in the memorandum of deposit as being deposited also, but in fact retained by the bankrupt, was not charged. *Hallifax, Ex parte, Ridge, In re*, 2 Mont. D. & D. 544.

**Of Mortgagor—Mortgage of Renewable Leasehold—Purchase of Reversion by Mortgagor—Mortgage of Reversion.**]—An ecclesiastical lease of a house for a term of years, which was renewable by custom, though it contained no covenant by the lessors for renewal, was mortgaged, and the equity of redemption was afterwards assigned for value. The ecclesiastical commissioners, in whom the reversion had become vested, would not renew the lease, but before its expiration they agreed to sell the reversion to the assignee of the equity of redemption. The conveyance was not executed till after the expiration of the lease. While the negotiation for the purchase of the reversion was in progress the assignee borrowed 300*l.*, giving the lender a memorandum in writing, which stated that the money was to be secured by a mortgage from him of the house "so soon as he had completed the enfranchisement of the property from the commissioners." The lender had no notice of the mortgage of the lease:—Held, that the mortgagor could only hold the fee simple of the property subject to the mortgage of the lease, and that he (and consequently the lender of the 300*l.*) was not entitled to any prior lien on the property for the purchase-money of the reversion, notwithstanding the fact that the mortgagor was under no obligation to the mortgagees of the lease to obtain a renewal of it, or to purchase the reversion. *Leigh* v. *Burnett*, 54 L. J., Ch. 757; 29 Ch. D. 231; 52 L. T. 458; 33 W. R. 578.

**Of Mortgagee.**]—A railway company, requiring possession of land which was subject to an equitable mortgage by deposit, proceeded to pay into court the amount of the valuation, and to enter into the usual bonds with the landowner and the equitable mortgagees. They afterwards assessed the purchase-money and compensation before a jury, as between themselves and the landowner, without giving notice to the mortgagees, who, however, were aware of, though they took no part in, the inquiry. The amount fixed by the jury was not enough to pay the mortgagees their debt, and was, moreover, less than the sum paid into court by the company. The mortgagees then filed a bill against the company and the landowner:—Held, that the sum in court, being deposited under the act as a security for what the jury should find, was not available for any other purpose, and consequently that the plaintiffs had no lien upon it; but that, as equitable mortgagees, they were entitled to a lien on the property comprised in the memorandum of deposit, and, in default of payment, to an assignment to them by the company of such property. *Martin* v. *L., C. & D. Ry.*, 35 L. J., Ch. 795; L. R. 1 Ch. 501; 12 Jur. (N.S.) 775; 14 L. T. 814; 14 W. R. 880.

Held, moreover, that the company was not, under the circumstances, entitled to proceed under the Lands Clauses Act, s. 124, which provides for the purchase of interests omitted to be purchased by mistake or inadvertence. *Ib.*

Among the effects of a testatrix were found title deeds belonging to a trader, and a letter written by the testatrix to her agent, directing him to advance a certain sum to the trader, and stating that the advances were made on the security of certain title deeds and documents therein described; and at the foot of this letter the trader signed a receipt for the advances. The title deeds found among the testatrix's effects did not answer the description in the letter; but it did not appear whether any others were deposited with her on the occasion of the loan. The trader became bankrupt, and the usual petition of an equitable mortgagee was presented by the testatrix's personal representative:—Held, that there was a good lien on the property comprised in the title deeds found in the testatrix's possession for the amount of the advances, but that there was no sufficient memorandum to entitle the petitioner to costs. *Powell, Ex parte*, 6 Jur. 490.

**Equitable.**]—A., a director, received from the company a cheque, paid in one of his own for a like amount, and received in exchange a deposit note for the same amount. This transaction was never confirmed by a general meeting:—Held, that his mortgagee was entitled to an equitable lien on the sum secured by the deposit-note. *Woodhams* v. *Anglo-Australian, &c. Assurance Society*, 8 Jur. (N.S.) 148; 5 L. T. 629; 10 W. R. 290.

In 1884, M., in consequence of H. advancing 60,000*l.*, agreed to cede one-third of the profits to be derived from a contract that he had for the construction of a railway in Spain; and to assist in raising 30,000*l.* by giving such bills of acceptance or otherwise as might be required. The agreement contemplated that H. should advance 30,000*l.* in cash, and the rest in bills, but he failed to perform the whole of his part of the contract; but H. had advanced some money in furtherance of the object which M. had in view when he entered into the agreement, and those advances were the means of preserving M. the benefit of his railway contract. In 1856 H. assigned to the plaintiff his share and interest under the agreement, in trust to secure the payment of debts, and of the residue, if any, to himself. On a bill by the plaintiff:—Held, that H. was not entitled to an equitable lien on the profits of the contract for the sums advanced by him. *Twynam* v. *Hudson*, 31 L. J., Ch. 577; 8 Jur. (N.S.)1685; 10 W. R. 653—L. JJ.

—— **Evidence.**]—What possession, and what agreement as to the possession, of title-deeds, shall constitute an equitable lien, quære. *Robarts* v. *Jefferys*, 8 L. J., Ch. 136.

An equitable lien on title deeds, relating to an estate in China, was created by verbal representations leading the party in possession of such title deeds to consider that he held them, not only as security for a portion of the purchase-money of the estate still unpaid, but also for the general balance of accounts which were then due or might become due to him from a large mercantile firm in London:—Held, that such representations being acted upon were equivalent to a written contract. *Watson* v. *Chapman*, 18 L. T. 705.

—— **By Deposit.**]—An equitable mortgagee by deposit entered into an arrangement to secure an annuity by vesting his interest under the mortgage in himself and the annuitant in trust to secure the growing payments. He then raised money on the deposit of the deeds, and became bankrupt:—Held, that the last deposit created a good lien to the extent of his interest in the premises. *Smith, Ex parte*, 2 Mont. D. & D. 587; 6 Jur. 610.

A person who advances money bonâ fide on the deposit of title deeds, made by one who has no right to them or the estate to which they relate, will be protected in equity as a purchaser for valuable consideration without notice, and

may retain the deeds, though the person making the deposit was not in possession of the property, if it be an incorporeal hereditament. *Joyce* v. *De Moleyns*, 8 Ir. Eq. R. 215; 2 Jo. & Lat. 374.

A., by deed, mortgaged freeholds to B. At the same time the title deeds not only of the freeholds but of leaseholds belonging to A. were delivered to B.:—Held, in the absence of proof to the contrary, that B. had no lien on the leaseholds for the money advanced. *Wardle* v. *Oakley*, 36 Beav. 27.

**Security, Extent of.**]—A person can only give a lien on deeds as against himself, and to the extent of his own interest. *Turner* v. *Letts*, 20 Beav. 185; 24 L. J., Ch. 638; 1 Jur. (N.S.) 1057.

The purchaser of an equity of redemption in premises subject to a mortgage term, deposits the purchase deed as a security. He afterwards pays off the mortgage, and takes a surrender of the term, retaining the deed of surrender in his own possession, and becomes bankrupt:—Held, that the lien created by the deposit extended to the whole estate freed from the incumbrance. *Bisdee, Ex parte, Baker, In re*, 1 Mont. D. & D. 333.

Other deeds, deposited at the same time and forming part of the same security, related to an undivided share belonging to the bankrupt in other property. Between the times of the deposit and the bankruptcy the entirety of a certain portion of the property was conveyed to the bankrupt in lieu of his undivided share, he paying 100*l.* for equality of partition:—Held, that the lien affected the portion conveyed to the bankrupt, and that the assignees had no claim in respect of the 100*l.* *Ib.*

The bankrupt deposited the leases of two houses with the petitioner, for securing 600*l.*, accompanied with an agreement in writing; and on the same day he signed another agreement, engaging to pay 85*l.* per annum, being the improved rental of the premises, "the leases of which are deposited" with the petitioner, viz. 45*l.* being the improved rental of a house in the occupation of J. H.; 20*l.* being the improved rental of the adjoining premises let to J. H., as tenant at will; and 20*l.* being the improved rental of premises in the occupation of A. B.; "the said 85*l.* to be collected by me, and paid over" to the petitioner. The lease of the premises let to J. H., as tenant at will, had not been, in fact, deposited with the petitioner; but only the lease of the other premises in the occupation of J. H., and the lease to A. B.:—Held, nevertheless, that the petitioner had a lien, as equitable mortgagee, upon the premises comprised in all the three leases. *Edwards, Ex parte*, 1 Deac. 611.

M., a solicitor, having in his hands 2,000*l.* belonging to the estate of J., of which he and A. were trustees, and 600*l.* belonging to the estate of R., of which A. and B. were trustees, and being pressed by A. to give security for the two sums, in A.'s presence placed a parcel, which he represented to contain deeds of his own, worth 4,000*l.* in a box belonging to the estate of J., and a parcel, which he represented to contain other deeds of his own, sufficient to secure 600*l.*, in a box belonging to the estate of R., both boxes being in his custody as solicitor to the respective trusts. At the death of M. it was found that both parcels had been removed from the boxes; and thereupon M.'s widow, who afterwards took out administration with the will annexed, to his estate, deposited with A. deeds belonging to M.'s estate as a security for the 2,000*l.* due to the estate of J.:—Held, first, that the deposit of deeds by M. in the box belonging to the estate of R. was a sufficient change of possession to give A. and B. a lien on the deeds deposited; and that, as these deeds had been taken away, and could not be identified, A. and B. were entitled to a lien for the 600*l.* on all deeds belonging to M. at the time of the deposit. *Mason* v. *Morley*, 34 L. J., Ch. 422; 11 Jur. (N.S.) 459; 12 L. T. 414; 13 W. R. 669.

Held, secondly, that the deposit by M.'s widow gave to A. a lien for the 2,000*l.* on the deeds deposited by her; and that these deeds were exempted from the lien of A. and B. for the 600*l.* *Ib.*

Held, thirdly, that A., by accepting the deposit from the widow, abandoned his right to a general lien for the 2,000*l.* on all the deeds belonging to M. at the time of the original deposit. *Ib.*

**Charge, Extent of.**]—Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of moneys previously advanced. *Mountford* v. *Scott*, Turn. & R. 274.

A debtor deposited his title deeds with his creditor until such time as his account should not reach 100*l.*, at which time they were to be restored to him. The debtor died indebted to the creditor in 274*l.*:—Held, that the creditor's lien extended to the whole 274*l.* *Ashton* v. *Dalton*, 2 Coll. C. C. 565; 10 Jur. 451.

A. borrows 4,000*l.* from B., and deposits title deeds as a security for that sum. He afterwards obtains further advances, and, after an act of bankruptcy, signs an agreement subjecting the deposit to such further advances. B. declared to be entitled to a lien of the whole amount. *Langston, Ex parte*, 1 Rose, 26.

### b. How Lost.

**By Parting with Deeds.**]—D. deposited deeds with A. as a security for advances. A. afterwards parted with the custody of the deeds to N., who undertook by letter, in pursuance of an authority received from D., to return the deeds to A. on payment of certain debts due by D. to N.:—Held, that A., by parting with the deeds, had lost his lien. *Driscoll, In re*, Ir. R. 1 Eq. 285.

Assignee in bankruptcy having purchased an estate of the bankrupt under the commission, held a trustee of the estate upon a resale; in the first instance, for an equitable mortgagee by possession of the deeds; who, having delivered them up on receiving the produce of the first sale, was held, under the circumstances, not to have lost his lien for the deficiency. *Morgan, Ex parte*, 12 Ves. 6; 8 R. R. 272.

**By Depositing as Security.**]—A party having a lien on deeds for money advanced in exoneration of the property, held to have lost that lien by depositing those deeds as a security with another party. *Baine, Ex parte, Boden, In re*, 1 Mont. D. & D. 492; 10 L. J., Bk. 16; 5 Jur. 105.

## 7. Of Colonial Estates.

### a. West Indies.

**Validity — Mortgage of Slaves.**]—By the laws of Antigua slaves were declared to be inheritance and affixed to the freehold; and by 59 Geo. 3, c. 120, s. 9, no deed or instrument

conveying any interest in slaves was valid unless the registered names and descriptions of the slaves were set forth in the instrument, or in some schedule thereof. The bankrupts deposited with R. & Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, first, that this was nevertheless a good equitable mortgage of the slaves; and, being real property in the island of Antigua, could not be considered as within the order and disposition of the bankrupts at the time of their bankruptcy. *Rucker, Ex parte and In re*, 3 Deac. & C. 704; 1 Mont. & Ayr. 481.

**Covenant—Benefit of—Consignment.**]—Merchants in London agreeing to become sureties for a West India planter, on being secured by a conveyance of his plantation in trust, with a covenant that they should be continued as consignees till the expiration of five years after reimbursement of what they might advance:—Held, entitled to the benefit of this covenant. *Banbury* v. *Winter*, 1 J. & W. 255.

Quære, whether a covenant to continue a mortgagee as consignee after payment of the debt is valid. *Ib.*

Principle on which mortgagee of a West Indian estate is allowed to stipulate for the consignment. *Id.* 261.

A covenant in a mortgage of property in the West Indies, on the part of the mortgagor, to consign the produce of the estate to the mortgagee, to be sold on commission for the mortgagor, and to take all such plantation stores as may be wanted for the use of the estate from the mortgagee, is not usurious. A mortgagee is entitled to the benefit of such a covenant, and to charge a commission on the sale of the produce consigned to him. On the assignment by a mortgagee, the cost of supplies and contingencies furnished to the plantation previous to the assignment, but paid for subsequently by the assignee, may be added to the mortgage debt, and charged against the estate. *Sayers* v. *Whitfield*, 1 Knapp, 133.

**Commission.**]—A mortgagee in possession of a West India estate is not entitled to charge the mortgagor with commission on the amount of bills paid on the value of the consignments, or on the costs and insurance of supplies shipped for the use of the estate; but stands precisely in the same situation as a mortgagee in possession of an estate in England. Principles on which the expense of the home management of such estates is to be calculated. *Leith* v. *Irvine*, 1 Myl. & K. 277.

**Priority.**]—Messrs. L., West India planters, being indebted in a large sum to D., mortgaged to him certain estates in the island of Tobago as security for the debt. By the mortgage deed Messrs. L. also agreed to consign to D. fifty hogsheads of sugar annually. These consignments were never made. Messrs. L. afterwards, by deed, agreed to consign, for the space of five years, or longer if the first mortgages should continue, to C. (who had also made advances), two-thirds of the produce of the estates which had been before mortgaged to D. These consignments were made to C. An order having been made by the court of commissioners for the sale of the estates on the petition of the mortgagee, C. claimed a priority as incumbrancer over D., on the ground that, as consignee, he had a general lien upon the estate:—Held, that this was not a case of lien, as C. was not an ordinary consignee, but only a second mortgagee, and as such not entitled to priority over D. *Chambers* v. *Davidson*, 36 L. J., P. C. 17; L. R. 1 P. C. 296; 12 Jur. (N.S.) 967; 15 W. R. 534. *S. C.*, sub. nom. *Leith, In re*, 4 Moore, P. C. (N.S.) 158.

A. mortgaged a West India estate to B., the consignee thereof, agreeing also to take all his supplies from him, and that the produce should be applied first in payment of the supplies, and then in payment of the mortgage debt, for which the produce was to be the only security; and it was further agreed that he should not sell or incumber the estate without the consent of B. A. afterwards, with such consent, sold the estate to C., who took upon himself the mortgage debt and the covenants from A. to B., and afterwards made a mortgage to B., agreeing to pay the money then due to him, and to perform the covenants, except as to the taking of supplies, which he was to be at liberty to procure elsewhere. C. had before mortgaged the estate to A. as a security for the purchase money, which was unpaid. C. continued to take the supplies of the estate from B.:—Held, that the money due for such supplies, as well as the mortgage debt due to B., had priority over the mortgage to A. *Brown* v. *Anderson*, 2 Moore, P. C. 249.

**Receiver.**]—A receiver, when appointed by the court, is entitled to receive rent then in arrear; but it was held that, a receiver of a West India estate, appointed at the suit of a mortgagee, was not entitled to the produce of crops severed and shipped to the consignees or the mortgagor before the date of the receiver's appointment. *Codrington* v. *Johnstone*, 1 Beav. 520; 8 L. J., Ch. 282; 3 Jur. 528.

Receiver of a West India estate applied for by one of the parties entitled to a charge thereon against the trustee, refused, notwithstanding the estate was depreciated in value, and incumbrances thereon were increasing, the management of the trustee not appearing to be improper. *Barkley* v. *Reay* (*Lord*), 2 Hare, 308.

**Consignee.**]—Though a mortgagee shall not be deprived of possession while anything remains due, where he refused to swear that anything was due a consignee (the estate lying in the West Indies) was appointed. *Quarrell* v. *Beckford*, 13 Ves. 377.

A., a second incumbrancer on an estate in Jamaica, filed a bill to have the produce of the estate applied in satisfaction of the incumbrance. A receiver was appointed, who was ordered to pay to B., the first incumbrancer, the interest on her charge out of the first proceeds, and to consign the produce to R. for sale. On making a consignment, the bill of lading was sent to be delivered to R., on his paying B.'s interest. Afterwards, by order of R., the consignments were made to other merchants, who paid B. her interest for several years, but then ceased to do so. Upon a bill by her for an account of the consignments, and payment of her interest, charging collusion between the receiver and consignees, a demurrer for want of equity was overruled. *Fitzgerald* v. *Stewart*, 2 Sim. 333.

**Account.**]—Mode of taking accounts, as against mortgagees and consignees, of the produce of a West India estate. *Faulkner* v. *Daniel*, 3 Hare, 219.

Under a conveyance of a West India estate, in effect a mortgage, though expressed as a trust, an assignee was held liable to account as a mortgagee, and not entitled to charge as trustee or agent; therefore the accounts settled with the executors of the mortgagor, since his death in 1791, were declared not to be considered settled; the prior accounts to stand, with liberty to surcharge and falsify, but no further back than 1725. *Chambers* v. *Goldwin*, 5 Ves. 834.

**Sale or Foreclosure.**]—The practice of the chancery courts in Jamaica is to decree a sale instead of a foreclosure. *Gordon* v. *Horsfall*, 5 Moore, P. C. 393; 11 Jur. 569.

**Costs of Appeal.**]—The costs of a successful appeal to the privy council by a mortgagee of West India property, in a suit for a foreclosure, will be added to the mortgage debt. *Henry* v. *Ryan*, 1 Knapp, 388.

### b. British Guiana.

**Priority—Construction, "Holland Currency"—Variable Rate of Interest.**]—A., resident in Amsterdam, being the owner in possession of a plantation in British Guiana, by an instrument executed on her behalf by her attorney in London in the year 1817, sold the plantation, cum annexis, to B., for 100,000 guilders, "Holland currency," and 30,000*l.* sterling, taking, as part of the consideration-money, a first mortgage on the plantation for the 100,000 guilders. By the terms of this mortgage it was stipulated that the 100,000 guilders were not to be paid during the lifetime of A., but upon her death to her lawful descendants (if she had any), and, if not, to the nephews and nieces of J. B.; and it was specially provided that, if at any time the interest, at the rate of 5*l.* per cent., should not be punctually paid every year at Amsterdam, and if by such default A. should be obliged to appoint an attorney to demand the same in the colony, the interest in that case should be at the rate of 6*l.* per cent., and a further charge of 10*l.* per cent. for commission. A. intermarried with E., and, the interest on the mortgage not having been paid as stipulated, an attorney was appointed at British Guiana to recover the arrears. In 1828 A. died without issue or lawful descendants, leaving E., her husband, surviving; at which time the interest on the mortgage was still in arrear. In the year 1836 C. & Co. purchased the first mortgage, and all the interest therein which the parties claiming title under the limitation in the mortgage deed to the nephews and nieces of J. B. had. The consideration-money paid by C. & Co. was considerably less than the amount of the first mortgage and interest thereon. Upon the passing of the act for the abolition of slavery, C. & Co. received from the compensation commissioners, in respect of this mortgage, a sum more than sufficient to repay them what they had paid for the mortgage, but much less than was due upon the mortgage for principal and interest. The plantation was sold, in 1838, at the suit of B., and all creditors having claims were summoned to render their claims; and upon C. & Co. claiming priority, under the first mortgage, the supreme court of Demerara and Essequibo held that the defendant, who was a second mortgagee, was preferent over the first, as under the Anastasian law, which they declared prevailed in British Guiana, an assignee for a valuable consideration of a debt, or chose in action secured by debt, could not recover more than the amount of the consideration-money actually paid to the assignor, with legal interest from the time of payment, and that the sum received by C. & Co. from the compensation commissioners was more than sufficient to pay off, and must be held to extinguish, the whole debt upon the first mortgage. Upon appeal:—Held, by the judicial committee of the privy council, reversing the decree: first, that in the absence of any fraud by C. & Co. in the purchase of the first mortgage, and of any authority to shew that the lex Anastasiana prevailed in British Guiana, or could be applied to a case so circumstanced, the amount of the consideration-money given by C. & Co. was not to enter into question between them and the second mortgagee; secondly, that the term in the mortgage deed, "Holland currency," coupled with the fact of Amsterdam being the place mentioned for payment, meant Dutch currency and not colonial currency; thirdly, that the clause for varying the interest from 5*l.* to 6*l.* was not confined in its operation to the lifetime of A., but that circumstances might have rendered it inequitable to increase the rate of interest after A.'s death or during some portion of the time after that event. *Macrae* v. *Goodman*, 5 Moore, P. C. 316; 10 Jur. 555.

### c. Canada.

**Form—Sale or Mortgage.**]—B., the owner of land in West Canada, under a contract of sale from the chancellor and scholars of King's College, being indebted to T. & Co., induced P. to assume the debt, and to secure him from any loss in consequence of such assumption, by deed poll indorsed on his original contract of sale, absolutely assigned the land to P. Up to the time of this assignment, B. himself had never been in the actual possession of the land, his father having managed the same as his agent. P. afterwards, in satisfaction of debts due by him, assigned the land conveyed to him by B., with other property, to G. This assignment was also indorsed on the original contract of sale. Prior to the execution of this assignment G. made inquiries about the ownership of the property, but it did not appear that he received any information that B. was the owner. In a suit by B. against P. and G. for redemption:—Held, upon appeal (affirming the decree of the court of error and appeal in Canada), first, that, under the circumstances, the transaction between B. and P., although in form an absolute assignment and sale, was in effect a mortgage only. *Barnhart* v. *Greenshields*, 9 Moore, P. C. 18.

A. contracted for the grant of certain lots of land from the government in Upper Canada, and paid part of the purchase-money; and, being indebted to B., he assigned by deed his interest in the plot to B., in consideration of 100*l.* B. took possession of the lots, and afterwards obtained a grant of them, by letters patent from the crown, in fee, with the privity of A. A. subsequently became bankrupt, and B. was appointed assignee to his estate. No mention was made of any claim on the part of A. for

right to redeem, or interest in the lots, in his affidavit of debts and assets, nor was any claim made by him or his creditors. B. remained in possession until his death; and, the property having greatly increased in value, A. procured the appointment of a new assignee of his estate, who filed a bill against the devisee of B. for redemption, upon the ground that the original transaction was one of mortgage, and not of absolute sale. The original deed of assignment was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties, made by the solicitor who acted for A. and B., upon which the arrangement in the deed was based. Parol evidence was admitted to prove the nature and terms of the transaction; but the court of error and appeal in Upper Canada dismissed the bill; and such decision was affirmed, on appeal, by the judicial committee. *Holmes* v. *Mathews*, 9 Moore, P. C. 413.

**d. Australia.**

**Sale—Purchaser's Interest—Registration.**]—Where the mortgagor is a registered owner of leasehold in Victoria (under Transfer of Land Statute), and the mortgage is made and registered under s. 83 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vict. No. 317, or sale under ss. 84, 85 & 87 of the Transfer of Land Statute, then, whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration (see ss. 42 & 87). *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889—P. C.

C. INTEREST.

1. *When Payable*, 1467.
2. *After Tender*, 1470.
3. *Rate*, 1471.
4. *Compound*, 1477.
5. *Arrears*, 1480.
6. *Against Mortgagee in Possession*, 1481.
7. *In Lieu of Notice to Pay off*, 1481.
8. *Default—Waiver—See* LOAN FOR A PERIOD, ante, B, 2, col. 1449.

1. WHEN PAYABLE.

**Without express Words.**]—It is not necessary that there should be express words directing payment of interest; if the intention of the party creating the charge, to give interest, be sufficiently apparent, the court will award it. *Purcell* v. *Purcell*, 2 Dr. & War. 217; 1 Con. & L. 371; 4 Ir. Eq. R. 558.

A mortgage deed made no provision for interest, and the mortgagee thereby agreed, upon payment of the principal, to reconvey:—Held, that the mortgage carried no interest. *Thompson* v. *Drew*, 20 Beav. 49.

—— **Under Deposit.**]—If deeds are deposited by way of equitable mortgage to secure a simple contract debt, the debt bears interest from the date of the deposit, and by reason of it, though there is no express contract that the demand should bear interest. *Carey* v. *Doyne*, 5 Ir. Ch. R. 104.

When a simple contract debt has been secured by a deposit of title-deeds unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred, the mortgagee is entitled to interest on the debt, but only at the rate of 4*l.* per cent. *Kerr, In re*, L. R. 8 Eq. 331.

**In Bankruptcy.**]—A mortgage upon a bankrupt's estate being deficient, the mortgagee, proving the remainder of his debt under the commission, cannot charge interest beyond the date of the commission. *Badger, Ex parte*, 4 Ves. 165.

**On tacking Judgment.**]—Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of his judgment, but he is entitled to interest upon his judgment debt, though it should exceed the penalty. *Godfrey* v. *Watson*, 3 Atk. 518.

**On Renewal of Leaseholds.**]—Where the mortgagor of a leasehold estate has not covenanted that he will procure the lives to be filled up, the mortgagee may do it, and, on adding the expense of renewal to the principal, it shall carry interest. *Lacon* v. *Mertins*, 3 Atk. 4. And see *Manlove* v. *Bale*, 2 Vern. 84.

**On Disbursements by Mortgagee.**]—Money disbursed by mortgagee shall carry the same interest as the original sum. *Woolley* v. *Drage*, 2 Anst. 551; 3 R. R. 628.

**On Mortgagee's Costs.**]—When a mortgagee's costs are ordered to be added to his security, and to be a charge on the mortgaged estate, the amount so charged carries interest. It makes no difference that the mortgage is by grant of a redeemable annuity. Interest in such a case was allowed at the rate of 4 per cent. per annum. *Lippard* v. *Ricketts*, 41 L. J., Ch. 595; L. R. 14 Eq. 291; 20 W. R. 898.

—— **Solicitor-Mortgagee.**]—A mortgage of Irish land given by a client to a solicitor to secure the payment of a sum of money due for untaxed costs does not, as against the assignee of the equity of redemption, carry any interest. *O'Connor, In re*, 17 W. R. 1143.

**Proviso for Redemption, and Covenant for Payment, extending to Principal only.**]—A mortgage deed recited an agreement to secure the money with interest, but the proviso for redemption on a day certain, and the covenant to pay the trusts of the produce of a sale, were restricted to the principal only:—Held, that interest was payable. *Ashwell* v. *Staunton*, 30 Beav. 52.

**Under Redemption Decree.**]—A., being entitled to certain lands as issue in tail, conveyed them in fee in 1749 to secure 800*l.*, and levied a fine. In 1762 he borrowed 450*l.*, and charged it upon the same lands by deed poll. He died in 1764, leaving the charge of the aggregate sum of 1,250*l.* upon the lands, with an arrear of interest, and devised all his lands to his wife. Two years afterwards the wife married B., and they, after reciting the mortgage, and that B. had paid the interest, granted and confirmed the mortgaged lands to the mortgagee, reserving the equity of

redemption to B., and his heirs, &c. By deed in 1789, 300*l.* arrear of interest was added to the principal, and the aggregate sum of 1,550*l.* charged on the lands, subject to redemption as before. The wife died in 1794, leaving C., her son by A., her heir-at-law. In 1797 B. sold part of the mortgaged lands, and in consideration of 2,000*l.* principal and interest paid to the mortgagee, and 600*l.* to B., he and the mortgagee conveyed such part to D. The rest of the lands were conveyed by the mortgagee to B., who died in 1799. On a bill by C. to redeem, the court of exchequer decreed that he was entitled to redeem, on payment of the principal money due upon the mortgage, and interest from the death of B. On appeal to the lords, it was declared that C. was entitled, notwithstanding the proviso of redemption reserved to B., to redeem the lands on payment of the principal and interest due at the death of the wife on the aggregate sum of 1,250*l.*, such interest to be computed according to the proviso in the indenture of release and mortgage. Upon reference to the master to take the accounts, it appeared that B. and his wife, during her life, paid to the mortgagee 1,500*l.*; that the master, in his report, did not include this sum, but reported that there was due upon this account, for principal, 1,250*l.*, and for interest at the death of the wife, 286*l.* On this ground exceptions were taken to the report, which being in this respect confirmed, and a decree made upon further directions accordingly, a further appeal was presented to the lords, who affirmed the decree, as they considered that the former order, directing an account of interest due on the mortgage, meant interest actually due. *Ruscombe* v. *Hare*, 2 Bligh (N.S.) 192.

**On improperly resisting Redemption.**]—Where a mortgagee improperly resists redemption, and on taking the accounts a balance is found to be in his hands, the court has power to charge him with interest on such balance, though he has not been in possession of the mortgaged premises. *Smith* v. *Pilkington*, 1 De G. F. & J. 120; 29 L. J., Ch. 227.

**Recovering as Damages.**]—Interest is recoverable in an action on a mortgage deed, particularly where there is a covenant for interest in such deed, and which at all events would be given as damages for the detention of the debt. *Verney* v. *Iddings*, 2 Chit. 234. And see *Eaton* v. *Bell*, 5 B. & Ald. 34.

Interest due is not a part of the principal debt due on mortgage, but rather sounds in damages. *Dickenson* v. *Harrison*, 4 Price, 282.

**Mistake.**]—The defendant borrowed money of the plaintiff, and he gave his promissory note for the amount, with interest at 60*l.* per cent., together with an equitable charge on copyholds as a collateral security for the note. The plaintiff sued on the note, and by mistake he claimed and recovered interest at 5*l.* instead of 60*l.* per cent., which was paid:—Held, that the plaintiff could not afterwards sue upon the mortgage to recover the deficiency, and a bill in equity for that purpose was dismissed with costs. *Darlow* v. *Cooper*, 34 Beav. 281.

Where a mortgage deed had been mislaid for many years, and interest had been paid and received at a lower rate than that reserved by the deed, the payment having been made during a portion of the time under a decree in an administration suit on an erroneous affidavit as to the contents of the missing deed:—Held (the case not being one to which the statute of limitations applied), that a tenant for life of the interest on the mortgage debt, who was not shewn to have agreed to take less than the reserved interest, was entitled to payment of the difference since she became tenant for life. *Gregory* v. *Pilkington*, 8 De G. M. & G. 616; 26 L. J., Ch. 177; 5 W. R. 57.

**Construction.**]—Upon a mortgage from B. to A., the deed, dated the 13th February, 1834, recited that, as an inducement to A. to advance the money, B. had agreed to covenant for the payment of the interest. B. covenanted to pay the principal and interest for the same, after the rate of 5*l.* per cent., on the 13th February, 1835; and C. covenanted that B. and C., or one of them, would, during the continuance of the security, pay the interest to become due in respect of the principal, after the rate of 5*l.* per cent. per annum, by two even half-yearly payments, on the 13th August and the 13th February. The deed contained a power of sale, on six months' notice, in default of payment of principal and interest, with authority to A., out of the proceeds, to pay herself the principal and interest, or so much thereof as should be due:—Held, that C.'s covenant was not limited to the payment of the first two half-years' interest, but was a covenant for payment of the interest so long as the principal remained unpaid. *King* v. *Greenhill*, 6 Man. & G. 59; 6 Scott (N.R.), 869; 12 L. J., C. P. 333; 7 Jur. 604.

**Remission.**]—A., to whom his son-in-law had, by deed, mortgaged some property, declined to receive the interest, and afterwards, to induce his son-in-law not to sell and reside on the mortgaged property, he had promised to allow him to live there rent free. The son-in-law acted on the promise until A.'s death:—Held, that, in equity, no interest was payable until that time. *Yeomans* v. *Williams*, 35 Beav. 130; 35 L J., Ch. 283; L. R. 1 Eq. 184.

**Repayment.**]—A. mortgaged to B., and delivered to him the title deeds of, the estate. Some years afterwards, A. gave B. notice of his intention to pay off the mortgage at the end of six months, but did not pay the money until after that time, owing to B. not having offered him any indemnity that was satisfactory to him in respect of B. having lost some of the deeds. B. having brought an ejectment for the estate, A. filed a bill to redeem. Redemption decreed, and ordered that a sum, which A. had paid for interest accrued on the mortgage-money after the expiration of the six months, should be repaid to him. *Midleton* (*Lord*) v. *Eliot*, 15 Sim. 531; 11 Jur. 742.

2. After Tender.

**Generally.**]—If the mortgagor tenders the money to the mortgagee, and he refuses it, his interest shall cease from that time, and he ought not to keep the pledge. *Manning* v. *Burgess*, 1 Ch. Ca. 29.

One of several mortgagees compelled to pay the costs, and another refused his costs, of a suit to redeem the mortgage; and the interest on the mortgage-money declared to stop on the day of

the tender. *Cliff* v. *Wadsworth*, 2 Y. & C. C. C. 598; 7 Jur. 1108.

**On Notice.**]—Interest on mortgage not stopped out on proper tender and notice. Not upon proposals to deduct upon open account on the other side. *Garforth* v. *Bradley*, 2 Ves. 678.

—— **Place of.**]—As to a tender of mortgage-money, there ought to be reasonable notice of paying it in; and, if the tender be insisted on, to stop interest, the money must be kept dead from that time, because the party is to be always ready. Six months' notice given to pay in the mortgage-money at H., though this be not the place mentioned in the proviso of the deed, yet, where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country. *Gyles* v. *Hall*, 2 P. Wms. 378.

### 3. Rate.

#### a. In General.

**Where none agreed.**]—When the rate of interest is not specified by the person creating the charge, the court will give interest at the rate allowed by the 106th general order, namely, 5 per cent., and not at the highest rate allowed by law, 6 per cent. *Purcell* v. *Purcell*, 2 Dr. & War. 217; 1 Con. & L. 371; 4 Ir. Eq. R. 558.

The court rate of interest, where no rate is fixed by the parties themselves, is in this country to be calculated at 5 per cent., pursuant to the 204th general order, which was held to apply to a legacy under a will made prior to the publication of the rule. *Leslie* v. *Leslie*, Ll. & G. t. Sugd. 1.

**204th General Order.**]—The 204th general order, regulating the court rate of interest, held not to apply to a charge created under a family settlement, there having been a course of dealing for many years, which, with other circumstances, the court thought sufficient to enable it to imply a contract between the successive owners of the estate, on which the money was charged, and the party beneficially entitled to the charge. *Ruttledge* v. *Ruttledge*, 1 Dr. & Wal. 243.

**Notwithstanding 204th Order.**]—Estates were conveyed to trustees to raise a certain sum by sale or mortgage with interest at 6 per cent.; on the 25th of January, 1838, there was a decree declaring the plaintiffs entitled to the sum reported due for principal and interest:—Held, that the plaintiffs were entitled to interest at the rate of 6 per cent. on the entire consolidated sum, notwithstanding the 204th new order (Irish). *Grattan* v. *Donegal*, Ll. & G. t. Plunk. 313.

**Repeal of Usury Laws.**]—Though, since repeal of usury laws, a lender may demand any interest he likes, yet the court of chancery's jurisdiction over unconscionable bargains did not rest on those laws and is unaffected by their repeal. *Chapple* v. *Mahon*, Ir. R. 5 Eq. 225.

**After day of Repayment.**]—A mortgagor covenanted to pay the principal and interest at the rate of 5 per cent. per month on a fixed day, and charged a reversionary interest with payment of the principal and interest, "at the rate aforesaid," but there was no further covenant for payment of interest. In taking accounts in a mortgagee's action, the mortgagee was allowed interest after the fixed day at the rate of 5 per cent. per annum only. *Wallington* v. *Cook*, 47 L. J., Ch. 508.

By a mortgage deed reciting an agreement for an advance at 10*l.* per cent., the mortgagor covenanted for payment of the principal sum at the expiration of twelve months, and for the payment of interest in the meantime at the rate of 10*l.* per cent. per annum, but there was no covenant as to payment of interest in the event of the principal sum, or any part of it, remaining unpaid after the day named for the repayment. The money was not repaid on the day, but interest at 10*l.* per cent. was paid for several years. The mortgagor having died, and a decree having been made for administration of his estate, the mortgagee proved as a creditor for the principal sum and interest:—Held, that interest was recoverable only as damages, and ought to be limited to 5*l.* per cent. *Roberts, In re, Goodchap* v. *Roberts*, 14 Ch. D. 49; 42 L. T. 666; 28 W. R. 870.

—— **Effect of Agreement.**]—In April, 1879, A. deposited title deeds with B. to secure repayment of an advance of 1,000*l.*, and an agreement was at the same time executed that the deeds should be held as an equitable security for payment on the 15th July, 1879, of the 1,000*l.* and interest at 7½ per cent. per annum, and also that A. should execute to B. a legal mortgage of the property, with power of sale and such other powers as B. might require for further securing payment of the money, which should then be owing on the security of the agreement, "with interest for the same after the rate aforesaid." In January, 1881, B. took out a debtors' summons for 150*l.*, on the footing that interest continued to be paid at the rate of 7½ per cent. down to the date of demand, and not merely until the 15th of July, 1879 (in which case the debt would have been under 50*l.*):—Held, that the agreement amounted to a contract that, if the 1,000*l.* was not repaid in July, 1879, interest at 7½ per cent. should continue to be paid, and, accordingly, that there was a liquidated demand of sufficient amount within the Bankruptcy Act, 1869, s. 6, to support the debtors' summons. *Furber, Ex parte, King, In re*, 17 Ch. D. 191; 44 L. T. 319; 29 W. R. 524.

**Fiduciary Relation.**]—The plaintiff had mortgaged her life interest in certain leasehold property to various persons. In the year 1880, the defendant, who was then acting as her solicitor, in order to release her from embarrassment, bought up several of the incumbrances with his own money, and took a transfer of them to himself:—Held, in an action for redemption brought by the plaintiff against the defendant, that the defendant must be allowed interest at the rate of 5 per cent. on the moneys he had actually advanced. *Macleod* v. *Jones*, 53 L. J., Ch. 534; 50 L. T. 358; 32 W. R. 660.

**Under Deposit without Memorandum.**]—When a simple contract has been secured by a deposit of title deeds unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred, the mortgagee is entitled

to interest on the debt, but only at the rate of 4 per cent. *Kerr, In re*, L. R. 8 Eq. 331.

**In Excess of Agreement.**]—If a mortgage be drawn for 5 per cent. and the mortgagee takes 6, it would be void on the word "take," in the 12 Anne, stat. 2, c. 16, s. 1. *Adlington* v. *Cann*, 3 Atk. 154.

**In Diminution of Agreement.**]—On a decree for the sale of an estate in mortgage, the master reported a stated sum due for principal and interest. Upon the confirmation of the report, it was decreed, that though the mortgage-money was lent at 5 per cent., yet, as there were other mortgages and creditors, interest shall be paid at the rate of 4 per cent. only, from the time the master's report was confirmed. *Harris* v. *Harris*, 3 Atk. 722.

**On Surplus after satisfying Mortgage.**] — When a party held securities for advances, with power of sale, which he exercised, and pending the settlement with creditors, who had instituted proceedings, retained the surplus, after satisfying his own claims, in his hands :—Held, not liable to more than 5 per cent. interest, and the accounts not to be taken with rests. *Court* v. *Robarts*, 6 Cl. & F. 65.

**Set-off.**]—A mortgagee of property to secure 2,000*l.* and interest at 5 per cent. became the purchaser of some of the mortgaged property and other property of the mortgagor for 2,700*l.*, paid a deposit of 270*l.*, and entered into possession of the property, not waiving objections to title. The conditions of sale provided that the balance of the purchase-money remaining unpaid should carry interest at 4 per cent. Ten years passed without either party claiming interest, and without the vendor showing a good title. The vice-chancellor held that the accounts should be taken upon the principle that the mortgage debt continued to bear interest at the rate of 5 per cent., and the balance of the purchase-money at the rate of 4 per cent.; but :—Held, reversing that decision, that, under the circumstances, set-off was to be presumed. *Wallis* v. *Bastard*, 17 Jur. 1107 ; 2 Eq. R. 508 ; 2 W. R. 47—L.JJ.

**Merger.**]—By an indenture of mortgage A., a beneficed clergyman, assigned to B. certain policies of assurance subject to a proviso for redemption thereof on payment by A., on the 30th of January, 1865, to B. of the sum of 3,000*l.*, with interest at the rate of 7*l.* per cent. per annum, and A. thereby covenanted that he would pay to B. the said sum of 3,000*l.*, with interest at the rate aforesaid, on the day before mentioned, and that, in case the said sum of 3,000*l.* should not be paid on the day before mentioned, A. covenanted that he would, so long as the said sum of 3,000*l.* remained due on that security, pay to B. interest at the rate aforesaid. A. made default in payment, and B., after obtaining a judgment against A., issued a sequestration against his benefice. The sequestrator paid to B. the principal sum, together with interest thereon at the rate of 4*l.* per cent. per annum. B. claimed the difference between the principal sum due on his security with interest at the rate of 7*l.* per cent. per annum, and the amount paid to him by the sequestrator. B. brought an action to recover that difference, and A. demurred, on the ground that the security of the mortgage deed was merged in the judgment :—Held, overruling the demurrer, that part of the security was extinguished and part remained ; that the debt due to B. in respect of the principal moneys was merged in the judgment, and therefore extinguished, but that the debt due to B. in respect of the interest was not merged in the judgment, and therefore remained. *European Central Ry., In re* (4 Ch. D. 33), distinguished. *Popple* v. *Sylvester*, 52 L. J., Ch. 54 ; 22 Ch. D. 98 ; 47 L. T. 329 ; 31 W. R. 116.

A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest thereon at 5 per cent. per annum for the six months. And there was a further covenant by the mortgagor that, if the principal sum, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent. per annum. After the expiration of the six months, the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear:—Held, that, the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum. *Popple* v. *Sylvester* (22 Ch. D. 98) distinguished. *Fewings, Ex parte, Sneyd, In re*, 53 L. J., Ch. 545 ; 25 Ch. D. 338 ; 50 L. T. 109 ; 32 W. R. 352—C. A.

**For Counsel's Fees.**]—The court will not suffer counsel, who happens to be a mortgagee, to insist on more than legal interest, under a pretence of a gratuity for business formerly done in the way of counsel. *Thornhill* v. *Evans*, 2 Atk. 330 ; 9 Mod. 331.

**On Mortgagee's Costs.**]—When a mortgagee's costs are ordered to be added to his security, and to be a charge on the mortgaged estate, the amount so charged carries interest. It makes no difference that the mortgage is by grant of a redeemable annuity. Interest in such a case was allowed at the rate of 4 per cent. per annum. *Lippard* v. *Ricketts*, 41 L. J., Ch. 595 ; 20 W. R. 898.

**After Calling in.**]—It was agreed by a settlement, that, until a sum of money should be "called in, and so long as it should be suffered to remain a charge upon certain lands, it should bear interest at the rate of 6 per cent.":—Held, that a party was not therefore entitled to interest at that rate, for the period elapsed after he had filed a bill to raise the charge. *Lynch* v. *Flanagan*, Hayes, 18.

**In Case of Assignment as Security.**]—There is no general rule as to the rate of interest the court will allow on repayment of consideration money expressed in an absolute assignment, which is treated only as a security for such consideration money ; and, in a case where the assignee of a reversionary interest in a trust fund was the solicitor to the trust estate, and there was evidence of the assignment having

been at an under-value, the court allowed interest at 5 per cent. *Unsworth, In re*, 2 Dr. & Sm. 337; 13 W. R. 448.

### b. Due Payment—Reduction.

**Agreement for Reduction if duly Paid—Default.**]—A mortgagee lends money at 6 per cent. and in the deed agrees to take 5 per cent., if it be paid within three months after it has become due. If the mortgagee fails to pay at the precise time, he must afterwards pay 6 per cent. *Jory* v. *Cox*, Pre. Ch. 160. S. P., *Holles* v. *Wyse*, 2 Vern. 289.

Deed of mortgage at 5 per cent. contained a proviso that, as often as the interest should be paid half-yearly, on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3¾ per cent. By a separate agreement, mortgagee covenanted not to call in the money within five years, unless the interest be in arrear. The first half-year's interest not having been tendered till after the three months, but the second half-year's interest before:—Held, first, that mortgagee was only entitled to interest at 5 per cent. for the half-year which had been tendered after the time; and, secondly, that in consequence of the default he was entitled to call in his money. *Stanhope* v. *Manners*, 2 Eden, 197.

—— **How far Default applies.**]—Where there is the common proviso for reduction of the interest payable on a mortgage debt, in case of punctual payment, a failure in such punctual payment only affects the rate of interest payable for the half-year in which such condition was not fulfilled. *Wayne* v. *Lewis*, 3 Eq. Rep. 1021; 3 W. R. 600.

—— **Mortgagee in Receipt of Rents as Agent of Mortgagor.**]—Interest on mortgage debt at 10 per cent. reducible to 8 per cent. if paid within twenty-one days after it fell due. Mortgagees were appointed by mortgagor agents and receivers over the mortgaged lands, and, as such agents, acted so as to delay the payment of rents which, if punctually paid, would have been funds in their hands to pay the interest within twenty-one days:—Held, mortgagees could only claim interest at lower rate. *Chapple* v. *Mahon*, Ir. R. 5 Eq. 225.

**Receipt of Reduced Rate after Default.**]—A mortgagor, who was liable to pay interest at the rate of 5 per cent. unless paid within a certain time after it became due, when it was to be reduced to 4 per cent., frequently paid interest to the executor of the mortgagee at the rate of 4 per cent. after the time limited for the lesser rate of interest:—Held, that the executor was justified in receiving the lesser rate of interest, and that the accounts were not to be reopened. *Booth* v. *Alington*, 26 L. J., Ch. 138; 3 Jur. (N.S.) 49.

**Relief.**]—Mortgagor reserving 6 per cent. with proviso to take 5 per cent., if paid within three months after due; if a great arrear, court will not relieve; secus, if but a small slip of time. *Brown* v. *Barkham*, 1 P. Wms. 652.

Where a mortgage is at 4½ per cent., with a proviso that, if the interest be paid after each half-year, and before three quarters become due, the mortgagee will accept 4 per cent.; if the mortgagor fails in paying the interest at the appointed time, he cannot be relieved in equity. *Nicholls* v. *Maynard*, 3 Atk. 519.

**Parol.**]—A. lends money upon mortgage at certain rate of interest, and afterwards by parol agrees to reduce rate of interest. Agreement, though verbal, held binding, though fact is triable by issue. *Milton* v. *Edgeworth*, 5 Bro. P. C. 313.

**Mortgagee in Possession.**]—A proviso in a mortgage for a reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise; and accordingly the mortgagee will be allowed, in his accounts as mortgagee in possession, the higher rate of interest, even though there was no interest in arrear at the time of taking possession. *Bright* v. *Campbell*, 41 Ch. D. 388; 60 L. T. 731; 37 W. R. 745.

—— **Through Mortgagor's Default.**]—Under a proviso in a mortgage deed for reduction of interest on punctual payment, a mortgagee in possession through the default of the mortgagor is entitled, on the accounts being taken, to charge the mortgagor with the higher rate of interest. *Stains* v. *Banks* (9 Jur. (N.S.) 1049; reversed on appeal, Reg. Lib. 7 B. 1863, 1761) considered. *Union Bank of London* v. *Ingram*, 50 L. J., Ch. 74; 16 Ch. D. 53; 43 L. T. 659; 29 W. R. 209.

### c. Penal.

**Relief against.**]—Where a mortgage is made with reservation of 4 per cent., and a proviso that, upon nonpayment within a certain time, the mortgagor shall pay 5 per cent., lord chancellor held this a nomine pœnæ, and relievable in equity. *Nicholls* v. *Maynard*, 3 Atk. 520.

A mortgage is made, with interest at 5 per cent., provided that, if the interest be not paid within two months after due, then to pay 5½ per cent. This is in nature of a penalty, and the court will relieve against it; otherwise, if 5½ per cent. be reserved originally, and be lessened to 5 per cent. if duly paid within two months after due. *Strode* v. *Parker*, 2 Vern. 316.

Mortgage at 5 per cent., with covenant to pay 6, on default of paying the interest within sixty days after due. If the interest is behind sixty days, the mortgage shall carry interest at 6 per cent., and the court will not relieve against it. *Halifax (Marquis)* v. *Higgins*, 2 Vern. 134.

A. made mortgage to B. for 1,769*l.*, payable by five equal payments, within the space of five years, with interest at 5 per cent.; but mortgagor covenanted that, if the money should not be paid at those times, or within three months after, he would, for every sum so unpaid, pay 8 per cent. interest until actual payment. The money was not paid; and, on bill of foreclosure, court decreed an account of the principal money and interest at 5 per cent. only; but, on appeal, decree was reversed, and mortgagor ordered to be charged with 8 per cent. interest from the end of three months after each payment became due. *Burton* v. *Slattery*, 5 Bro. P. C. 233.

—— **Arrears.**]—Interest reserved at 5 per cent.; but, if not duly paid, then to answer interest at 6 per annum; great arrear of interest.

Mortgagor decreed to pay but 5 per cent., the reservation at 6 per cent. being only as nomine pœnæ. *Holles* v. *Wyse*, 2 Vern. 289.

**Mortgagee in Possession.**]—Where a mortgagee was in possession, and there was a stipulation in the mortgage deeds for the payment of interest, at 4*l.* 10*s.* per cent. if paid regularly, and 5*l.* per cent. if not, the court confirmed the chief clerk's decision, allowing 4*l.* 10*s.* per cent. *Stains* v. *Banks*, 9 Jur. (N.S.) 1049. But see *Union Bank of London* v. *Ingram*, 50 L. J., Ch. 74; 16 Ch. D. 53; 43 L. T. 659; 29 W. R. 209.

### 4. Compound.

#### a. In General.

**Generally.**]—Rule as to accumulation of interest upon interest not broken through. *Combe* v. *Acland*, Dick. 436.

**Agreement for.**]—A correspondence took place between a mortgagee and a mortgagor, extending over a series of years, in which the mortgagee stated his intention, if the interest upon the mortgage debt was not paid, to add it to the principal, and to charge the same interest upon the amount as the mortgage bore. The mortgagor replied from time to time that he could not pay the interest, and that it must be added to the claim of the mortgagee:—Held, that it did not amount to an agreement to pay compound interest; and the claim of the mortgagee was not allowed. *Tompson* v. *Leith*, 4 Jur. (N.S.) 1091.

—— **Implied.**]—Where interest has, for a length of time, been paid upon a consolidated sum of principal and interest, an agreement to that effect will be inferred, and decree made accordingly *M'Carthy* v. *Llandaff* (*Lord*), 1 Ball & B. 375.

—— **Nature of.**]—An agreement to turn interest upon a mortgage into principal must be done fairly, and on the advance of fresh money. *Thornhill* v. *Evans*, 2 Atk. 330; 9 Mod. 331.

—— **Absence of.**]—In the absence of special agreement, simple interest only can be charged in a mortgage account. *Daniell* v. *Sinclair*, 50 L. J., P. C. 50; 6 App. Cas. 181; 44 L. T. 257; 29 W. R. 569.

—— **Limitation.**]—A. and B., reversioners after a life interest in C., mortgaged their property and covenanted that interest in arrear should be capitalised, and bear interest after the same rate; and C. also assigned her life interest as a part of the security:—Held, that the covenant was good and valid; and that the mortgagee was not limited to six years' interest. *Clarkson* v. *Henderson*, 49 L. J., Ch. 289; 14 Ch. D. 348; 43 L. T. 29; 28 W. R. 907.

—— **Void.**]—Proviso in the deed, if future interest is not paid, that interest shall be paid on it, is void. *Ossulston* (*Lord*) v. *Yarmouth* (*Lord*), 2 Salk. 449. S. P., *Broadway* v. *Moorcraft*, Moseley, 247.

—— **Usurious.**]—Mortgagee cannot originally stipulate for a collateral advantage, as that, if interest is not paid at the end of the year, it shall be converted into principal, or that mortgagee shall be receiver, with a commission, as tending to usury; but he may stipulate for a receiver to be paid by mortgagee, and may appoint a bailiff, &c. *Chambers* v. *Goldwin*, 9 Ves. 271; 7 R. R. 181.

**As against subsequent Incumbrancer.**]—A prior incumbrancer not allowed to turn interest into principal by indorsement, as against a subsequent incumbrancer, of whom she had notice. *Digby* v. *Craggs*, 2 Eden, 200; Amb. 612.

**Second Mortgage for.**]—Mortgagor gives second mortgage for what is due for principal and interest on first mortgage, and also for interest upon interest due on first mortgage. Quære, if second mortgage void as founded on usury. *Sackett* v. *Bassett*, 4 Madd. 58.

**Relief against.**]—Where mortgagee, who is entitled to only 4½ per cent. interest, had compelled mortgagor to turn interest into principal at 5 per cent. at the end of every six months, and, at the time the mortgage was paid off, insisted on an advance of six months' interest over and above interest which was due: on bill for relief against mortgagee, and to set aside a grant to defendant of the place of steward to a manor of plaintiff's, as obtained by fraud, plaintiff was relieved both in respect to the transactions relating to mortgage, and also in regard to the grant of stewardship. *Thornhill* v. *Evans*, 2 Atk. 330; 9 Mod. 331.

Master directed to take an account only of what was due on the original sum at 4½ per cent., and plaintiff to pay same rate of interest for any fresh money that should appear due. *Ib.*

**On Account stated.**]—Compound interest on mortgage allowed on foot of an account stated. *Chesterfield* (*Lord*) v. *Cromwell*, 1 Eq. Abr. 287.

**In Colonies.**]—No larger sum can be recovered by way of interest on a mortgage in one of our colonies (Demerara), where the Dutch law is retained, than a sum equal to the principal. *Shand* v. *Brereton*, 1 Knapp, 160, n.

#### b. After Transfer.

**In General.**]—Mortgagee assigns his mortgage to J., who pays off the principal and the interest, which is considerably in arrear. Whether this interest shall be reckoned principal against the mortgagor, quære. *Macclesfield* (*Lord*) v. *Fitton*, 1 Vern. 168.

A mortgage made for 450*l.*, payable at the end of five years, with interest at 5 per cent. in the meantime. About two months before the end of the five years, the mortgagee assigned over the mortgage for 560*l.*, being the principal and interest then due. The 560*l.* shall carry interest, though the five years were not elapsed, the mortgage being forfeited by the nonpayment of the interest. *Gladwin* v. *Hitchman*, 2 Vern. 135.

**With Privity of Mortgagor.**]—Where a mortgage is assigned with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest; but otherwise, if assigned without

the mortgagor's consent. *Ashenhurst* v. *James*, 3 Atk. 271.

If a considerable sum be due for interest, and the mortgagee assigns over the mortgage, in consideration of the amount of the principal and interest, (if such assignment be without the privity of the mortgagor,) then interest shall be carried on only on the principal; but, if the mortgagee had applied to the mortgagor before, and demanded his money, and required him to join in the assignment, and the mortgagor refused either to pay or join, the assignee shall have interest both on the principal and interest. *Anon.*, Bunb. 41.

As between mortgagee and persons claiming under him, without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal. *Mathews* v. *Wallwyn*, 4 Ves. 118.

**To avert Sale.**]—The interest on a mortgage debt being in arrear, the mortgagee ordered the mortgaged estate to be put up for sale. To avert the sale the defendant was induced to agree to take a transfer of the mortgage, and, pending the negotiations for the transfer, he paid the amount due for arrears of interest. The deed of transfer did not contain any reference to the arrears of interest paid by him, but merely purported to transfer the principal debt and the interest due at the date of the transfer. By a contemporaneous deed, the owner of the equity of redemption (who was a trustee) purported to capitalise the arrears of interest which had been paid by the transferee, and to charge them with interest upon the mortgaged estate:—Held, that, although the deed purporting to charge the arrears of interest upon the mortgaged estate was inoperative inasmuch as the trustee had no power to create such a charge, yet the transferee was entitled to charge the amount paid by him for arrears of interest against the estate, as money paid by way of salvage to prevent the sale, but without interest thereon. *Cottrell* v. *Finney*, 43 L. J., Ch. 562; L. R. 9 Ch. 541; 30 L. T. 733.

### c. After Report.

**In General.**]—In the case of a mortgage the whole sum liquidated by the report carries interest. *Creuze* v. *Hunter*, 2 Ves. J. 159; 4 Bro. C. C. 157; 2 R. R. 38.

Subsequent interest on a mortgage to be calculated upon the principal and interest reported due, but upon bonds or legacies on the principal only. *Perkyns* v. *Baynton*, 1 Bro. C. C. 574.

**Rule as to.**]—Rule as to the computation of subsequent interest, where the amount of the principal, interest and costs due upon a mortgage has been found by the master's report. *Brewin* v. *Austin*, 2 Keen, 211.

Where the amount of principal and interest due upon a mortgage has been found by the master's report, the rule now is to compute subsequent interest upon the principal only, and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due. *Whatton* v. *Cradock*, 1 Keen, 267; 6 L. J., Ch. 178.

**Under Agreement with Mortgagor.**]—Interest computed by the master's report shall carry interest. But where the mortgagor signed an account, whereby so much is admitted to be due for interest, this will not carry interest, unless the mortgagor by any letter or writing under his hand agrees to make it principal. *Brown* v. *Barkham*, 1 P. Wms. 653.

**In Favour of other Creditors.**]—A decree for sale of an estate in mortgage, the master reported a stated sum due for the principal and interest, and the report was confirmed. As the mortgage was at 5 per cent., and there was another mortgagee and creditors besides, from the confirmation of the master's report it shall only carry 4 per cent. *Harris* v. *Harris*, 3 Atk. 722.

### 5. Arrears.

**Interest on.**]—Though interest is in arrear when the mortgage is paid, a mortgagee shall not have interest for that interest. *Thornhill* v. *Evans*, 2 Atk. 330; 9 Mod. 331.

Where there was a great arrear of interest due on a mortgage, interest allowed for the interest reserved in the body of the deed. *Howard* v. *Harris*, 1 Vern. 194.

**Bond for.**]—A mortgagee takes a bond from the assignee of the devisee for the arrears of interest then due, and gives a receipt; the bond is still unpaid: the interest is still secured by the mortgage. *Hardwick* v. *Mynd*, 1 Anst. 111; 3 R. R. 562.

Whether mortgagee taking a bond for arrears of interest shall be at liberty, in case of a deficient fund, to abandon the bond and re-attach the interest to his prior charge against intervening creditors, quære. In the present case, the bond for arrears being taken by the guardian of an infant, he was not concluded; but lord chancellor doubted whether, if it was the spontaneous act of the creditor himself being competent, he would be at liberty to retract where the point of severing or not affected third persons. *Kemmis* v. *Stepney*, 2 Moll. 85.

**As against Remainderman.**]—Incumbrancer is entitled to arrears of interest against remainderman, though by laches he omitted to obtain it against tenant for life. *Roe* v. *Pogson*, 2 Madd. 457.

Where an equity of redemption is put in settlement, though the tenant for life is the party bound to pay the interest upon the mortgage, yet the mere laches of the mortgagee to demand such interest from the tenant for life will not prejudice his claim against those in remainder. *Wrixon* v. *Vize*, 2 Dr. & War. 192; 3 *Id.* 104; 1 Con. & L. 298; 2 *Id.* 138; 4 Ir. Eq. R. 463; 5 *Id.* 173.

**As against Heir.**]—The heir of a mortgagor, who has covenanted for himself and his heirs to pay the mortgage debt and interest, cannot redeem without paying arrears of interest to the extent of twenty years, the mortgagee being entitled to tack the arrears of interest to the debt as against the heir. *Elvy* v. *Norwood*, 5 De G. & Sm. 240; 21 L. J., Ch. 716; 16 Jur. 493.

**As against Second Mortgagee.**]—A. mortgages to B., and after to C.; then B. enters, and after suffers A., the mortgagor, to receive the profits for several years without requiring interest.

This interest shall not be charged on the lands to keep out C. *Bentham* v. *Haincourt*, Pre. Ch. 30.

**On Reversionary Interest.**]—A mortgagee of a reversionary interest in land is precluded from recovering more than six years' arrears of interest, although accruing whilst the property was reversionary. *Smith* v. *Hill*, 47 L. J., Ch. 788; 9 Ch. D. 143; 38 L. T. 638; 26 W. R. 878.

A testatrix, who had lent 3,000*l.* on a mortgage of freehold property, bequeathed the income of all her residuary estate in trust for three persons for their joint lives and the lives of the survivors and survivor, with an ultimate trust in favour of H. absolutely. H. mortgaged his reversionary interest in the 3,000*l.* to the plaintiff, and died insolvent several years before the death of the last tenant for life. No arrears of interest on the last-mentioned mortgage having been paid, the plaintiff, on the death of the last tenant for life, sought to recover the whole arrears of interest:—Held, that arrears of interest could not be recovered while the property was reversionary. *Ib.*

Held, also, that the mortgage of the reversionary interest was not a mortgage of an interest in land within s. 42 of 3 & 4 Will. 4, c. 27, and that the plaintiff was, therefore, entitled to recover the whole arrears of interest. *Ib.*

*See also* LIMITATIONS, STATUTE OF.

6. AGAINST MORTGAGEE IN POSSESSION.

**After Satisfaction of Debt.**]—Mortgagee let into possession by mortgagor till he should be paid the sum lent and interest, overpaid in two years, and holding over thirty-two years longer, was charged with the balance and interest (from the date of the notice to pay the receipts to a prior mortgagee) at 4 per cent. only, though he had purchased two small shares of a prior mortgage, which had been paid off at 5 per cent. interest. *Archdeacon* v. *Bowes*, M'Cle. 149; 13 Price, 353; 28 R. R. 685.

There are, however, exceptions to this rule of interest. *S. C.*, M'Clel. 166.

Mortgagee in possession charged with interest, on gales of rent received by him after debt satisfied. *Trimleston* v. *Hamill*, 1 Ball & B. 377; 12 R. R. 38.

Where the mortgagee in possession became overpaid during the suit to redeem:—Held, that he was liable to interest on the balance from the date of the report, and on the rents, &c., subsequently received, from the date of such receipts. *Lloyd* v. *Jones*, 12 Sim. 491.

Mortgagee in possession holding over after payment of his principal and interest, charged with the balance and interest. *Quarrell* v. *Beckford*, 1 Madd. 269; 16 R. R. 214.

7. IN LIEU OF NOTICE TO PAY OFF.

**When Payable.**]—The rule that, in case of default of payment by the mortgagor, six months' notice or interest must be given, applies when the mortgagee has required payment on a particular day and the money is not then paid. *Bartlett* v. *Franklin*, 36 L. J., Ch. 671; 17 L. T. 100; 15 W. R. 1077.

**In Administration Suit.**]—A son, in 1855, mortgaged a reversionary interest to which he was entitled under his father's will, and died in March, 1869, intestate, and there was no legal personal representative. The mortgagee, having filed a bill for the administration of the father's estate, was, on behalf of a surety of the mortgagor, paid the principal and interest due on the mortgage security and a sum for costs of suit. On motion to dismiss the bill:—Held, that he was not entitled to six months' interest in lieu of notice, but that he was entitled to the costs of the motion, as he had been paid off in a summary way. *Letts* v. *Hutchins*, L. R. 13 Eq. 176.

If in an administration suit a mortgagee consents to the sale of the mortgaged property, such consent amounts to an acceptance by him of notice to pay off; and, if the property is sold, he is not entitled to six months' interest in lieu of notice, but only interest for the period which intervenes between the actual payment off and the expiration of the six months from the time of such consent being given. *Day* v. *Day*, 31 Beav. 270; 31 L. J., Ch. 806; 8 Jur. (N.S.) 1166; 7 L. T. 122; 10 W. R. 728.

—— **Delay in Completion of Order.**]—One of the beneficiaries under a will mortgaged her interest in the testator's estate. She gave the mortgagees six months' notice to pay off the mortgage on the 1st of July, 1885, and on the 20th of May, 1885, an order was made in an action to administer the estate, on the application of the beneficiaries and in the presence of the mortgagees, which directed (inter alia) payment to the mortgagees, out of funds in court standing to the credit of the mortgagor, of the mortgage debt, with interest up to the 1st of July, 1885. Owing to delay in the completion of the order the payment could not be made on the 1st of July, and on the 2nd of July the mortgagees took out a summons, claiming six months' additional interest in lieu of a fresh six months' notice to pay off the mortgage. On the 20th of July the order was completed, and on the 21st of July the mortgagees took the sum mentioned in the order out of court:—Held, that the mortgagees were only entitled to additional interest from the 1st to the 21st of July, on the ground that, by accepting the order, they assented to payment out of the fund in court subject to all the contingencies to which the completion of the order might be subject. *Moss, In re, Levy* v. *Sewill*, 55 L. J., Ch. 87; 31 Ch. D. 90; 54 L. T. 49; 34 W. R. 59.

—— **Reversionary Interest—Death of Tenant for Life.**]—In the year 1852, pursuant to an order made in a suit to administer the trusts of a will, a sum of 20,000*l.* consols was transferred into court to satisfy an annuity of 600*l.* bequeathed to A. by the will. B., who was, under the will, absolutely entitled to the fund in court, subject to A.'s life interest therein, mortgaged his reversionary interest to secure the repayment of 5,000*l.* and interest. A. died in June, 1891. Upon a petition by the trustee of B.'s marriage settlement for a transfer to him of the fund in court, after selling so much thereof as would pay the amount due on the mortgage:—Held, that, as the mortgagees had taken no steps to compel payment of their security, they were entitled to have six months' interest (from the date of the service of the petition on them) in lieu of notice in the usual way. *Smith* v. *Smith*, 60 L. J., Ch. 694; [1891] 3 Ch. 550; 65 L. T. 334; 40 W. R. 32.

**Agreement for—Title Deed not Forthcoming.**]—Mortgagor, desiring to redeem, agreed to pay three months' interest in lieu of notice. Mortgagee was unable to produce the title deed:—Held, that interest must stop at the end of the three months. *James* v. *Rumsey*, 48 L. J., Ch. 345; 11 Ch. D. 398; 27 W. R. 617.

**Equitable Mortgagee.**]— An equitable mortgagee, who had proved his debt before the master, was ordered to reconvey to the purchaser upon receiving his money without the usual notice. *Matson* v. *Swift*, 5 Jur. 645.

**Where Mortgagee in Possession.**]—A mortgagee who enters into possession of the mortgaged property, since he thereby does what amounts to taking proceedings to recover his mortgage-money, deprives himself of his equitable right to insist on six months' notice or interest in lieu of notice from a person seeking to redeem the mortgage. *Borrill* v. *Endle*, 65 L. J., Ch. 542; [1896] 1 Ch. 648; 44 W. R. 523.

**In Compulsory Sale.**]—In the case of the compulsory purchase, under the Lands Clauses Act, 1845, of land being subject to mortgage, interest is payable by the vendor to the mortgagee in lieu of notice. *Spencer-Bell* to *L. & S. W. Ry.*, 33 W. R. 771.

**Ship.**]—The contract of mortgage of a ship provided that interest should be paid half-yearly in advance. The mortgagee sold the ship shortly before a half-yearly day for payment of interest, and received the balance of purchase-money (covering his principal debt) three days after that half-yearly day:—Held, that he was only entitled to interest in respect of the three days for that half-year. *Banner* v. *Berridge*, 50 L. J., Ch. 630; 18 Ch. D. 254; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

## D. ASSIGNMENT AND TRANSFER.

1. *In General*, 1483.
2. *At Undervalue*, 1485.
3. *Title of Assignee*, 1485.
4. *Account*, 1488.
5. *Under Vendor and Purchaser Act*, 1874, *s.* 4, 1490.
6. *Under Conveyancing Act*, 1881, *s.* 15, 1490.

### 1. In General.

**Under Deposit.**]—Where a debtor deposits a title deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person. *Hobson* v. *Mellond*, 2 M. & Rob. 342.

—— **By Parol.**]—An equitable mortgagee by deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed; and, as his interest in the deed is only incidental to his interest in the mortgage, the donee of the deed has no right to retain it. *Richardson, In re, Shillito* v. *Hobson*, 55 L. J., Ch. 741; 30 Ch. D. 396; 53 L. T. 746; 34 W. R. 286—C. A.

**Notice.**]—Notice to mortgagor of assignment not necessary to its validity. *Jones* v. *Gibbons*, 9 Ves. 411; 7 R. R. 247.

Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life, not bound to discover whether he himself had notice. *Sweet* v. *Southcote*, 2 Bro. C. C. 67; Dick. 670.

A party taking an equitable mortgage with notice of a prior equitable mortgage cannot, by assignment to another without notice, give him a better title. *Ford* v. *White*, 16 Beav. 120.

Where mortgagee assigns without notice, delivery of goods by mortgagor to mortgagee is a good discharge as to mortgagor against assignee. *Norrish* v. *Marshall*, 5 Madd. 475.

After an assignment of a mortgage, payments to the mortgagee, with notice, must be allowed by the assignee; the registry, the premises being in Middlesex, is not notice for this purpose. Tender, after the bill filed, of the balance, deducting the payments to the mortgagee, with costs, deprived the assignee of subsequent costs. *Williams* v. *Sorrell*, 4 Ves. 389.

**Sub-Mortgage.**]—A mortgagee assigns the mortgage debts, and executes a bond to the assignee for the amount, but by a memorandum of even date with the assignment he declares that he advanced to the assignor part of the debts only, and will stand possessed of the remainder (specifying the amount) in trust for the assignor. The security proving deficient:—Held, that the transaction was in substance a sub-mortgage, giving the assignee a priority as to the amount advanced by him. *Berridge, Ex parte, Loosemore, In re*, 3 Mont. D. & D. 464; 7 Jur. 1141.

**Building Society.**]—A building society is not precluded by the provisions of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), from exercising the ordinary right of a mortgagee to transfer his mortgage, by way of assignment, to any third person. *Ulster Permanent Building Society* v. *Glenton*, 21 L. R., Ir. 124.

**Mortgage of Two Estates, One Surety for Other—Sale of Mortgagee's Interest to Prior Mortgagee, after Offer to Owner of Surety Estate.**]—A mortgagee upon two estates, one of which was not to be had recourse to unless the other proved insufficient, instituted a redemption suit against the prior mortgagees of the other property, setting up various doubtful claims against them. The prior mortgagees offered a small sum of money for the purchase of her interests. She applied to the owners of the surety estate, offering either to sell to them on the same terms or to allow them to continue the suit. They refused or neglected to do anything, and she then sold to the prior mortgagee:—Held, that under the circumstances the sale was binding on the owners of the surety estate. *Acland* v. *Gravener*, 1 N. R. 350. *And see* 31 Beav. 482; 32 L. J., Ch. 474.

**Vesting, under Trustee Act, 1893.**]—The exception of mortgages for securing trust money from the operation of s. 12 of the Trustee Act, 1893, explained. *London and County Banking Co.* v. *Goddard*, 66 L. J., Ch. 261; [1897] 1 Ch. 642; 76 L. T. 277; 45 W. R. 310.

**Practice—Injunction.**]—S., in consideration of a loan of 10,000*l.* from G., assigned to the latter two mortgages, which he held upon an estate belonging to N., and executed another mortgage

of an estate of his own, by way of further security. Afterwards, on N.'s mortgage debts becoming due, S. brought an action against him on the covenants in his mortgage deeds, which G. filed a bill to restrain. On motion to discharge an injunction granted by the vice-chancellor :—Held, that it ought not to have been granted, except upon the term of the plaintiff reconveying S.'s mortgage, and releasing him from his mortgage debt ; and, the plaintiff now declining these terms, and S. undertaking that the sum to be recovered in the action should be paid to the plaintiff, the injunction was dissolved. *Gurney* v. *Seppings*, 2 Ph. 40 ; 1 Coop. t. Cott. 12 ; 15 L. J., Ch. 385.

### 2. At Undervalue.

**Generally.**]—A purchaser or mortgagee buying in an incumbrance for less than is due shall have the benefit of the whole money due thereon. *Ascough* v. *Johnson*, 2 Vern. 66.

Where a mortgagee buys in an incumbrance, he shall be allowed all that is due on it, though he bought it in for less ; otherwise, if an heir or trustee buys in an incumbrance. *Darcy* v. *Hall*, 1 Vern. 49.

A stranger gets an assignment of a mortgage for less than is due. The mortgagor or his heir shall not redeem without paying the whole that is due. *Phillips* v. *Vaughan*, 1 Vern. 336.

Mortgagee assigns his mortgage for less than is really due to him. The mortgagor shall not redeem without paying the whole money due on the mortgage. *Williams* v. *Springfeild*, 1 Vern. 476.

—— **As against subsequent Incumbrancers.**]—Where there are subsequent incumbrances or creditors, a man that buys in a prior incumbrance shall be allowed only what he really paid. But it is otherwise as between him and the mortgagor or his heir. *Ib.*

**Heir.**]—If an heir, or any other, buys in an incumbrance, he shall not be allowed as against a purchaser any more than he really paid for such incumbrance. *Long* v. *Clopton*, 1 Vern. 464.

The heir buying in an incumbrance on the estate, charged with the portions, allowed no more than what he really paid. *Brathwaite* v. *Brathwaite*, 1 Vern. 335.

**Tenant for Life.**]—Semble, a tenant for life buying up an incumbrance affecting the inheritance is not entitled to have credit against such inheritance for any greater amount than he actually paid. *Hill* v. *Browne*, Dr. 426 ; 6 Ir. Eq. R. 403.

### 3. Title of Assignee.

**Generally.**]—The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. *Walker* v. *Jones*, 35 L. J., P. C. 30 ; L. R. 1 P. C. 50 ; 12 Jur. (N.S.) 381 ; 14 L. T. 686 ; 14 W. R. 484.

**Assignment after Deposit.**]—M. & Co. deposit with S. & Co. the mortgage deeds of certain colonial property, for securing a floating balance due from M. & Co. to S. & Co., and afterwards execute an assignment of the mortgage debt, "in addition to the securities then already held by S. & Co.," but without making any actual assignment of the mortgage itself, or the mortgaged property :—Held, that S. & Co. continued, nevertheless, the equitable mortgagees of the mortgaged property. *Smith, Ex parte*, 2 Deac. & C. 271.

**Consideration—For Mortgage.**]—A. obtained a mortgage of real and personal estate from B., without consideration. It was afterwards deposited with C. as a security, who had no notice of the circumstances under which it had been obtained :—Held, that C. could stand in no better position than A., and the deed, being void as against A., was equally void as against C. *Parker* v. *Clarke*, 30 Beav. 54 ; 7 Jur. (N.S.) 1267 ; 9 W. R. 877.

On the 10th of February, 1879, the plaintiffs mortgaged to B. for 250*l.* their equitable interests in a sum of stock, and also certain policies of assurance. By the mortgaged deed they acknowledged the receipt of 250*l.*, and they also signed a receipt for that sum indorsed on the mortgage deed. On the 11th of March, 1879, B. transferred the mortgage to H., who gave full value for it as a mortgage for 250*l.*, and had no notice that the plaintiffs had not received that sum. The plaintiffs brought their action alleging that they had only received 91*l.* instead of 250*l.*, and asking redemption on payment with interest of what they had actually received. The court considered that the evidence would have been sufficient to entitle the plaintiffs to a judgment on that footing as against B., but :—Held, that as against H., who had no notice that the whole 250*l.* had not been advanced, the account must be taken on the footing of its having been advanced ; for that, in the absence of any circumstances to cause suspicion, he was entitled to rely on the acknowledgment in the mortgage deed and the indorsed receipt, and had a better equity than the plaintiffs, who, by leaving the documents in the hands of B., had enabled him to commit a fraud. *Bickerton* v. *Walker*, 55 L. J., Ch. 227 ; 31 Ch. D. 151 ; 53 L. T. 731 ; 34 W. R. 141—C. A.

—— **For Assignment.**]—A. mortgaged property to three trustees, B., C. and D. Some time after, B., who was a solicitor, having in his hands a sum belonging to a client, E., proposed to lay it out on a transfer of the mortgage. He prepared a transfer, which was executed by A., B. and C., but not by D., and a receipt for the money was signed by B. and C. alone. No money was ever paid, and it was lost by B.'s insolvency :—Held, that the transfer to E. was ineffectual, the consideration not having actually been paid, and that, in equity, the deed was inoperative both against the mortgagor and the three trustees. *Griffin* v. *Clowes*, 20 Beav. 61.

An action was brought by the transferor of a mortgage against the transferees, seeking for payment of the money which was the consideration of transfer, or to have his mortgage and other deeds back again. The plaintiff and the defendants employed in the matter of the transfer the same firm of solicitors, who were then in good credit. On the 20th October, 1888, the plaintiff executed the transfer, which expressed that the money was paid, and he handed the transfer and the title deeds to the solicitors, they undertaking either to return them or to pay the money. The plaintiff did not make any inquiry till the 5th

February, 1889, the solicitors telling him so much notice was required. On the 22nd February the solicitors handed over the deeds and the transfer to the defendants. On the 15th March the solicitors filed their petition in bankruptcy. The defendants never paid the money in cash to the solicitors, but they set off in their books part of a sum owed by them to the defendants :—Held, that the defendants ought to have paid the solicitors in cash, and were not entitled to set off a debt due to them from the solicitors; that there had been no negligence on the part of the plaintiff, and that the deed was an escrow until the defendants had paid the money to the solicitors in cash. *Coupe* v. *Collyer*, 62 L. T. 927.

On the transfer of a mortgage for 10,000*l.*, with an additional advance of 4,000*l.*, it was proved that the 10,000*l.* was paid in bank notes by the transferee to the original mortgagee, and the 4,000*l.* by a cheque to the mortgagor, as to which there was no proof that it was honoured :—Held, that the payment of the 10,000*l.* was a sufficient consideration as against one claiming under a voluntary settlement. *Doe* d. *Barnes* v. *Roe*, 6 Scott, 525; 4 Bing. (N.C.) 737.

**Lease Assigned but not Delivered.**]—Where, under a lease from A. to B. for twenty-one years, at the rent of 50*l.*, B. by indenture assigned the lease to C., to secure money previously advanced to him by C., a great part of which was laid out by B. in repairing and improving the premises demised; and C. registered the assignment, but did not take the indenture of lease from B., who afterwards gave up the indenture to A., in consideration of receiving a further advance from him of 200*l.*, to be expended in further improvements; and A. granted him a new lease, at the increased rent of 70*l.* per year; and B. afterwards again gave up that lease, on having another advance made to him of 200*l.* more by A., and took a third lease from him at a rent of 90*l.* :—Held, that C. was not, under the circumstances, precluded, by the neglect to take from B. the indenture of lease, from availing himself of the assignment against A. *Bailey* v. *Fermor*, 9 Price, 262; 23 R. R. 666. But see *Goodtitle* d. *Norris* v. *Morgan*, 1 Term Rep. 755.

**Fraud of Solicitor—Negligence of Transferor.**]—G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors, D. and P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and, being satisfied, he, on the 19th of June, 1878, sent the 1,000*l.* to D. and P., who gave him a receipt for it. In July D. and P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. and P. shortly afterwards handed this deed with the title deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H.; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. and P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the defendant asserting a right against the property in the nature of an unpaid vendor's lien :—Held, that, as the plaintiffs by the deed of transfer and receipt which they handed to D. and P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. and P. had come to the hands of the plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. and P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. and P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon* v. *James*, 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217—C. A.

Quære, per Cotton, L.J., whether D. and P., assuming them to have authority to receive mortgage money on behalf of the plaintiffs, could be taken ever to have, in fact, received this 1,000*l.* on their behalf. *Ib.*

**Notwithstanding Injunction against Assignor.**]—A mortgagee who takes an assignment of property without notice of any defect in his assignor's title acquires a good title, notwithstanding that his assignor has in fact been restrained by injunction and the appointment of a receiver from dealing with such property. *Wigram* v. *Buckley*, 63 L. J., Ch. 689; [1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43 W. R. 147—C. A.

**Assignment after Decree.**]—After decree in a suit by a second mortgagee to redeem the first, and foreclose the subsequent mortgagees, one of the subsequent mortgagees assigned his interest in the premises to A.; A. then filed a bill against all the parties to the former suit, praying to be entitled to the benefit of that suit, and to redeem the mortgagees who were prior to himself, and to foreclose the others. The bill was dismissed as against all the defendants except the assignor, and A. was declared to be entitled to stand in his place, and to use his name in the further prosecution of the first suit. *Booth* v. *Creswicke*, 8 Sim. 352.

**Equitable Mortgagee with Notice—Assignee without.**]—A party taking an equitable mortgage with notice of prior equitable mortgage, cannot, by assignment to another without notice, give him a better title. *Ford* v. *White*, 16 Beav. 120.

**Notice through Solicitor.**—A transferee of a mortgage is not affected by the knowledge of the solicitor, acting for him in the matter of the transfer, of an incumbrance subsequent to the original mortgage, so as to prevent him from making further advances, such knowledge not being material to the business of the transfer *Wyllie* v. *Pollen*, 3 De G. J. & S. 596; 2 N. R. 500; 32 L. J., Ch. 782; 9 L. T. 71; 11 W. R. 1081.

### 4. Account.

**Assignment—Without Privity of Mortgagor.**]—As a mortgagee is a trustee, to answer the profits of his pledge, if he assigns his mortgage without the assent of the mortgagor, he is bound to account for them, both before and after the assignment, though assigned only for his own debt. Sed quære, if the mortgagor

hides himself so that he cannot be served with a subpœna to foreclose, if the mortgagee may not assign, without being answerable for the profits after the assignment. *Norfolk's (Duke) Case*, 3 Ch. Ca. 3.

Assignment of a mortgage without the privity of the mortgagor; the assignee takes subject to the account between the mortgagor and mortgagee. *Matthews* v. *Wallwyn*, 4 Ves. 118. S. P., *Chambers* v. *Goldwin*, 9 Ves. 264; 7 R. R. 181.

Where assignee takes assignment of mortgage without requiring mortgagor to be a party thereto, he takes, though he has no notice, subject to the accounts subsisting at that time between the mortgagor and mortgagee. *Bradwell* v. *Catchpole*, 3 Swanst. 79, n.; 19 R. R. 180.

Although the transferee of a mortgage, without the mortgagor's concurrence, takes it subject to the equities affecting the account between the mortgagor and mortgagee, and can claim on his security no more than is justly due from the mortgagor, yet, if the transfer is for value and without notice of equitable grounds which render the security impeachable by the mortgagor as against the mortgagee, then, as between the mortgagor and transferee, the latter has the better equity, and is entitled to what is due to him on his security. *Nant-y-glo and Blaina Ironworks Co.* v. *Tamplin*, 35 L. T. 125. S. P., *Judd* v. *Green*, 45 L. J., Ch. 108; 33 L. T. 597.

—— **Effect of, as to Money Due.**]—Where mortgagee assigns his interest in mortgage, all the money then due shall be accounted principal. *Anon.*, 3 Salk. 241.

If a mortgagee fairly assigns his mortgage, all the money bonâ fide paid by the assignee shall be accounted principal, but the mortgagor shall not be concluded thereby. *Smith* v. *Pemberton*, 1 Ch. Ca. 67; *Gladman* v. *Heuchman*, 1 Eq. Ca. Abr. 287. *S. C.*, nom. *Gladwyn* v. *Hitchman*, 2 Vern. 135. And in *Anon.*, 1 Ch. Ca. 258, such was said to be the constant rule in equity, and that there was not one case contra, except *Porter* v. *Hubbart* or *Hobart* (2 Ch. Rep. 85; 3 Ch. Rep. 78), which was decided by the lords upon its own circumstances of peculiar hardship. See also *Macclesfield* (*Lord*) v. *Fitton* (1 Vern. 168), where the court thought it reasonable that the interest should carry interest with respect to an assignee.

Mortgagee assigns his mortgage to S., who pays off the principal and the interest, which is considerably in arrear. Whether this interest shall be reckoned principal against the mortgagor. *Macclesfield* (*Lord*) v. *Fitton*, 1 Vern. 168.

Property was conveyed to trustees to raise by mortgage 75,000*l.*, and pay off prior mortgagees, whose mortgage debts, including arrears of interest, amounted to that sum. The trustees did not raise the 75,000*l.*, but allowed A. to pay off the prior mortgagees, and to take transfers of their mortgages, and then, in consideration of such payments, executed a deed purporting to assign to A. the 75,000*l.* raisable under the trust, and to mortgage the property to A. for 75,000*l.*: —Held, that A. was not entitled to stand as a mortgagee for the principal of 75,000*l.*, but only for the principal and interest due on the transferred mortgages. *Thompson* v. *Hudson*, L. R. 2 Eq. 612.

—— **Mortgage for Costs of.**]—F. devised a real estate to trustees for a term of 2,000 years upon trust to raise money in aid of his personal estate, and subject thereto in strict settlement. Large sums of money were raised under this trust, and amongst others a sum of 10,000*l.* by a mortgage to M. In 1890 M. called in the mortgage. At this time the estate of the tenant for life under the will had been assigned to the L. Society; the tenant in tail in remainder was an infant. An order was then made on a summons taken out by the infant tenant in tail by his next friend, to which the trustee of the term was the only defendant, that the trustee should be at liberty to raise the sum of 10,000*l.* which M. had called in, by way of transfer of the hereditaments comprised in the said mortgage, except a small portion thereof, which should be released, and that the costs of all parties of the transfer should be raised by a mortgage of the part so released for the remainder of the term. The costs were accordingly raised by a mortgage of the excepted portion by the trustee, and the mortgagee now took out a summons for foreclosure, and a receiver. The L. Society opposed: —Held, that the trustee of the term had not discharged all his duties, as a sum of 1,600*l.* might still have to be raised under the trusts thereof, besides which he had a right to redeem the mortgage for 10,000*l.*, and had a duty to his cestui que trust under the term to preserve the equity of redemption, and therefore the mortgage to raise the costs of the transfer was binding on the tenant for life and his assignees, apart from the order, for the amount of the taxed costs of such transfer. *Sewell* v. *Bishopp*, 62 L. J., Ch. 985; 69 L. T. 68—C. A.

5. Under Vendor and Purchaser Act, 1874, s. 4.

**Application of Act.**]—The 4th section of the Vendor and Purchaser Act, 1874, does not apply to a transfer of a mortgage, and therefore the legal personal representative of a mortgagee of a freehold estate cannot, on receiving payment of the mortgage debt, convey the estate to a transferee. *Spradbery's Mortgage, In re*, 49 L. J., Ch. 623; 14 Ch. D. 514; 43 L. T. 82; 28 W. R. 822. S. P., *White's Mortgage, In re*, 51 L. J., Ch. 856; 29 W. R. 820; and *Brooke's Mortgage, In re*, 46 L. J., Ch. 865.

Sect. 4 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), is confined to cases where the mortgage is paid off and the estate reconveyed. *S. C.*, 25 W. R. 841.

6. Under Conveyancing Act, 1881, s. 15.

**"Mortgagor entitled to Redeem."**] — The "mortgagor entitled to redeem" in the Conveyancing Act, 1881, s. 15, means a mortgagor, or person claiming under the mortgagor, who has a right to require a reconveyance from the mortgagee; and no other person can take advantage of that section. *Teeran* v. *Smith*, 51 L. J., Ch. 621; 20 Ch. D. 724; 47 L. T. 208; 30 W. R. 716—C. A.

**Consent of Puisne Mortgagee.**]—If there are first and subsequent mortgagees of the same estate, the mortgagor cannot require the first mortgagee to assign the debt and property to a nominee of his own, under that section, without the consent of the puisne mortgagee. *Ib.*

**Tenant for Life.**]—A tenant for life of mortgaged premises who has failed to keep down the interest, and who has obtained the usual order

permitting him to redeem the mortgage, is not of right entitled under the Conveyancing Act, 1881, s. 15, to require the mortgagee to transfer the mortgage debt and premises to a third person. *Alderson* v. *Elgey*, 26 Ch. D. 567; 50 L. T. 505; 32 W. R. 632.

### E. EFFECT OF, ON LIMITATIONS OF PROPERTY.

**Intention.**]—A mortgage of property does not alter the existing limitations affecting it, except for the purpose of the mortgage, unless an express intention be shown to resettle it. *Hastings (Lord)* v. *Astley*, 30 Beav. 260; 8 Jur. (N.S.) 225; 10 W. R. 73. S. P., *Wood* v. *Wood*, 7 Beav. 183.

**Revocable Settlement.**]—Mortgage in fee is a revocation pro tanto only of a settlement with power of revocation. *Thorne* v. *Thorne*, 1 Vern. 182.

**Joint Tenancy.**]—Mortgage severs the joint tenancy of the trust of a term. *Yorke* v. *Stone*, 1 Salk. 158.

### F. MANAGEMENT AND ACCOUNT.

1. *General Rights and Duties of Mortgagee*, 1491.
2. *Mortgagee in Possession*, 1492.
3. *Account*, 1497.
4. *Growing Crops*, 1505.
5. *Leases*, 1506.
6. *Mines*, 1515.
7. *Outlay and Expenditure*, 1517.
8. *Rents and Profits*, 1525.
9. *Timber and Waste*, 1534.
10. *Right to Policy Moneys*—*See* INSURANCE.
11. *Presentation to Benefice*—*See* ECCLESIASTICAL LAW.

#### 1. GENERAL RIGHTS AND DUTIES OF MORTGAGEE.

**Mortgagee—A Trustee.**]—Distinction between the cases of mortgagees and trustees in the ordinary sense. *Dobson* v. *Land*, 8 Hare, 220; 4 De G. & Sm. 575; 19 L. J., Ch. 484; 14 Jur. 288.

The principle, upon which the court restrains persons filling a fiduciary character from having any dealings for their own benefit, does not necessarily apply to the case of mortgagor and mortgagee. *Ib.*

Acts done by a trustee or termor for years cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee. *Cholmondeley* v. *Clinton*, 4 Bligh, 1.

The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualifications. *S. C.*, 2 J. & W. 182; 22 R. R. 84.

A mortgagee is not, subject to his security, a trustee of the legal estate for the mortgagor—Per Lord Herschell. *Taylor* v. *Russell*, 61 L. J., Ch. 657; [1892] A. C. 244; 66 L. T. 565; 41 W. R. 43—H. L. (E.)

—— **Must Preserve Mortgaged Estate.**]—A mortgagee who holds property in pledge is responsible for it in its integrity. *Hood* v. *Easton*, 2 Giff. 692; 2 Jur. (N.S.) 729; 4 W. R. 575.

If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, a court of equity will prevent him suing at law to recover the mortgage money. *Palmer* v. *Hendrie*, 27 Beav. 349.

—— **Must Discover Boundaries.**]—Mortgagee of an estate, partly in settlement, must discover the boundaries. *Strode* v. *Blackburne*, 3 Ves. 225.

—— **On a Sale.**]—A mortgagee in exercising his power of sale is not (except as to the balance of the purchase-money after a sale) a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale. *Downes* v. *Grazebrook* (3 Mer. 200) and *Robertson* v. *Norris* (1 Giff. 421) observed upon. *Warner* v. *Jacob*, 51 L. J., Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.

—— **Under Power given to Mortgagor.**]—Trustees having power, during the minorities of tenants for life or in tail, to superintend the management of an estate, cut timber, erect, pull down and repair houses, and do various other things of a more or less similar character, "and generally to deal with the premises as they or he might do if they or he were the absolute beneficial owners or owner, without being answerable for any loss or damage which might happen thereby," deposited with a bank the title deeds of the estate to secure an advance of money to be employed in the erection of buildings under the power:—Held, that the bank had no valid title under the power. *Broom* v. *Sheffield and Rotherham Bank*, 24 W. R. 948.

**Under Apportionment Act.**]—A mortgagee who is not in possession is not an assign of the mortgagor within the meaning of the Apportionment Act (4 & 5 Will. 4, c. 22), s. 2. *Paget* v. *Anglesey (Marquis)*, 43 L. J., Ch. 437; L. R. 17 Eq. 283; 29 L. T. 721; 22 W. R. 507.

**Need not take Possession.**]—Mortgagee cannot be compelled to take possession, but may foreclose. *Penrhyn (Lord)* v. *Hughes*, 5 Ves. 106.

#### 2. MORTGAGEE IN POSSESSION.

*a.* Who is, 1492.
*b.* Position of, 1496.

##### a. Who is.

**How Determined.**]—The fact that mortgagees are in receipt of the rents and profits of the mortgaged estate does not necessarily make them chargeable as mortgagees in possession. The question whether they are mortgagees in possession depends upon whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants. *Noyes* v. *Pollock*, 55 L. J., Ch. 513; 32 Ch. D. 53; 54 L. T. 473; 34 W. R. 383—C. A.

**On Application for Rent.**]—A mortgagee out of possession called on the tenant for his rent, who said he had laid it out in repairs. The mortgagee acquiesced in this; but there was no evidence of the tenant's accepting the mortgagee as his landlord or of anything like an attornment;

—Held, that there was not an entering into possession or into the receipt of the rent by the mortgagee. *Ward* v. *Carttar*, 35 Beav. 171.

B. was the agent of a mortgagor, and received the rents of the estate for him, and applied them in payment of the interest to the mortgagees. The mortgagees wrote to B. inclosing notices to the tenants to pay the rents to them, which he was to serve on them if the mortgagor should attempt to interfere. B. replied promising to pay the rents to the mortgagees, and not to the mortgagor. The notices were not served on the tenants, but B. paid the rents as he received them to the mortgagees:—Held, that the mortgagees could not be charged as mortgagees in possession. *Noyes* v. *Pollock*, 55 L. J., Ch. 513; 32 Ch. D. 53; 54 L. T. 473; 34 W. R. 383.

The mortgagees of land, consisting of copses and of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mortgagees, and afterwards moved to restrain the mortgagors from cutting the timber:—Held, that though the mortgagees had become mortgagees in possession of the farm, they had not become mortgagees in possession of the shooting, the copses, or the timber, so as to be liable to account for default. *Simmins* v. *Shirley*, 46 L. J., Ch. 875; 6 Ch. D. 173; 37 L. T. 121; 26 W. R. 25.

**On Entering as Tenant.**]—B. mortgaged certain premises to L. The premises were required to be partly pulled down and rebuilt; P. undertook to perform the work, but required security for the payment. An agreement was entered into between B., L. and P., by which L. consented to become tenant of part of the premises when rebuilt, and to take a lease of them from P., to whom B. had assigned his interest for a term of years, and to pay P. 1,000*l.* for the lease, and 250*l.* a year for rent. The premises having been rebuilt, L. entered into possession, but, as no lease was granted by P., did not pay the 1,000*l.*, nor the 250*l.* a year rent. In a suit afterwards instituted by P., and to which both B. and L. were parties:—Held, that L. was a mere tenant, and not mortgagee in possession; the possession being in respect of the tenancy, and the agreement not having the effect of changing the relative situation of the parties in that respect. *Page* v. *Linwood*, 4 Cl. & F. 399.

**When Right Accrues.**]—A tenant for years of a house demised it, by a deed, dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to a proviso; and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the same proviso. The deed contained a proviso for reconveyance, on payment of the mortgage money on the 24th June then next, and also a proviso that, on nonpayment on that day, it should be lawful for the mortgagee to enter upon and receive and take the rents and profits of the leasehold and other premises, and, if he should think proper, of his sole authority, to sell or underlet the premises, and to sell the fixtures and chattels:—Held, that the mortgagee's right to take possession did not attach until the 24th June, and that he could not maintain trespass for an entry, or for an asportation of the fixtures and chattels before that day by a stranger. *Wheeler* v. *Montefiore*, 1 G. & D. 493; 2 Q. B. 133; 11 L. J., Q. B. 34; 6 Jur. 299.

In trespass quare clausum fregit, the plaintiff made title under a mortgage deed of 6th March, 1840, by which the mortgagor demised premises to the plaintiff thenceforth for a term, subject to a proviso that the demise should cease and be void if the mortgagor paid the principal and interest by 6th March, 1841, and interest at stated periods in the meantime: and to another proviso empowering the plaintiff to sell (after three months' notice) if default should be made in payment of principal and interest at the times named. Then followed covenants by the mortgagor to the plaintiff for payment of principal and interest at the days appointed, and that, at any time after default made in such payment, it should be lawful for the plaintiff peaceably and quietly to enter upon the premises, and thenceforth, for the residue of the term, to hold the same and take the rents and profits without lawful interruption from the mortgagor or any other person. On pleadings, setting forth the deed, and shewing that the plaintiff had entered upon the mortgaged premises after the execution of the deed, but before 6th March, 1841, and before default in payment, and raising the question whether or not he had a right so to enter:—Held, that the deed gave power to the mortgagee to enter before default, and before the day named for any payment. *Rogers* v. *Grazebrook*, 8 Q. B. 895.

**Under Supposed Purchase.**]—A person, who, under a mortgagee, becomes possessed of a property, supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such a liability that he should have known he was in possession as mortgagee. *Parkinson* v. *Hanbury*, 36 L. J., Ch. 292; L. R. 2 H. L. 1; 16 L. T. 243; 15 W. R. 642.

**On Possession of Part.**]—A mortgagee in possession of part, and allowing the mortgagor to retain possession of the rest, is not, at the suit of a subsequent incumbrancer, to be charged, constructively, as in possession of the whole. *Soar* v. *Dalby*, 15 Beav. 156.

**Under Agreement.**]—An agreement, that a mortgagee shall enter into the possession of lands of the mortgagor at a fair rent in discharge of the debt, will be supported in equity, not being against public policy, or working a private injury, and is an exception to the rule that a mortgagee in possession must account for the full value of lands. *Morony* v. *O'Dea*, 1 Ball & B. 117.

A mortgagee, who went into possession under a contract between himself and his mortgagor made subsequently to the mortgage, is liable to be charged as a mortgagee in possession. *M'Kinley, In re*, Ir. R. 7 Eq. 467. *Parkinson* v. *Hanbury*, supra, distinguished. *Ib.*

F. and three others, W. D., F. D. and J. D. purchased from J. a herd of cattle in the following shares:—F., one-third, W. D., F. D. and J. D., two-thirds between them. At the time of the purchase, F. and W. D. wrote a letter to W. & Co., which, after stating the purchase, and that they had given their promissory notes for the purchase-money at one and two years' date, proceeded thus:—"We request you to

endorse these bills for the satisfaction of Mr. J., for which endorsement we will allow you the usual commission of 2*l.* 10*s.* per cent.; and will for your security place at your unreserved disposal the whole of the herd in question and its increase, trusting however that our recommendation of allowing such part of it to be disposed of as will cover the amount of your endorsements, and confiding to J. D., acting under your instructions from us, to remit you all the proceeds as they arise, will meet with your satisfaction." W. & Co. assented to this arrangement, endorsed the notes, and handed them over to J. At the same time F. and W. D. wrote a further letter to W. & Co. as follows:—"In consequence of your complying with our request to endorse our bills for the purchase of J.'s herd, we hereby make over the said herd to you, requesting you to give to J. D. instructions how to dispose of the herd, and remit you the proceeds, until by such remittances your endorsement is covered." W. & Co. in no way interfered with the sale of the cattle, nor was any part of the proceeds of the sale ever handed to them, and the herd was lost. Upon a bill filed by F. against W. & Co., seeking to make them liable as trustees for the loss:—Held, that under the above agreement W. & Co. could not be considered as having been in possession of the cattle as mortgagees or as equitable assignees, and that the letter operated only as a collateral security, and that they were not liable in equity to account for the loss. *Flint* v. *Walker*, 5 Moore, P. C. 180; 12 Jur. 1.

**Assignees.**]—Where a mortgagee of certain lands which were held under leases for lives renewable for ever had become bankrupt, and an ejectment for nonpayment of rent having been brought by the head landlord, and the premises redeemed by the assignees within the time allowed by the statute to mortgagees, who subsequently entered into possession by their agent:—Held, on a bill filed by an annuitant, claiming under a deed of settlement prior to the date of the mortgage, that the assignees were chargeable as mortgagees in possession, and were bound to appropriate the rents and profits of the lands which they had received, or without wilful default might have received, in discharge of the redemption-money in priority to that of their own mortgage. *Sloane* v. *Mahon*, 1 Dr. & Wal. 189.

**Elegit Creditor.**]—A prior elegit creditor, who gains precedence and executes his habere, shall be charged as if he were a mortgagee in possession from the day of the demise in his ejectment. *Shaw* v. *Murtagh*, Hayes, 586.

**Husband and Wife.**]—In a case where the wife was entitled to lands contracted to be sold before the marriage, and the husband completed the purchase and resold:—Held, that the husband, and the purchasers from him, ought, if they accepted the relief offered to them on eviction by the heir of the wife, by way of lien on the estate, to be treated as mortgagees in possession, and, in that character, to account for the rents and profits received by the husband and the purchasers, as well during the life of the wife as after her death. *Neesom* v. *Clarkson*, 4 Hare, 97; 9 Jur. 82.

**As between Mortgagees.**]—A prior mortgagee who has obtained leases subsequent to a puisne mortgagee, and who has entered into possession, will, as against the latter, be charged as mortgagee in possession. *Gregg* v. *Arrott*, Ll. & G. t. Sugd. 246.

**Acquiescence.**]—Where the possession has been obtained under a forfeiture, and has been acquiesced in for seventeen years, a bill to charge the party, as mortgagee in possession, should not be entertained. *Blennerhassett* v. *Day*, 2 Ball & B. 125.

**Relief against Forfeiture.**]—Relief cannot be given against a forfeiture created by act of parliament. But a court of equity will see that the proceedings working the forfeiture have been regular. *Id.* 128.

**Depriving of Possession.**]—Mismanagement of the estates, and misapplication of the rents, and collusion with the mortgagor, are not grounds for a motion before answer, to take possession from first mortgagee. *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265.

### b. Position of.

**Generally.**]—Discussion of the powers of a mortgagee in possession. *Robinson* v. *Maguire*, 9 Ir. Eq. R. 269.

**Cannot give up Possession.**]—A legal mortgagee who has once gone into possession cannot afterwards go out of possession. *Mason* v. *Westoby* (32 Ch. D. 206) discussed. *Prytherch, In re, Prytherch* v. *Williams*, 59 L. J., Ch. 79; 42 Ch. D. 590; 61 L. T. 799; 38 W. R. 61.

**Extent of Right of Possession.**]—Mortgagee has a right to retain possession against all the world except him who, at his own cost, proves himself entitled to equity of redemption. *James* v. *Biou*, 3 Swanst. 237; 19 R. R. 200.

—— **Till Paid.**]—Mortgagee in possession is not compellable to quit to purchaser until fully paid. *Davy* v. *Barker*, 2 Atk. 2.

It is a rule in equity that a mortgagee in possession shall not by any suit of redemption be stripped of possession before payment. *Brine* v. *Hartpole*, 15 Vin. Abr. 467, pl. 15. Semble, *S. C.*, 5 Bro. P. C. 197.

**Right to Carry on Business.**]—A mortgagee in possession of business premises is entitled to carry on business for a reasonable time so as to enable him to sell as a going concern, and for that purpose to use the name of the mortgagor's firm. *Cook* v. *Thomas*, 24 W. R. 427.

**Must Act with Prudence.**]—Where a mortgagee enters into possession of mortgaged property with a view to a sale of it, he is bound to act with the same care and prudence, and to use every effort which a prudent man should use, to have the sale conducted under circumstances of the greatest advantage. *Marriott* v. *Anchor Reversionary Co.*, 2 Giff. 457. Affirmed, 3 De G. F. & J. 177; 30 L. J., Ch. 571; 7 Jur. (N.S.) 713; 4 L. T. 590; 9 W. R. 726.

If a mortgagee takes possession of mortgaged property, and uses it for the purposes of speculation or adventure, and the speculation or adventure results in a loss, the mortgagee must himself bear such loss. *Ib.*

**Paying Produce to Mortgagor.**]—Mortgagee in possession has no right to pay the produce of estate to mortgagor, after notice to pay it to a prior mortgagee. *Archdeacon* v. *Bowes*, M'Cle. 165 ; 28 R. R. 685.

After bill filed by second incumbrancer, first incumbrancer in possession cannot pay surplus rents to debtor. *Parker* v. *Calcraft*, 6 Madd. 11.

**Bound by Agreement made by Mortgagor.**]—An act of parliament authorised lessees of mines to make a railroad to a canal, through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railroad, and paying an annual rent. The mortgagee afterwards entered into possession and received the rent for some time :—Held, that the mortgagee and all claiming under him were bound by the agreement. *Mold* v. *Wheatcroft*, 27 Beav. 510 ; 29 L. J., Ch. 11 ; 6 Jur. (N.S.) 2 ; 1 L. T. 226.

**Possession under Informal Judgment.**]—First mortgagee having got possession by means of informal judgment, court will not restrain proceedings by mortgagor to recover possession, though he had disclaimed in foreclosure suit. No receiver appointed. *Stevens* v. *Lord*, 2 Jur. 92.

### 3. Account.

#### a. General Principles and Wilful Default.

**For actual Receipts.**]—Mortgagee shall not account for more than he actually receives, unless where he has been guilty of a wilful default ; as if he has turned out or refused a sufficient tenant. *Anon.*, 1 Vern. 45.

**Collusion.**]—Mortgagee recovers judgment in ejectment, but, in combination with the tenant in possession, refuses to take out execution. He shall be compelled so to do, or answer for the profits, as in the case of wilful default. *Bucks (Duke)* v. *Gayer*, 1 Vern. 258.

Mortgagor becomes a bankrupt, and the mortgagee refuses to enter, and permits the bankrupt to continue in possession, and to fence against an ejectment brought by the assignees with this mortgage. Mortgagee shall be charged with the profits from the time of the ejectment. *Chapman* v. *Tanner*, 1 Vern. 267.

**Transfer of Possession—Derogation of Mortgagor's Rights.**]—A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title and in derogation of the rights of the mortgagor. *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391 ; 40 L. T. 697 ; 27 W. R. 889—P. C.

**Mortgagee in Possession.**]—If a mortgagee enters into possession by his own act, he makes himself accountable for what he receives in discharge of his principal and interest. *Robinson* v. *Cumming*, 2 Atk. 410.

A mortgagee in possession of a business is accountable not only for what he has received, but for what he might or ought to have received. *Chaplin* v. *Young*, 33 Beav. 330.

Where mortgagee enters, and thereby prevents subsequent incumbrancers from entering, and yet permits the mortgagor to receive the profits, he shall be charged with all the profits he had or might have received since his entry. *Coppring* v. *Cooke*, 1 Vern. 270.

On a bill for redemption of mortgaged property in the possession of the mortgagee, the latter will be made to account for all loss and damage occasioned by his gross negligence, in respect of bad cultivation and non-repair of the mortgaged premises. *Wragg* v. *Denham*, 2 Y. & C. 117 ; 6 L. J., Ex. Eq. 38.

The defendant, a solicitor-mortgagee, took from the mortgagor an authority to receive the rents of the property accruing due at the date of the mortgage, and in fact received the rents from that date : — Held, that the mortgagor was entitled to an account in the usual form as against a mortgagee who has entered into possession before there was any interest in arrear. *Jones* v. *Jenkins*, 44 L. T. 601.

—— **As Mortgagor's Agent.**]—Mortgagees, under a conveyance in trust to sell, to secure principal and interest, take possession, not as mortgagees, but as agents of the mortgagor :—Held, that in a suit for redemption the mortgagees will not be ordered to account on the footing of wilful default. *Parkinson* v. *Hanbury*, 13 W. R. 331.

**Sale.**]—A mortgagee in possession sold the property under his power of sale, a day being fixed for the completion of the sale and for letting the purchaser into possession. At the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent. In an action by the mortgagor for ascertaining the amount of the balance due to him, quære whether the mortgagee might be charged with wilful default in not requiring a rent from the purchaser. *Shepard* v. *Jones*, 21 Ch. D. 469 ; 47 L. T. 604 ; 31 W. R. 308.

In an action for account by a mortgagor against a mortgagee in possession who has sold, the mortgagor is entitled to an account of the proceeds of sale received by the mortgagee or by his order or for his use, "or which without his wilful default might have been so received" ; although wilful default may not have been charged in the pleadings and proved at the trial ; but such an account does not entitle the mortgagor to question the propriety of the sale or the adequacy of the amount for which the property has been sold. *Mayer* v. *Murray*, 47 L. J., Ch. 605 ; 8 Ch. D. 424 ; 26 W. R. 690.

**Set-off.**]—In taking the accounts between mortgagor and mortgagee, whether in a foreclosure or in a redemption suit, the mortgagor is entitled to the benefit of set-off. *Anderson, Ex parte, Agra and Masterman's Bank, In re*, 36 L. J., Ch. 73 ; L. R. 3 Eq. 337 ; 15 W. R. 246.

**Relief.**]—Where a mortgagee takes an estate subject to a perpetual account, he will not be relieved from his own contract. *Yates* v. *Hambly*, 2 Atk. 362.

**Re-opening — Mistake.**]—Where a mortgage account had been settled on the footing of compound interest with half-yearly rests, both

parties wrongly understanding the mortgage deed to require the same:—Held, that such settled account might be re-opened. *Daniell* v. *Sinclair*, 50 L. J., P. C. 50; 6 App. Cas. 181; 44 L. T. 257; 29 W. R. 569.

—— **No Independent Advice.**]—An account of costs in respect of several abortive sales, and of the sales finally carried out, which had been signed by the defendant without any independent advice, was ordered to be re-opened and taxed. *Jones* v. *Linton*, 44 L. T. 601.

**Interest on Receipts.**]—A mortgagee in possession is not chargeable with interest on his receipts, if, when he took possession, an arrear of interest was due to him, unless, by setting up a title adverse to the mortgagor, he has lost the immunities of an ordinary mortgagee. *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889—P. C.

**Practice.**]—A defendant (bankrupt mortgagor) to a suit by his mortgagee, praying for a declaration of priority and for accounts, cannot by means of an answer and disclaimer avoid answering fully, for, though he may disclaim his interest in the subject-matter of the suit, he cannot disclaim his liability to account. *Dobree* v. *Nicholson*, 22 L. T. 774; 18 W. R. 965.

An estate was conveyed by A. to B. upon trust, for ten years, to apply the rents in payment to B. of the interest and capital of 1,000*l.*, lent by B. to A., and then to sell, pay off the residue of the 1,000*l.*, and hold the remainder in trust for the wife and children of A. The rents exceeded the interest. B. permitted A. to retain possession, and the interest was not applied as directed. Upon a bill by B. against A. and his wife and children for a sale:—Held, that B. could not, until he took possession, be made liable for what, without his wilful default, he might have received, except upon a cross bill raising that question. *Beare* v. *Prior*, 6 Beav. 183; 12 L. J., Ch. 262.

—— **Onus Probandi.**]—The proper mode of taking the account on a bill to redeem, does not cast upon the mortgagee the burden of proving that he made the most of the mortgaged premises whilst in possession. If he dealt with them as his own, he is only chargeable with the rent reserved, unless proof can be brought, which lies upon the opposite side, that he acted fraudulently, as in underhand dealing between him and the tenant to whom he let, or was guilty of wilful default, as by leaving the premises vacant, which would throw upon him the proof that no tenant offered, or could be had with reasonable diligence. If the mortgagor was a party to any act to prevent the letting, that would be an answer to wilful default. If he occupied, a fair occupation rent should be charged him. *Metcalf* v. *Campion*, 1 Moll. 238.

**Costs.**]—A mortgagee in possession who had neglected or refused to render an account upon the demand of the mortgagor, was refused his costs up to the hearing. *Powell* v. *Trotter*, 1 Dr. & Sm. 388; 7 Jur. (N.S.) 206; 4 L. T. 45.

### b. When Ordered.

**In Absence of Collusion.**]—The mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown that there is collusion between them and the mortgagee. *White* v. *Parnther*, 1 Knapp, 179.

**In favour of Subsequent Mortgagee.**]—Subsequent mortgagee prays redemption of first mortgage on payment of what was due; and, pending suit, first mortgagee sets up another mortgage prior to all:—Decreed a trial of its validity at law, and an account of money paid, &c. *Dowse* v. *Rue*, 9 Mod. 38.

**Against Annuitant.**]—Annuitant in possession of lands demised to secure his annuity, decreed to account, although bill not filed to repurchase. *Olicer* v. *Harrison*, 1 Jur. 918.

**Against Infants.**]—A., seised in fee, mortgaged for a term of years, and afterwards devised the mortgaged premises and died. On a bill by the mortgagee against the devisees, some of whom were infants, for foreclosure:—Held, that the defendants, during the infancy of the devisees, were not entitled to take an account of what was done. *Taylor* v. *Coates*, 3 Hare, 263.

**Practice.**]—On a bill to redeem, an account decreed, and 240*l.* reported due, and exceptions to the report; pending which the defendant, the mortgagee, commits waste: court orders the mortgagee to deliver up the possession, on the plaintiff giving security to abide the event of the account. *Hanson* v. *Derby*, 2 Vern. 392.

—— **Limitation.**]—A decree for redemption and general account, &c., having been made in the original and revived cause, in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c., to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account. *Rylands* v. *Latouche*, 2 Bligh, 567.

—— **Exceptions—Parties.**]—Exceptions were filed to the master's report, principally on the ground that the deeds of supposed mortgage were in fact deeds of trust, executed to secure the lands against the claims of adverse creditors; and also that there were unsatisfied judgments prior to the plaintiff's claim. By a decree upon further directions the exceptions were allowed, and the account directed to be taken, excluding the alleged mortgage; and, as against J. B., the heir of the mortgagor, the bill was dismissed. Upon appeal, this judgment was affirmed. Quære, whether J. B., against whom the bill was dismissed, ought not to have been brought before the house as a party to the appeal. *Kelly* v. *Bateman*, 1 Bligh (N.S.) 237.

—— **Sums "properly" laid out by Plaintiff "as Mortgagee."**]—In a foreclosure action by a first mortgagee, who was also third mortgagee, and the mortgagor, the plaintiff having entered into possession of the mortgaged property and laid out sums of money in lasting improvements, an account was directed of all the sums "properly" laid out by the plaintiff "as mortgagee" in lasting improvements upon the property. *Houghton* v. *Sevenoaks Estate Co.*, 33 W. R. 341.

### c. Rests.

**In Case of Realty.**]—The court directs annual rests in an account of the rents of real, but not of personal estate. *Robinson* v. *Cumming*, 2 Atk. 410.

**In Case of Leaseholds.**]—A mortgagee of leaseholds may take possession, even when there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests, as when he enters in order to prevent a forfeiture for nonpayment of ground-rent or for non-assurance. *Patch* v. *Wild*, 30 Beav. 99; 7 Jur. (N.S.) 1181; 5 L. T. 14; 9 W. R. 844.

**Against Mortgagee in Possession.**]—A mortgagee by entering into possession by his own act makes himself accountable, and in this case a direction for annual rests is given. *Robinson* v. *Cumming*, 2 Atk. 410.

It is the settled practice of this court, in taking accounts against mortgagees in possession, to make half-yearly rests, and not to charge against the mortgagee interest on payments exceeding the interest due to him, received at any intermediate periods, no matter how frequently the payments are made. *Graham* v. *Walker*, 11 Ir. Eq. R. 415.

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mortgagor and mortgagee. *Scholefield* v. *Lockwood*, 32 Beav. 439.

It having been referred to a master to take an account between mortgagor and mortgagee, under a foreclosure, and the report being confirmed in 1736, Lord Hardwicke dismissed defendant's petition for a bill of review, as it appeared that his attorney, solicitor and agent had then attended the settling of the account before the master, by which defendant should be bound. When the sum is large, and the mortgagee is forced to enter on the estate, he subjects himself to an account, but the master is not obliged, for a small excess of interest, to apply it to sink the principal; nor is it an invariable rule, that in taking such accounts he must make annual rests. *Gould* v. *Tancred*, 2 Atk. 533. See *Needler* v. *Deeble*, 1 Ch. Ca. 299. S. P., *Higgins* v. *York Buildings Co.*, 2 Atk. 107.

A. conveyed his estates to B., in trust to sell and to pay off a mortgage and other incumbrances on the estates, and to retain a debt due to B., and until the sale to apply the rents in keeping down the interest on the charges, and to pay the surplus to A. B. took a transfer of the mortgage, and entered into and remained in possession for twenty-four years, but did not sell the estates. For the first ten years the rents were less than the interest, but afterwards they exceeded it. A. filed a bill for an account of the rents received by B., with yearly rests, and for a reconveyance of the estates; but the court refused to direct the rests. *Latter* v. *Dashwood*, 6 Sim. 462; 3 L. J., Ch. 149.

—— **Redemption.**]—On a bill to redeem mortgagee in possession, annual rests will not be directed without a special case is shown for it. *Scholefield* v. *Ingham*, C. P. Cooper, 477.

A bill was filed by a mortgagor against a mortgagee in possession for redemption, and at the hearing the ordinary decree as against a mortgagee in possession was made. The mortgagor subsequently applied to take the accounts as against the mortgagee, with annual rests:—Held, that such a case was not within s. 54 of the 15 & 16 Vict. c. 86, or the 20th Order of the 16th October, 1852; and the application was refused. *Nelson* v. *Booth*, 3 De G. & J. 119; 27 L. J., Ch. 782; 5 Jur. (N.S.) 28; 6 W. R. 845.

Bill to redeem against mortgagee in possession; interest never having been in arrear, and annual rents having exceeded yearly interest on mortgage; rests in reduction of principal by such access directed in the accounts. *Shepherd* v. *Elliot*, 4 Madd. 254; 20 R. R. 296.

—— **Where there are Arrears.**]—It is the settled practice of the court not to take the account against a mortgagee in possession, with annual rests, where, at the time of his entering into possession, there is an arrear of interest. *Nelson* v. *Booth*, 3 De G. & J. 119; 27 L. J., Ch. 782; 5 Jur. (N.S.) 28; 6 W. R. 845.

Generally, annual rests are not directed against a mortgagee in possession, when the interest is in arrear at the time he takes possession, and, in the absence of special circumstances, a mortgagee is not liable to account with annual rests when he enters into possession; he does not become liable until the whole of the mortgage debt has been paid off. Where, however, a mortgagee in possession came to account with the mortgagor, whereby all the arrears of interest, &c., were converted into principal, leaving thereby no arrears, and he continued in possession, the rent being more than sufficient to keep down the interest, the court directed annual rests. *Wilson* v. *Cluer*, 3 Beav. 136; 9 L. J., Ch. 333; 4 Jur. 883.

Where at the time of a mortgagee taking possession, many years' arrears of interest were due, and he had been put to great costs in defending the mortgage from an unsuccessful attack, the court would not compel the account to be taken with rests, but allowed a sum in court, and rents in the receiver's hands before taking possession, to be in discharge pro tanto of the interest due at that time. *Horlock* v. *Smith*, 1 Coll. C. C. 287.

The mortgagor had, before the mortgagees entered into possession, indorsed to the mortgagees bills of exchange for the arrears of interest. The bills fell due after the possession was taken, and were dishonoured:—Held, that the interest was in arrear when possession was taken, so as to preclude the mortgagor from claiming to have the accounts of the receipts of the mortgagees taken with rests. *Dobson* v. *Laud*, 4 De G. & Sm. 575; 8 Hare, 216; 19 L. J., Ch. 484; 14 Jur. 288.

A mortgagee in possession brought a foreclosure action. In his statement of claim he did not allege that interest was in arrear when he took possession. The mortgagor, in his statement of defence, alleged that the rent received greatly exceeded the interest:—Held, that the accounts must be directed to be taken with annual rests. *Carter* v. *James*, 29 W. R. 437.

A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first, in payment of interest and costs, and then either pay the balance to the mortgagor or apply it in

reduction of the principal due on the mortgage; and in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are held by the same person, who sells one of the mortgaged estates. *Thompson* v. *Hudson*, 40 L. J., Ch. 28: L. R. 10 Eq. 497; 23 L. T. 278; 18 W. R. 1081.

A. having agreed for the purchase of part of a property, subject to a mortgage, entered into possession without paying the purchase-money and afterwards took a transfer of the mortgage on the whole, upon which an arrear of interest, less than the unpaid purchase-money, was then due:—Held, that the rule applied, that an account will not be given with annual rests against the mortgagee where there was an arrear of interest at the time of his taking possession. *Finch* v. *Brown*, 3 Beav. 70.

Annual rests not directed in the account against a mortgagee in possession from the time when the arrear of interest was discharged by the rents, such direction being not of course, but under special circumstances only, and never for a broken period. *Davis* v. *May*, 19 Ves. 383.

**Against Mortgagor.**]—B. mortgaged certain premises to L. The premises were required to be partly pulled down and rebuilt. P. undertook to perform the work, but required security for the payment. An agreement was entered into between B., L. and P., by which L. consented to become tenant of part of the premises when rebuilt, and to take a lease of them from P., to whom B. had assigned his interest for a term of years, and to pay P. 1,000*l.* for the lease, and 250*l.* a year for rent. The premises having been rebuilt, L. entered into possession; but, as no lease was granted by P., did not pay the 1,000*l.*, nor the 250*l.* a year rent. In a suit afterwards instituted by P., and to which both B. and L. were parties:—Held, that the accounts of what was due to L. on the mortgage were not to be taken to with annual rests, as the accounts on the other side could not be taken in the same manner either as to the 1,000*l.* or the 250*l.* a year rent. *Page* v. *Linwood*, 4 Cl. & F. 399.

**Occupation Rent.**]—Annual rests are directed in an account of occupation rent as well as in an account of rents and profits received. *Wilson* v. *Metcalfe*, 1 Russ. 530.

**Against Tenant for Life and Equitable Incumbrancer.**]—In a suit by devisees of the reversion against a party deriving title under a tenant for life and equitable incumbrancer, the court under the circumstances directed accounts with annual rests. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.

**Husband and Wife.**]—A husband who completes a sale of his wife's lands, which were contracted to be sold before marriage, will not, nor will the purchaser, be liable to account with annual rests in an action brought for eviction by the heir of the wife where no special case for that form of decree is made by the pleadings. *Neeson* v. *Clarkson*, 4 Hare, 97; 9 Jur. 82.

**After Abandonment of Suit.**]—In a suit by a mortgagor for redemption, a decree was made for an account with annual rests. The plaintiff died, and the suit was abandoned, after which the mortgagee instituted a suit for foreclosure:—Held, that the decree must be the same, and with annual rests. *Morris* v. *Islip*, 20 Beav. 654.

**Possession under Contract of Purchase.**]—A. agreed to become purchaser of leasehold property which was subject to mortgages. He entered into possession, and after the contract had been put an end to, he obtained a transfer of the mortgages, having all along continued in possession:—Held, that, although the circumstances would have justified the mortgagees in taking possession, still A. was not entitled to stand in the same position, and he was directed to account as mortgagee in possession with annual rests from the date of the transfer to him of the mortgagees. *Patch* v. *Wild*, 30 Beav. 99; 7 Jur. (N.S.) 1181; 5 L. T. 14; 9 W. R. 844.

**Usury.**]—Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor, and confirmed by a deed executed by him three years afterwards, for securing repayment of the balance to the mortgagee:—Held, that these transactions were not usurious, and that the mortgagor was liable for the balance. *Blackburn* v. *Warwick*, 2 Y. & C. 92; 6 L. J., Ex. Eq. 17.

**Practice—When Decree Silent.**]—On decree against mortgagee in possession to account, rests cannot be made by master, unless directed by decree. *Webber* v. *Hunt*, 1 Madd. 13.

After the time is ascertained at which the mortgage debt of a mortgagee in possession was paid off, annual rests from that date will be made in the accounts against him, though rests were not directed by the previous orders and decrees under which those accounts were taken. *Wilson* v. *Metcalfe*, 1 Russ. 530; 25 R. R. 128.

—— **From what Date.**]—In a redemption action against mortgagees in possession the plaintiffs, who claimed to represent the original mortgagor, alleged that the defendants had been overpaid. The defendants delivered a defence in which they denied the title of the plaintiffs to redeem; pleaded the Statute of Limitations; and asserted that a large amount was still due to them. At the trial the plaintiffs' title to redeem was not disputed, and the defence of the statute was overruled. The judgment directed the taking of the ordinary accounts in a redemption action against mortgagees in possession, including an account of what was due to the defendants for principal and interest, and their taxed costs of the action; and that, on payment by the plaintiffs within six months after the certificate of the balance (if any) which should be found due to the defendants, the defendants should re-convey the mortgaged property to the plaintiffs, and that, in default of payment, the action should be dismissed with costs. But, in case it should appear on taking the accounts that the

defendants had been overpaid, the further consideration of the action was to be adjourned. The chief clerk found by his certificate that the mortgagees went into possession in May, 1857; that the mortgage debt was fully repaid in November, 1866; and that at the date of the certificate there was a balance of 618*l.* due from the defendants:—Held, that the account must be taken against the defendants with annual rests from the date at which the mortgage debt was fully paid, and that the defendants must pay the costs of the action. *Wilson* v. *Metcalfe* (1 Russ. 530; 25 R. R. 128) followed as to the annual rests, but distinguished as to the costs. *Ashworth* v. *Lord*, 57 L. J., Ch. 230; 36 Ch. D. 545; 58 L. T. 18; 36 W. R. 446.

—— **When Rest to be Made.**]—Where a decree ordered that in taking the accounts of a mortgagee in possession annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal, a rest ought to be made, at the date of the receipt, by the mortgagee, of a sum exceeding the interest, though occurring in the interval between the annual rests. From that date the subsequent annual rests ought to be computed. *Binnington* v. *Harwood*, Turn. & R. 477.

**Costs.**]—Costs given in a redemption suit against a mortgagee in possession, who upon an account taken with annual rests was found to have been overpaid. *Wilson* v. *Cluer*, 4 Beav. 214.

### 4. Growing Crops.

**Mortgagor in Possession.**]—The plaintiffs were mortgagees of a freehold farm, the mortgagor remaining in possession until his trustee in liquidation entered and managed the farm business. The mortgagees having demanded possession, to which they were entitled under their mortgage deed:—Held, that, from the date of their demand, possession of the mortgagor by his trustee was wrongful, and that, without either ejectment or foreclosure, the mortgagees were entitled to the property as it was at the time of their demand, and the trustee must accordingly be restrained by injunction from cutting and removing the growing crops. *Bagnall* v. *Villar*, 48 L. J., Ch. 695; 12 Ch. D. 812; 28 W. R. 242.

—— **By Express Contract.**]—Where the mortgagor in possession was by express contract tenant at will to the mortgagee:—Held, that the mortgagee was not entitled to the crops upon the mortgaged premises at the bankruptcy of the mortgagor, or at the time of the order for sale by the commissioners. *Temple, Ex parte*, 1 Glyn & J. 216. See also *Bignold, Ex parte, Postle, In re*, 4 Deac. & C. 259; 2 Mont. & Ayr. 214; 4 L. J., Bk. 58. *Bignold, Ex parte, Harvey, In re*, 2 Glyn & J. 273. But see *Alexander, Ex parte*, 2 Glyn & J. 275.

Whether a mortgagee could, in an action for mesne profits, after judgment in ejectment against the mortgagor in possession of the mortgaged premises, recover the value of the crops severed and sold subsequent to the day of the demise laid in the declaration, but before the delivery of possession by the sheriff, quære. *Ib.*

**After Notice from Mortgagee.**]—A mortgagor presented a petition for liquidation of his estate, and the trustee appointed went into possession of the mortgaged lands and commenced cutting the growing crops. The mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do. In an action against the trustee an injunction was granted restraining him from cutting crops and from removing the crops cut after the demand made by the mortgagee. *Bagnall* v. *Villar*, 48 L. J., Ch. 695; 12 Ch. D. 812; 28 W. R. 242.

**Sale.**]—An equitable mortgagee is entitled to the growing crops and rents from the date of the order of sale. *Bignold, Ex parte, Keer, In re*, 2 Deac. & C. 398; 1 L. J., Bk. 100.

—— **Arrangement Prior to.**]—A legal mortgagee obtained the usual order for sale of the property, previous to which it was arranged between himself and the assignees that he should be placed in the same situation as if he had given notice to the tenants:—Held, that the mortgagee was, under these circumstances, entitled to the crops growing on the estate at the time of the order of the sale. *Barnes, Ex parte, Medley, In re*, 3 Deac. 223; 3 Mont. & Ayr. 497; 7 L. J., Bk. 37; 2 Jur. 329.

And to the same rents due since the bankruptcy, and to the crops. *Ib.*

Quære, whether in the absence of any such arrangemenent the mortgagee is not entitled to have the estate sold in the same condition as it stands at the date of the order for sale. *Ib.*

### 5. Leases.

#### a. By Mortgagor.

**Contract for, Specific Performance of.**]—A contract for a lease by mortgagor cannot be enforced against the tenant without obtaining a reconveyance of the mortgage, or procuring the mortgagee to confirm same; tenant holding under such contract cannot compel landlord to pay off the mortgage to give effect to the contract. *Costegan* v. *Hastlar*, 2 Sch. & Lef. 166. See *Howell* v. *George*, 15 R. R. 207.

—— **Against Tenant.**]—C., the owner of a leasehold estate which was subject to a mortgage, entered, without the privity of the mortgagees, into an agreement with P. to grant him a lease for twenty-one years, and in 1875 P. took possession under this agreement. On the 25th of March, 1881, the mortgagees' solicitors wrote to P. stating that they, on behalf of the mortgagees, had withdrawn C.'s authority to receive the rents, and asking him to pay the rent due that day and all future rent to them. P. wrote to ask C. whether he ought to pay according to the notice, and C. replied that he would be correct in doing so. P. consulted his solicitors, who inspected the mortgage deed, and advised him that the mortgagees could claim rent from him. P. therefore paid the mortgagees the rent due on the 25th March, and on the 22nd of June gave them notice to determine his tenancy at Christmas. At the end of the year the mortgagees refused to accept possession, and in June, 1882, they and C. commenced this action to compel P. to take a lease according to the agreement:—Held, that the notice by the mortgagees to the tenant to pay rent to them and the payment accordingly did away with the agreement between C. and P., and made P. tenant from

year to year to the mortgagees, and that specific performance of the agreement could not be decreed. *Corbett* v. *Plowden*, 54 L. J., Ch. 109; 25 Ch. D. 678; 50 L. T. 740; 32 W. R. 667.

—— **Against Purchaser from Bankrupt Mortgagor.**]—A. made an equitable mortgage of certain premises to B., and he afterwards entered into an agreement to grant a lease of the premises to C., who had notice of the prior charge. A. became bankrupt before the lease was executed, and on the petition of B. an order in bankruptcy was made, under which the premises were sold, and B. became the purchaser, and retained the amount of his equitable mortgage out of the purchase-money:—Held, on a bill filed by C. for specific performance of the agreement, that B. having become the purchaser, and thereby united his equitable mortgage with the equity of redemption, was bound to perform the agreement. *Smith* v. *Phillips*, 1 Keen, 694; 6 L. J., Ch. 253.

**Mortgagee bound by.**]—A mortgagor made a lease of part of the mortgaged premises; the mortgagee, with notice of the lease, took from the mortgagor a conveyance of the equity of redemption, in such a way as that, instead of being kept distinct, it became united with the interest in the mortgage:—Held, that the mortgagee was bound by the lease. *O'Loughlin* v. *Fitzgerald*, Ir. R. 7 Eq. 483.

**Underlease—Effect.**]—A mortgagor of leasehold premises granted an underlease. The original lease, by numerous mesne assignments, and by the assignment of the equity of redemption by the mortgagor, became absolutely vested in the plaintiff as the legal personal representative of the last assignee:—Held, first, that as the mortgagor had only the equity of redemption at the time of the grant, the underlease operated as a demise by estoppel only between the parties to it; and that, as the mortgagor never afterwards acquired any legal interest in the premises, he could not pass any legal interest in that contract. *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25; 20 L. J., C. P. 26.

Held, secondly, that, although some of the mesne assignments were made subject to the underlease, yet any possible effect of this circumstance was confined to the parties to the deeds, and, inasmuch as neither the defendant nor any person through whom he claimed, or with whom he had any legal privity, was a party to such assignments, the plaintiff was in no respect bound or affected by the underlease. *Ib.*

Held, thirdly, that, though payment of rent had been made in accordance with the terms of the underlease, yet, by such payment and the other circumstances of the case, a tenancy from year to year only had been created, which was well determined by a regular notice to quit, served upon the attorney or the administratrix of the person who paid rent to the plaintiff, and under whom the defendant claimed. *Ib.*

**After Bill Filed.**]—A lease granted by a mortgagor to a party, without notice, nineteen days after a bill filed by an equitable mortgagee, set aside, as a purchase pendente lite. *Perry* v. *Keane*, 6 L. J., Ch. 67.

**After Foreclosure.**]—After a bill of foreclosure filed by mortgagee, and a receiver appointed, tenant for life of the mortgaged premises, with leasing power, makes leases; a bill is filed by a judgment creditor, who moves to let the premises pending the cause; ordered to let without prejudice to any right the tenants may have against their lessor, and they, as tenants from year to year to the receiver, being entitled to notice to quit. *Mansfield* (*Lord*) v. *Hamilton*, 2 Sch. & Lef. 28.

**Sale subject to Lease.**]—To a bill to raise a charge secured by a term, a subsequent mortgagee of the inheritance and a lessee who claimed under a lease made by the inheritor after he had executed the mortgage were made parties. The bill prayed that if necessary the lands should be sold discharged of the lease; there was a consent to sell the inheritance instead of the term. The mortgagee insisted by his answer that the lease had been made at a gross under-value, and that the lands should be sold discharged of it. The lessee insisted that the lease was made at the full value, and that the lands should be sold subject to it. The plaintiff amended his bill, but did not put in issue the case made by the mortgagee:—Held, that in this suit the mortgagee was not entitled to have the lands sold discharged of the lease; and the lands were directed to be sold subject to the lease without prejudice to the mortgagee filing a bill to have them sold discharged of it. *Colthurst* v. *Colthurst*, 2 Jones, 262.

**Position of Tenant to Mortgagor.**]—A., after mortgaging in fee to B., demised to C. for years from Lady-day, at a quarterly rent. A. afterwards sold the equity of redemption in parcel of the mortgaged premises to B.; B. in August gave notice of the mortgage, and required C. to pay to himself and not to A. rents then due, or thereafter to become due, from C. in respect of the mortgaged premises. B. then entered upon the parcel sold. In December C. tendered to B. three quarters' rent due, upon the lease at Michaelmas, which B. refused to accept:—Held, that this notice was sufficient to establish the affirmative of an issue taken upon an allegation, that B. demised to C. for one year from the date of the notice. *Browne* v. *Storey*, 1 Man. & G. 117; 1 Scott (N.R.) 9; 9 L. J., C. P. 225; 4 Jur. 319. See *Doe* d. *Hughes* v. *Bucknell*, 8 Car. & P. 567.

The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognised by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the lands under the powers of the mortgage. *Gibbs* v. *Cruikshank*, 42 L. J., C. P. 273; L. R. 8 C. P. 454; 28 L. T. 735; 21 W. R. 734.

**Right to Maintain Possessory Action against Tenant of Mortgagor.**]—A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October, 1849, the plaintiff, without having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a judge's order, dated the 31st October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment, and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of

levy, &c. On the 15th of November the plaintiff first entered into possession of the premises, and brought an action for mesne profits accrued between November, 1848, and the 15th of November, 1849:—Held, that the plaintiff, not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry on that day not having relation back to his title as mortgagee, and that the judge's order made no difference in the case. *Litchfield* v. *Ready*, 5 Ex. 939; 20 L. J., Ex. 51.

Trespass will not lie against the occupier of land by a mortgagee, who has never been in actual possession, or been seised of the land, and has not obtained judgment in ejectment, either by default or by verdict, and therefore he cannot waive the tort, and maintain an action of use and occupation. *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; 20 L. J., Ex. 71.

**Lease before Mortgage—Position of Tenant.**]—Tenants under leases granted by a mortgagor before the mortgage may safely continue to pay rent to the mortgagor until they get notice of the mortgage, and are requested to pay their rent to the mortgagee. *Cook* v. *Moylan*, 1 Ex. 67; 5 D. & L. 701. *Trent* v. *Hunt*, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899; 1 W. R. 481.

**Notice to Pay Rent to Mortgagee.**]—A mortgagor let the mortgaged premises subsequently to the mortgage. During the quarter ending at Michaelmas the mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and that the principal sum was still due and owing together with an arrear of interest, and requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mortgagor appointing the plaintiff who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mortgagees threatened the tenant with legal proceedings unless he paid the rent to them, and the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—Held, that the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mortgagees, they being prior incumbrancers whose rights were reserved by the order; that the tenant, having paid the rent to the mortgagees under compulsion of law and in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; and that consequently the claim of the receiver could not be maintained. *Johnson* v. *Jones* (9 A. & E. 809) approved and followed. *Underhay* v. *Read*, 57 L. J., Q. B. 129; 20 Q. B. D. 209; 58 L. T. 457; 36 W. R. 298—C. A.

The tenant of a mortgagor, by virtue of a lease subsequent to the mortgage, does not become tenant to the mortgagee, as soon as the latter gives him notice of the mortgage and that the money has not been paid according to the condition. *Evans* v. *Elliott*, 9 Ad. & E. 342; 8 L. J., Q. B. 51; 1 P. & D. 256.

Where a mortgagor is in possession, and after the mortgage makes a lease, notice by the mortgagee to the tenant to pay the rent to him will not of itself make him tenant to the mortgagee, but the old tenancy created by the mortgagor must be put an end to and a new tenancy created by the mortgagees receiving rent from the tenant. *Partington* v. *Woodcock*, 4 L. J., K. B. 239.

A mortgagor in possession let the mortgaged property without the concurrence of the mortgagees. The lease was one authorised by s. 18 of the Conveyancing Act, 1881. The lessee then advanced certain moneys to the mortgagor upon the terms that the lessee should retain the rent as it became due until the moneys were repaid. Subsequently the mortgagees gave notice to the lessee informing him of the mortgage, and requiring him to pay them the rent thereafter to become due, and not to pay it to the mortgagor. The lessee having refused to comply with the notice, the mortgagees brought an action to recover possession under a condition of re-entry upon non-payment of rent contained in the lease:—Held, that, by the combined effect of ss. 10 and 18 of the Conveyancing Act, 1881, the mortgagees, after giving the above notice to the lessee, were entitled as reversioners to enforce the covenants and provisions in the lease, and were therefore entitled to recover possession of the property under the condition of re-entry; and, further, that the agreement between the mortgagor and lessee as to the retention of the rent was not binding upon the mortgagees. *Municipal Permanent Building Society* v. *Smith*, 58 L. J., Q. B. 61; 22 Q. B. D. 70; 37 W. R. 42—C. A.

**Under Conveyancing Act, 1881.**]—In a mortgage of land to be given in pursuance of an agreement made before the Conveyancing Act, 1881, the mortgagee is not entitled to a provision to expressly exclude the operation of s. 18 of the act, under which a mortgagor in possession has power to make leases of the mortgaged land. *Nugent and Riley, In re*, 49 L. T. 132.

The effect of a lease granted by a mortgagor in possession under the powers of the Conveyancing Act, 1881, s. 18, is to bind the mortgagee and those claiming under him so as to prevent the interference with any easement to which the lessee is entitled as against the lessor and those claiming under him. *Wilson* v. *Queen's Club*, 60 L. J., Ch. 698; [1891] 3 Ch. 522; 65 L. T. 42; 40 W. R. 172.

**Under Power.**]—The doctrine that a tenant for life, with a power to sell or lease, may sell or lease to a trustee for himself is an established exception to the rule as to dealings by persons filling fiduciary positions. Under a mortgage, power was reserved to the mortgagor until entry by the mortgagee to grant building leases:—Held, that the case fell within the principle of the above exception, and that a lease to a trustee for the mortgagor was good. *Bevan* v. *Habgood*, 1 J. & H. 222; 30 L. J., Ch. 107; 7 Jur. (N.S.) 41; 8 W. R. 703.

**Rights of Mortgagor's Assignees.**]—A., having demised land to a tenant for years, mortgaged it, and afterwards assigned his equity of redemption to the defendant. The defendant paid off the incumbrance, but, before a transfer was executed, distrained in the name of the mortgagee for rent in arrear:—Held, that he had the same implied authority to do so as a mortgagor

in possession. *Snell* v. *Finch*, 13 C. B. (N.S.) 651; 32 L. J., C. P. 117; 9 Jur. (N.S.) 333; 7 L. T. 747; 11 W. R. 341.

If a mortgagor of lands, who retains only an equity of redemption, leases by deed, and afterwards assigns his interest in the land by words large enough to convey a legal estate, the assignee may, as assignee of the reversion, sue the tenant for waste in breach of the covenant in the lease, for the tenant is estopped from denying that his lessor had a legal reversion capable of being assigned. *Cuthbertson* v. *Irving*, 4 H. & N. 742; 28 L. J., Ex. 306; 5 Jur. (N.S.) 740. Affirmed on appeal, 6 H. & N. 135; 29 L. J., Ex. 485; 6 Jur. (N.S.) 1211; 3 L. T. 335; 8 W. R. 704—Ex. Ch.

The assignee of a mortgagor who has let a tenant into possession after the mortgage can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. *Hickman* v. *Machin*, 4 H. & N. 716; 28 L. J., Ex. 310; 5 Jur. (N.S.) 576.

### b. By Mortgagee.

**Before Foreclosure.**]—Mortgagee cannot make a lease of a house in mortgage before foreclosure. *Hungerford* v. *Clay*, 9 Mod. 1.

**Whether Tenancy created.**]—Where, subsequently to a mortgage, the mortgagor creates new tenancies, and submits rental to mortgagee, who raises no objection, such tacit acquiescence does not suffice to create a new tenancy as against the mortgagee. The act of the solicitor having carriage, in approving the rental which sets out such tenancies, will not create a new tenancy. The act of the receiver, in accepting rent from such tenants, and paying interest thereout to the mortgagee, will not create a new tenancy. The solicitor having carriage and the receiver are officers of the court, but not agents for the parties. *O'Rourke's Estate, In re*, L. R. 23 Ir. 497.

**Agreement for—Concurrence of Mortgagor.**]—A mortgagee of leaseholds, without any leasing power, agreed in writing to grant a lease of the premises for the whole term, at a premium. It was not so expressed in the agreement, but it was understood by both parties that the lease was not to be granted without the concurrence of the mortgagor. The mortgagor refused to concur. A bill against the mortgagee alone, to compel him to grant a lease, the plaintiff being willing to take such a lease as the mortgagee alone could grant, was dismissed, but, under the circumstances, without costs, and without reserving liberty to bring an action. *Franklinski* v. *Ball*, 34 L. J., Ch. 153; 10 Jur. (N.S.) 606; 10 L. T. 446; 12 W. R. 845.

**By Mortgagee in Possession—Registered Mortgage.**]—The mortgagee while in possession made a lease; the mortgage was registered. The lessee set up a title as a purchaser without notice, and also relied on there being no acknowledgment to bind him:—Held, 1st, that the registration gave priority to the mortgagor's equitable title, which rendered notice immaterial; 2nd, that the acknowledgment by the mortgagee alone was sufficient against his lessee. *Ball* v. *Riversdale* (*Lord*), Beat. 550.

—— **By Brewers—Public-house—Account.**]—Mortgagees in possession, who were brewers, let the premises with a restriction that the tenant should take his supply of beer entirely from them:—Held, that the mortgagees must account for such additional rent as they would have made if the premises had been let without restrictions, but not for the profit which they made by the sale of beer to the tenant. *White* v. *City of London Brewery*, 58 L. J., Ch. 855; 42 Ch. D. 237; 61 L. T. 741; 38 W. R. 82—C. A.

—— **Sub-lease — Account.**]—The plaintiffs were mortgagees in possession of a colliery, and were also treated by the court as lessees of the same colliery under a lease for a fixed term of years at a rent and a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof and not to work or remove the pillars. The mortgagees underlet the colliery, and gave their sub-lessees permission to work and remove the pillars, which they did:—Held, that in taking the accounts as against mortgagees in possession, the mortgagees having allowed their sub-lessees to take the coal, must be treated as having taken it themselves, and, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; and the foreclosure, which had been made absolute before the appeal was heard, was reopened. *Livingstone* v. *Rawyards Coal Co.* (5 App. Cas. 25) distinguished. *Taylor* v. *Mostyn*, 55 L. J., Ch. 893; 33 Ch. D. 226; 55 L. T. 651—C. A.

### c. By Mortgagor and Mortgagee Jointly.

**Subsequent Bankruptcy of Mortgagor.**]—Mortgagee of leaseholds held for a term of years joined with the mortgagor in leasing part of the property to A. B. for the residue of the term at a rent of 3*l.* per annum, payable to the mortgagor, his executors, administrators and assigns. The right of re-entry was reserved in the same terms. There was also a declaration that nothing therein contained should be construed to defeat, impeach, or determine the estate of the mortgagee under the mortgage deed so far as the same affected the entirety of the premises. After the execution of the deed the mortgagor became bankrupt:—Held, that A. B. was entitled to the benefit of this lease exempt from the mortgage, but that the mortgagee, and not the assignee of the bankrupt mortgagor, was entitled to the rent of 3*l.* per annum. *Edwards* v. *Jones*, 1 Coll. C. C. 247; 13 L. J., Ch. 371; 8 Jur. 416.

**Right to Sue on Covenants.**]—Where an estate pur autre vie is granted in mortgage, and mortgagor and mortgagee jointly make a lease of a portion of the mortgaged premises, reserving rent to both the lessors and to their heirs and assigns; and the lessee covenants for the payment of the rent accordingly; on the death of the mortgagee the mortgagor may maintain an action of covenant for non-payment of the rent, which accrues due in his own lifetime, the covenant being quoad the mortgagor a covenant in gross; but, semble, that the rent which accrues due subsequently to his death, goes to the heir-at-law of the mortgagee, who may sue upon the covenant notwithstanding the

mortgagor having survived the mortgagee, for the court will mould such a covenant so as to make the rent go, on the death of the survivor of the lessors, to the party entitled to the reversion. *Thwaites* v. *M'Donough*, 2 Ir. Eq. R. 97.

**Right of Re-entry—Breach of Conditions.**]—A mortgagee and mortgagor demised leasehold premises to J. for a term of years, reserving to them, or either of them, a right of re-entry if J. should assign without consent of the mortgagor. After several assignments, made with the consent of the mortgagor before 22 & 23 Vict. c. 35, s. 1, an assignee in a deed (to which the mortgagor was a party for the purpose of assenting thereto) covenanted with the mortgagor not to assign without his consent, and a condition of re-entry was reserved to the mortgagor in case of such assignment. An ejectment was brought by the mortgagee and mortgagor to recover possession upon a breach of the condition:—Held, first that the mortgagee could not recover under the condition of re-entry in the original lease, as his right of re-entry was determined by the assignment with consent prior to the 22 & 23 Vict. c. 35. *Saunders* v. *Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115; 11 Jur. (N.S.) 655; 13 W. R. 814.

Held, secondly, that the mortgagor could not recover upon the right of re-entry reserved in the assignment, because he had no legal interest in the reversion. *Ib.*

Held, thirdly, that, as from the recitals in the assignment it appeared that the mortgagor had no legal estate in the reversion, the assignee was not estopped from setting up such want of legal title in the mortgagor as a defence to the action. *Ib.*

### d. Distress.

**By Mortgagor in Possession.**]—A mortgagor in possession has, in the absence of interference by the mortgagee, an implied authority from the mortgagee to distrain upon the tenant of the mortgaged property for the rent due in respect thereof; and, although it may be necessary for the mortgagor to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name. *Reece* v. *Strousberg*, 54 L. T. 133; 50 J. P. 292.

Where a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he during such permission is præsumptione juris authorised, if it should become necessary, to realise the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. *Trent* v. *Hunt*, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899; 1 W. R. 481.

A mortgagor in possession distrained for rent accruing due after the mortgage, but the notice of the distress described the rent as due to himself:—Held, that he could make cognizance as the bailiff of the mortgagee. *Ib.*

—— **After Receiver appointed by Mortgagee.**]—A mortgagee appointed a receiver of the income of the mortgaged property under the Conveyancing Act, 1881, and gave notice of the appointment to the mortgagor. The mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver. The mortgagor claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent:—Held, that an injunction must be granted to restrain the mortgagor from interfering with the receiver or receiving the rent. *Bayly* v. *Went*, 51 L. T. 764.

Semble, that even if the mortgagor had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests. *Ib.*

**By Mortgagee.**]—A. agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, and provided that A. should put the premises in repair. B. alleged that, prior to the agreement being signed, A. promised verbally, that if B. would take the farm the buildings should be put into a thorough state of repair, and that no rent should be demanded till this was done, and that on the faith of this promise B. took the farm. A. afterwards mortgaged the premises to C., who gave to B. notice of the mortgage, and that the principal and interest were in arrear, and directed him to pay the rent to C. B. then set up the alleged collateral agreement, of which C. was previously unaware. C., after notice, distrained for the rent reserved by the written agreement, and due before and after the date of his mortgage. In an action by B. against C. for an injunction to restrain him for holding or selling the goods, and damages for improperly distraining, and against A. and C. for specific performance of the written agreement, and the alleged parol agreement, the vice-chancellor, on the motion of the plaintiff, and subject to certain terms, granted an interlocutory injunction restraining C. from remaining in possession and from selling for a certain time:—Held, that the injunction ought not to have been granted, for that, assuming that the parol agreement existed, the mortgagee of the reversion, without notice, was not bound by it. *Carter* v. *Salmon*, 43 L. T. 490.

Semble, that a court of equity will not interfere with the legal right of distraint by the owner of the reversion for the rent due to him on the contract of tenancy, even where the distraint is for more money than is due as rent. *Ib.*

—— **Where Mortgagee Relets to Mortgagor.**]—Mortgagees entering on the mortgaged premises, and reletting them to the mortgagor, as tenant, the mortgagor cannot maintain trespass against them for distraining. *Dawson* v. *Johnson*, 1 F. & F. 656.

—— **In Possession—Account—Wilful Default.**]—A mortgagee in possession of a livery stable-yard and premises let the same to a tenant. He afterwards distrained for rent, taking possession, under such distress, of the horses and carriages standing at livery on the premises. On being threatened with legal proceedings by the owners of the chattels at livery so seized, he restored them:—Held, that, in taking the accounts in a suit in equity by a second mortgagee to redeem the premises, the first mortgagee was not answerable, as for wilful neglect or default, in not realising the chattels which he had seized and afterwards restored to the owners. *Cocks* v. *Gray*, 1 Giff. 77; 26 L. J., Ch. 607; 3 Jur. 1115; 5 W. R. 749.

*See also cases under* DISTRESS.

### e. Ejectment.

**By Mortgagee in Possession after Satisfaction of Debt.**]—A mortgagee in possession, who

appears upon the pleadings to be paid off, and has given security for the payment of the rents into court, will be restrained by injunction from ejecting the tenants in occupation of the lands, although the answer claims a sum to be still due. *Robinson* v. *Maguire*, 9 Ir. Eq. R. 269.

**Restraining Action of.**]—The court will not stay an action of ejectment by a mortgagee against his tenants at the desire of an executor who has come in as a co-defendant, and seeks to restrain the action on the ground that a suit is pending to administer the estate of his testator of which the premises mortgaged formed part. *Crowle* v. *Russell*, 27 W. R. 84.

### f. Action on Covenants.

**By Mortgagor without joining Mortgagee.**]—A mortgagor who has the control and management of the mortgaged property can maintain an action to restrain the breach of a restrictive covenant affecting the land by a tenant who has notice of the covenant, and the mortgagee need not be joined if his security is not likely to be affected. *Fairclough* v. *Marshall*, 39 L. T. 389; 27 W. R. 145.

### 6. Mines.

**Opening by Mortgagor.**]—A mine or quarry opened by the owner of the inheritance, while he was still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee. *Elias* v. *Snowdon Slate Quarries*, 48 L. J., Ch. 811; 4 App. Cas. 454; 41 L. T. 289; 28 W. R. 54—H. L. (E.)

—— **Waste.**]—The opening of a quarry by a mortgagor in possession enures to the benefit of the mortgagee of a term, so as to render him dispunishable for waste if he work the quarry during the term. *Ib.*

—— **Onus of Proof.**]—Where it is proved that a quarry was worked, and that there was a lease which would authorise the workings, it will be presumed after a great lapse of time that the workings took place under the lease, and the burden of proof will lie on a party who seeks to show that they were unauthorised. *Ib.*

—— **What is.**]—Semble, sale of the produce is not a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. *Ib.*

Where there is an open mine or quarry, the sinking of a new pit or the same vein, or breaking ground in a fresh place on the same rock, is not necessarily the opening of a new mine or quarry. *Ib.*

**Working by Mortgagee in Possession.**]—A mortgage was made of mines, and the mortgagee entered into possession. He expended large sums in working the mines, which by the terms of the deed he was entitled to work:—Held, that the mortgagee was entitled, not only to the repayment of such sums but the interest for the same. *Norton* v. *Cooper*, 25 L. J., Ch. 121.

Mortgagee in possession of mines is not bound to expend more than a prudent owner. *Rowe* v. *Wood*, 2 J. & W. 553; 22 R. R. 208.

A mortgagee in possession, who had opened and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses *Thorneycroft* v. *Crockett*, 16 Sim. 445; 12 Jur. 1081.

—— **If Security Insufficient.**]—Where a mortgagee of freehold estates enters into possession, he may work mines under the estate, if the security is insufficient for the payment of his principal, interest and costs. *Millett* v. *Davey*, 31 Beav. 470; 32 L. J., Ch. 122; 9 Jur. (N.S.) 92; 7 L. T. 551; 11 W. R. 176.

**Surcharge.**]—A mortgagor was not allowed to surcharge a mortgagee with the value of minerals which he or his lessees had raised after entering into possession, when he knew that the mines were being worked for four years, and allowed the work to proceed without remonstrance or complaint. *Ib.*

**Account.**]—A mortgagee of lands containing underneath unopened coalfields, who allowed an owner of adjacent coal mines to explore and work the coal, on a bill by the mortgagor against him, and such coal-owners, held responsible, and, besides the common decree, the court directed an account of all coal worked by the defendants, or either of them, and of the proceeds thereof. *Hood* v. *Easton*, 2 Giff. 692; 2 Jur. (N.S.) 729; 4 W. R. 575.

The principle acted upon in *Thorneycroft* v. *Crockett* (16 Sim. 445) followed.

Where a trespass was committed on the plaintiff's mine, and an aircourse and level roads made through it underground to connect adjoining collieries in mortgage to the defendants, and large quantities of the defendants' coals were thereby fraudulently gotten and removed without their knowledge:—Held, first, that the mortgagees could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding the proceeds of the coal so wrongfully removed by him had found their way, week by week, but without notice of the fraud, into the mortgagees' hands, and notwithstanding they continued the use of the aircourse and roads after taking possession, and retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated. *Powell* v. *Allen*, 4 K. & J. 343.

Held, secondly, that the court had no jurisdiction to give the plaintiff compensation in respect of consequential injury, by reason of large portions of their coal being rendered unworkable and useless to them. *Ib.*

But held, thirdly, that the mortgagees could not be allowed to retain the use of the aircourse or roads, although the continuance of that user might be no special injury to the plaintiffs. *Ib.*

Held, fourthly, that, not having themselves made such apertures, they could not be ordered to fill them up. *Ib.*

Held, fifthly, that all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not in a court of equity be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction. *Ib.*

Form of order, under such circumstances, and of decree for an account against the mortgagor and mortgagees, and as to the allowance to be made to the defendants in respect of the coal for which they were held accountable. *Ib.*

### 7. Outlay and Expenditure.

#### a. In General.

**Mortgagor's Lien for Outlay.**]—As a general rule a mortgagor can have no lien on the property mortgaged for money expended in preserving the property; but money so expended enures for the benefit of the mortgagee. *Norris* v. *Caledonian Insurance Co.*, 38 L. J., Ch. 721; L. R. 8 Eq. 127; 20 L. T. 939; 17 W. R. 954.

**Expenses of Recovering Debt.**]—A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage money. *Ellison* v. *Wright*, 3 Russ. 458; 27 R. R. 108.

**Allowance for Payments to Outgoing Tenant.**]—After the amount due to a mortgagee had been ascertained and paid, the mortgagee was held entitled to some allowance for crops, manure, &c., for which he remained liable to pay to an outgoing tenant of the mortgaged property. *Oxenham* v. *Ellis*, 18 Beav. 593.

**Mortgagee of a Newspaper—Account.**]—N. was in 1838 appointed printer of a newspaper, and in 1840 he became the mortgagee of two fourth parts of the newspaper, with a power of sale, which power he in 1841 exercised, and he sold the two fourth parts to his brother, and at the same time N. became the manager of the paper. In 1846 N. ceased to be the printer and manager, and in 1848 he obtained an assignment of the two fourth parts from his brother. In 1850 he became the purchaser of the other two fourth parts, and he was then registered as the owner of the newspaper. In 1857 the court decreed that the sale of 1841 was invalid, and the mortgagor was declared entitled to redeem. An account was directed of all sums received by N., or which but for his wilful neglect and default he might have received, in respect of the proceeds of the newspaper from the sale in 1841; and in taking such account regard was to be had to any debt or debts (other than the mortgage debt) which should be found due from the mortgagor to N. In taking the account N. claimed to be allowed to charge credit prices, on the ground that, although he was in receipt of cash payments from 1841 to 1846, yet he was entitled to apply those payments, first in discharge of a debt due to him for printing, and then in payment of the expenses of the newspaper:—Held, that he was entitled to charge, not credit, but only cash prices in the account. *Robertson* v. *Norris*, 1 Giff. 428; 5 Jur. (N.S.) 1238; 1 L. T. 123.

A balance of 2,201*l.* had been found due to N. in 1841 for printing up to that date. In 1847 N. entered into an agreement with one of the proprietors, to which the mortgagor was not a party, that he, N., would accept 400*l.* "in satisfaction of all claims upon the proprietary." In taking the account with the mortgagor, N. claimed to be allowed credit for 2,201*l.*, or for half of it, against the mortgagor; but the court disallowed the claim. *Ib.*

A person who enters into wrongful possession of property under an unjust bargain will be treated as a trespasser and wrong-doer, and be dealt with more severely than a mortgagee in possession. *Ib.*

**Mortgagee in Possession of a Publication—Account.**]—Reference to the master to take an account of sums properly expended by a mortgagee in possession of a publication, in printing, publishing and selling the work, with a direction to make just allowances:—Held, not to include the expenses of preparing the work for the press. *Whellier* v. *Macdonald*, 1 Jur. 510.

**Management of Flats—Recouping Loss.**]—A mortgage of a large block of buildings, let out in residential apartments, and containing a common kitchen and salle à manger for the use of the tenants, contained an assignment of the "rents and profits" and a power to the mortgagees to enter on the hereditaments on default of payment and "manage" and receive the rents and profits thereof. The deed contained no assignment of chattels, nor any reference to existing arrangements with tenants, but the mortgagor covenanted to pay moneys expended by the mortgagees for any of the purposes thereby authorised. At the date of the mortgage the apartments were let out to tenants under agreements, made by a former mortgagee (who had been paid off), by some of which the tenants stipulated for the supply by the landlord of attendance and cooked food, such food being generally supplied according to a tariff from time to time fixed by the manager. The mortgagees, having entered into possession, continued to supply all the tenants, whether they had contracted for the supply of attendance and food or not, with attendance and cooked food, and in so doing managed the premises at a loss:—Held, in an action by second mortgagees for an account, that the first mortgagees were entitled to be recouped the losses made by them in management, not only out of the rents of the property, but out of the surplus proceeds of sale thereof. *Bompas* v. *King*, 56 L. J., Ch. 202; 33 Ch. D. 279; 55 L. T. 190—C. A.

#### b. Insurance Premiums.

**On Fire Policy — Payment by Mortgagee without Express Contract.**]—If a mortgagee of houses, not entitled by express contract to insure the premises against fire, at the mortgagor's expense, nor entitled to require the mortgagor to insure them against fire, nevertheless does so insure them, without the privity of the mortgagor, he will not be allowed, as a matter of course, to add the premiums of the policies to his mortgage debt, and charge them against the mortgage premises. *Dobson* v. *Land*, 4 De G. & Sm. 575; 8 Hare, 216; 19 L. J., Ch. 484; 14 Jur. 288.

Mortgage deeds contained covenants on the part of the mortgagor to insure the mortgaged premises in the names of the mortgagor and mortgagees, not adding their heirs, executors, administrators, or assigns. The mortgagees entered into possession, and, after the mortgagor's death, the persons entitled to the equity of redemption not having insured the premises, the mortgagees insured in their own names only as mortgagees:—Held, that the mortgagees were entitled to add the premiums to their mortgage debt. Semble, that if the rents and profits were insufficient to keep down the interest, and pay the premiums, the mortgagees would have been entitled to be allowed interest on the premiums so paid. *Ib.*

In the absence of an express contract authorising him so to do, a mortgagee cannot, (notwithstanding his mortgagor has covenanted to insure against fire, and neglected so to do,) as against a subsequent incumbrancer, himself insure the mortgaged premises, and add the sums so paid to his mortgage debt. *Brooke* v. *Stone*, 34 L. J., Ch. 251; 12 L. T. 114; 13 W. R. 401.

—— **Mortgagee in Possession.**]—A mortgagee in possession is not entitled, in the absence of express contract, to charge in account premiums on a fire policy on the mortgaged property. *Bellamy* v. *Brickenden*, 2 J. & H. 137.

A mortgagee in possession, without express powers authorising him to do so, incurred expenditure in insuring the mortgaged estates:—Held, that the sums expended for insurance would be allowed under the usual direction as to just allowances. *Scholefield* v. *Lockwood*, 33 L. J., Ch. 106; 9 Jur. (N.S.) 1258; 8 L. T. 407; 11 W. R. 555.

**On Life Policy—Contract for Mortgagee to pay on Mortgagor's Default.**]—In a mortgage security, H. covenanted with C. & Co. to pay the principal sum (6,648*l.* 3*s.* 4*d.*) and interest thereon at 5 per cent., &c., and that he would pay during the life of R. the premiums on three policies of insurance, and that in case of default it should be lawful for C. & Co. to pay any sums requisite for keeping on foot or renewing the policies. And it was further agreed that the sums that should be so advanced should be charged upon the mortgaged premises, and carry interest at 5 per cent., and be raised in like manner as the other moneys thereby secured; provided that the total amount of the moneys secured, and to be ultimately recoverable by virtue of the mortgage security, exclusive of the sums of 3,000*l.* and 2,000*l.* secured by bonds (being part of the said principal sum), in respect whereof the proper ad valorem stamp duties had been already paid, should not exceed the sum of 3,000*l.*; the stamp impressed on the mortgage security covered only the sum of 8,000*l.*:—Held, that the master was correct in finding the amount due to the mortgagees to consist of the principal sum originally advanced, and a further sum, being the amount of moneys advanced in payment of certain only of the premiums due on the three policies of assurance, altogether amounting to the sum of 8,000*l.*, and also of the further sums of 3,417*l.* 17*s.* 7*d.* and 497*l.* 14*s.* 6*d.*, being interest due respectively on the original principal sums of 6,648*l.* 3*s.* 4*d.* and 1,351*l.* 16*s.* 8*d.*, the amount paid in respect of such premiums. *Richards* v. *Macclesfield*, 10 L. J., Ch. 329.

—— **Payment by Mortgagee of Premiums on Insurance of Life of Surety for Mortgagor.**]—An insurance was effected on the life of a surety for a mortgagor; the premiums were paid by the mortgagee, who went into possession of the mortgaged premises, but it was not proved that the mortgagor had ever been charged with them. In a redemption suit:—Held, that the mortgagor was not entitled to credit for the amount received on the policy. *Humphrey* v. *Arabin* (Ll. & G. t. Plunk. 318) approved. *Bell* v. *Ahearne*, 12 Ir. Eq. R. 576.

—— **By First Mortgagee, out of Rents, with Notice of Second Mortgage.**]—A tenant for life of leaseholds under a settlement, who is also entitled to a share of a deceased child, mortgages her interest twice, and a suit being instituted to carry out the settlement, the leaseholds are sold and others held for three lives are purchased; two of the lives drop, and a large fine being demanded to renew, a bill is filed to compel a renewal. A policy having been effected on the last life, the first mortgagee, who is in possession, with notice of the second mortgage, pays two premiums, with the authority of the tenant for life, and then allows the policy to drop. Such premiums were paid by the first mortgagee out of the rents, he being a solicitor, and managing the estate and suit himself. Another bill was afterwards filed impeaching the settlement, but ultimately dismissed with costs, and in that suit the first mortgagee is a defendant. In taking the accounts in chambers, the chief clerk disallows the premiums, and allows only costs out of pocket to the first mortgagee. Upon exceptions to that certificate:—Held, that he was right in all the disallowances. *Selater* v. *Cottam*, 3 Jur. (N.S.) 630; 5 W. R. 744.

### c. Repairs and Improvements.

**Repair—Damage through Age.**]—A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse. *Russell* v. *Smithies*, 1 Anst. 96.

—— **Assent of Mortgagor.**]—A mortgagee in possession will be allowed for repairs necessary for the support of the property, and for doing that which is essential for the protection of the title of the mortgagor, if he has got the consent of the mortgagor, or has given him notice in which he acquiesces. *Sandon* v. *Hooper*, 6 Beav. 246; 12 L. J., Ch. 309. *S. C.*, 14 L. J., Ch. 120.

—— **Pulling down Premises.**]—A mortgagee in possession held liable for damage occasioned by his pulling down two cottages on the property. *Ib.*

Mortgagee of a copyhold may pull down ruinous houses and build better to prevent a forfeiture. *Hardy* v. *Reeves*, 4 Ves. 480.

**Improvements.**]—Mortgagee in possession may be allowed for money laid out in increasing the value of the property, but he is not justified in increasing the value of the estate by improvements so as to cripple the mortgagor's power of redemption. *Sandon* v. *Hooper*, 6 Beav. 246; 12 L. J., Ch. 309. *S. C.*, 14 L. J., Ch. 120.

—— **Permanent.**]—In taking an account in an action between a mortgagor and a mortgagee in possession, allowance must be made for permanent improvements made by the latter while in possession, so far as the value of the premises is thereby enhanced. *Henderson* v. *Astwood*, [1894] A. C. 150; 6 R. 450—P. C.

—— **Account.**]—A mortgagee in possession is entitled to an account of moneys properly expended in improving the property. *Scholefield* v. *Lockwood*, 33 L. J., Ch. 106; 9 Jur. (N.S.) 738; 8 L. T. 409; 11 W. R. 555.

—— **Repayment.**]—If a mortgagee in possession, or a mortgagee selling under his power of sale, has reasonably expended money in permanent works on the property, he is entitled on primâ facie evidence to that effect to an inquiry whether the

outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure. Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it. *Sandon* v. *Hooper* (6 Beav. 246; 14 L. J., Ch. 120) commented on. *Shepard* v. *Jones*, 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.

—— **By Second Mortgagee.**]—A second mortgagee who is in possession of the mortgaged property and expends money in permanently improving or preserving it, is not entitled as against the first mortgagee to any charge on the property for the money so expended. *Landowners' West of England, &c., Co.* v. *Ashford*, 50 L. J., Ch. 276; 16 Ch. D. 411; 44 L. T. 20.

—— **With Consent.**]—On consent, in equity, mortgagee allowed to expend sums in improvements, and to add amount to his charge on premises. *Smith, Ex parte, Cunnington, In re*, 3 Mont. & Ayr. 63; 2 Deac. 236.

—— **Allowance for.**]—A feme sole seised in fee, subject to a mortgage, married A. In ten years A. paid off the mortgage, and took an assignment to B. in trust for himself, and then made considerable improvements. A., having issue two daughters, by his will devised the lands to the youngest, and died; his wife survived, and enjoyed the lands for her life; on her death, the eldest daughter brought her bill against her sister to redeem, but the question was, upon what terms? Per cur., there shall be no allowance to A. for improvements before the assignment to B.; but from thence the devisee shall be allowed two-thirds of the lasting improvements, but no interest during the devisor's life, for a tenant for life is bound to keep down the interest during his estate. *Newling* v. *Abbot*, 1 Vin. Abr. 185, Ca. 8.

—— **Under Decree.**]—Where a decree directed the chief remembrancer to take an account of what the defendant, a mortgagee in possession, had received, or without wilful default might have received, out of the premises; and that in taking this account all parties were to have all just and fair allowances; he cannot make an allowance to the mortgagee for valuable and lasting improvements. *Murphy* v. *Meade*, 1 Jones, 620.

**Practice.**]—In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to necessary repairs, under the head of "just allowances"; but, to entitle him to permanent improvements, or substantial repairs, he must make out a case for them at the trial. *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*, 47 L. J., Ch. 152; 7 Ch. D. 192; 26 W. R. 348.

—— **Evidence.**] — Mortgagee in possession claiming upon a bill for redemption to be allowed for substantial repairs and lasting improvements, but adducing no proof of any such expenditure, held not entitled to any inquiry on the subject. *Sandon* v. *Hooper*, 6 Beav. 246; 12 L. J., Ch. 309. Affirmed, 14 L. J., Ch. 120.

—— **Objection by Mortgagor.**] — Where a mortgagor filed a bill for redemption against a mortgagee in possession, who claimed allowances for repairs and improvements, which the mortgagor objected to, as being unnecessary and improper, such objection must be raised by the bill; otherwise the mortgagor will be only entitled to an ordinary decree allowing "necessary repairs and lasting improvements." *Powell* v. *Trotter*, 1 Dr. & Sm. 388; 7 Jur. (N.S.) 206; 4 L. T. 45.

### d. Rents and Fines Disbursed.

**Mortgagor's Rent Paid by Mortgagee.**]—If a mortgagor of leasehold premises allows an arrear of rent to fall due, and an ejectment to be brought by the landlord, the mortgagee may pay the arrear and costs, and apply for a receiver. *Kelly* v. *Staunton*, 1 Hog. 393.

**Advances for Preservation of Estate—Right to Sale or Receiver.**]—Advances made by a mortgagee for the preservation of the estate (e.g. head rent paid by him) follow the nature of the mortgage security, and, if the mortgagee is not entitled to foreclose the mortgage until after the decease of mortgagor, neither is he entitled, during the life of the mortgagor, to a sale of the estate for payof such advances; but, if necessary, a receiver will be appointed to keep down the interest on the mortgage debt and advances. *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521; 4 Ir. Eq. R. 482.

—— **To Tenant for Life—Enforcement against Inheritance.**] — If the assignee of a mortgage knowingly suffers a tenant for life of the equity of redemption, put in settlement since the mortgage, to remain in possession without paying head rents, and then advances him money to save the estate from eviction: semble, the sum advanced may be enforced notwithstanding, as salvage, against the inheritance. *Hill* v. *Brown*, 6 Ir. Eq. R. 403; Dr. 426.

**Renewal Fines.**]—Mortgagee of a leasehold interest paying renewal fines was reimbursed out of the estate. *Hamilton* v. *Denny*, 1 Ball & B. 202; 12 R. R. 14.

Where the mortgagor of a leasehold estate has not covenanted that he will procure the lives to be filled up, the mortgagee may do it, and, on adding the expenses of renewal to the principal, it shall carry interest. *Lacon* v. *Mertins*, 3 Atk. 4.

### e. Commission and Receivership.

**Commission—Stipulation for.**]—A mortgagee cannot, at the time he advances money, stipulate for an advantage not strictly belonging to the contract of mortgage. *Broad* v. *Selfe*, 9 Jur. (N.S.) 885; 11 W. R. 1036.

A mortgagee stipulated with the mortgagor that he should sell the mortgaged premises and charge a commission upon the sale, in addition to his expenses in effecting the sale. The mortgagor revoked the authority to sell, and the mortgagee filed a bill for foreclosure, and on account of what was due for principal and interest, commission, and expenses:—Held, that the charge for commission was not covered by the security, but the mortgagee having incurred expenses in attempting to sell under the contract, an inquiry was directed in respect thereof. *Ib.*

A mortgagee deed contained a proviso for redemption on payment of the debt, which was a sum advanced to redeem the lands from eviction, and also contained a stipulation that the sum of 100*l.* a year was to be allowed to the mortgagee, who had an immediate right to go into possession, for his trouble in managing the lands of which he should be in possession; the mortgagee went into possession on the execution of the mortgage, and, in a redemption suit:—Held, that the stipulation for 100*l.* a year was void, and refused to allow the mortgagee credit for it in taking the account. *Comyns* v. *Comyns*, Ir. R. 5 Eq. 583.

Stipulations for commission on receipt of rents and conversion of arrears of interest into principal inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit. *Eyre* v. *Hughes*, 45 L. J., Ch. 395; 2 Ch. D. 148; 34 L. T. 211; 24 W. R. 597.

If the contract between the parties entitles a mortgagee to any commission he may claim, either in taking the account of what is due on the mortgage, or under the head of just allowances. But where the only commission to which a mortgagee was entitled was upon any renewal of the mortgagor's promissory note which he might accept, and, though payment was not demanded upon its becoming due, the note was not in fact renewed:—Held, that the fact that the mortgagor had been placed in as beneficial a position as if the note had been renewed, did not make the commission payable. *Bucknell* v. *Vickery*, 64 L. T. 701—P. C.

Where advances have been made by a mortgagee to a mortgagor upon security of a speculative character, such as a building estate, the court will, in taking the account in a redemption action, allow to the mortgagee sums actually deducted by him for commission or bonus at the times of making the advances, provided the deductions were made as part of the mortgage contract, under a bargain deliberately entered into by the parties while on equal terms, and knowing perfectly well what they were doing, and without any improper pressure, unfair dealing, or undue influence on the part of the mortgagee; the court treating the transaction in each case as amounting in fact to the payment of the whole amount of the advance to the mortgagor and the return of a certain part of it to the mortgagee as a consideration for the accommodation. *Potter* v. *Edwards* (26 L. J., Ch. 468) followed. *Broad* v. *Selfe* (11 W. R. 1036), and *James* v. *Kerr* (40 Ch. D. 449) discussed. *Mainland* v. *Upjohn*, 58 L. J., Ch. 361; 41 Ch. D. 126; 60 L. T. 614; 37 W. R. 411.

—— **Under Deed.**]—A person lent money to a business firm on the security of a deed of trust for sale of the personal property of the firm (without any proviso for redemption or repayment), which deed gave him full power to manage the business, and authorised him to pay off various debts, and to retain the money due to himself. He assisted in the management of the business, and charged in account certain annual sum for his assistance, under the designation of bonuses:—Held, on a bill by a surviving partner of the firm, that the bonuses must be disallowed, and that the property must be reassigned, on payment of the sum which, exclusively of the bonuses, should be found due. *Barrett* v. *Hartly*, L. R. 2 Eq. 789; 12 Jur. (N.S.) 426; 14 L. T. 474; 14 W. R. 684.

—— **For Personal Trouble.**]—Where a party holding the control over an estate, and a power of selling it to secure the repayment of liabilities he had incurred on account of the owner, received the rents, sold the estate, and then received the purchase-money (for which, while he retained it, he was held liable to interest), he was not on account of the acts thus done by him entitled, without any previous stipulation, to claim commission for the trouble he had had in the matter. *Court* v. *Roharts*, 6 Cl. & F. 65.

A mortgagee being one of a firm of auctioneers, sold under the power of sale, and made charges for the expenses of the sale, as having been conducted by the firm:—Held, that the firm could not charge for personal trouble. *Mathison* v. *Clarke*, 3 Drew. 3; 24 L. J., Ch. 202; 18 Jur. 1020; 3 Eq. R. 127; 3 W. R. 2. And see *Miller* v. *Beale*, 27 W. R. 403.

—— **Disallowance of.**]—In taking the accounts of a mortgagee in possession, the chief clerk disallowed three claims for commission, at the rate of 5*l.* per cent., paid to agents for receiving the rents; and the disallowance was confirmed. *Stains* v. *Banks*, 9 Jur. (N.S.) 1049.

A. executed a conveyance of all his estate and property to trustees for the benefit of his creditors. His lands were under mortgage, and the mortgagees were made assignees in trust under the deed, with the usual powers and provisions for the protection and in ease of the trustees. The mortgagees immediately after the execution of the creditors' deed, appointed W., one of their number, to be receiver, who paid in the amounts received by him to the bankers, to the account of the trustee mortgagees (by name), "as assignees in trust of A.":—Held, that such entry showed W. to have received the rents as their agent, not in their character of mortgagees, but in their character of trustees, and that they could not add to their mortgage money and interest, and costs, charges, and expenses properly incurred, the commission paid or allowed to W. upon the rents received by him. *Nicholson* v. *Tutin*, 3 K. & J. 159; 3 Jur. (N.S.) 235.

The defendants, who were mortgagees of two houses, went into possession as mortgagees, and appointed M., one of their directors, to collect the rents as their agent:—Held, that he could not be allowed any commission out of the rents. *Kavanagh* v. *Workingman's Benefit Building Society*, [1896] 1 Ir. R. 56—C. A.

**Receivership — By Mortgagee himself.**]—A mortgagee is not entitled to charge receiver's fees for himself. *Carew* v. *Johnston*, 2 Sch. & Lef. 301.

The court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed he shall be paid for his trouble of receiving the rents. *French* v. *Baron*, 2 Atk. 120.

Mortgagee or trustee manages the estate himself; he is not to be allowed for his own care and pains: otherwise, if he employs a bailiff. *Bonithon* v. *Hockmore*, 1 Vern. 316.

—— **By Agent for Mortgagee.**]—It is a general rule that mortgagee shall not charge for receiving

the rents personally, though he may have a receiver at the expense of the mortgagor. Liberty was therefore given to surcharge and falsify an account settled with an allowance; acquiescence having no effect, the mortgagee being attorney to mortgagor. *Langstaffe* v. *Fenwick*, 10 Ves. 405; 8 R. R. 8.

Mortgagee allowed expense of receiver, the property consisting of small houses at small rents, and mortgagee living at a distance. *Davis* v. *Dendy*, 3 Madd. 170; 18 R. R. 209.

Under a proviso in a mortgage deed for reduction of interest on punctual payment, a mortgagee in possession through the default of the mortgagor is entitled, on the accounts being taken, to charge the mortgagor, in a proper case, with the commission paid to a receiver for collecting the rents. *Stains* v. *Banks*, (9 Jur. (N.S.) 1049; reversed on appeal, Reg. Lib. 7 B. 1863, 1761), considered. *Union Bank of London* v. *Ingram*, 50 L. J., Ch. 74; 16 Ch. D. 53; 43 L. T. 659; 29 W. R. 209.

—— **By Creditor.**]—A creditor in possession of his debtor's estate, under a power of attorney, taking an assignment of a mortgage, directed to account as agent, and allowed receiver's fees, so long as the trusts imposed by the power required him to be in possession, after that to be charged as mortgagee in possession. Expenses incurred by mortgagee in possession for the protection of the estate, acquiesced in by mortgagor, allowed. After decree for redemption on payment, on principal, interest, and costs, mortgagee, though overpaid, entitled to costs. *Trimleston* v. *Hamill*, 1 Ball & B. 377; 12 R. R. 38.

Creditor going into possession as quasi mortgagee, not entitled to receiver's fees. *Id.* 384.

### 8. Rents and Profits.

#### a. Right of Mortgagee to take.

**On Entry or Notice.**]—A legal mortgagee is not entitled to the rents of the mortgaged premises until he makes an actual entry, or gives notice to the tenant to pay the rent to him: and the commissioner's order for the sale of the property is not equivalent for this purpose. *Living, Ex parte, Tombs, In re*, 2 Mont. & Ayr. 223; 1 Deac. 1.

A. was seised in fee of a house and two acres of land, which he had let to B. A. mortgaged this property to C. in fee, and it was arranged, between A., B. and C., that B. should pay the amount of the interest on the mortgage to C., and the residue of the rent to A. After this, C. gave notice to B. to pay the whole rent to him. B. did so:—Held, that by reason of the arrangement B. was not justified in so doing; but, if there had been no such arrangement, it would have been otherwise. *Whitmore* v. *Walker*, 2 Car. & K. 615.

A. was seised in fee of nine acres of land charged with legacies, for which there was a power of distraining. A. let the land to B., and the legatees assigned their legacies to C., who gave notice to B. to pay the rent to him:—Held, that B. was not justified in so doing upon a notice only, although he would have been under a threat of a distress. *Ib.*

**Intention of Parties as to.**]—The respondent mortgaged a sheep run to the appellant. The deed fixed no time for the repayment of the money, but only stipulated that, if the mortgagor should make default in payment of the amount on demand, the mortgagee should be at liberty to enter. It appeared from the covenants in the deed that it was the intention of the parties that the mortgagor should remain in possession until default was made; but there was no express stipulation to that effect. During the absence of the respondent the appellant sent an agent to the station with a demand in writing for repayment, which was served on the respondent's wife, and in default of payment the appellant's agent took immediate possession of the run and the sheep on it:—Held, that, as the respondent had no opportunity of inquiring into the truth of the agent's statement, there was no default which justified the appellant in entering into possession and seizing the property, and that the respondent was entitled to substantial damages. *Moore* v. *Shelley*, 52 L. J., P. C., 35; 8 App Cas. 285; 48 L. T. 918.

**Rents—What are.**]—Under a mortgage of wharves and wharehouses occupied by the mortgagors for their business of wharfingers and warehousemen:—Held, that the mortgagees going into possession were not entitled to receive debts due to the mortgagors for warehousing goods, though the charges out of which the debts arose were termed rents, and were by act of parliament recoverable (amongst other charges) by distraint and sale of the goods in respect of which they were incurred. *Anderson* v. *Butler's Wharf Co.*, 48 L. J., Ch. 824.

Payments agreed to be made by the actual occupier of the soil, under a licence to dig earth and make bricks, are in the nature of rent, and, as such, a mortgagee of the premises is entitled, after notice, to all rent in arrear at the time of such notice, as well as all that may afterwards become due. *Hankey, Ex parte*, Mont. & M'Ar. 247.

—— **Arrears of.**]—Semble, a mortgagee going into possession is entitled to receive all unpaid rents properly so called. *Anderson* v. *Butler's Wharf Co.*, 48 L. J., Ch. 824.

A mortgagee having given notice to the tenants holding the mortgaged premises, under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. *Pope* v. *Biggs*, 9 B. & C. 245; 4 Man. & Ry. 193; 7 L. J. (o.s.) K. B. 246.

—— **From what Time.**]—In general an equitable mortgagee is not entitled to the rents, &c., prior to the date of the order for sale; but when prior to bankruptcy the mortgagor absconds, and the equitable mortgagee of part of the property takes possession of that part by an agent, and a fiat issues against the mortgagor, and then the solicitor to the commission, on behalf of the creditors, and the equitable mortgagee jointly appoint the same agent to manage the whole property, which agent is subsequently adopted by the assignees:—Held, the mortgagee, though he was also petitioning creditor, was entitled to the rents, &c., from the time of his first taking possession. *Bignold, Ex parte*, 4 Deac. & C. 259; 2 Mont. & Ayr. 16, 214; 4 L. J., Bk. 58.

—— **Authority to take.**]—The deposit of title-deeds is a sufficient authority to the mortgagee to receive rents. *Garry* v. *Sharratt*, 10 B. & C. 716; 8 L. J. (o.s.) K. B. 306.

**Mortgagee taking Rent, bound by Mortgagor's Agreement.**]—An act of parliament authorised lessees of mines to make a railroad to a canal, through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railroad, and paying an annual rent. The mortgagee afterwards entered into possession, and received the rent for some time:—Held, that the mortgagee and all claiming under him were bound by the agreement. *Mold* v. *Wheatcroft*, 27 Beav. 510.

**As against Bankrupt Mortgagor's Assignee.**]—The rule, that mortgagee of estate of bankrupt suffering the rents of the mortgaged premises to go into the hands of the assignee cannot recall them, such receipts becoming part of the effects distributable amongst creditors, does not apply where the receipt of the rents by the assignee was in pursuance of agreement to pay interest, in which case the mortgagee is entitled to receive back so much of the rent as his interest amounts to, the agreement governing that case, although entered into without consent of creditors. *Calwell, Ex parte*, 1 Moll. 259.

The mortgagee of property, which has been some time untenanted, consents that the assignee of the bankrupt mortgagor shall let the premises to such person as he may think proper, the mortgagee stipulating that his consent is not to be considered as assuming the possession of the premises as mortgagee. In pursuance of this arrangement, the assignee lets the property, and receives the rents for a period of seven years, when the property is sold, but the proceeds of the sale are not sufficient to pay off the whole of what is due upon the mortgage:—Held, that the assignee, and not the mortgagee, was entitled to these bygone rents. *Carr, Ex parte, Wilckens, In re*, 2 Mont. D. & D. 534; 6 Jur. 588.

**As between Incumbrancers.**]—After second incumbrancer's filing of bill, first incumbrancer in possession cannot pay surplus rents to debtor. *Parker* v. *Calcraft*, 6 Madd. 11.

—— **Receiver.**]—When a receiver appointed on the petition or in the suit of a puisne incumbrancer is afterwards extended to the matter or suit of a prior incumbrancer, the rents received before the extension of the receiver belong to the puisne incumbrancer. *Abbott* v. *Stratten*, 3 Jo. & Lat. 603; 9 Ir. Eq. R. 233.

But rents due at the date of the extending order, and not received until afterwards, belong to the prior incumbrancer. *Ib.*

And rents due at the date of the order appointing a receiver under the judgment acts, but received afterwards, belong to the judgment creditor, and not to the debtor. *Ib.*

An equitable mortgagee is entitled to priority over a subsequent creditor, by judgment affecting the legal estate, who is in possession by a receiver, though the judgment was obtained without notice of the mortgage. *Ib.*

A prior mortgagee instituted a foreclosure suit in chancery, and obtained a decree for a sale. A puisne mortgagee instituted a similar suit in the exchequer, in which the prior mortgagee was not a party, and obtained a receiver. The receiver having brought in a sum of money, being bygone rents of the mortgaged premises:—Held, that the puisne mortgagee was not entitled to this sum as against the prior mortgagee, who had filed a bill in the exchequer to attach it. *Lismore* v. *Chamley*, Hayes, 329.

**Receiver.**]—A mortgagee of a life estate, over which a receiver had been appointed, having taken no steps to recover his debt and interest during the lifetime of the tenant for life, was held not to be entitled after his decease to a fund in court, which had been paid in by the receiver from time to time, after keeping down the interest on a prior mortgage affecting the fee, but the same was held to form part of the personal estate of the tenant for life, the mortgagor. *Flight* v. *Camac*, 25 L. J., Ch. 654; 4 W. R. 664—L. C.

A mortgagee has no title to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding that after the appointment of a receiver he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas* v. *Brigstocke*, 4 Russ. 65; 28 R. R. 4.

**Account—Right of Mortgagee to.**]—A mortgagee of a term, created for raising portions and expired, is not entitled to an account of rents and profits in the hands of a receiver accrued before the expiration of the term. *Gresley* v. *Adderley*, 1 Swanst. 573; 18 R. R. 146.

A mortgagee of a term is not entitled to a retrospective account of rents and profits. *Ib.*

Mortgagee is not entitled to account of past rents from mortgagor. *Wilson, Ex parte*, 2 V. & B. 252; 1 Rose, 444; 13 R. R. 75.

Mortgagee cannot have a decree for an account of rents for any of the years back during the possession of the mortgagor. *Higgins* v. *York Buildings Co.*, 2 Atk. 107.

A mortgagor in possession is not liable to account for the rent and profits to the mortgagee, for he ought to take the legal remedy to get into possession. *Mead* v. *Orrery (Lord)*, 3 Atk. 244.

No account of bygone rents will be directed against a mortgagor in possession, nor against his agent, nor against a person claiming under his voluntary revocable deed. *Hele* v. *Bexley (Lord)*, 20 Beav. 127.

Mortgagee cannot have an account of rents and profits received by the mortgagor, though the security being upon an estate for lives is become insufficient. *Colman* v. *St. Albans (Duke)*, 3 Ves. 25.

**Under Sequestration.**]—Sequestrator took possession of certain mortgaged premises; mortgagees on petition obtained order to have rents and profits of mortgaged premises in hands of sequestrators applied towards payment of mortgage-money, &c., and possession of estates delivered up to them. *Walker* v. *Bell*, 2 Madd. 21; 17 R. R. 174.

J. P., in 1846, made an equitable mortgage of lands by deposit of title-deeds. In December, 1849, a sequestration in the suit, to which the mortgagees were not parties, and which did not relate to the mortgaged property, was issued against J. P.'s estate. The equitable mortgagees afterwards became the transferees of a legal mortgage for another debt, executed by J. P. after the filing of the bill, but before the sequestration, but they had never been in possession:—Held, on petition by the mortgagees praying to be let into possession, that the sequestration might be discharged as against them, and that

they were entitled to the back rents in the hands of the sequestrator after payment of costs, and that the order as prayed must be made. *Tatham* v. *Parker*, 1 Jur. (N.S.) 992 ; 3 W. R. 347.

**Apportionment Act—Effect of.**]—The Apportionment Act does not disentitle a mortgagee entering into possession to back rents unrecovered. *Anderson* v. *Butler's Wharf Co.*, 48 L. J., Ch. 824.

**Statute of Limitations—Receipt a Payment.**]—If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is primâ facie a payment within the meaning of the provision of the statute of limitations. *Brocklehurst* v. *Jessop*, 7 Sim. 438.

**Attornment.**]—In an action for use and occupation by a mortgagee against a tenant, it appeared that, on the 24th of February, 1841, during a subsisting tenancy of the defendant, from year to year, the mortgage deed was executed ; subsequently, by an agreement between the mortgagor and the tenant, improvements were effected on the premises, for which the latter agreed to pay an increased rent. On the 13th of October, 1842, notice of the mortgage was given to the tenant by the mortgagee, with a demand of payment of all arrears and of all future rent ; in the action, both arrears and subsequently-accrued rents were sought to be recovered :—Held, that the plaintiff was entitled to recover such arrears, as well as subsequent rent, and also the amount of the improved rent ; for that the mortgage, and the subsequent notice of its execution, operated as an attornment within 4 Anne, c. 16, s. 9 ; and that the case was not affected by the circumstance of the defendant being a mere tenant from year to year, and not holding under a lease ; and that the relative position of the defendant and the mortgagee was not altered by the new agreement between the former and the mortgagor. *Burrows* v. *Gradin*, 1 D. & L. 213 ; 12 L. J., Q. B. 333 ; 7 Jur. 942.

—— **Avowry — Evidence.**] — A mortgagee avowed for rent due to him from the plaintiff, by virtue of a demise to him for two years, ending on the 29th of September, 1842. The plaintiff was tenant of the mortgagor, and he, with other tenants subsequently to the mortgage, on the 14th of October, 1842, attorned to the mortgagee. Opposite the plaintiff's name in the instrument of attornment was entered, "Rent 55*l.* from Michaelmas, 1840":—Held, that the avowry was well supported. *Gladman* v. *Plumer*, 10 Q. B. 473 ; 15 L. J., Q. B. 79 ; 10 Jur. 109.

**Rents, how to be Applied.**]—In 1812 a mortgage was executed by A. and B. to C.; in 1813 two judgments, and in 1815 a third judgment, were obtained by C. against A. C. entered into possession of the mortgaged lands in 1812, and continued in possession until 1855. In a redemption suit it was held that the judgments were not, so far as related to the question in this case, to be considered as incorporated in the mortgage so as to form one security, and therefore that the rents received or which might have been received by C., were to be applied, first, in payment of the interest and principal due on the mortgage ; secondly, in payment of the interest and principal due on the two judgments of 1813 ; thirdly, in payment of the interest and principal due on the judgment of 1815. *Montgomery* v. *Donohoe*, 5 Ir. Ch. R. 495.

**Practice.**]—Where the lessor of premises, at a rent payable quarterly, had given a written authority to a mortgagee to receive rent from the lessee, and the mortgagee had given notice to the lessee to pay such rent to no one but him, and the lessee had paid the mortgagee such rent from time to time, and there was still an arrear of interest due from the lessor on the mortgage :—Held, that these facts furnished no defence, under non tenuit and riens in arrear pleaded by the lessee, to an avowry of the lessor in respect of a quarter's rent, which the lessee had not paid to any one. *Wheeler* v. *Branscombe*, Dav. & M. 406 ; 5 Q. B. 373 ; 13 L. J., Q. B. 83.

Where a mortgage had been effected, and then a lease granted by the mortgagor in possession, upon which rent had become due, but before payment the mortgagee had given notice of the mortgage to the tenant in possession, and claimed the rent in arrear :—Held, in an action for use and occupation brought for such rent in arrear by the mortgagor against the tenant in possession, that an averment of such notice and claim by the mortgagee, without an accompanying averment of a consequent payment by the tenant, was no sufficient bar to the mortgagor's right of action. *Wilton* v. *Dunn*, 17 Q. B. 294 ; 21 L. J., Q. B. 60 ; 15 Jur. 1104.

### b. Account against Mortgagee for.

**Liability—On giving Notice.**]—Liability of a mortgagee who gives notice to the tenants to pay him their rents, but does not take possession, whereby a loss is occasioned. *Heales* v. *M'Murray*, 23 Beav. 401.

—— **Entry but not as Mortgagee.**]—A mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default ; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established. *Parkinson* v. *Hanbury*, 36 L. J., Ch. 292 ; L. R. 2 H. L. 1 ; 16 L. T. 243 ; 15 W. R. 642.

—— **For Default in, in not Letting.**]—Where a mortgagee in possession of leaseholds, being resident at a distance, employed an agent, and the property was advertised and let at intervals, but vacant for a long period, the mortgagee acting on the agent's advice in not letting, such mortgagee is not chargeable under a decree for wilful default in non-receipt of rent. But where a tenant is suffered to remain for several years in possession, paying no rent, and none being demanded by the mortgagee, he is liable for wilful default as to such rent. *Brandon* v. *Brandon*, 10 W. R. 287.

—— **Onus of Proof.**]—The onus lies, primâ facie, on the party charging wilful default in not letting, to prove it ; but if he shows that the property can be let, or has been let, the

onus is transferred to the other party to show that he has not been guilty of wilful default, but has been vigilant. *Ib.*

—— **On Sale by Mortgagor and Mortgagee.**]—A. mortgaged leaseholds to B., who entered into possession, received the rents, and sold a part under a power. A. afterwards mortgaged the equity of redemption to C., and A. and B. then assigned the premises and mortgage debt to D. In a foreclosure suit by C.:—Held, that B. might be called upon to account for the rents and purchase-moneys received by him. *Hinde* v. *Blake*, 11 L. J., Ch. 26.

—— **On Transferring Security.**]—Although a mortgagee in possession who voluntarily transfers his security is liable to account for the subsequent rents, he is subject to no such continuing liability when he transfers by the direction of the court in a redemption suit. *Hall* v. *Heward*, 55 L. J., Ch. 604; 32 Ch. D. 430; 54 L. T. 810; 34 W. R. 571—C. A.

—— **Receipts by Agent—Liberty to Surcharge.**]—The defendants had by the judgment in an action been held to be mortgagees in possession of certain mortgaged estates, and the usual accounts and inquiries as against mortgagees in possession were directed. The defendants brought in an account purporting to show their receipts in respect of the rents and profits of the mortgaged estates, but which in fact only showed certain lump sums received by them from one J. H. Blood, then deceased, their agent. On motion by the plaintiff for a further and better account:—Held, that the defendants were bound to render the further account, for that the receipts of Blood were as between the plaintiff and the defendants the receipts of the defendants; the defendants were bound to deliver an account showing not only what they had received from Blood, but what he had received from the tenants, and that it was a question not of technicality but of substance, for without the knowledge derived from such an account the plaintiff would be unable to proceed on the inquiry as to wilful default, which was a matter of surcharge, and that the death of the defendant's agent could not excuse the defendants from this liability. *Noyes* v. *Pollock*, 55 L. J., Ch. 54; 30 Ch. D. 336; 53 L. T. 430; 33 W. R. 787—C. A.

**Possession—Under Arrangement with Mortgagor.**]—Where mortgage is made in trust that mortgagee should continue in possession, till by perception of the rents and profits he should be satisfied the principal and interest; mortgagor may come into court of equity for an account of the profits received, as in an elegit the conusor has a right to see if the conusee on the extended value has received a satisfaction for his whole debt, and to have surplus paid to him. *Yates* v. *Hambly*, 2 Atk. 362.

—— **Under Purchase.**]—Mortgagee, having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, and takes possession under that purchase; he is bound to apply the surplus rents and profits beyond the current interest in discharge of the arrear, and in the account under a bill of foreclosure was charged accordingly. *Penrhyn (Lord)* v. *Hughes*, 5 Ves. 99.

—— **Under Conditional Agreement.**]—A. conveys lands to B., who is put into possession, but under an agreement that, if A. pays the money in ten years, B. shall reconvey. The profits appearing to be much more than the interest, upon a bill by the heir to redeem, B. ordered to account for the profits, and not permitted to set the profits against the interest. *Fulthorpe* v. *Foster*, 1 Vern. 476.

—— **Under Assignment of Lease.**]—If a lease, household and shop-goods are assigned over to another, and he comes into possession, and carries on the trade, from that time they are to be considered as money received, and an account thereof taken accordingly. *Clayton* v. *Luckin*, Moseley, 252.

—— **With Notice of Settlement.**]—R. G., on the marriage of his daughter with R. T., by a settlement of 1815, conveyed certain premises held under a lease for three lives or forty-one years, upon trusts to raise 500*l.*, and to pay the interest thereof to R. T., during the joint lives of R. T. and wife, and after his decease to his wife as jointure, and after her decease to pay the principal to the issue of the marriage; and it was agreed that said sum of 500*l.* should remain a charge on said lands for six years, and then be raised out of the rents at the rate of 50*l.* per annum, with interest. R. G., having become indebted to O. K., on the 23rd of January, 1822, with the concurrence of R. T. and wife, granted to him a rent-charge of 50*l.* a year out of a part of the said premises until the debt should be paid off; and also, on the same day, with the like concurrence of R. T. and wife, demised to him the remainder of the said premises at a rent of 50*l.* a year, to be retained until he should be paid off; and, in 1823, in consideration of a further sum, mortgaged to O. K. the said last-mentioned premises:—Held, that the settlement of 1815 could not be viewed as a mortgage, and that O. K., having dealt with the estate with notice of that settlement, was accountable for the bygone rents from the period at which he entered into the possession. *Turkington* v. *Kearnan*, Ll. & G. t. Sugd. 35.

**Allowances.**]—Where a mortgagee in possession pays rent to the ground landlord, he is to be allowed such rent in account, but not after he has purchased the reversion; but he will be allowed payments to a person for taking charge of the premises to save them from deterioration. *Brandon* v. *Brandon*, 10 W. R. 287.

—— **For Speculating.**]—Mortgagee in possession, though answerable beyond fraud for wilful default, is to take the fair rents and profits; not bound to engage in, and will not be allowed for, speculation and adventure. *Hughes* v. *Williams*, 12 Ves. 493; 8 R. R. 364.

**Taking Rents after Account taken.**]—When a mortgagee receives rents after the account has been taken, he must account on affidavit for the amount. *Oxenham* v. *Ellis*, 18 Beav. 593.

**Opening, by Receipt between Certificate and Day of Payment.**]—A mortgagee in possession who receives a sum by way of rent from the mortgaged property in the interval between the filing of the chief clerk's certificate and the day fixed for payment thereby opens the account

and cannot get a final order without getting another certificate fixing another day for redemption. *Allen* v. *Edwards*, 42 L. J., Ch. 455; 21 W. R. 471.

**Practice—Account after Settlement.**]—Mortgagor and mortgagee settle an account before a master, and now a subsequent mortgagee sues for a new account without insisting upon particulars, but only alleging the former to be false, and made by consent:—Decreed, the second mortgagee should be bound if the collusion be answered. *Needler* v. *Deeble*, 1 Ch. Ca. 299. See *Gould* v. *Tancred*, 2 Atk. 533.

—— **Surcharge.**]—A mortgagee having notice of a judgment before his foreclosure and purchase of the equity of redemption, the judgment creditor may go before the master, and surcharge and falsify the mortgagee's account; but the mortgagee is not to account for the profits since the decree of foreclosure. *Bird* v. *Gandy*, 7 Vin. Abr. 45 pl. 20.

### c. Occupation Rent.

**Where Rent Unobtainable.**]—A mortgagee of a house, having taken possession of it, will not be charged with an occupation rent for it during a time when it was in so ruinous a state that rent could not have been obtained for it. *Marshall* v. *Cave*, 3 L. J. (o.s.) Ch. 57.

**Where no actual Occupation.**]—In a suit to redeem against a mortgagee in possession, the court will not direct the master to fix and charge the defendant with an occupation rent, unless the plaintiff alleges and shows not only that the defendant has been in possession of the mortgaged estate and in receipt of the rents and profits of it, but also that he has been in the actual occupation of it or of part of it, semble. *Trulock* v. *Robey*, 15 Sim. 265; 15 L. J., Ch. 343.

**Where Value enhanced by Improvements.**]—Where a first mortgagee in possession, after decree for redemption, has expended money on permament improvements on the mortgaged property, he is not to be charged with an increased occupation rent by reason of the value of the property having been increased by the improvements he has effected, unless the expenditure in improvements is allowed to him. *Bright* v. *Campbell*, 54 L. J., Ch. 1077; 53 L. T. 428—C. A.

**Occupation before Sale by Arrangement.**]—A mortgagee in possession sold the property under his power of sale, a day being fixed for the completion of the sale, and for letting the purchaser into possession. At the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent:—Held, in an action by the mortgagor for ascertaining the amount of the balance due to him, that the mortgagee could not be charged with an occupation rent for the interval during which the purchaser had been in possession before the appointed day. *Shepard* v. *Jones*, 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.—C. A.

**From what Date Payable.**]—In a foreclosure action against a mortgagor in possession, an order having been made for the appointment of a receiver and for the tenants to attorn and pay their rents in arrear and growing rents to such receiver:—Held, that, the possession of the mortgagor being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver. *Yorkshire Banking Co.* v. *Mullan*, 56 L. J., Ch. 562; 35 Ch. D. 125; 56 L. T. 399; 35 W. R. 593.

**Giving up Possession.**]—In a redemption suit by a puisne mortgagee, a prior mortgagee in possession of part of the mortgaged lands, and who had been charged under a decree to account with a high occupation rent, was permitted to give up the lands to the receiver in the cause, upon the expiration of the current year, commencing with the day upon which he first went into possession. *Gregg* v. *Arrett*, Sau. & Sc. 674.

## 9. Timber and Waste.

### a. Rights of Mortgagee.

**Timber.**]—A mortgagee in fee may cut timber, &c., at law, but not in equity, unless his mortgage is defective. *Withrington* v. *Cotesworth*, Sel. Ch. Ca. 31.

If a mortgagee uses timber on the mortgaged premises, which has been furnished to the mortgagor, but not paid for, he will be liable, though he is afterwards evicted. *Williams* v. *Shaw*, 1 Esp. 93.

**Waste.**]—An injunction against committing waste will not be granted against a mortgagee, even though he make no affidavit denying the waste, if it appear by the affidavit of the actual occupier of the land that the alleged waste is not committed by the mortgagee, or by his authority. *Anon.*, 1 L. J. (o.s.) Ch. 119.

### b. Rights of Mortgagor.

**Timber.**]—Mortgagor restrained from cutting down timber on mortgaged premises. *Usborne* v. *Usborne*, Dick. 75.

Injunction to restrain mortgagor from cutting timber not granted unless security without timber be insufficient or scanty. *Hippesley* v. *Spencer*, 5 Madd. 422. S. P., *King* v. *Smith*, 2 Hare, 239; 7 Jur. 694.

Quære, what proportion the value of the mortgaged property should bear to the mortgage debt, in order to be deemed a sufficient security within the rule under which the court acts in restraining waste by the mortgagor. *Ib.*

A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent. *Humphreys* v. *Harrison*, 1 J. & W. 581; 21 R. R. 238.

On a motion by a mortgagee for an injunction to restrain the mortgagor from cutting timber standing upon the mortgaged land, it was admitted that the security was insufficient in its present state. The plaintiffs produced evidence that the land might at some time be used as building land, and for that purpose the timber would increase its value. On the other hand the mortgagor produced evidence that the chance of the

land becoming building land was very remote, that the trees were ready to cut, and that if they were cut down the land could be let in allotments at a higher rent. He offered to pay the money received by the sale in reduction of the mortgage debt:—Held, that the mortgagee had a right to have the timber left standing on the land, and the injunction must be granted. *Harper* v. *Aplin*, 54 L. T. 383.

**Waste.**]—Mortgage of wood and underwood; it is not waste by the mortgagor in possession to cut underwood at seasonable time, and of proper growth; but, being a bankrupt, an injunction was granted on the right of the mortgagee to have the estate sold in the plight in which it was at the bankruptcy, and to prove the rest of his debt. *Hampton* v. *Hodges*, 8 Ves. 105.

—— **Working open Quarries.**]—The opening of a quarry by a mortgagor in possession enures to the benefit of the mortgagee of a term, so as to render him dispunishable for waste if he work the quarry during the term. *Elias* v. *Snowdon Slate Quarries Co.*, 48 L. J., Ch. 811; 4 App. Cas. 454; 41 L. T. 289; 28 W. R. 54—H. L. (E.)

—— **Injunction by Mortgagor in Possession.**]—A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee. *Fairclough* v. *Marshall*, 48 L. J., Ex. 146; 4 Ex. D. 37; 39 L. T. 389; 27 W. R. 145—C. A.

—— **Practice.**]—After decree in a foreclosure suit, a mortgagor in possession began to commit waste. He was restrained by injunction, though no injunction was prayed by the bill. *Goodman* v. *Kine*, 8 Beav. 379.

## G. PRIORITY OF ESTATES, DEBTS AND INCUMBRANCES.

1. *Of Mortgagee in General*, 1535.
2. *Of Puisne Incumbrancer*, 1557.
3. *By getting in Outstanding Legal Estate*, 1566.
4. *Of Equitable Mortgagee by Deposit*, 1573.
5. *Registration—Effect*, 1578.
6. *By Possession of Deeds*, 1584.
7. *Mortgages of Personalty—Notice to Legal Owner*, 1692.

### 1. Of Mortgagee in General.

#### a. To Prior Estates.

**Under Mortgage in Fee by Tenant for Life.**]—Bill by tenant in tail in possession under marriage settlement, for discovery and delivery of title deeds. Plea, mortgage by tenant for life allowing himself to be seised in fee, and in possession of premises and deeds as apparent owner, allowed, upon rule that equity gives no assistance against purchaser for valuable consideration without notice. *Wallwyn* v. *Lee*, 9 Ves. 24; 7. R. R. 142.

Averments necessary to plea of purchase for valuable consideration without notice, that vendor or mortgagor was owner or pretended owner, and that he was in possession, not that purchaser was. *Id.* 32.

Tenant for life makes mortgage in fee, pretending to be seised in fee; the mortgagee not having notice of the settlement is not bound. *Putland* v. *Burrows*, 5 Bro. P. C. 236.

Tenant for life, remainder over, mortgages and levies a fine, whereby estate is forfeited, and remainderman recovers in ejectment; yet mortgagee, having no notice of his being tenant for life only, and mortgagor having made affidavit that he was entitled absolutely as heir-at-law, and that there was no will:—Held, entitled for life of mortgagor. *Willis* v. *Fineux*, Pre. Ch. 108.

—— **Forfeiture.**]—The estate of a tenant for life was liable to forfeiture on his mortgaging it. He mortgaged it to A., unknown to the parties taking under the forfeiture:—Held, that A. was liable to account to them for the rents, at all events from the filing of the bill, and, beyond that, from the time he had notice of the trusts creating the forfeiture. *Hennessey* v. *Bray*, 33 Beav. 96.

**By Purchase of Annuity having Priority over Claimants.**]—In 1829 A. secured an annuity on trust funds, and in 1841 he, for valuable consideration, assigned his interest in the same funds, in trust to raise 1,100*l.* and redeem the annuity, and hold the residue on trusts for his family. The trustees accordingly raised the 1,100*l.* by mortgage and redeemed the annuity, and the trust funds were assigned to the mortgagees, but no transfer was made of the annuity. The mortgage deed stated the consideration to have been for the repurchase and extinction of the annuity. The annuity had originally priority over certain claimants, but the deed of 1841 had not:—Held, that, to the extent of the moneys paid for the repurchase of the annuity, the mortgagees had priority over these claimants. *Irby* v. *Irby*, 25 Beav. 632.

**To Prior Equitable Right Undisclosed.**]—Upon the treaty for a mortgage of an estate, a person who was entitled to be recouped out of the estate, in case a certain incumbrance was levied out of his own estate, was in communication with the mortgagee upon the subject of the mortgage, but did not inform him of his equitable claim:—Held, that he could not afterwards set up his claim against the mortgagee. *Boyd* v. *Belton*, 1 Jo. & Lat. 730.

**Of Puisne Incumbrancers—Sale of Equity of Redemption—Bankruptcy of Mortgagor—Acquisition by Mortgagor of First Mortgage.**]—A mortgagor of lands who had sold his equity of redemption therein, and has also been discharged by process of bankruptcy from all personal liability under the mortgages affecting the lands, if he purchase a first mortgage on the lands, will be regarded as a stranger to the estate, and the equities in favour of puisne incumbrancers which might otherwise have existed against him as such mortgagor will not be revived by a subsequent repurchase of the lands. *Howard's Estate, In re*, 29 L. R., Ir. 266—C. A.

**Negligence—Money left in Hands of Solicitor for Investment—Representation that Money advanced on Mortgage.**]—A client left moneys for investment in the hands of his solicitors. The solicitors represented that the sum of 11,000*l.*, part of these moneys, was invested on mortgage of freehold property at A., belonging to a firm, and the client made no further inquiry.

The solicitors were in fact the holders of a mortgage for 55,000*l.* upon property X. at A., belonging to the firm, and they repaid themselves 11,000*l.* of the 55,000*l.* with the client's money. The firm afterwards bought property Y. at A., and mortgaged it in fee to a bank. The solicitors released the firm from the mortgage debt of 55,000*l.* on property X., and took from them a mortgage for 50,000*l.* on properties X. and Y., subsequently, by arrangement with the firm, purchasing the equity of redemption in both properties, and selling them for shares to a limited company into which the firm was, through their instrumentality, converted. These transactions all took place without the knowledge of the client :—Held, first, that the solicitors must be treated as having become trustees for the client of 11,000*l.* out of the 55,000*l.* secured by mortgage on property X. ; and, having improperly, as against the client, given up that mortgage in exchange, the client had a right under the circumstances to claim a charge for 11,000*l.* and interest upon property Y. (in which the legal estate was outstanding) as well as upon property X. :—Held, secondly, that there had been under the circumstances no such negligence or want of prudence on the part of the client as to postpone him, and that he was entitled in priority to the limited company to a charge on property Y. in which the legal estate was outstanding. *Waldron* v. *Sloper* (1 Drew. 193) distinguished. *Vernon, Ewens & Co., In re*, 56 L. J., Ch. 12 ; 33 Ch. D. 402 ; 55 L. T. 416 ; 35 W. R. 225—C. A.

**Mortgagee paying off Prior Incumbrances—Mesne Incumbrancers.**]—In 1854 lands were conveyed to trustees, to raise 75,000*l.* for the discharge of incumbrances. The money was not raised, but in 1857 T. and S., having paid off and taken transfers of the incumbrances, took from the trustees of the deed of 1854, and the mortgagor, an assignment of the 75,000*l.*, and a mortgage of the property comprised in the trust deed for securing the 75,000*l.* and interest. In the meantime other incumbrances had been created : —Held, that T. and S. could only claim priority over the intervening incumbrances to the extent of the principal and interest secured by the transferred incumbrances ; but that, as against all incumbrances subsequent to their assignment and mortgage, they were entitled to priority in respect of the whole 75,000*l.* and interest. *Thompson* v. *Hudson*, 36 L. J., Ch. 388 ; L. R. 2 Ch. 255 ; 15 W. R. 697.

**To Trusts of Will.**]—T. being under a will trustee of 800*l.* for two persons, in moieties, leaves that sum outstanding on the promissory note of J. The note is payable to T. only, and not to T., or order. In 1839 T. becoming embarrassed, indorses the note to his banker M. (who is also the banker of J.), as a security for advances, M. having no notice of the trust ; in 1840 T. becomes beneficially entitled to one moiety of the 800*l.* ; in 1841 J. becomes a creditor of T. for goods sold and claims set off against the note. On the 7th April, 1842, J. has notice through his agent of the indorsement of the note of M. In July, 1842, T. becomes bankrupt :—Held, that, as to the moiety of the 800*l.* which is held by T. in trust, the trust must prevail against the banker's security ; secondly, that, as to the other moiety, the set-off of J. must prevail against the banker's security up to the 7th April, 1842. *Moore* v. *Jervis*, 2 Coll. C. C. 60.

**To Trusts of Settlement.**]—A settlement was made on the marriage of F. with his wife, then an infant. This deed contained a covenant by F. with the trustees that if the wife attained twenty-one he would then join and concur with her, if she would consent, and also would use his utmost endeavours to induce her to join and concur with him, in conveying certain real estate of the wife to the trustees, for the benefit of the husband and wife and the issue of the marriage. The wife attained twenty-one, and, no conveyance having been made to the trustees, she joined with her husband in mortgaging the property to S. to secure 200*l.* At the time when he advanced his money S. had no actual notice of the settlement. F. and his wife had been advised that, notwithstanding the settlement, they had power to deal with the property, and they informed C., who acted as the solicitor of S. in the transaction, of the settlement and of the advice which they had received as to its effect. C., however, told them that he should not inform S. of the settlement, as it might make him nervous about his security. The mortgage was executed in 1862, and duly acknowledged by the wife. By an accident the certificate of the acknowledgment was never filed with the officer of the Court of Common Pleas, and this omission was not supplied until 1867, when a new acknowledgment was made by the wife, and the certificate thereof filed. Meanwhile, in 1865, S. discovered the existence of the settlement, and, in 1866, filed a bill, praying for a declaration that he was entitled in respect of his mortgage to priority over the settlement :—Held, that S. was entitled to priority. *Sharpe* v. *Foy*, L. R. 4 Ch. 35 ; 17 W. R. 65.

R. on the marriage of his daughter with T., by a settlement of 1815 conveyed certain premises held under a lease for three lives or forty-one years, upon trust to raise 500*l.* and to pay the interest thereof to T. during the joint lives of T. and wife, and after his decease to his wife as jointure, and after her decease to pay the principal to the issue of the marriage ; and it was agreed that said sum of 500*l.* should remain a charge on said lands for six years, and then be raised out of the rents at the rate of 50*l.* per annum with interest. R. having become indebted to O. on the 23rd January, 1822, with the concurrence of T. and wife, granted to him a rent-charge of 50*l.* a year out of a part of the said premises until the debt should be paid off ; and also, on the same day, with the like concurrence of T. and wife, demised to him the remainder of the said premises at a rent of 50*l.* a year, to be retained until he should be paid off ; and in 1823, in consideration of a further sum, mortgaged to O. the said last-mentioned premises :—Held, that the settlement of 1815 could not be viewed as a mortgage, and that O., having dealt with the estate with notice of that settlement, was accountable for the bygone rents from the period at which he entered into the possession : —Held, also, that as the interest in the premises depended on one old life, there should be a decree for immediate payment. *Turkington* v. *Kearnan*, Ll. & G. t. Sugd. 35.

A trust fund was settled upon S. for life, remainder to his wife for life, remainder to their children. The trustees had power to invest the fund upon leaseholds for an unexpired term of

100 years. S. being possessed of a plot of ground, held for 500 years under a lease which contained a covenant to expend 2,000*l.* in building on the lands, the trustees applied the trust funds in erecting houses thereon, without obtaining an assignment of the lease or possession of the title deeds. One of the trustees, afterwards being advised that a breach of trust had been committed, commenced an action against his co-trustee and S., and obtained a judgment declaring that the trust fund was a lien upon the premises. Prior to this action S. had deposited the lease of the premises with a bank to secure his then present and future indebtedness. The court being of opinion, on the evidence, that the bank had no notice of the breach of trust, and that the trustees, though guilty of laches, were not parties to the fraudulent conduct of S.:—Held, that the bank, notwithstanding that they had not called for a legal mortgage, were entitled to priority over the claims of S.'s wife and children to the extent of advance made to S. on the foot of the equitable mortgage before service of the conditional order for a sale of the premises. *Sloane's Estate, In re*, [1895] 1 Ir. R. 146.

A trustee (a solicitor) used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor for his brother, the mortgagor, in raising money on the estate by legal and afterwards by equitable mortgages:—Held, that the legal mortgagee had priority over the cestuis que trustent, for that the fraud of the solicitor ran through the whole transaction, and prevented the imputation of notice. *Cave* v. *Cave*, or *Chaplin* v. *Cave*, 49 L. J., Ch. 505; 15 Ch. D. 639; 42 L. T. 730; 28 W. R. 793.

Held, also, that the claim of the cestuis que trustent was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time. *Ib.*

The trustees of a settlement advanced the trust-money on the security of real property, which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage-money which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconveyance. When the fraud was discovered, the cestuis que trustent under the settlement filed a bill against the new mortgagees claiming priority:—Held, that the court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance. *Pilcher* v. *Rawlins*, 41 L. J., Ch. 485; L. R. 7 Ch. 259; 25 L. T. 921; 20 W. R. 281.

The trustees of a settlement advanced the trust-money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mortgagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and shewing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:—Held, that the court would not interfere to take away the legal estate from the mortgagee. *Ib.*

Under a marriage settlement containing the usual powers of sale and exchange, with power to the trustees (of whom one was a minor), with the consent in writing of the wife, to lend the whole or part of the proceeds to the husband on his bond, the trustees, in order to make the loan, inconsiderately sold the estate under the power to the family solicitor, who, as owner thereof, raised a sum of money by way of mortgage, of which part was paid to the husband. The solicitor afterwards resold the estate, no money being paid, to the husband, who, for valuable consideration, mortgaged it to other persons, and soon after became insolvent. On a bill filed by the infants interested under the settlement, impeaching the sale:—Held, they were entitled to have the inheritance reconveyed, free from incumbrance, to the uses of the settlement. *Robinson* v. *Briggs*, 1 Sm. & G. 188; 1 W. R. 223.

The solicitor having funds in his hands, the property of another client, applied them in discharging the prior mortgage for raising the money lent to the husband, and, as owner of the estate, executed a mortgage to his client for the amount advanced:—Held, there being an infirmity in his own title, he could convey no valid equitable interest to his mortgagee. *Ib.*

**Practice — Notice.**]—The husband, as purchaser from the solicitor, being in treaty for a loan on mortgage of the estate, abstracts were delivered, which disclosed the marriage settlement, the conveyance to the solicitor as purchaser under the power, the covenant to repurchase by the husband, and the deed of confirmation by the infant trustee; the mortgage being completed:—Held, that the abstract disclosed what ought to have put the mortgagees on inquiry; and that they were affected with notice. *Ib.*

A defendant claiming as a mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill, nor proved: an inquiry, for the purpose of affecting him with notice, was refused, first, upon a petition to vary the minutes; and again, upon a rehearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy* v. *Reeves*, 5 Ves. 426.

### b. To Debts and Charges.

**Of Equitable Charge—To Garnishee Order.**]—An equitable charge given before a garnishee order is obtained takes priority of the order, even in the absence of notice of the charge. *Badeley* v. *Consolidated Bank*, 57 L. J., Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745—C. A.

—— **To Judgment Creditor in Possession by Elegit.**]—An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by an elegit and an attornment of the tenants. *Whitworth* v. *Gaugain*, 1 Ph. 728; 15 L. J., Ch. 433; 10 Jur. 531.

**Charging Order—Fund in Court.**]—A judgment creditor cannot by obtaining a charging order upon money in court belonging to his

debtor, obtain priority over a previous mortgagee. *Bell, In re, Carter* v. *Stadden*, 54 L. T. 370 ; 34 W. R. 363.

**Registration of Lis Pendens.**]—Registration of a petition for sale by the second mortgagee as a lis pendens has not the effect of notice to the first mortgagee, so as to affect the priority of further advances made by him in ignorance of such petition and registration. *O'Byrne's Estate, In re*, 15 L. R., Ir. 373—C. A.

**Of Agreement for Mortgage, over Creditors.**]—Agreement for a mortgage, specific lien against creditors. *Burn* v. *Burn*, 3 Ves. 582.

**Of Mortgagee, over Bankrupt's Assignees.**]—By a marriage settlement, a term of 500 years was vested in trustees, by demise, sale or mortgage, to raise a sum of money as portions for younger children. One of the children assigned his share in the sum, by way of mortgage, but no notice of the incumbrance was given to the trustees of the term. The mortgagor afterwards became bankrupt :—Held, that the mortgagee had not an interest in land, and that he was, therefore, not entitled to priority as against the assignees in bankruptcy. *Hughes, In re*, 33 L. J., Ch. 725 ; 10 Jur. (N.S.) 900 ; 12 W. R. 1025.

Pledge of a lease carried into effect against assignees of a bankrupt. *Russel* v. *Russel*, 1 Bro. C. C. 269.

—— **Though Conveyance Defective.**]—Mortgagee or purchaser, precedent, though by defective conveyance, shall be preferred before assignees of bankrupt. *Taylor* v. *Wheeler*, 2 Salk. 449.

**To Bankrupt's Creditors.**]—Mortgagee who has paid arrears of rent on bankrupt's estate, unless he has an order to stand in landlord's place, shall not be preferred to the creditors under the commission. *Anon.*, 1 Atk. 103.

**Purchase, by Mortgagor's Trustee in Bankruptcy, of First Mortgage.**]—A trustee in bankruptcy does not by purchasing from the first mortgagee of the bankrupt extinguish the first mortgage and make the second mortgagee the first incumbrancer on the estate. *Bell* v. *Sunderland Building Society*, 53 L. J., Ch. 509 ; 24 Ch. D. 618 ; 49 L. T. 555.

**Act of Bankruptcy.**]—An equitable mortgage, with agreement for legal mortgage. Then an act of bankruptcy ; then a legal mortgage :—Held, legal mortgage invalid, but that equitable mortgage was not merged, but revived. *Harvey, Ex parte, Emery, In re*, Mont. & C. 261 ; 3 Deac. 547 ; 4 Deac. 52.

**Of Mortgagee of Policy, over Purchaser from Trustee for Creditors.**]—In 1850 C. and D. effected a policy for 2,000*l.* with a guarantee company, and mortgaged the same to H. & Co. The company disputing their liability upon the policy, H. & Co. commenced an action against them in the name of C. and D. The company then obtained the common injunction to stay proceedings in the action. The answer of C. and D. having, after some delay, been put in, the injunction was dissolved ; and in January, 1854, a verdict was obtained for the plaintiffs in an action for 2,250*l.* Prior to the action, H. & Co. had charged their interest in the policy in favour of the Royal Bank of Liverpool ; and, pending the proceedings in the action, application was made to the bank, by the attorneys conducting the legal proceedings, to make them some advances for carrying on the action. The bank neglecting to make such advances, H. & Co. in November, 1852, assigned their property, including their interest in the policy, to trustees for their creditors, and the trustees sold the policy to B., who made advances for costs of the litigation exceeding the costs recovered against the company in the action :—Held, that the omission of the bank to furnish funds to carry on the legal proceedings was not a ground for postponing their interest in the policy to that of B. ; but held by both judges, that the bank were bound to pay B. his advances for the purposes of the litigation, with interest. *Myers* v. *United Guarantee and Life Assurance Co.*, 7 De G. M. & G. 112 ; 1 Jur. (N.S.) 833 ; 3 Eq. R. 579 ; 3 W. R. 440.

**Of Debenture Stockholders, over Elegit Creditors.**]—A scheme made under the Railway Companies Act, 1867, and confirmed by the Court of Chancery, provided that unpaid vendors of land and other mortgagees of a railway company should take debenture stock in satisfaction of their claims. Before the scheme was made a judgment creditor of the company, over whom the unpaid vendors and mortgagees had priority, had sued out a writ of elegit, and the sheriff had made a return that the company was possessed of the lands used for the purposes of the railway. The lands were in the possession of another company, by whom the railway was worked under an agreement :—Held, that the scheme did not operate, upon the principle of *Mocatta* v. *Murgatroyd* (1 P. Wms. 393), to give the elegit creditor priority over the holders of debenture stock who had taken such stock under the scheme in satisfaction of their mortgages, and that the elegit creditor, not being bound by the scheme, was entitled to no other rights than those which he had before the scheme was made. *Stevens* v. *Mid-Hants Ry.*, 29 L. T. 318.

**To Charge from which Estate Exonerated.**]—An estate subject, in conjunction with another estate, to a charge of 10,000*l.*, is afterwards mortgaged, and is then devised to the party entitled to the first charge. By agreement made with the owner of the other estate, a certain portion of the 10,000*l.* was thrown upon that estate, and it was agreed that "the remainder of the estate subject to the charge should be exonerated from the residue of the sum" :—Held, that this charge could not be set up as to such residue against the mortgagee. *Farrow* v. *Rees*, 4 Beav. 18 ; 4 Jur. 1028.

**To Lien of Company for Debts incurred by Shareholder subsequently to Mortgage of Shares.**]—A member, who was also a customer, of a trading company formed under the Companies Act, 1862, deposited the certificates of his shares with the bank to secure an advance, and notice of the deposit was given to the company. One of the articles of association provided that the company should have "a first and permanent lien and charge" on every share for all debts due to them from the holder :—Held, first, that the notice was not rendered nugatory by s. 30 of the Companies Act, 1862, but affected the company in its trading capacity with knowledge of the appellants' interest ; secondly, that the article did not

exclude the application of *Hopkinson* v. *Rolt* (9 H. L. Cas. 514), and that the company's lien for debts incurred to them by the member after the notice must be postponed to the bank's charge. *Bradford Banking Co.* v. *Briggs*, 56 L. J., Ch. 364; 12 App. Cas. 29; 56 L. T. 62; 35 W. R. 521—H. L. (E.)

**To Costs of Suit.**]—A. took a mortgage of part of the property devised by B. L.'s will. A suit was afterwards instituted by a party claiming under the will for administration of the testator's estate, to which A. was made a party for the sake of impeaching his security. A receiver was appointed, and A., who had not given the notice requisite to enable him to take possession, did not oppose. Before decree the parties entitled to the equity of redemption of the mortgaged property brought an action, with the sanction of the court, against parties asserting adverse rights, and in November, 1849, the action was, with the sanction of the court, compromised. A. was served with notice of the applications relating to these proceedings, but did not in any manner interfere. During these proceedings a decree for accounts and inquiries was made, and in November, 1849, A. was found to be first incumbrancer. In 1853 a decree on further directions was made, directing a sale, and obliging A. to concur. A. did not oppose, but shortly afterwards, having discovered that a sale would be prejudicial to him, he presented a petition for the discharge of the receiver, and to be let into possession. This was refused by the vice-chancellor, on the ground that A. was not entitled to take possession till the costs relating to the action and compromise had been paid:—Held, on appeal, that the mortgage had priority over the costs incurred in relation to the action, and over the general costs of suit, and that the prayer of the petition must be granted:—Held, also, that the decree on further directions must be varied by directing the sale to be subject to the mortgage if the mortgagee should not concur, and free from it if he did concur. *Langton* v. *Langton*, 8 De G. M. & G. 30; 24 L. J., Ch. 625; 1 Jur. (N.S.) 1078; 3 Eq. R. 394; 3 W. R. 222.

**Of Memorandum of Charge, over Post-nuptial Settlement.**]—On the 14th June, 1858, L., being indebted to the plaintiff, signed a memorandum of agreement, whereby, "in consideration of the forbearance of the plaintiff in not requiring immediate repayment of the moneys he had advanced to or for him, L. agreed to give and execute to the plaintiff a charge on the interest to which he was entitled by right of marriage in the property settled on his wife, or to which she was entitled in respect of her former marriage, as a security "for the repayment of the moneys the plaintiff had advanced to or for him, L."; and L. pledged himself not to incumber his interests in such property, or any part of it. On the 18th June, L., with the knowledge, but without the consent of the plaintiff, executed a post-nuptial settlement, whereby he conveyed all his interest in right of his wife in the property settled on her on her first marriage, to trustees, for her for life, for himself for life, and after the decease of the survivor, for the children. Afterwards, on the 13th July, L. executed a deed, purporting to be in pursuance of the agreement of the 14th June, whereby he charged all the dividends, interest and annual proceeds of the trust funds which were settled at the time of his wife's first marriage, and also his share in the trust funds themselves, with payment to the plaintiff of 800*l.* and interest. He also, by the deed, assigned his share in the trust funds to the plaintiff by way of mortgage, with a proviso for redemption to L. on repayment by him of the 800*l.* and interest:—Held, that the post-nuptial settlement could not prevail against the rights of the plaintiff under the memorandum of the 14th June. *Carew* v. *Arundell*, 8 Jur. (N.S.) 71; 5 L. T. 498.

—— **Account—Foreclosure.**]—Held, also, that the deed of the 13th July, though constituting a mere equitable security and being entirely mistaken with regard to the form of the mortgage, and the reservation of the equity of redemption, yet operated as a recognition of the debt of 800*l.*, and that, coupled with the memorandum, it gave the plaintiff a right to an account and payment of what should be found due on both securities, and, in default of payment, a right of foreclosure against L. and his assignee in insolvency. *Ib.*

**Of Covenantee under Marriage Articles, over Mortgagee of Devisee of Covenantor.**]—A., upon his marriage, in 1808, executed marriage articles, whereby he covenanted with trustees to provide at his death 30,000*l.* for an eldest son of the marriage, and (in case there should be living at his death other issue of the marriage than a son and daughter) 20,000*l.* for the younger children. He died in 1821, seised of real and personal estate, and leaving an eldest son and two daughters, by whom a suit for the administration of his assets was instituted, in which suit a receiver was appointed. Pending the suit one of the daughters died, and the eldest son, soon after coming of age, having become indebted on his own personal account to B., and being entitled, as heir or devisee to his father's real estate, executed a mortgage to B. of the real estate, to secure the debt. The deed of mortgage recited the articles, the pendency of the suit, and the intention of the eldest son to pay off his sister:—Held, that the claim of the sister, under the articles of 1808, had priority, as against the real estate of A., over the mortgage executed by A.'s eldest son. *Hynes* v. *Redington*, 10 Ir. Ch. R. 206.

**Of Portioners.**]—J. being about to mortgage an estate, upon which his younger brothers and sisters had charges, got them to join in the conveyance, and acknowledge the receipt of their portions, giving them an undertaking that he would grant them a subsequent mortgage, and enter into prior security. He afterwards makes a subsequent mortgage to plaintiff, for money lent before on bond, and a fresh sum advanced. The claims of the younger children have priority in equity, and shall be preferred to plaintiff's mortgage. *Beckett* v. *Cordley*, 1 Bro. C. C. 353.

**Of Mortgagee of Lease, over Lessor's Equity to reform the Lease.**]—A. granted to B. a lease, in which, by error, the rental was stated to be 130*l.* instead of 230*l.* B. mortgaged it to C. without notice of the mistake, and D. afterwards paid off C., but the lease was reassigned to B. and not to D.:—Held, that D.'s claim in respect of the mortgage and sums advanced by him without notice had priority over A.'s equity to reform the lease. *Garrard* v. *Frankel*, 30 Beav. 445.

**Power to create Jointure—Subsequent Mortgage, followed by Exercise of Power—Mortgage postponed to Jointure.**] — A settlement executed on the settlor's first marriage, under which he was tenant for life, with remainder to his eldest son in fee, gave power to the settlor to create a jointure for any aftertaken wife. He joined with his eldest son in mortgaging the settled lands for an advance to the son. The mortgage-deed contained two separate witnessing parts—first, a demise for five hundred years to a trustee for the lender; and, secondly, a grant of the lands in fee to the lender. The second testatum was followed by a clause reserving to the father the powers reserved to him by the settlement, and it was provided that neither principal nor interest should be called in during his lifetime, and that neither his real nor personal estate should be answerable for the moneys secured. The settlor afterwards married a second time and exercised the jointuring power: —Held, after his death, that the jointure so created took priority over the mortgage. *Evans' Estate, In re*, [1897] 1 Ir. R. 410. Affirmed in C. A.

**Mortgage by Tenant for Life—Power to raise Portions—Appointees postponed to Mortgage.**] —A tenant for life of real estates, with a power to charge 20,000*l.* for the portions of younger children, mortgaged his life estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power for the benefit of his children, and created a term of 1,000 years to secure payment of the 20,000*l.*, and, upon the marriage of one of his daughters, he appointed 5,000*l.* to her for a portion. The trustees, and also the appointees, had notice of the mortgages and of the covenant:—Held, that the appointees were not entitled to any priority, and that they must be postponed to the previous mortgage. *Hurst* v. *Hurst*, 16 Beav. 372; 22 L. J., Ch. 538; 1 W. R. 105.

**Of Puisne Mortgagee.**]—As to priority among several mortgagees. *Anon.*, 1 Eq. Abr. 320.

—— **Title by Adverse Possession.**]—T. being the equitable owner of a moiety in lands, under the will of a testator who had, in 1806, purchased the entirety, in 1812 conveyed the moiety upon trust to pay an annuity, and subject thereto, for himself in fee. In 1823 he purchased the legal fee simple in the second moiety. By a settlement in 1825 he charged the two moieties with a sum to be raised at his death. In 1830 he again mortgaged the first moiety only, and he, or his solicitor (who was also a trustee of the settlement), deposited with the second mortgagee the purchase-deeds of 1806, and the deeds of charge of 1812. In 1832 the second mortgagee first had notice of the settlement, and in 1835 she bought in the annuity. The annuitant died in 1837. In 1851 the trustee of the settlement died. Since 1832 the second mortgagee had been in possession. T. died in 1866:—Held, that a title by adverse possession had not been acquired by the second mortgagee. *Thorpe* v. *Holdsworth*, 38 L. J., Ch. 194; L. R. 7 Eq. 139; 17 W. R. 394.

—— **By Purchase of Annuity.**]—Held, also, that the second mortgagee had not, by purchase of the annuity, acquired priority over the first mortgagee. *Ib.*

—— **By taking Assignment of first Mortgage.**] —Where B., an annuitant under a will, joined with A., one of the residuary legatees, in a mortgage of their respective interests to C.; and A. afterwards with D., another residuary legatee, joined in a similar mortgage to E.; F. paid off the debt to C., and took an assignment of his mortgage:—Held, that he did not thereby entitle himself to priority over E., but that the securities ranked according to the dates. *Medley* v. *Horton*, 14 Sim. 226; 8 Jur. 853, 949.

—— **By Purchaser paying first Mortgagee's Debt.**]—A. having a reversionary interest in personalty, which he had mortgaged first to B. and then to C., agreed to sell it to D., and, D. having at A.'s request paid off B. out of the purchase-money, A. agreed that, until the sale should be completed, D. should stand in the place of B. and have the benefit of B.'s security. In the memorandum in which the agreement was expressed, there was a recital that the payment had been made to B. out of the purchase-money, and in discharge of his debt:—Held, that B.'s debt was not extinguished, but that D. was entitled to the benefit of B.'s security. *Watts* v. *Symes*, 1 De G. M. & G. 240; 16 Jur. 114. Reversing 16 Sim. 640.

In the same case the mortgagor became bankrupt. Objection to his evidence in favour of the purchaser, on the ground of interest, overruled. *S. C.*, 16 Sim. 640; 13 Jur. 245.

—— **Buying in Incumbrance for less than Debt due on it—Account.**]—Where a mortgagee buys in an incumbrance, he shall be allowed all that is due on it, though he bought it in for less; otherwise, if an heir or trustee buys in an incumbrance. *Darcy* v. *Hall*, 1 Vern. 49.

—— **Equitable Interests — Legal Estate in Trustee.**]—If a puisne incumbrancer buys in a prior mortgage, and the legal title be in a trustee, or in any third person, then the buying in such first mortgage will not avail; but, in all cases where the legal estate is standing out, the incumbrances must be paid according to their priority. *Brace* v. *Marlborough* (*Duke*), 2 P. Wms. 493; Moseley, 50. *See also* 9 Mod. 38.

**First Mortgagee taking second Mortgage jointly.**]—A., a creditor, having a security for his debt upon funds of the debtor, takes afterwards, either alone, but on behalf of himself and B., another creditor of the same debtor, or jointly with B., a security for both debts on the same funds which were the subject of A.'s separate security. A. does not thereby necessarily relinquish the separate security, or alter its precedence. *Miln* v. *Walton*, 2 Y. & C. C. C. 354; 7 Jur. 892.

**Of statutory Mortgagees — Application of Mortgage-moneys in Payment of prior Mortgages.**] — The corporation of Exeter, being owners of the Exeter Canal, obtained an act of parliament giving them powers to raise an unlimited sum upon mortgage of the canal for the purpose of carrying to completion certain improvements in the canal which the corporation had commenced some time prior to the passing of the act. The corporation raised a considerable sum under the powers given them by the act, a large portion of which they appplied in paying off certain mortgages, which prior to the passing

of the act they had effected upon their corporate property other than the canal, and the money raised whereby had been expended by them in the improvements in the canal effected prior to the act. Upon a bill being filed by one of the mortgagees under the act, challenging such an application of the funds raised by means of the powers given by the act, it was held that, upon the true construction of the act of parliament, the corporate property, other than the canal, which had been relieved by means of the statutory funds from the mortgages created prior to the passing of the act, was the first fund for paying those mortgages, inasmuch as it was not within the powers of the corporation under the act to raise money for the payment of any mortgages previously existing; and it was declared that the moneys which had been so applied by the corporation ought to have been repaid to the statutory mortgagees rateably, and in proportion to the moneys advanced by them; and that the amount of such moneys constituted a debt due to the canal property, for which the mortgagees under the act had a lien upon the corporate property, other than the canal, comprised in the mortgages created prior to the act, so far as such property was remaining vested in the corporation. *Trevilian* v. *Exeter Corporation*, 18 Jur. 1019.

—— **Agreement for Priority.**]—A public company was formed to erect works, and borrowed money for the purpose, giving mortgages to secure repayment with interest. By several statutes the exchequer loan commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works and on the tolls and profits of such works, and priority is given to mortgages given to the commissioners, over mortgages made to private individuals, except bonâ fide creditors who at the time of the advances by the commissioners are entitled to repayment. The 57 Geo. 3, c. 34, provides that, where four-fifths in value of the creditors shall agree in writing that a priority over their claims shall be given to the commissioners, such consent shall be binding on all the creditors. The creditors of the company entered into an agreement, by which they consented to give the commissioners' mortgage priority over their own securities (in manner following), in the first place, that the commissioners should out of the annual rates and tolls be paid interest; in the next, they should then be paid interest; and, lastly, that the surplus should be applied in discharge of the principal sum advanced by the commissioners until that principal sum should be repaid in preference to all other claims:—Held, that an agreement giving this qualified priority to the commissioners was valid. *S. E. Ry.* v. *Jortin*, 6 H. L. Cas. 425; 27 L. J., Ch. 145; 4 Jur. (N.S.) 467. Reversing 6 De G. M. & G. 270.

—— **Ejectment against Mortgagor—Estoppel.**]—By an act for building a bridge, the commissioners were empowered to raise money by mortgage, and to convey, as a security, "the bridge and the toll-houses, and all the tolls, and all right, title and interest to the same," according to a form contained in the act, to hold till the money borrowed, with interest, should be paid and satisfied. The act contained no clause as to ejectment. To an ejectment brought against the clerk of the commissioners by one who was not the first mortgagee, to recover possession of the bridge, toll-houses and tolls:—Held, that the commissioners were estopped by their own deed from putting in a prior subsisting mortgage to defeat the ejectment, by shewing that all the legal estate had passed to the prior mortgagee; and this, notwithstanding that, as commissioners, they were not acting for their own benefit, but in a public capacity. *Doe* d. *Levy* v. *Horne*, 3 G. & D. 239; 3 Q. B. 757; 12 L. J., Q. B. 72; 7 Jur. 38.

**Under Lands Improvement Acts.**]—Where a part only of the land charged under the Lands Improvement Company's Acts, 1853 and 1855, is subject to a mortgage or other incumbrance, the charge executed under the authority of those acts has priority in respect of the whole amount of such charge over the mortgage or other incumbrance, until apportionment made by the inclosure commissioners, under the 70th section of the first-mentioned act, so as to enable the person entitled to such charge to exercise his remedies under those acts as if no such mortgage or incumbrance existed. *Lands Improvement Co.* v. *Richmond*, 17 C. B. 145; 25 L. J., C. P. 73; 4 W. R. 197.

**To Creditors of Testator.**]—A bill by a creditor of a testator alleged that the testator gave the residue of his estate to R. and M., charged with debts; that they, shortly after his death, mortgaged part of his estate, and the mortgage deed was framed as if the mortgagors were beneficial owners; that the mortgage-money was not applied in payment of debts; and prayed to have the mortgage postponed to the claims of the creditors. The mortgagees demurred:—Held, by Knight Bruce, L.J., that the allegations in the bill exhibited a case requiring an answer, and that it ought not to be disposed of upon demurrer; and affirming decision below, demurrer overruled. *Collingwood* v. *Russell*, 34 L. J., Ch. 22; 10 Jur. (N.S.) 1062; 11 L. T. 322; 13 W. R. 63—L.JJ.

Per Turner, L.J., the allegations in the bill, shewing that the mortgagors dealt with the estate as beneficial owners, were not sufficient to disturb such a transaction. *Ib.*

An executor, who was also devisee, subject to a charge of debts, mortgaged, by one and the same deed, real estate of the testator, and property belonging to himself personally. Subsequently he again mortgaged part of the testator's property; and by a contemporaneous deed made between the same parties, and for the same sum, mortgaged property of his own:—Held, that these circumstances were not in themselves sufficient to rebut the ordinary presumption of law; that the executor must be taken to have been acting in the due discharge of his duty; and that therefore the mortgagees must be satisfied out of the mortgaged estates in priority to the creditors of the testator. *Barrow* v. *Griffith*, 13 W. R. 41.

**Creditor's Administration Suit — Consenting to Sale.**]—In a creditor's administration action, the ordinary rule is that a mortgagee does not lose his priority by consenting to a sale of the premises mortgaged to him by the deceased. *Hilliard* v. *Moriarty*, [1894] 1 Ir. R. 316.

**To Debts and Legacies.**]—Where an estate was devised subject to debts and legacies, and the devisee was also executor of the testator, and he mortgaged the estate with a covenant against all incumbrances except the legacies which were specified:—Held, that the mort-

gagee was not subject to the debts (which turned out to be unpaid), but to a charge of a sum equal in amount to the legacies. *Eland* v. *Eland*, 1 Beav. 235; 2 Jur. 852. Affirmed 4 Myl. & Cr. 420; 8 L. J., Ch. 289; 3 Jur. 474.

Testator devised his estates charged with debts and legacies. The devisee mortgaged the estate to A., subject expressly to the legacies. A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B., but not expressly subject to the legacies, and B. is informed, falsely, by the devisee, that all the legacies had been paid:—Held, that B. took the estate subject to the legacies. *Rogers* v. *Rogers*, 6 Sim. 364.

**Practice—Decree an Estoppel.**]—A decree in a mortgagee's suit to have priorities declared, and to ascertain amounts due, is an estoppel to a party in the suit who seeks to invalidate the security of a prior incumbrancer. *Forde* v. *Tynte*, 10 L. T. 93.

—— **Right of Prior Incumbrancer to Institute Suit.**]—A mortgagee of a devisee filed a bill to enforce his security, and obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate, and had priority over the mortgage, filed a bill to have the legacy raised:—Held, that the decree in the other suit was no bar to his proceeding with his suit, for that a prior incumbrancer is not bound to go in under a decree obtained by a puisne incumbrancer, but is at liberty to institute a suit of his own. *Arnold* v. *Bainbridge*, 2 De G. F. & J. 92.

### c. To Statutes Staple.

**Of subsequent over prior Statute.**]—A., seised in fee in right of his wife, joins in a fine, and declares the uses to B. by way of mortgage for securing 15,000*l.*, and subject thereto to the use of A. for life, the remainder to the wife in fee; then A. acknowledges a statute to C. for 500*l.*; then the wife dies, and A. sells his estate for 3,000*l.* to D., the son and heir-at-law of the wife, who had no notice of the statute, and the mortgage is assigned to a third person, who paid off the 15,000*l.*, and advanced the 3,000*l.*; then D. acknowledges a statute to E., who had no notice of C.'s statute, makes his will and devises these lands to A. and dies. As to the 3,000*l.*:—Held, clearly, that it should be preferred to C.'s statute. Held, also, that E.'s statute should be preferred to C.'s because the mortgagee was but in nature of trustee for the son. *Blake* v. *Hungerford*, Pre. Ch. 158.

**Of subsequent Mortgagees.**]—Act of parliament for sale of Lord S.'s estate, and that the moneys arising by sale should be first applied to pay off the mortgages, and afterwards for payment of statutes, judgments and recognizances, with a saving to all but the rights of the heirs of Lord S.:—Decreed, that subsequent mortgages shall be paid before precedent statutes. *Ward* v. *Cecil*, 2 Vern. 711.

**Concealment.**]—A counsel, having a statute from A., advises B. to lend A. 1,000*l.* on a mortgage, and draws the mortgage with a covenant against all incumbrances, and conceals his own statute. The statute shall be postponed to the mortgage. *Draper* v. *Borlace*, 2 Vern. 370.

### d. To Crown Debts.

**In General.**]—A., by deed, assigned certain sums represented by a fund in court to B., in trust to apply the same in payment and discharge of money then due from A. to B., and in further payment of all and every the sums of money which B. might advance to A., and subject thereto in trust for A. A. died indebted to B. in the sum of 3,000*l.*, due at the date of the assignment, and also largely indebted to the Crown. A. was further indebted to a banking firm, of which B. was a partner, in a sum which was treated by the partnership as a bad debt, and in respect of which B.'s share of the loss amounted to 3,914*l.*, and a further sum of 2,313*l.* was paid after the death of B., by his executor, to the Crown, upon process being issued against the estate of B., who had been a surety to the Crown for A. The Crown claimed priority as to the whole fund in court, insisting that the property comprised in the deed consisted of choses in action, and that no notice had been given to the trustees of the fund:—Held, that the estate of B. was entitled to the benefit of the deed, in respect of the sum due at the date of it, and the sum paid by the executor, but not to the sum representing B.'s share of the loss in the partnership transaction. *Foster* v. *Hargreaves*, 1 Keen, 281.

**Of Equitable Mortgagee.**]—Where Crown had seized for its debt lands of simple contract debtor, affected with an equitable mortgage, the court ordered the money due to the mortgagee to be paid out of the proceeds of the sale before the Crown should be satisfied. *Casberd* v. *Att.-Gen.*, 6 Price, 411; 20 R. R. 671.

—— **By Deposit.**]—Deposit of title deeds by simple contract debtor of the Crown, for securing part of purchase-money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the Crown; and that, although purchaser have also given his bond to vendor for whole amount. *Ib.*

Equitable mortgage by deposit of deeds, by accountant of Crown, to one who has an opportunity of knowing mortgagor is or may become a debtor to Crown is not available against an extent. *Broughton* v. *Davis*, 1 Price, 216.

An agreement, on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property (freehold and leasehold) should stand pledged for repayment of it, and a delivery of the title deeds, amounting in equity to a mortgage or a right to a mortgage, creates a lien, binding as against the prerogative lien of the Crown in respect of a debt accruing due to the king subsequently; and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the Crown debtor, seized under an extent in chief. *Fector* v. *Philpott*, 12 Price, 197; 26 R. R. 650.

*See also* N. 3, post, col. 1715.

### e. Notice—Effect.

**In General.**]—One who lends money on a security which he is advised by a lawyer to be a good one, yet if it proves otherwise, and he has notice that another made title to it, he must deliver up all the writings relating to it, but not the mortgage deed, for there may be covenants

in that for payment of the money. *Opie* v. *Godolphin*, Pre. Ch. 548.

**Of Settlement.**]—A mortgagee, with notice of the settlement, cannot protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. *Eyre* v. *Dolphin*, 2 Ball & B. 290; 12 R. R. 94.

**Mortgagee Accountable for Rent since Possession.**]—G. on the marriage of his daughter with T., by a settlement of 1815, conveyed certain premises held under a lease for three lives or forty-one years, upon trust to raise 500*l.*, and to pay the interest thereof to T., during the joint lives of T. and wife, and after his decease to his wife as jointure, and after her decease to pay the principal to the issue of the marriage; and it was agreed that said sum of 500*l.* should remain a charge on said lands for six years, and then be raised out of the rents at the rate of 50*l.* per annum with interest. G. having become indebted to O., on the 23rd of January, 1822, with the concurrence of T. and wife, granted to him a rent charge of 50*l.* a year out of a part of the said premises until the debt should be paid off; and also, on the same day, with the like concurrence of T. and wife, demised to him the remainder of the said premises at a rent of 50*l.* a year, to be retained until he should be paid off: and in 1823, in consideration of a farther sum, mortgaged to O. the said last-mentioned premises:—Held, that the settlement of 1815 could not be viewed as a mortgage, and that O. having dealt with the estate with notice of that settlement, was accountable for the bygone rents from the period at which he entered into the possession. Held, also, that as the interest in the premises depended on one old life, there should be a decree for immediate payment. *Turkington* v. *Kearman*, Ll. & G. t. Sugd. 35.

**Mortgage ordered to be Assigned to Trustee.**]—Mortgage by husband and wife of the wife's estate, to persons who had notice of a settlement made before the marriage during the wife's infancy, ordered to be assigned to the trustee in settlement; but interests, during the life of husband and wife, to be applied to the payment of the mortgages, without prejudice to her remedy against the husband. As to what the settlement made during the wife's infancy will bind her, quære. *Durnford* v. *Lane*, 1 Bro. C. C. 106.

**Subsequent Mortgagee bound by Covenants.**]—Where a father, being seised of the absolute interest in the lands of K. and M., and of an estate for life, with remainder to his first and other sons in tail, in the lands of J., and being indebted by judgments which were charges upon all these lands, by settlement, executed on the marriage of his second son K., settles on his second son and the issue of the marriage, and, by a contemporaneous deed, conveys his life estate in F. and the reversion, subject to his life estate, in M. to his eldest son; and the eldest son thereby covenants generally to indemnify the lands settled on the second son against all the father's incumbrances:—Held, that a subsequent mortgagee of F. and M., with notice of this covenant, and of the incumbrances, was bound by them, and was not entitled to contribution as against the lands of K. *Power* v. *Standish*, 8 Ir. Eq. R. 526.

**Of Covenant—Premises subject to Annuity, in Hands of Mortgagee.**]—A father being seised of estates in tail and in fee, on his daughter's marriage covenanted with two trustees, one of whom was his son, to pay an annuity to his daughter out of the rents and income of his real and personal estates, and by deed or will to settle an estate of 200*l.* a year, or at his own election 4,000*l.* in lieu of it, on certain trusts, for the benefit of his daughter and her husband and their issue. By a subsequent deed, the father and son, no other person being a party, agreed to suffer a recovery of the entailed estates, and to sell them, and also the fee simple estates, and that out of the proceeds the father's debts (for some of which the son was surety) should be paid, and that certain sums should be taken by the father and son for their own use, and that 4,000*l.* should be paid, and provision made for the annuity pursuant to the covenant on the daughter's marriage. A recovery was accordingly suffered, and the estates were limited to the father and son in fee. The father and son afterwards agreed to abandon the last-mentioned agreement, and, in consideration of the son covenanting to pay the father's debts, the estates were conveyed by them to the son in fee. The son afterwards mortgaged the estates comprised in the recovery:—Held, that the covenant for payment of the annuity created a charge on the estates, and that, the mortgagee having had notice of that covenant, the premises were subject to the annuity, but that the covenant to settle the estate of 4,000*l.* in lieu of it created no lien or charge on any of the father's estates, and that the subsequent agreement between the father and son was merely voluntary, and was fairly abandoned by them. *Ravenshaw* v. *Hollier*, 7 Sim. 3. Affirmed, *id.* 16, n.; 4 L. J., Ch. 119.

**Of Marriage Articles.**]—By marriage articles, a husband covenanted, in consideration of his wife's portion, to settle an estate to his own use, and after his decease to the use of his heirs on the body of his intended wife, and for want of such issue, to his own right heirs for ever. The articles did not express any further intention of providing for the children of the marriage, and made a provision for the intended wife in lieu of dower. No settlement was executed; and the husband mortgaged the estate, and at the same time delivered the articles to the mortgagee:—Held, on his death, that under the articles he was entitled to a life estate only, and that the mortgagee took with notice, and could not therefore hold as against the issue of the marriage. *Davies* v. *Davies*, 4 Beav. 54.

**Of Agreement between Parties.**]—A mortgagee of leaseholds for 1,150*l.* entered into a parol agreement with the mortgagor to concur in a new mortgage for 750*l.*, to be paid to the original mortgagee in reduction of her debt, so that the new mortgage should be the first charge, but upon an express understanding that the mortgagor should execute to her a second mortgage for the balance. The new mortgage was executed accordingly; and it recited that the original mortgagee had agreed to accept 750*l.*, and to release the premises from the moneys secured by the original mortgage, and to make other arrangements with the mortgagor for payment of the residue of the 1,150*l.*; and the deed witnessed that, in pursuance of such agreement, and in consideration of 750*l.* paid to the original

mortgagee, she and the mortgagor assigned the mortgage premises to the new mortgagee for 750*l.* discharged from the original mortgage. Afterwards the 750*l.* was paid off by another person, to whom the mortgagor applied for that purpose, on an agreement for an assignment; but all parties had notice of the agreement with the original mortgagee. On the original mortgagee filing a bill to be declared first incumbrancer or to redeem:—Held, that she might adduce parol evidence of the agreement with her, and was entitled to redeem on payment of the 750*l.* and interest, but had not a lien prior to that of the person who had last advanced that sum. *Banks* v. *Whittall*, 1 De G. & Sm. 536; 17 L. J., Ch. 14, 352.

**Of Payment of Purchase Money.**]—Where a solicitor took a mortgage in fee from his client, and entered into possession, he afterwards transferred the mortgage and handed over the title-deeds, but continued in possession as the visible owner, paying interest to the transferee, and, having obtained from the latter the deeds with a view to the sale, he received the purchase-money, and the purchaser entered into possession, without any notice of the transferee's charge, until the solicitor absconded, when he was first informed of it:—Held, that, if the transferee had no notice of the payment of the purchase-money until that time, there having been a delay in the completion of the purchase on the ground of an alleged defect in the title, he was not to be postponed to the purchaser. *Stevens* v. *Sterens*, 2 Coll. C. C. 20; 14 L. J., Ch. 252; 9 Jur. 984.

**Of Charge for Payment of Debts.**]—Mortgagees with notice of a specific charge for payment of debts upon devised estates, were held, notwithstanding releases of the executors to the devisees (such devisees being themselves two of the executors, and the releases not shewing that the charges had been raised and paid), to be bound to see to the application of the mortgage money. *Braithwaite* v. *Britain*, 1 Keen, 206.

Devise for payment of debts, the trustees convey to A. for the purpose of the trust; A. mortgages to several persons, who have notice of the trust; these mortgages are good. *Hardwick* v. *Mynd*, 1 Anst. 109; 3 R. R. 562.

**By Witnessing Mortgage.**]—Where a first mortgagee is a witness to the second mortgage, though no actual proof of his knowing the contents thereof, yet, since the presumption is that he might have known the same, this shall postpone him. *Mocatta* v. *Murgatroyd*, 1 P. Wms. 394. Sed quære, see *Id.* n.

**By Mortgage being prepared by Mortgagor's Solicitor.**]—A mortgage was given for a judgment debt; there was a prior equitable charge, of which the mortgagee had no direct notice, but no investigation of title or production of deeds was had; besides which, by arrangement, the mortgagor's solicitor prepared the deed for the mortgagee's solicitor. The court concluded that the arrangement was to give a mortgage subject to existing charges, and, also, that the mortgagee was affected by the notice possessed by the mortgagor's solicitor of the prior equitable title. *Tweedale* v. *Tweedale*, 23 Beav. 341.

**Through Solicitor Acting for Two Parties.**]—L. had an equitable security, dated in 1848. C. in 1850 took a legal mortgage in fee of the same estate without notice. In May, 1851, the estate was mortgaged to W. and A. for 3,000*l.*, and in August, 1851, to K., for 2,000*l.* In December, 1851, B. and B. lent 6,000*l.* on security of same estate, and on this transaction their solicitors received notice of L.'s security. In September, 1853, H. took a transfer of the mortgages to C., W., and A. and R., without any notice of L.'s security, but employed in the transaction the solicitors who had been employed by B. and B.:—Held, that the notice received by them as solicitors for B. and B., in 1851, could not be carried on so as to affect H., and that he was entitled to tack the 3,000*l.* and 2,000*l.* to his first mortgage. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

**Through Mortgagor being the only Solicitor employed.**]—Where a mortgagor is a solicitor and prepares the mortgage deed, no other solicitor being employed in the transaction, the mortgagor will not be considered as the solicitor for the mortgagee, so as to affect the mortgagee with notice of facts within the mortgagor's knowledge, unless there be some consent on the part of the mortgagee to constitute the relation. *Espin* v. *Pemberton*, 2 De G. & J. 547; 28 L. J., Ch. 311; 5 Jur. (N.S.) 157; 7 W. R. 221. Affirming 4 Drew. 333.

**Through Solicitor acting for all Parties.**]—A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage:—Held, that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage (his fraud not excluding the effect of such notice), and took subject to it, except to the extent of the money paid by him in satisfaction of the first mortgage. *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; 25 L. J., Ch. 792; 2 Jur. (N.S.) 117; 4 W. R. 734.

**Through Solicitor party to a Fraud.**]—The rule that notice of a trust through his solicitor is not imputed to a mortgagee where the solicitor is a party to a fraud, discussed. *Cave* v. *Cave*, or *Chaplin* v. *Cave*, 49 L. J., Ch. 505; 15 Ch. D. 639; 42 L. T. 730; 28 W. R. 793.

**Constructive — Through Solicitor.**]—A solicitor mortgaged property A. to a client, retaining the deeds in his own possession. He then fraudulently deposited the deeds by way of equitable mortgage with another person, and on the same day executed a demise of property B. by way of further securing the sum due to his client on property A. The demise was never communicated to the client, but remained in the solicitor's possession until his death. Some years after the execution of the demise the solicitor executed a legal mortgage in fee of property B. to a third set of mortgagees:—Held, that, even if the first mortgagee of property A. had (which it was held he had not) constructive notice of the demise by reason of the fact that the person making it was his solicitor, such notice would not alter the voluntary character of the demise, inasmuch as notice must be acted upon before consideration

can arise out of it. *Barker. In re, Jones* v. *Bygott*, 44 L. J., Ch. 487; 23 W. R. 944.

—— **Partnership.**]—C. and B., tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets: and it became the place where the business of the firm was carried on. After this B. made a legal mortgagee in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards B. absconded, and C. was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:—Held, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C.; and that the circumstances of the debts paid by C. having been incurred since the mortgage did not affect the case. *Cavander* v. *Bulteel*, 43 L. J., Ch. 370; L. R. 9 Ch. 79; 29 L. T. 710; 22 W. R. 177.

—— **Notice of Existence of Debenture not Notice of Contents.**]—Actual notice by the solicitor of the mortgagees of the existence of certain debentures is not constructive notice of their contents and of the restrictive clause in such debentures, so as to affect the mortgagees with notice of such restrictive clause. *English and Scottish Investment Co.* v. *Brunton*, 62 L. J., Q. B. 136; [1892] 2 Q. B. 700; 4 R. 58; 67 L. T. 406; 41 W. R. 133—C. A.

**Of Memorandum of Prior Charge drawn up by puisne Mortgagee.**]—A solicitor drew up a memorandum of charge by A. in favour of the plaintiff. Afterwards the solicitor took a legal mortgage to himself from A. of the same property. The plaintiff brought an action claiming priority. There was a conflict of evidence at the trial whether the memorandum was signed at the time it was prepared, the solicitor deposing that it was not then signed, nor, to his knowledge, signed before the legal mortgage:—Held, without deciding the disputed point, that the solicitor had notice of the memorandum, which, therefore, had priority over the legal mortgage. *Huggins* v. *Burchell*, 60 L. T. 32.

**Fund in Court — Mortgagor and Mortgagee parties to Suit, Notice through.**]—After a mortgage of a reversionary interest in a share of personalty bequeathed by will, a suit was instituted for the administration of the testator's estate, to which the mortgagor and mortgagee were parties; and, after the master by his report had found the fact of the mortgage, the mortgagor made a further mortgage to the mortgagee. The latter, however, did not obtain a stop-order upon the fund in court representing the share. The mortgagor became insolvent, and the question was raised as to whether the fund (being still reversionary) passed to the assignee as being in the insolvent's order and disposition, or whether it belonged to the mortgagee, subject to the equity of redemption:—Held, that, although no stop-order had been obtained on the fund, yet, as the mortgagor and mortgagee were parties to the suit and the fund was in court, there was notice of the incumbrance, and hence, therefore, that the fund was not in the order and disposition of the insolvent, and nothing passed to the assignee but the equity of redemption. *Grainge* v. *Warner*, 12 L. T. 564; 13 W. R. 833.

**Of Equitable Mortgage — Onus.**] — An equitable mortgagee will not be preferred to a subsequent legal mortgagee, who had no notice of the equitable mortgage; and the onus lies upon the former, claiming a priority, to prove that the latter had such notice. *Hardy, Ex parte*, 2 Deac. & C. 393.

—— **Intention.**] — A mortgage was made, "subject to prior incumbrances":—Held, under the circumstances, that a prior equitable charge was not included, it being unknown to the mortgagee, and it not appearing to have been the intention of the mortgagors to include it. *Greenwood* v. *Churchill*, 6 Beav. 314; 12 L. J., Ch. 400.

—— **Deposit by Trustee with knowledge of Cestui que Trust.**]—An owner of the legal estate in realty deposited the title deeds of it with the plaintiffs, to secure moneys advanced by them to him. He afterwards admitted that he was originally trustee of the legal estate in the property for A., to whom such legal estate was afterwards conveyed. It appeared, from the balance of the evidence in the case, that A. must have known of the deposit of the deeds with the plaintiffs:—Held, that they were entitled to a decree for the sale of the realty, and payment of what was due to them, with costs of suit, to be paid by A. *Sharples* v. *Adams*, 32 Beav. 213; 8 L. T. 138; 11 W. R. 450.

—— **Avoiding Inquiry.**]—The title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant fourteen years afterwards, upon the eve of the bankruptcy of the mortgagor, took a mortgage, antedated; he had notice of the deposit, but avoided inquiring the purposes for which it was made. The court decreed for the plaintiff. *Birch* v. *Ellames*, 2 Anst. 427; 3 R. R. 601.

**Necessity for making Inquiry.**]—A person who advances money on security of property, with notice that there are charges affecting it, cannot claim as purchaser without notice of those charges, because he believed that two charges of which he was cognizant, and which were sufficient to satisfy the words, were all the charges upon it. He is bound to inquire whether these are all the charges affecting the property. *Jones* v. *Williams*, 24 Beav. 47; 3 Jur. 1066.

A false answer, or a reasonable answer, given to an inquiry, may be sufficient to dispense with further inquiries; but a purchaser cannot excuse himself for not having made proper inquiries, on the ground that had he made them there would have been no satisfactory result. *Ib.*

**Of Judgment—Undue Execution of Power.**]—A married woman having a life estate, with power to dispose of the same in trust for such person or persons, for such estate or interests, or upon or subject to such powers, provisions, charges, and limitations, as she should at any time during her life, by deed attested by two or more subscribing witnesses, or by her last will, attested by three witnesses, direct, limit and

appoint, joined her husband in executing a joint and several bond, attested by one witness only, upon which joint and several judgments were entered; and subsequently by deed, attested as prescribed by the power, she conveyed the lands to a mortgagee who had notice of the judgment:—Held, that as against the mortgagee the bond was not a due execution of the power, and that the judgments did not affect the lands in the hands of the mortgagee. *O'Callaghan* v. *Comyn*, Ll. & G. t. Plunk. 484.

**Of Money expended on Improvements.**]—A. lent to B. 550*l.* on mortgage of premises, under circumstances disclosing an equitable claim to the premises on the part of C. A sum of 320*l.* was, with C.'s knowledge, laid out in the improvement of the premises:—Held, that the mortgage must stand good as a security for 320*l.* *Hughes* v. *Seanor*, 18 W. R. 108.

**Of Mortgage by Administrator for Repairs.**]—An administrator having no power to mortgage leaseholds of the intestate under leases not containing repairing covenants, in order to raise money for repairing the property, such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised. *Ricketts* v. *Lewis*, 51 L. J., Ch. 837; 20 Ch. D. 745; 46 L. T. 368; 30 W. R. 609.

2. Of Puisne Incumbrancer.

*See also* G. 1, *a.* and *b*, cols. 1535, 1540.

a. Without Notice.

**In General.**]—Second mortgagee with notice of a former, but without notice of a trust charge antecedent to both, of which first mortgagee had notice, must take subject to that demand. Secus, if first mortgagee had not notice. *Pomfret (Earl)* v. *Nelson (Lord)*, 2 Ves. 485.

—— **With Possession of Deeds.**]—It is not a general rule in equity that second mortgagee who has the title deeds, without notice of prior incumbrance, shall be preferred; negligence alone will not postpone the first; there must be fraud. *Evans* v. *Bicknell*, 6 Ves. 183; 5 R. R. 245.

—— **Delivery up by Second to First Mortgagee.**]—Where there is a subsequent mortgagee without notice who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him, without paying him his mortgage money. *Head* v. *Egerton*, 3 P. Wms. 280.

**Grounds on which Legal Mortgage postponed to subsequent Equitable Security.**]—The court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2) where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate. But the court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee. *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 53 L. J., Ch. 629; 26 Ch. D. 482; 51 L. T. 806; 32 W. R. 626—C. A.

**Neglect to perfect Security.**]—Where a mortgagee who has obtained an order appointing a receiver and restraining the mortgagor from dealing with the property comprised in the mortgage takes no further steps, either by himself or by the receiver, to perfect his security, such neglect constitutes laches which will postpone him to a subsequent incumbrancer, who has taken without notice of any prior incumbrance, and has used due diligence. *Wigram* v. *Buckley*, 63 L. J., Ch. 689; [1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43 W. R. 147.

**Trustee lending to Beneficiary.**]—A trustee who has the legal estate, and takes from his cestui que trust an assignment of the equitable interest by way of security for money advanced to the cestui que trust, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice. *Newman* v. *Newman*, 54 L. J., Ch. 598; 28 Ch. D. 674; 52 L. T. 422; 33 W. R. 505.

**Mistake.**]—The steward of a manor mortgaged his estate four times, but entered the admittance of the third mortgage in a wrong book, contrary to the custom of the manor. Per curiam, when there is a second mortgage of part of the lands that were before in mortgage, he shall not redeem part of the first mortgage, and so put the first mortgagee to seek what is due to him out of the residue of the lands where he has a precedent title to the whole; but, paying all that is due, he shall redeem the whole:—Ordered, that the second mortgagee shall redeem what was contained in his own mortgage, and the master to settle what proportion he shall pay to the first:—Decreed also, that the fourth mortgagee, being without notice of the third, which was entered in a wrong book, the third shall be postponed until after the fourth is satisfied. *Welman* v. *Warren*, 2 Eq. Abr. 595.

**Fraud.**]—In 1873 D., in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September, 1875, conveyed by a mortgagee to H. in trust for M., and in March, 1876, by H. to M. M. was alleged to have been an accomplice of and trustee for D. In August, 1874, in pursuance of this scheme, T., claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in March, 1870, by a merely fictitious freeholder (an agent and accomplice of D.), demised the property by way of mortgage to A. In November, 1874, M. claiming to be entitled to the same property, under a fictitious lease for ninety-nine years, also dated March, 1870, and purporting to be granted to him by T., demised the property by way of mortgage to B., the mortgage deed being executed by M. only. In January, 1877, M. (to whom the legal estate had been conveyed in March, 1876,) deposited the genuine title deeds of the property with C., upon a memorandum

charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to M. and D., who came forward and stated that M. was merely a trustee for him of the property. In 1878 D., M., and T. were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and C. as equitable mortgagee entered into possession. In an action by A. to settle the priorities of himself, B. and C. as incumbrancers on the property:—Held (1), that, assuming T. to have been the agent of D., so that his representations to A. of having a good title were binding on D., such representations, followed by the acquisition of the property beneficially by D., did not bind the estate so as to give A. a prior equitable charge as against subsequent purchasers for value without notice; (2) that the like representations of M. to B., followed by the acquisition, first, of the equitable, and afterwards of the legal estate by M., did not put B. in any better position, and that the doctrine of estoppel did not apply so as to convert the fictitious title acquired by B. from M. in November, 1874, into a valid legal title ab initio upon the conveyance of the legal estate to M. in March, 1876; (3) that, as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. and B. *Keate* v. *Phillips*, 50 L. J., Ch. 664; 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710.

—— **Mortgagee allows Mortgagor to have Lease — Mortgagor deposits with Bank.**]—A mortgagee of leasehold property lent the lease to the mortgagor for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money that he had a prior charge. The mortgagor borrowed money from his bankers upon the security of a deposit of the lease, without giving them notice of the mortgage:—Held, that the mortgage must be postponed to that of the bankers. *Briggs* v. *Jones*, L. R. 10 Eq. 92; 22 L. T. 212.

—— **Of Mortgagor having Custody of Deeds.**]—C., the manager of a joint stock company, executed a legal mortgage to the company of his own freehold estate, and handed over the title deeds to them. The deeds were placed in a safe of the company, which had only one lock having duplicate keys, one of which was intrusted to C., as manager. Some time afterwards C. took out of the safe the deeds, except the mortgage, and handed them to W., to whom at the same time he executed a mortgage for money advanced to him by her, without notice of the company's security:—Held, that the mortgage of the company had priority over the mortgage to W. *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 53 L. J., Ch. 629; 26 Ch. D. 482; 51 L. T. 806; 32 W. R. 626—C. A. See also *Garnham* v. *Skipper*, 55 L. J., Ch. 263; 53 L. T. 940; 34 W. R. 135.

—— **Of Solicitor-Trustee.**]—W., the acting trustee of a marriage settlement, advanced 2,000*l.*, part of the trust funds, upon mortgage of real estate, of which he took a conveyance to himself and his co-trustee, and obtained possession of the title deeds. C., the mortgagor, was a client of W., who was a solicitor. Afterwards W. fraudulently handed over all the deeds to C. C. suppressed the mortgage deeds, and deposited the rest, in March, 1865, with a bank to secure his current account. The manager of the bank requiring a certificate of title, C. referred him to W., who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit: "I hereby certify that Mr. C. has a good title to the above properties," for which the bank paid him a fee. In 1868 W. became bankrupt, whereupon the fact of the deposit with the bank was discovered by the co-trustee and the beneficiaries; and the bank were informed of the trustee's claim. In 1869 C. died, and the mortgage deeds could not be found. In 1873 W. died. On a bill by the beneficiaries and surviving trustee of the settlement against the bank, praying for a declaration that they were first mortgagees, and for delivery up of the title deeds:—Held, that by reason of the fraud of W. notice of the first mortgage could not be imputed through him to the bank, and that the bank was a mortgagee for value without notice of the prior mortgage. *Waldy* v. *Gray*, 44 L. J., Ch. 394; L. R. 20 Eq. 238; 32 L. T. 531; 23 W. R. 676.

Decree against the bank for foreclosure simply, without any order for delivery up of the title deeds. *Ib.*

—— **Mortgage taken by Solicitor in his own Name—Deposit of Deeds by Solicitor with Bank without Notice—Priority—Negligence.**]—R., a solicitor, in 1883 received money from a client for the purpose of investment, and represented to him that he had invested it upon the security of a particular mortgage. The mortgage, however, was one which R. had previously taken in his own name, and it was never transferred to the client. He afterwards deposited the title deeds of the mortgaged property with his bankers to secure his overdrawn account, and paid interest on the mortgage to the client down to the death of the latter in 1885, and subsequently to his executors. R. died in 1888, his account being overdrawn to an extent exceeding the value of the mortgaged property, and the bank immediately gave notice of their claim to the mortgagors. The bank had no notice of the client's claim at the date of the deposit, and their notice to the mortgagors was prior to any notice given by the client's executors:—Held, (1) that R. was a trustee of the mortgage for his client, and that neither the client nor his executors had been guilty of negligence so as to deprive them of their priority; and (2) that the principle of *Dearle* v. *Hall* (3 Russ. 1) did not apply, and therefore the bank were not entitled to priority by virtue of having given notice to the mortgagors before the executors. *Richards, In re, Humber* v. *Richards*, 59 L. J., Ch. 728; 45 Ch. D. 589; 63 L. T. 451; 39 W. R. 186.

**Practice.**]—A. lends money to B. on mortgage, but, before he does so, sends C. to inquire of D., who had a prior mortgage, whether he had any incumbrance on B.'s estate, who denied he had any. This was proved by C. D., by answer, confessed C. inquired of him what money B. owed him; but denied C. told him that A. was about to lend B. any money:—Decreed, the estate should stand charged, in the first place, with A.'s debts; but upon an appeal, issue directed to try whether C. told D. that A. was about to lend money on B.'s estate. *Ibbotson* v. *Rhodes*, 2 Vern. 554.

**b. By giving Notice.**

**By third to first Mortgagee.**]—Where a third mortgagee, without notice of the second mortgage, gave notice of his incumbrance to the first mortgagee, and caused a notice to the same effect to be endorsed upon the settlement in possession of the first mortgagee, under which the mortgagor claimed title:—Held, that the third mortgagee did not thereby gain priority over the second. It appeared that the second mortgagee had no notice of the first mortgage. *Jones* v. *Jones*, 8 Sim. 633; 7 L. J., Ch. 164; 2 Jur. 589.

A first mortgage of real estate was made to A. in fee. A second mortgage was then made to B. of the same estate, together with other real estate, by a release and conveyance of the respective premises to C. as a trustee for B., with power of sale. B. afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advance to A. or C. Subsequently C. (after inquiry of A. whether he had notice of any incumbrance other than his own, and that of which C. was a trustee for B.) advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to A.:—Held, that the several mortgages took effect with regard to the different estates according to the order of time at which they were respectively created, and that their priorities were not affected by the giving, or the omitting to give, notice to the party in whom the legal estate was vested. *Wilmot* v. *Pike*, 5 Hare, 14; 9 Jur. 839.

First mortgage to W., with power of sale, and declaration of trust of residue of moneys arising from the sale, for the persons entitled to the equity of redemption. Second mortgage to R. Third mortgage, without notice of the second, to H., who was W.'s solicitor, and as such had possession of the deeds. Afterwards, other incumbrances. Then W. died, having devised mortgage and trust estates to H., and appointed him and another executors. H. sold under the power, and conveyed the mortgaged estate, paid off W.'s mortgage out of the purchase-money, and retained the balance; subsequently H. for the first time had notice of R.'s mortgage:—Held, first, that R.'s omission to give notice did not give priority either to H. or to a subsequent incumbrancer, who gave notice before R.; the estate, though subsequently converted, being real estate when the securities were executed, and to real estate the rule, as to notice giving priority, does not apply. *Rooper* v. *Harrison*, 2 K. & J. 86.

Held, secondly, that, since R. was not bound to give notice, his motives for abstaining from giving notice were, in the absence of fraud, immaterial; the rule being that an equitable incumbrancer on real estate is not postponed by any absence of activity in asserting his rights, except such as amounts to participating in fraud, or to constructive fraud. *Ib.*

Held, thirdly, that, if before the sale H. had the legal estate in the premises (and as to part, semble, that he had), still, having since parted with it, his opportunity of using it as a tabula in naufragio, to protect his own charge, was gone, and that H., having as devisee of W. paid off W.'s mortgage, held the surplus upon trust for the persons entitled to the equity of redemption; and though he might, before notice of R.'s mortgage, have paid the surplus to other subsequent incumbrancers, he could not be heard to say he had appropriated it to himself. *Ib.*

The incumbrances were declared to have priority according to the dates of the instruments. *Ib.*

Investigation of the doctrine as to the protection afforded to an incumbrancer by means of the legal estate. *Ib.*

**Neglect to take Protection.**]—A second incumbrancer, who takes a protection against a subsequent incumbrancer, has a better equity than a first incumbrancer who has neglected to take such a protection, and is consequently entitled to priority. *Foster* v. *Cockerell*, 9 Bligh (N.S.) 333; 3 Cl. & F. 456. Affirming 1 Myl. & K. 297; 2 L. J., Ch. 84. And see *Ryall* v. *Rowles*, 9 Bligh (N.S.) 377, n.

**To Trustees.**]—Upon this principle, a prior incumbrancer, who had not given notice of his security to trustees, was postponed to a subsequent incumbrancer, who had given such notice; for the notice was an effectual protection against any subsequent dealing on the part of the trustees. *Ib.*

—— **Equitable and Legal Rights.**]—But a difference in the form of the instruments under which a prior and a subsequent incumbrancer claimed, that of the prior incumbrancer giving only an equitable right, and that of the subsequent incumbrancer giving a legal right, to come upon the estates charged, does not affect the equities of the parties so as to postpone the prior incumbrancer. *Ib.*

—— **Perfecting Title — Notice to one of Several.**]—Where a prior incumbrancer on a fund in the hands of a trustee, by omitting to give notice, has not perfected his title, a subsequent incumbrancer by notice will obtain priority; but notice to one of several trustees will be sufficient whilst such party continues in the trust; and, where actual knowledge is shown, the character in which the party obtains it is immaterial. So, inquiry by the subsequent incumbrancer is immaterial where none of the trustees are cognisant of the prior incumbrance, and the result of inquiry would not therefore affect the conduct of the subsequent incumbrancer. *Meux* v. *Bell*, 1 Hare, 73; 11 L. J., Ch. 77; 6 Jur. 123.

—— **Money and Land.**]—The doctrine that incumbrancers of real estate take rank by the date of their incumbrances, and not by date of notice to the trustee, applies to the case of stock or of money which is in equity real estate. *Carew, In re*, 16 W. R. 1077.

—— **Equitable Interest in Realty.**]—A subsequent mortgagee of an equitable interest in a share of residuary real estate without notice of the prior mortgage does not obtain priority over the former mortgagee, by first giving notice of his security to the trustee in whom the legal estate is vested; notwithstanding that, by a deed of arrangement made previously to the mortgages, between the mortgagor and the other persons interested in the real estate, their interests were treated as personal estate. *Lee* v. *Howlett*, 2 K. & J. 531; 4 W. R. 406.

—— **Devise for Sale—Chose in Action.**]—But it is otherwise if the estate is vested in the

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trustee by a devise to him, in trust to sell and to divide the proceeds among several persons, of whom the mortgagor is one, and the mortgages are of the mortgagor's share in such proceeds; because then, although the mortgages may have been made before any sale took place, the subject of them could only, as regarded the mortgagor's interest therein, be considered a chose in action. *Ib.*

—— **Formal and Accidental Notice—Effect.**]—Although formal notice, to the trustee of the proceeds of real estate devised in trust for sale or of a chose in action, of an incumbrance thereupon does not give priority over an earlier incumbrance of which the trustee may have obtained accidental notice, the converse proposition, that incumbrances are to rank not in the order of notices given by the incumbrancers but of accidental knowledge obtained by the trustees, does not hold good. *Arden* v. *Arden*, 54 L. J., Ch. 655; 29 Ch. D. 702; 52 L. T. 610; 33 W. R. 593.

In order to give priority to an equitable assignment of a trust fund, it must be shewn that the trustee has such knowledge, however acquired, of the transaction, as an ordinary man of business would act upon, but it is not necessary that formal notice should be given. *Lloyd* v. *Banks*, 37 L. J., Ch. 881; L. R. 3 Ch. 488; 16 W. R. 988.

A trustee, who saw in a newspaper an advertisement relating to a petition by his cestui que trust as an insolvent debtor, believed (correctly) that the cestui que trust was insolvent, and treated such insolvency as a fact in a transaction independent of the trust. The cestui que trust two years afterwards made an equitable assignment of his interest in the trust fund by way of mortgage, of which the mortgagee gave formal notice to the trustee. Subsequently to such notice the assignees in insolvency for the first time gave formal notice of the insolvency to the trustee. On a question of priority between the mortgagee and the assignees in insolvency:—Held, that the assignees in insolvency were entitled to priority. *Ib.*

Formal notice to the trustee of a fund in which an insolvent is interested is necessary to give the assignee in insolvency priority over subsequent incumbrancers who have given notice. Therefore, knowledge of the insolvency acquired aliunde by the solicitor of the trustees is insufficient to give priority to the assignee. *Brown, In re*, 37 L. J., Ch. 171; L. R. 5 Eq. 88.

A person, having become insolvent, obtained his discharge under the Insolvent Debtors Act, and subsequently borrowed money of two persons successively on a reversionary interest in a fund to which he was entitled in right of his wife, the mortgagees giving formal notice to the trustees of the fund. The assignees in insolvency gave no notice of the insolvency, but it happened that the solicitor of the trustees was aware of the insolvency:—Held, that the assignees for value who gave actual notice were entitled to priority over the assignees in insolvency. *Ib.*

—— **Not Invalidated by Erroneous Date.**]—A mortgagee of a reversionary estate gave a formal notice to the trustees of the estate whereby he referred to his mortgage deed by an erroneous date, but otherwise correctly described it:—Held, that the notice was sufficient, and entitled the mortgage to priority after a prior incumbrance of which subsequent notice had been given. *Whittingstall* v. *King*, 46 L. T. 520.

—— **Annuity.**]—Testator bequeathed a leasehold estate to trustees upon trust as therein mentioned; and first, he charged the estate with the payment of an annuity to his daughter during all his interest in the estate. The daughter afterwards mortgaged her annuity first to A. and afterwards to B.; but B. gave the trustees notice of his mortgage before A. did:—Held, that the annuity was not a chose in action, but a chattel interest; and that B. had not gained any priority over A. *Wiltshire* v. *Rabbits*, 14 Sim. 76; 13 L. J., Ch. 284; 8 Jur. 769.

Where an annuity was secured by a charge on certain stocks standing in the names of trustees, and an assignment of the dividends of the stock, but the grantee omitted to give notice of the annuity to the trustees, the grantee of an annuity subsequently granted was preferred to the grantee of the first annuity. *Hulton* v. *Sandys*, Younge, 602.

In a suit to carry into execution the trusts of a will, it was ordered that the receiver should, out of the rents, pay to H., a feme covert, and the devisee of the real estates, the annual sum of 400*l.*, for her separate use, and on her own receipt, by way of maintenance. By a deed subsequently executed, to which H. and her husband were parties, the estates, subject to certain charges, were conveyed in fee to such uses as H. should by deed appoint:—Held, that the 400*l.* a year was not a chose in action, but a portion of the estate of H. in the lands, and that a puisne assignee thereof could not, by giving an earlier notice of the assignment to him to the trustees in whom the estates were vested, obtain priority over a prior assignee who had omitted to give such notice, and that the memorial of first mortgage was sufficient memorial of assignment of the 400*l.* a year. *Rochard* v. *Fulton*, 1 Jo. & Lat. 413; 7 Ir. Eq. R. 131.

—— **Reversionary Share.**]—The plaintiffs took a mortgage of a reversionary share in a testator's estate, and gave notice of the incumbrance to a firm of solicitors who were acting for the trustees and executors in a chancery suit to which the testator had been a party, and were employed by them in all matters relating to the testator's estate in which professional assistance was required. The solicitors wrote accepting the notice on behalf of the trustees. A member of the firm deposed that at the close of a meeting held at his office two months afterwards, with reference to the winding-up of the chancery suit, and lasting above three hours, the notice was read to the trustees. Two of the trustees positively denied this, and the third denied all recollection of it. There was no further proof of their having received notice of it until after notices of other incumbrances had been duly given to them:—Held, that the plaintiffs must be postponed to the subsequent incumbrancers. *Saffron Walden Second Benefit Building Society* v. *Rayner*, 49 L. J., Ch. 465; 14 Ch. D. 406; 43 L. T. 3; 28 W. R. 681—C. A.

—— **Mortgagor entitled to two Properties.**]—A mortgagor was entitled to a reversionary

interest in the residuary estate of a testator, and was also entitled to a life interest in certain sums of money under his own marriage settlement. Before 1872 he mortgaged both his reversionary and life interests to divers persons. Notice of all these mortgages was given to the trustees of both funds before any notice of the next-mentioned mortgage had been given. In 1872 he mortgaged his reversionary interest alone to the defendant, who gave notice to the trustees of that fund. In 1876 and subsequent years the mortgagor made five subsequent mortgages of his life interest to the plaintiffs, of which notice was given to the trustees of that fund. The plaintiffs in 1880 took a transfer of the securities prior to the defendant's mortgage of 1872. The defendant took two further charges on the reversionary interest, of neither of which did he give notice to the trustees thereof. An action having been brought by the plaintiffs for foreclosure of the reversionary and life interest:—Held (reversing the decision of Pearson, J.), that the defendant, on paying off the plaintiffs' mortgages which were prior to his mortgage of 1872, was entitled to an assignment of both properties, although his mortgage included only one:—Held, that, as regards the defendant's two further charges on the reversionary property, and the plaintiffs' five mortgages on the life interests, they must be redeemed in order of date respectively, notwithstanding the plaintiffs' notices as to the life interests:—Held, also, that the plaintiffs thus becoming the last mortgagees as well as the first must pay the costs of the suit if they did not redeem. *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460; 54 L. T. 326—C. A. Affirming 53 L. J., Ch. 996; 32 W. R. 791.

—— **Knowledge of Solicitor — Conveyancing Act, 1882, s. 3.**]—In June, 1875, A. mortgaged his share of trust property to E. by deed, which did not disclose any prior charge, and contained the usual covenant by A. that he was entitled to assign free from incumbrances. Notice of this mortgage and of a further charge created in May, 1877, was served on behalf of E. on the trustees of the property in November, 1881. A.'s share was subject to a prior mortgage to B., a solicitor, who was paid off in 1873, when a fresh mortgage was executed to C., which in July, 1874, was transferred by C. to D. (with a further charge in February, 1881). B. was solicitor for the trustees and A. the mortgagor, and had acted as solicitor for C. and D. in the mortgage transactions of 1873 and 1874, and also as solicitor for E. in the mortgage transaction of June, 1875. The trustees had not received notice of any charge before receiving notice of E.'s mortgage in November, 1881:—Held, having regard to s. 3, sub-s. 1, cl. 2, of the Conveyancing Act, 1882, that E.'s charge, of which notice was first given, was entitled to priority, as his mortgage deed shewed a title in A. free from incumbrances; and that, as the court declined to infer that B. had any recollection, or that inquiries made by him when acting as solicitor for E. in the transaction would have elicited from A. the existence of any prior incumbrance, it could not be said that, although B. had acted as solicitor for the parties in the previous mortgage transactions, notice of any prior charge affecting the property had come to his knowledge as the solicitor of E. in the mortgage transaction of June, 1875. *Cousin's Trusts, In re*, 55 L. J., Ch. 662; 31 Ch. D. 671; 54 L. T. 376; 34 W. R. 393.

—— **Before Assent by Executor.**]—A testatrix entitled, upon the decease of a tenant for life, to a sum of stock standing in the names of D. and L., as trustees, bequeathed such stock to P., and appointed D. her sole executor. In 1834, after the death of the testatrix, P. assigned all his estate and effects to L. and H. upon trust for his creditors. In 1838 P. assigned his interest in the stock to the plaintiff by way of mortgage, and the plaintiff thereupon gave D. notice of the incumbrance. No notice of the assignment of 1834 was given to D. until 1843:—Held, that until D., the executor, had assented to the legacy to P., the notice to L. of the deed of 1834 was insufficient to exclude a subsequent incumbrancer from obtaining priority, and that the notice of the incumbrance of 1838 given to D. by the plaintiff entitled the plaintiff to the prior charge on the fund. *Holt* v. *Dewell*, 4 Hare, 446.

### 3. By Getting in Outstanding Legal Estate.

#### a. In General.

**Review of Authorities.**] — Review of the principal authorities on the protection afforded to a purchaser for valuable consideration without notice of a prior incumbrance, where he has got in the legal estate or obtained possession of the title deeds. *Carter* v. *Carter*, 3 K. & J. 617.

The authorities establish that a purchaser from a person in possession, purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from a trustee of a satisfied term, or a mortgagee whose mortgage is satisfied, will be protected against a prior incumbrancer or cestui que trust, provided the party so conveying the legal estate have no notice of the prior trust or incumbrance. *Ib.*

But it has never yet been decided that, where the party so conveying has notice of an express prior trust or incumbrance, the purchaser can protect himself therefrom by means of the legal estate. And, semble, such a decision would be contrary to principle. *Ib.*

**Mortgage by Devisee under Revoked Will.**]—A., B., C., and D., supposing themselves to be entitled under a will each to one undivided eighth part of copyhold hereditaments, conveyed the same, by way of mortgage, to X. for valuable consideration, and appointed an attorney to surrender their several one-eighth shares. The attorney, exceeding his authority, surrendered the four-eighths on behalf of each and all of the mortgagors, and the mortgagee was upon such surrender admitted to all the four-eighths. It afterwards appeared that the supposed last will had been revoked by a subsequent will, which in effect devised the entirety of the copyholds to A. alone in fee, upon trust for himself and others. None of the parties to the mortgage had at the time any notice of the latter will:—Held, that X. could not avail himself of the legal estate vested in him by virtue of the surrender by A. and the devise in the subsequent will, so as to protect himself against the trusts of the same will. But held, however, that the mortgage bound all the beneficial interest which A. took under the subsequent will. *S. C.*, 3 K. & J. 618; 27 L. J., Ch. 74; 4 Jur. (N.S.) 63.

**Without Notice.**]—T. mortgaged his property first to a friendly society and then to a bank.

Afterwards T. applied to a building society for an advance. The building society, without notice of the second mortgage, paid off the first mortgage and made a further advance to T. The friendly society reconveyed the property to T. by means of a regular conveyance, and on the same day T. executed a mortgage to the building society:—Held, that the building society was entitled to the legal estate and to priority over the bank for the whole advance. *Pease* v. *Jackson* (L. R. 3 Ch. 576) and *Robinson* v. *Trevor* (12 Q. B. D. 423) distinguished. *Carlisle City and District Banking Co.* v. *Thompson*, 33 W. R. 119.

—— **Getting Possession of Deed.**]—A subsequent incumbrancer, without notice, protected by getting possession of the deed, creating an outstanding term. *Knott, Ex parte*, 11 Ves. 613; 8 R. R. 254.

**Right to call for Legal Estate.**]—The question of priority between incumbrancers, if the legal estate has not been got in, depends upon the better right to call for it, and the prior incumbrancer, if he has the right, is, in equity, in the same state as if he had an assignment. *S. C.*, 11 Ves. 618; 8 R. R. 254.

**Outstanding Term.**]—Rule between incumbrancers, that a subsequent incumbrancer, without notice, and having as good a right, getting in the legal estate by assignment of term or possessing himself of the deed creating it, is protected. *Maundrell* v. *Maundrell*, 10 Ves. 260; 7 R. R. 393.

**Satisfied Term.**]—Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in either by an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term; nor if he has notice before he pay his money; distinction upon that as to the dowress, upon no principle, but established by practice. *S. C.*, 10 Ves. 271; 37 R. R. 393.

**Difference between Trusts of Mortgage and of Outstanding Term.**]—The trustee of a mortgage holds same in trust, to the extent of the mortgage, for the mortgagee, subject thereto for the mortgagors, and he cannot do anything to prejudice the mortgagors. The trust of a mortgage, as between mortgagor and mortgagee, differs from that of an outstanding term in a third person, unconnected with either of the parties seeking the legal estate, the only question there being which has the better equity to call for the legal estate. *Blennerhassett* v. *Day*, 2 Ball & B. 133.

**By one of successive Incumbrancers from Trustee for all.**]—The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all. *Sharples* v. *Adams*, 32 Beav. 213; 8 L. T. 138; 11 W. R. 450.

If an owner of the legal estate in realty creates successive equitable incumbrancers upon it, he cannot alter the equities of those incumbrancers by afterwards transferring the legal estate to any one of them; but, if the legal estate is outstanding in a third person who has no privity with the several incumbrancers, the incumbrancer who obtains a conveyance of it to himself, or a trustee for him, will secure a priority over the others. *Ib.*

**By equitable Incumbrancer from bare Trustee.**]—The owner of a copyhold, which was subject to a mortgage by conditional surrender for 350*l.*, made by a former owner, instructed S., his solicitor, to procure him, on the security of the property, a loan of 550*l.*, out of which the old mortgage was to be paid off. S., in July, 1876, obtained the money from the plaintiff, who was also his client. In July, 1877, S. took a security for 700*l.* on the property in his own name, the mortgagee assigning the old mortgage debt, and the mortgagor covenanting to surrender. The old mortgagee was paid by a cheque drawn by S. on B. & Co., his bankers. S.'s account was already overdrawn, but on the same day he applied to them for leave further to overdraw, which was granted on his depositing with them the security for 700*l.*, and the cheque when presented was honoured. B. & Co. had no notice of the plaintiff's claim. Some time after this S. put his account in credit, but it shortly afterwards became again overdrawn. S. handed over some of the other muniments of title to the plaintiff. The plaintiff commenced his action to establish his right to rank as incumbrancer for 550*l.* in priority to B. & Co. After this, B. & Co. procured the old mortgagee to be admitted under the old conditional surrender, and to surrender to them:—Held, that B. & Co. did not acquire priority by having got the legal estate, for that an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee. *Harpham* v. *Shacklock*, 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49—C. A.

**Where Mortgagor a Trustee for Mortgagee—Effect of Trustee Act, 1893, s. 12.**]—A declaration in an equitable mortgage, that the mortgagor, in whom the legal estate is vested, will hold all his estate and interest in trust for the equitable mortgagee, followed by an authority to the equitable mortgagee to remove the mortgagor from being a trustee, appoint new trustees, and vest all the mortgagor's estate and interest in them by declaration, enables the equitable mortgagee, by virtue of s. 12 of the Trustee Act, 1893, to divest the legal estate out of a subsequent legal mortgagee with notice of the trust, and to set it up against a prior incumbrancer of whose charge the equitable mortgagee has only received notice since the date of his own equitable mortgage. *London and County Banking Co.* v. *Goddard*, 66 L. J., Ch. 261; [1897] 1 Ch. 642; 76 L. T. 277; 45 W. R. 310.

**Mortgage of Term by Underlease—Subsequent Mortgage by Assignment of Term.**]—P., having a term of years in a house, made a mortgage thereof to M. by way of underlease, retaining in himself a reversion of two days. He subsequently made an equitable mortgage by way of written memorandum to P. He again made a third mortgage to S., and assigned to S. the original term, including the reversion of two days. S. had no notice of the equitable mortgage to P., and the vice-chancellor held that, the equities being equal, S. had a legal estate by virtue of the assignment to him of the original term and the reversion of two days, which entitled

him to priority over P. On appeal, the lords justices expressed themselves not prepared to affirm this view, and therefore desired a further question of fact to be argued; but the case was compromised before any judgment was given. *Russell Road Purchase Moneys, In re*, 40 L. J., Ch. 673; L. R. 12 Eq. 78; 23 L. T. 839; 24 L. T. 139; 19 W. R. 520, 706.

**Warrant of Attorney—Subsequent Sequestration.**]—J. B., the incumbent of B. and M. H., on the 24th January, 1851, gave to the plaintiffs a warrant of attorney to secure 300*l.* and interest. On the same day J. B. entered into an agreement with the plaintiffs, by which, in consideration of the 300*l.* then lent to him he agreed, upon request, to assign, by way of mortgage, eight acres of underwood in the parish of M. H., and all the rent-charge of the parishes of B. and M. H., for the repayment of that sum and interest. The plaintiffs on the following day entered up judgment on the warrant of attorney, and registered the same. On the 15th November, 1851, J. B., by indenture, after reciting that he had requested the plaintiffs to allow him to receive the rent-charge of B. and M. H. for his own use, which they agreed to do upon having the security thereinafter contained, in consideration of the sum of money lent to him in January, assigned to the plaintiffs the eight acres of underwood, and all his furniture and other effects belonging to the house in his occupation in the parish of B. In December, 1851, A. D. entered up and registered a judgment against J. B. for 8,000*l.* and costs, and sued out, in 1852, a writ of sequestrari facias, upon which he was nominated by the bishop sequestrator, and put in possession of the rent-charge of B. and M. H. The plaintiffs, not being paid the 300*l.* at the time appointed, in February, 1852, by virtue of a power of sale, sold the underwood, and the furniture and effects, and with the proceeds paid off a portion of their debt. On motion for a receiver to collect the rent-charge of B. and M. H., and for an injunction to restrain A. D. from proceeding with the writ of sequestrari facias, and from receiving the rent-charge under it:—Held, that the motion must be refused, first, on the ground that, where there were several equitable incumbrancers, one of whom, by greater diligence, though later in date, got, in aid of his equitable incumbrance, a legal right, the court would not disturb him in his possession; and secondly, on the ground that by the contract entered into by the indenture of the 15th November, 1851, the plaintiffs were estopped and concluded from getting possession of the rent-charge. *Bates* v. *Brothers*, 23 L. J., Ch. 150; 17 Jur. 1174; 3 Eq. R. 321; 2 W. R. 116.

**Two Equitable Mortgages—Agreement for Legal Mortgage.**]—The owner of the A. and B. property deposited with K. some of the earlier title deeds of the A. property as a security for 300*l.*, promising to execute a legal mortgage. He subsequently executed a legal mortgage of both properties to the plaintiff, who took without notice of K.'s charge, as security for an immediate loan; but the mortgage was stated to be subject to a charge in favour of J., with whom the title deeds were said to be deposited. J.'s charge was only over the B. property, though she had possession of the title deeds relating to both properties, except such of the earlier title deeds of the A. property as were in K.'s possession:—Held, that the mortgage to the plaintiff must take priority over K.'s charge, although the plaintiff had not obtained possession of the title deeds or made active inquiry about them, and although the mortgagor, before executing the mortgage to the plaintiff, had agreed to give K. a legal mortgage. *Garnham* v. *Skipper*, 55 L. J., Ch. 263; 53 L. T. 940; 34 W. R. 135.

Although a mortgagor cannot give the second of two equitable mortgagees priority over the first by voluntarily conveying to him the legal estate after the transaction is completed, a person who advances money on an agreement for a legal mortgage will not, when the legal mortgage is executed, be postponed to a prior equitable mortgagee of whom he had no notice, merely because the mortgagor had contracted to execute a legal mortgage to such prior equitable mortgagee. *Maxfield* v. *Burton* (L. R. 17 Eq. 15) distinguished. *Ib.*

—— **Getting in after Notice—Fraud of Mortgagor.**]—The trustees of a will executed a legal mortgage of land of their testator, but failed to hand over to the mortgagees the title deeds of a portion of the mortgaged property. This portion the surviving trustee and tenant for life conveyed to a purchaser, and the trustee, forgetting that the property was comprised in the former mortgage, entered into a covenant that he had not encumbered. The purchaser then forged a deed which purported to be a conveyance of the property by other persons to himself, and, alleging title under the forged deed, executed a mortgage of the property, handing over the forged deed to the mortgagee, who thus became the first equitable mortgagee. He subsequently executed a mortgage of the same property to a second mortgagee, alleging title under the genuine deed of conveyance to himself. The purchaser absconded, and, his fraud becoming known, such second mortgagee thereupon induced the original mortgagees, in whom was vested the legal estate, to release to their mortgagors the land subject to his charge, on condition that they should convey, and they did convey, the legal estate to him:—Held, that the second equitable mortgagee was not precluded from availing himself of the benefit of the legal estate so as to obtain priority over the first equitable mortgagee. *Taylor* v. *Russell*, 61 L. J., Ch. 657; [1892] A. C. 244; 66 L. T. 565; 41 W. R. 43—H. L. (E.)

A mortgagee is not, subject to his security, a trustee of the legal estate for the mortgagor. By Lord Herschell. *Ib.*

An equitable mortgagee, who has advanced his money without notice of a prior equitable mortgage, may gain priority by getting in the legal estate, unless the circumstances are such as to make it inequitable for him to do so—as would be the case, for example, if the legal estate were held upon express trusts, or, according to recent authorities, if it were vested in a satisfied mortgagee. The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. By Lord Macnaghten. *Ib.*

—— **Constructive Notice.**]—Doctrine as to constructive notice in *Ware* v. *Egmont* (4 De G. M. & G. 460) approved. The doctrine that where equities are equal the legal title prevails is not confined to tacking mortgages, but applies in favour of all equitable owners or incumbrancers

for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them. *Brace* v. *Marlborough (Duchess)* (2 P. Wms. 491) followed. *Bailey* v. *Barnes*, 63 L. J., Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66—C. A.

—— **Equity in favour of Third Person.**]—Where a question arises as to priority between two equitable mortgagees, one of whom has afterwards got in the legal estate, a trust or equity to affect the conscience of him who has got in the legal estate must be a trust or equity not in favour of some third person who may have no care or desire to insist upon it, but a trust or equity in favour of the person against whom the legal estate is set up. Certain trustees having obtained the legal estate of some mortgaged property on express condition to convey it to the defendant:—Held, that they were bound to convey it to the defendant, though the plaintiff had a better right to it. *Taylor* v. *Russell*, 60 L. J., Ch. 1; [1891] 1 Ch. 8; 63 L. T. 593; 39 W. R. 81—C. A. *S. C.* in H. L., col. 1570.

### b. After Notice.

**In General.**]—If a subsequent purchaser or a mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference. *Willoughby* v. *Willoughby*, 1 Term Rep. 763; 1 R. R. 397.

But if he had no notice of such prior purchase or incumbrance, and, having the first and best right to call for the legal estate, gets an assignment of it, a court of equity will not deprive him of his advantage. *Ib.*

**Deposit of Deeds with Misrepresentation.**]—The title deeds of plot A. were deposited with the plaintiff as a security for advances. A parcel of deeds relating to plots B. and C., which adjoined A., was afterwards deposited with the defendant, with the representation that they related to plots A., B. and C. A legal mortgage was subsequently executed to the defendant, in which the general words were extensive enough to comprise the whole of the plots. The defendant paid off a charge affecting plots A. and B., and got in the legal estate:—Held, that he could not be treated as purchaser of plot A. without notice of the plaintiff's incumbrances, so as to entitle him to priority over the plaintiff. *Jones* v. *Williams*, 24 Beav. 47; 3 Jur. 1066.

**Where Mortgagor a Trustee for Owner of Prior Equity.**]—When money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has had notice that his mortgagor has made himself a trustee for the owner of the prior equity. *Mumford* v. *Stohwasser*, 43 L. J., Ch. 694; L. R. 18 Eq. 556; 30 L. T. 859; 22 W. R. 833.

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an underlease to M., who gave valuable consideration for the underlease, and entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the house, and deposited it with the defendant to secure an advance made without notice of M.'s title. After this the builder, as agent for the plaintiff (who claimed under M.'s will), let the house to a tenant. Subsequently the builder granted to the defendant a legal mortgage to secure the previous advance. The suit was instituted for specific performance of the agreement for an underlease:—Held, that the tenancy gave the defendant constructive notice, at the time of taking the legal mortgage, that the builder was a trustee for M., and that the legal estate was no protection to the defendant against the prior equity; and a decree was made for specific performance, but, having regard to the negligence of M., without costs. *Ib.*

**Prior Trust fraudulently Concealed by Mortgagor.**]—Where two or more successive mortgagees advance their money upon the security of real property, without notice of a prior trust fraudulently concealed by the mortgagor, the first mortgagee taking a mortgage of the legal estate, the last mortgagee is at liberty, after notice of the trust, and pending a suit by the cestui que trust for redemption of the first mortgage, to pay off all the prior mortgages, and, upon getting in the legal estate, to hold it until all the moneys advanced by him have been paid in full. *Bates* v. *Johnson*, 1 Johns. 304; 28 L. J., Ch. 509; 5 Jur. (N.S.) 842; 7 W. R. 512.

The first mortgagee, having received notice of the trusts of the settlement, was at liberty to transfer the legal estate to any person who would pay off his incumbrance, being in a different position from a dry trustee or a satisfied mortgagee. *Ib.*

**Getting in by Second Mortgagee by Deposit.**]—Four trustees sell out stock, under an agreement that the proceeds shall be lent to two of them upon equitable mortgage, by deposit of the documents of title of a copyhold estate which belonged to such two trustees in undivided moieties. The money was lent and the documents deposited, but afterwards, by some unexplained means, they came into the hands of one of the two trustees who had borrowed the fund, and that trustee made a second equitable mortgage on his moiety of the estate by depositing the documents with a third person, who took them without notice of the first mortgage. The trustee afterwards became bankrupt, and the second equitable mortgagee purchased and obtained from the assignees of the bankrupt a surrender, and was admitted tenant of the bankrupt's undivided moiety, having, at the time of such purchase of the legal estate, received constructive notice of the first mortgage. In a suit of one of the trustees (the lender of the trust fund, the other having become bankrupt), for foreclosure:—Held, that the second equitable mortgagee, who had taken the legal estate with notice of the obligations of the mortgagor to third parties, could only hold that estate subject to such obligations, notwithstanding that he had originally taken his mortgage security without notice. *Allen* v. *Knight*, 5 Hare, 272. Affirmed, 16 L. J., Ch. 370; 11 Jur. 527.

**Keeping Mortgage on Foot.**]—If third incumbrancer, having constructive notice of second mortgage, fails to keep on foot the first security for his protection, he is not entitled to stand in place of first mortgagee against second. *Parry*

v. *Wright*, 1 Sim. & S. 369 ; 6 L. J. (O.S.) Ch. 174 ; 24 R. R. 191. Affirmed, 5 Russ. 142. And see *Parry* v. *Parry*, 1 L. J. (O.S.) Ch. 161.

4. Of Equitable Mortgagee by Deposit.

**Generally.**]—Equitable mortgage by deposit of title deeds, preferred to a purchase with notice. *Hiern* v. *Mill*, 13 Ves. 114 ; 9 R. R. 149.

**Mortgage by Crown Debtor.**] — Equitable mortgage by deposit of deeds by accountant of crown, to one who has an opportunity of knowing mortgagor is or may become a debtor to crown, is not available against an extent. *Broughton* v. *Davies*, 1 Price, 216.

**Over Subsequent Registered Deed.**] — An equitable mortgagee by deposit of title deeds, unaccompanied by any memorandum in writing, takes priority over a purchaser for value claiming under a subsequent registered deed, without notice of such deposit. *Burke's Estate, In re*, 9 L. R. Ir. 24—C. A.

**As against Creditor of Testator.**]—An equitable deposit with memorandum of charge by a devisee is an alienation which pro tanto prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104. *British Mutual Investment Co.* v. *Smart*, 44 L. J., Ch. 695 ; L. R. 10 Ch. 567 ; 32 L. T. 849 ; 23 W. R. 800.

Semble, that an equitable mortgage by deposit of title deeds made by an heir-at-law, or a devisee of a legal estate, would be good as against creditors of the ancestor or testator who had not obtained any judgment or decree binding the land before the mortgage was made. *Ib.*

**Fraud—Of Mortgagor.**] — The owner of a public-house agreed to grant a lease of it, at a premium. The intended lessee deposited the agreement with M. & Co., brewers, to secure repayment of an advance. The lease was executed, and was deposited by the lessee with the landlord's solicitor, to secure the premium. The lessee obtained it from them for the purpose, as he alleged, of producing it to the magistrates, to enable him to procure a licence. He undertook to return it forthwith ; but, instead of doing so he instructed an auctioneer to obtain an advance upon it from other brewers, R. & Co. The auctioneer produced to R. & Co.'s agent an order from the lessee for the delivery of the lease to R. & Co., noticing that the advance was for the purpose of enabling the lessee to pay M. & Co. The agent objected to recognise this memorandum, and inquired whether the lessee owed anything to M. & Co. ; he was informed by the lessee's agent that there was nothing due to M. & Co., except for goods supplied. He had previously obtained from the lessee himself an order for the delivery of the lease, not mentioning M. & Co. at all ; and he obtained the lease on delivering the order. R. & Co. advanced money on the deposit :—Held, that their security must be postponed to those of the landlord, and of M. & Co. *Reid, Ex parte*, 1 De G. 600 ; 17 L. J., Bk. 19 ; 12 Jur. 533.

—— **Negligence of First Depositee.**]—A lady lent money to her solicitor upon a deposit of title deeds, with a written memorandum. The deeds thus deposited did not comprise the latter title deeds, and so did not show that the depositor had any interest in the estate. The solicitor afterwards deposited the remaining deeds with his bankers to secure the balance of his account :—Held, that the lady had not, in omitting to call for the other deeds, been guilty of such gross negligence as to postpone her security to that of the bankers. *Roberts* v. *Croft*, 2 De G. & J. 1 ; 27 L. J., Ch. 220 ; 6 W. R. 144.

—— **Of Mortgagee—Deposit by.**]—A depositee for value without notice of a mortgage deed which had been obtained by the original mortgagee by fraud, and without consideration, held to stand in no better situation than the original mortgagee ; and the deed was ordered to be delivered up to be cancelled. *Parker* v. *Clarke*, 30 Beav. 54 ; 7 Jur. (N.S.) 1267 ; 9 W. R. 877.

—— **Deposit by Trustee.**]—A trustee sold out trust stock, and subsequently advanced money to one of his cestuis que trustent for the purchase of an estate, which was when purchased mortgaged to the trustee for the advance. He afterwards deposited the deeds with his brokers to secure a debt due from himself. Certain of the cestuis que trustent instituted a suit for the delivery up of the deeds, on the ground that the money advanced on mortgage was trust money ; and the trustee, by his answer in the suit, admitted a promise by himself to execute a declaration of trust of the mortgage in favour of his cestuis que trust :—Held, that the admission by the trustee, that the money advanced by him for the purchase of the estate was trust money, was not evidence as against the bankers ; and, being of opinion on the evidence that the estate had not been shown to have been purchased with trust money, the court on this ground reversed the decree of the M. R., granting the relief prayed by the bill. *Newton* v. *Newton*, 38 L. J., Ch. 145 ; L. R. 4 Ch. 143 ; 19 L. T. 588 ; 17 W. R. 238.

—— **Of Solicitor—Authority to raise Money.**]—The plaintiff executed a mortgage to his solicitor, believing the document to be an authority to raise money on the property. The solicitor deposited the deeds with S. & Co. to secure a present advance and appropriated the money :—Held, that S. & Co.'s equity was prior to that of the plaintiff. *French* v. *Hope*, 56 L. J., Ch. 363 ; 56 L. T. 57.

—— **Trust Money.**]—Plaintiffs were trustees of a settlement, under which H. was tenant for life. P. was their solicitor. P., having trust funds in hand, arranged with H. that a certain sum should be invested on a mortgage. P. advanced the money in his own name, but entered it in his firm's book as a loan on behalf of the trust, and treated it as such in correspondence with H. The plaintiffs were not told of the investment. P. fraudulently deposited the mortgage with the defendants to secure a debt of his firm, the defendants taking bonâ fide :—Held, that, though the plaintiffs could not delegate their trust so as to constitute H. their agent to authorise the investment, and although P. did not hold the fund in trust for investment on any specific security, the plaintiffs were entitled to priority over the defendants. *Hartopp* v. *Huskisson*, 55 L. T. 773.



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**Mortgage by Trustee of Prior Incumbrancer.**]—S., a solicitor, was instructed by his client, P., the owner of a copyhold property subject to a mortgage thereof to K. (who had not been admitted) for 350*l.*, to raise 550*l.* on the property, and thereout to pay off K. S. obtained the money from another client, H., telling him it should be invested in this manner; but, in fact, paid the money into his bankers, B. D. & Co., to his own current account. S. subsequently, by cheques drawn on B. D. & Co., paid off K., and advanced 350*l.* to P., taking in his own name a transfer of K.'s charge, and a fresh mortgage of the property from P. to him to secure the whole 700*l.* The account of S. with B. D. & Co. was already overdrawn, but these cheques were nevertheless honoured upon his depositing with them as security the deed of transfer and mortgage from K. and P., with other documents relating to the property. S. also, to quiet H., handed to him some of the muniments of P.'s title to the property, and from time to time made payments to him (H.) in respect of interest upon 550*l.* B. D. & Co. afterwards got admitted on the court rolls through K.:—Held, that S. and K. were only trustees for H., and that his equitable mortgage must rank prior to that of B. D. & Co. under S.'s deposit with them of the transfer to him of K.'s incumbrance. *Harpham* v. *Shacklock*. 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49.

**Of Admission to Copyhold—Notice.**]—A. mortgaged copyhold to B. by a deposit of a copy of his admission; A. died, and his heir mortgaged them to C. by deposit of a copy of his own admission: C. afterwards sold and conveyed the estate to D.; D. had notice of B.'s security:—Held, that it was unnecessary to determine whether C. took with notice of B.'s incumbrance, as by the deposit he could take only such interest as the heir could give, namely, his interest subject to the equitable charge of his ancestor; and secondly, that the conveyance to D. was void as against B. *Tylee* v. *Webb*, 6 Beav. 552.

**Of Officer's Commission, over Creditors.**]—An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary, B., to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified debts due from him to certain specified individuals, which individuals had no notice of his contract with B.:—Held, that these creditors were entitled to a priority over B. After the institution of the suit, the officer took the benefit of the Insolvent Debtors Act:—Held, that B. had not any title preferable to that of the general body of the insolvent's creditors to the surplus which remained after the debts specified in the written order were satisfied. *Collyer* v. *Fallon*, Turn. & R. 459; 3 L. J. (o.s.) Ch. 23.

**Forfeiture.**]—When an equitable mortgagee, by deposit of title deeds, took a bond to secure the same debt, and entered up judgment thereon, which he afterwards registered as a mortgage against the lands:—Held, that he did not thereby forfeit his security by equitable mortgage, or defeat his priority. *Jennings' Estate, In re*, 15 L. R. Ir. 277.

**Trustee for Sale parting with Conveyance without receiving Purchase-money—Priority of Mortgagee by Deposit over Cestui que trust.**]—The receipt for consideration-money in the body of a deed being, by s. 55 of the Conveyancing Act, 1881, conclusive in favour of a purchaser, the fact that the vendor, who was trustee for sale of an equity of redemption, committed a breach of trust in executing and parting with the deed of conveyance without receiving the purchase-money, will not prevent a subsequent mortgagee by deposit without notice from obtaining priority over the cestui que trust, inasmuch as the trustee had authority to sell the trust property. *Shropshire Union Railways and Canal Co.* v. *Reg.* (45 L. J., Q. B. 31; L. R. 7 H. L. 496) distinguished. *Lloyds Bank* v. *Bullock*, 65 L. J., Ch. 680; [1896] 2 Ch. 192; 74 L. T. 687; 44 W. R. 633.

**Banker and Customer—Equitable Mortgage Deposit—Priority of Subsequent Incumbrancer after Service of Notice to lodge Deeds.**]—An owner deposited title deeds with his bankers, by way of equitable mortgage, to secure past and future advances. A petition for sale having been presented by a subsequent incumbrancer, notice to lodge deeds was served by the petitioner at the bank:—Held, that the petitioner was entitled to priority over any advances made after service of the notice. *Keogh's Estate, In re*, [1895] 1 Ir. R. 201.

—— **Negligence of Trustee of Settlement.**]—In November, 1875, a husband deposited with his bankers the title deeds of some leasehold houses, together with a memorandum of deposit as a continuing security to the bankers for any overdraft of his wife's current account with them. In November, 1876, he died, having bequeathed all his property to his wife, and appointed her his executrix. After his death the deeds remained with the bankers, and the widow was allowed on the security of them to overdraw her account. In May, 1877, she married again. Prior to the marriage the houses were assigned by her to a trustee on trust for herself for life, and after her death on trust for an infant son of her first marriage absolutely. Power was given to the trustee to sell the houses during the life of the wife at her request, and after her death at the discretion of the trustee. The trustee made no inquiry about the title deeds, and no notice of the settlement was given to the bankers. In June, 1877, the husband and wife gave notice to the bankers of their marriage, and at their request a balance, which then stood to the credit of the wife's current account, was transferred to a new current account opened by the bankers with the husband. The deeds remained with the bankers, but no notice of the settlement was given to them. In November, 1877, at the request of the bankers, the probate of the first husband's will was sent to them, and at their request, a new memorandum of deposit was, in January, 1878, signed by the husband and wife, making the deeds a continuing security to the bankers for any overdraft of the husband's current account. In April, 1878, the wife died. The deeds were still with the bankers, and at that time the husband's current account was in credit. In 1883 the trustee made some inquiries, and then discovered that the deeds, which he had believed to be in the custody of the solicitor who had prepared the settlement, were with the

bankers. He then gave the bankers notice of the settlement, and claimed the deeds. This was the first notice that the bankers had had of the settlement:—Held, that the omission of the trustee to inquire for the title deeds was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bankers, and that the cestui que trust stood in no better position. Held also, that the bankers were entitled to priority in respect of the amount due to them on their security at the time when they received notice of the settlement. *Lloyd's Banking Co.* v. *Jones*, 54 L. J., Ch. 931; 29 Ch. D. 221; 52 L. T. 469; 33 W. R. 781.

—— **Priority as against Trusts of Settlement.**]—M., being entitled to the lessee's interest in certain lands at C., in 1868 deposited, inter alia, the title deeds with a bank, to secure any balance due or to become due, accompanied by a letter of deposit. On the 21st November, 1870, he wrote to the manager of the bank, O., asking for the title deeds of C. in exchange for other securities, and stating that he had agreed to put C. in settlement on his marriage; and at the same time he deposited other securities with O. on behalf of the bank. O. thereupon drew two lines through the memorandum of 1868 in the deposit book; and wrote at foot of the entry, "Annexed list cancelled, and new ones substituted." The bank, however, refused to give up the deeds of C. On the occasion of his marriage, M. executed a settlement, dated the 24th November, 1870, and registered on the 8th February, 1871, charging C. with a sum of 3,000*l*., which, subject to life interests for himself and his wife, was settled in trust for the children of the marriage. M., who was a solicitor, drew the settlement, and was the only solicitor in the transaction. Subsequently, in 1871, M. gave the bank a further letter of deposit in which the title deeds of C. were included. None of the letters of deposit were registered. After the settlement M. paid in, to the credit of his current account with the bank, sums of money exceeding the amount due from him at the date of the settlement. In a paper, pinned to the letter of deposit of 1870, O. made a memorandum stating that it was cancelled by the letter of deposit of 1871, which was taken, fearing any irregularity in the former transaction. O. deposed that he did not intend to give up the security of the deposit of 1868; that he had a general authority to substitute one security for another, but not to give up a security altogether. M. and his wife afterwards died, leaving one child, issue of the marriage; M. being at the time of his death indebted to the bank, who claimed priority over the charge created by the settlement:—Held, 1. That the deposit of 1868 was not cancelled, but was still a subsisting security in favour of the bank. 2. That the bank had notice of the settlement of the 24th November, 1870; and consequently all subsequent advances made by them were postponed to the charge of 3,000*l*. 3. That the issue of the marriage was not affected with notice of the equitable mortgage to the bank. *Macnamara's Estate*, 13 L. R. Ir. 158.

—— **Priority of Bank over Subsequent Settlement.**]—The owner of real estate deposited the title deeds with his bankers to secure the balance of his account current, and executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Afterwards, being about to be married, he agreed to settle the property. Articles of settlement were prepared and executed. After the marriage, the husband conveyed the property to the trustee of the articles upon the trusts therein contained, being for the benefit of the wife and issue of the marriage. A suit was afterwards instituted by the bankers for foreclosure; and the wife claimed to be a purchaser for value without notice:—Held, that the husband, having contracted to execute a legal mortgage to his bankers, could not deprive them of priority by conveying the property to a party with whom he had entered into a subsequent contract for value, even although such party was a purchaser without notice. *Maxfield* v. *Burton*, 43 L. J., Ch. 46; L. R. 17 Eq. 15; 29 L. T. 571; 22 W. R. 148.

—— **Deposit of Part of Deeds—Memorandum not Registered — Subsequent Mortgage by Deposit of Rest of Deeds—Negligence of First Depositee.**] — L. was entitled under the will of R. to premises held under three leases for terms of years and assigned to R. by deed of the 31st July, 1846. In 1877 L. deposited this deed with a bank by way of equitable mortgage, accompanied by a memorandum in writing, which the bank did not register. In 1879 the bank having pressed L. for payment, they were informed that L. was about to raise money out of which they would be paid a sum on account of what was due to them, and B., who had investigated the title and searched the registry, immediately afterwards made an advance, upon the deposit of a number of title deeds of the premises, including the original leases and the probate of R.'s will. B. was at the time informed by L.'s solicitor (both of them being ignorant of the deposit with the bank) that all the title deeds were delivered to him; but a comparison of the schedule of deeds delivered with the abstract of title which had been furnished would have shown that a material title deed was absent. The greater part of the money so advanced by B. was paid over by L. to the bank:—Held, that B. had the better equity, and that the bank, by not registering their memorandum of deposit, and by allowing L. to retain all the title deeds but one, and thereby enabling him to raise further sums on the property, without notice of their charge, were guilty of negligence so as to deprive them of their priority. *Lambert's Estate, In re*, 13 L. R. Ir. 234.

### 5. Registration—Effect.

**With Notice.**]—A registered deed, with notice of an unregistered one, shall not prevail against it. *Blades* v. *Blades*, 1 Eq. Abr. 358.

Notice of an unregistered mortgage:—Held, to affect subsequent mortgagees, who had registered. *Sheldon* v. *Cox*, 2 Eden, 224.

**Without Notice.**]—The registry of a mortgage will not by itself affect a subsequent incumbrance without notice. *Cator* v. *Cooley*, 1 Cox, 182.

—— **Defective Memorial—Registration after Notice.**]—A subsequent incumbrancer, who at the time of taking his security has no notice of the prior incumbrance, may, by properly memorialising his security, though after notice, obtain

priority over the prior incumbrancer, if the memorial of the security of the latter be defective. *Essex* v. *Baugh*, 1 Y. & C. C. C. 620; 11 L. J., Ch. 374; 6 Jur. 1030.

—— **Demise for Term—Subsequent Mortgage by Deposit.**]—Mortgage by demise for a term of years; the mortgagor does not deliver to the mortgagee the purchase deed conveying the freehold to the mortgagor, but keeps it back, and subsequently deposits it with another person as a security for a loan. The conveyances to the mortgagor and the mortgagee were executed within a day of each other, and were both registered on the same day. The deposit was not made for a considerable time afterwards; but, no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer, it was held that he was entitled to the benefit of the deposit, as against the mortgagee, and was not bound to deliver up to him the conveyance. *Wiseman* v. *Westland*, 1 Y. & J. 117; 30 R. R. 765.

**As against Lessee.**]—The mortgagee while in possession made a lease; the mortgage was registered. The lessee set up a title as a purchaser without notice, and also relied on there being no acknowledgment to bind him:—Held, first, that the registration gave priority to the mortgagor's equitable title, which rendered notice immaterial; and secondly, that the acknowledgment by the mortgagee alone was sufficient against his lessee. *Ball* v. *Riversdale* (*Lord*), Beat. 500.

**Deed Founded on Unregistered Deed.**] — Deed of appointment of lands in a register county, pursuant to a power in a former deed which was not registered, postponed to a mortgage made subsequent to it, and registered before it. *Scrafton* v. *Quincey*, 2 Ves. 413.

—— **Settlement—Subsequent Registered Mortgage.**]—A. and B. were equal partners in certain mills and concerns, of which A. was the lessee. In November, 1810, they took in C. as a partner for 8,500*l*. In January, 1811, B. proposed to A. and C. to sell them his share for 8,500*l*., and to let his name continue in the firm for five years, they paying interest at 8 per cent. on his money remaining in their hands; this was accepted, and thenceforward A. had two-thirds, and C. one-third of the profits. In July, 1812, A. conveyed to C. the legal estate in one-third of the mills and concerns, by a deed which was never registered. In August, 1812, C., by his marriage settlement, conveyed his one-third to A. and D. as trustees for himself for life, with remainder for plaintiff as tenants in common; this deed was registered in 1814. In 1819 B. withdrew his name from the firm, and furnished A. and C. with an account current, shewing a balance due to him of about 24,000*l*. This was made up of the 8,500*l*., and interest at 8 per cent., and of advances made to the firm since 1814 on the credit of B. A mortgage of the mills was then executed by A. and C. to B., to secure this 24,000*l*. It was soon after registered. C. died in 1820, and A. in 1823. In 1826 B. procured from the representatives of A. an assignment of the equity of redemption, and entered into possession of the mills. The bill charged that, before the execution of the mortgage, B. was informed by A. and C. of the previous settlement. It prayed for an account and partition, and allotment of one-third. The only evidence of notice was by E., who swore that he had apprised B. of the settlement:—Held, that the registry of the mortgage of 1819 did not give it precedence of the settlement of 1812, although this latter deed was founded on the unregistered deed of July, 1812; that the settlement, having been registered before the mortgage, thereby prevailed over it, even though no actual notice had been given to the defendant, and that the defendant had no claim as a creditor against the plaintiff's one-third of the partnership assets. *Stuart* v. *Ferguson*, Hayes, 452.

**Fraud.**]—The registry of a deed of separation and maintenance being fraudulently prevented by the agent of the husband, who afterwards negotiated a registered mortgage:—Held, that the mortgagee was fixed with notice of the deed of separation through the agent of the mortgagor, who acted for both parties, and his security was postponed to the unregistered deed. *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364; 1 Ir. Eq. R. 46.

**Further Advances without Notice, after Registration.**] — A registered deed of mortgage to secure moneys due and further advances is, as regards a puisne mortgage, a valid security for such further advances, if made bonâ fide, and without notice of the subsequent mortgage, though after its registration. *O'Byrne's Estate, In re*, 15 L. R. Ir. 373—C. A.

**Extent of Security.**]—An unregistered deed of mortgage was held entitled to priority over a subsequent deed which was registered, on the ground that the latter deed only operated upon what the mortgagor could honestly charge. *Punchard* v. *Tomkins*, 31 W. R. 286.

**Registry Act—Sale under Decree.**]—Where premises had been sold under a decree:—Held, that the lien of an incumbrancer was not transferred to the purchase-money, so as to be out of the Registry Act, and he was, therefore, postponed to subsequent incumbrancers. *Hennand* v. *Moore*, 1 Eden, 327.

—— **6 Anne, c. 2—Tacking.**]—A mortgagee is prevented by the operation of the Registry Act, 6 Anne, c. 2, from tacking so as to gain a priority against mesne registered incumbrances. *Latouche* v. *Dunsany* (*Lord*), 1 Sch. & Lef. 137.

—— **Judgments.**]—The 5th section of the act applies not to judgments generally. Judgment creditors have no priority by the Registry Act, except where priority between deeds is to be adjusted. *Id.* 160. But as to this latter position, see *D'Arcy* v. *Chambers*, 1 Sch. & Lef. App. 467.

—— **Annuity Deed—18 & 19 Vict. c. 15.**] — A landowner, by deed in February, 1872, charged his land with two life annuities. He subsequently made several mortgages of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by 18 & 19 Vict. c. 15, s. 12:—Held, that, as the 18 & 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the registry acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the legislature must be taken to have used the words in the later act in the sense given to them by those decisions, and that the annuities therefore

were valid as against all the subsequent incumbrancers who took with notice of them, and against the trustee in bankruptcy of the grantor. *Greaves* v. *Tofield*, 50 L. J., Ch. 118; 14 Ch. D. 563; 43 L. T. 100; 28 W. R. 840.

**Registration Acts—Policy and Effect.**]—The policy of the registration acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice, therefore, to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. *Lee* v. *Clutton*, 46 L. J., Ch. 48; 35 L. T. 84; 24 W. R. 942—C. A.

—— **7 Anne, c. 20.**]—The statute 7 Anne, c. 20, was intended to prevent fraud by secret conveyances, and, consequently, if there has been notice, a subsequent incumbrancer who is first to register does not gain priority. *Punchard* v. *Tomkins*, 31 W. R. 286.

**Middlesex—Constructive Notice Insufficient.**]—A firm of solicitors took an equitable charge, by a memorandum and deposit of title deeds, from their client, A., upon premises in Middlesex, which they omitted to register. A. subsequently sold the premises to the defendant, who duly registered the conveyance. The solicitors filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in their hands, and made no inquiry:—Held, that the facts alleged amounted only to constructive notice, and that, in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior charge. *Lee* v. *Clutton*, 46 L. J., Ch. 48; 35 L. T. 84; 24 W. R. 942—C. A.

—— **Constructive Notice Sufficient.**]—Constructive notice of a prior unregistered incumbrance affecting lands in Middlesex is as effectual as actual notice. *Wormald* v. *Maitland*, 35 L. J., Ch. 69; 12 L. T. 535; 13 W. R. 832.

A registered marriage settlement of leaseholds in Middlesex was postponed to an equitable mortgage of the same property by deposit prior in date, but registered subsequently to the settlement, the trustees of the settlement being held to have had constructive notice of the equitable mortgage, in consequence of not having inquired for the title deeds when the abstract was delivered to them. *Ib.*

—— **Tacking.**]—The equitable mortgagee held entitled to tack to his security advances made subsequently to the date and registration of the settlement of which he had no notice at the time of such advances. *Ib.*

—— **Notice through one Solicitor acting for both Mortgagees.**]—A solicitor induced a client to advance money for A., on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—Held, that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority. *Rolland* v. *Hart*, 40 L. J., Ch. 701; L. R. 6 Ch. 678; 25 L. T. 191; 19 W. R. 962.

The plaintiff had lent money to a solicitor on the security of the deposit of title deeds of land in Middlesex, with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:—Held, that the client must be presumed to have had notice of the plaintiff's charge, which, therefore, though unregistered, retained priority. *Bradley* v. *Riches*, 47 L. J., Ch. 811; 9 Ch. D. 189; 38 L. T. 810; 26 W. R. 910.

—— **Agreement to Mortgage—7 Anne, c. 20.**]—An agreement to mortgage a Middlesex property does not come within the 7 Anne, c. 20, and, therefore, where an owner of property in Middlesex had first mortgaged to A., and then agreed to mortgage to B., and had subsequently mortgaged to C., and C. had registered, and B. had not:—Held, that C. had not obtained priority over B. *Wright* v. *Stansfield*, 27 Beav. 8; 28 L. J., Ch. 183; 5 Jur. (N.S.) 5.

—— **Deposit with Memorandum.**]—A memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds relating to lands in Middlesex, requires registration, under 7 Anne, c. 20. *Neve* v. *Pennell*, *Hunt* v. *Neve*, 2 H. & M. 170; 33 L. J., Ch. 19; 9 L. T. 285; 11 W. R. 986.

—— **Registration of Two Mortgages same Day.**]—According to the memorandum of registration indorsed on two mortgaged securities of different dates brought to the Middlesex registry, they were both registered on the same day and at the same hour; but one was numbered 764, the other 768:—Held, that the security numbered 764 must be regarded as having been registered first. *Ib.*

—— **Unregistered Memorandum of further Charge.**]—A second mortgagee, who registers his mortgage in Middlesex, under 7 Anne, c. 20, is entitled to priority over a memorandum of further charge of prior date given by the mortgagor to the first mortgagee, who omitted to register the same in Middlesex. *Moore* v. *Culverhouse*, 27 Beav. 639; 29 L. J., Ch. 419; 6 Jur. (N.S.) 115.

—— **Equitable Interests—Assignment.**]—Property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered before B. and afterwards assigned to D., who had no notice of B.'s mortgage:—Held, that, the interests being equitable, D. had no priority over B. *Ford* v. *White*, 16 Beav. 120.

—— **Evidence.**]—Registration, in Middlesex, of an equitable mortgage, is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage. *Morecock* v. *Dickens*, Amb. 678.

—— **Real Estate—Share in Proceeds of Sale of.**]—The local registry acts are intended to apply

only to dealings at law or in equity with the land itself. Accordingly an incumbrancer upon a share in the proceeds of real estate in Middlesex, devised in trust for sale, obtains no priority over other incumbrancers on such share by registering his mortgage deed, and the priorities of such incumbrancers rank according to the dates of their respective notices to the trustees. *Malcolm* v. *Charlesworth* (1 Keen, 63) approved. *Arden* v. *Arden*, 54 L. J., Ch. 655; 29 Ch. D. 702; 52 L. T. 610; 33 W. R. 593.

**Yorkshire—Memorandum of Further Charge needs Registration.**]—A memorandum of further charge in favour of the first mortgagee of lands in Yorkshire requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge, nor will the first mortgagee be entitled to tack his further charge if the second mortgagee has given him notice of his charge. *Credland* v. *Potter*, 44 L. J., Ch. 169; L. R. 10 Ch. 8; 31 L. T. 522; 23 W. R. 36.

—— **Unregistered Memorandum Postponed.**]—A. executed a legal mortgage of property in Yorkshire to B. for 700*l.*; at the same time he borrowed 100*l.* from C., and signed a memorandum agreeing to give C. a second mortgage on the property to secure that amount. A. subsequently executed another mortgage of the property for 500*l.* to D. The first and third mortgages were registered at Wakefield, but not the second:—Held, that the third mortgage had priority over the second. *Wight* or *Wright's Mortgage Trusts, In re*, 43 L. J., Ch. 66; L. R. 16 Eq. 41; 28 L. T. 491; 21 W. R. 667.

—— **Registration of Will Necessary.**]—The East Riding Registration Act (6 Anne, c. 35) is imperative, and, unless a will of lands in that riding is registered within six months after the testator's death, or a memorial of the impediment which disables the devisee from doing so registered in the manner pointed out by s. 15, the will is void as against subsequent purchasers and mortgagees. *Chadwick* v. *Turner*, 34 Beav. 634. Affirmed, 35 L. J., Ch. 349; L. R. 1 Ch. 310; 12 Jur. (N.S.) 339; 14 L. T. 86; 14 W. R. 491.

—— **Notice.**]—To defeat the title of a registered purchaser from the heir-at-law, there must be clear and distinct notice, amounting to fraud. *Ib.*

—— **No Memorandum Registered—Subsequent Registered Mortgage—"Lien or Charge"—"Actual Fraud."**]—The Yorkshire Registries Act, 1884, deprives equitable mortgages by deposit of title deeds of the priority they previously enjoyed over subsequent registered mortgages, unless a memorandum such as is described in s. 7 of the act has been registered, and the priorities given by the act are not to be altered except in the case of "actual" fraud, by which expression in s. 14 is meant fraud in the ordinary popular acceptation of the term, and not "legal" or "constructive" fraud or "fraud in the eye of a court of law or of equity." *Battison* v. *Hobson*, 65 L. J., Ch. 695; [1896] 2 Ch. 403; 74 L. T. 689; 44 W. R. 615.

A solicitor who is aware that a security in which his client is interested is not perfected by registration, and who, with such knowledge, takes and registers a subsequent mortgage of the same property in his own favour and claims priority for his own mortgage over the security of his client, is guilty of "actual fraud" within the meaning of s. 14. *Ib.*

**Practice.**]—The plaintiff is not bound to notice assignments of prior incumbrances, although the assignments are registered, and may proceed as if there had been no assignment by the original incumbrancer, unless the inheritor will point out the proper parties. *Webb* v. *Blessington* (*Lord*), 1 Moll. 74.

**As to Registration Generally.**]—*See* REGISTRATION; DEED AND BOND.

### 6. By Possession of Deeds.

#### a. Negligence or Possession.

**Losing Priority through Fraud or Negligence—Nonpossession of Deed by First Mortgagee.**]—A first mortgagee having the legal title is not to be postponed to a second, merely because he has not possessed himself of the title deeds of the estate; he can only be postponed where he has been guilty of fraud or gross negligence. *Colyer* v. *Finch*, 5 H. L. Cas. 905; 26 L. J., Ch. 65; 3 Jur. (N.S.) 25.

A. became mortgagee of a portion of lands charged under a will with debts and legacies. The mortgagor was devisee of the lands, and likewise one of the executors of the will. The same person acted as solicitor for the mortgagor and mortgagee. The latter received the mortgage, and some (but not all the material) title deeds of the mortgaged estate came into his possession. The mortgagor afterwards mortgaged this and the other portion of the lands to B., and finally sold the first portion of the lands to pay the legacies which were charged on the whole. B. became the purchaser. Both A. and B. acted in ignorance of each other's rights:—Held, that the first mortgagee, as against the mortgagor, was in equity entitled to throw on the other portion of the estate the debts and legacies, and that the purchaser, not having attained the legal estate in the property, was affected by this equity. *Ib.*

A legal mortgagee cannot be postponed on the ground of nonpossession of the title deeds of the mortgaged property, unless there has been fraud or wilful negligence on his part in not obtaining them. *Hunt* v. *Elmes*, 2 De G. F. & J. 578; 30 L. J., Ch. 255; 7 Jur. (N.S.) 200; 3 L. T. 796; 9 W. R. 362.

A solicitor borrowed money from a client upon a mortgage of two properties, A. and B., and handed over to him a quantity of title deeds in a parcel bearing a label stating it to contain the deeds relating to both properties. It, in fact, contained only the deeds relating to property A., but the client, relying on the solicitor, never opened it. Shortly afterwards the solicitor sold property B. to the defendant, who completed his purchase without any notice of the mortgage, and, upon completion, the title deeds were handed over to him. Several years afterwards the solicitor absconded, and the mortgagee, for the first time, discovered that the deeds had not been delivered to him, and that the purchaser claimed a title to the property:—Held, that the mortgagee had not been guilty of such negligence as to postpone his title to that of the purchaser, and that the mortgagee was entitled to a decree

for foreclosure or payment, and might add his costs to his security. *Ib.*

—— **First Mortgagee parting with Deeds.**]—A first mortgagee parting with the title deeds will not on that account be postponed to a subsequent incumbrancer, with whom the deeds have been deposited, without notice of the prior charge, unless either in the act of parting with the deeds, or in his subsequent conduct, there appears to be such negligence as in the view of a court of equity amounts to fraud. *Dowle* v. *Saunders*, 2 H. & M. 242; 34 L. J., Ch. 87; 10 Jur. (N.S.) 901; 10 L. T. 840; 12 W. R. 1074.

A firm of solicitor's acted for both mortgagor and mortgagee in the matter of an equitable mortgage, and the title deeds of the property, the legal estate in which was outstanding, were deposited with them for the mortgagee. One of the solicitors afterwards, without consulting his partner or the mortgagee, allowed the mortgagor to take the deeds, upon a representation that they were wanted for the purpose of inspection by a railway company. The mortgagor immediately deposited the deeds, by way of equitable mortgage, with a third person, who had no notice of the previous transaction. Shortly afterwards the mortgagor died. There was no satisfactory evidence that, up to the time of his death or for five years afterwards, the solicitor had taken any steps to ascertain what had become of the deeds, but they unsuccessfully attempted to sell some other property included in their client's security, and ultimately took a transfer of the security to themselves:—Held, that their conduct was such as to disentitle them to priority over the second mortgagee. *Ib.*

—— **Not obtaining Deeds—Onus of Proof.**]—In order to postpone an incumbrancer prior in point of date by a subsequent incumbrancer, who has got the title deeds, the latter must show not only his own possession, but that the former was guilty of gross negligence in not having obtained them, and the onus is on the subsequent mortgagee to shew this. *Carter* v. *Carter*, 3 K. & J. 617; 27 L. J., Ch. 74; 4 Jur. (N.S.) 67.

—— **Gross Negligence, what.**]—To allow title deeds to remain with a party, who, besides having a beneficial interest in the property, is also a trustee to others, is not gross negligence; for, quâ trustee, he is the right person to hold them. *Ib.*

—— **Making no Inquiry.**]—Making no inquiry concerning title deeds is gross negligence. But, where a party took a mortgage of an undivided share, it is not gross negligence in the mortgagee to suffer the deeds to remain in the hands of the mortgagor as the agent for the other tenants in common. *Ib.*

**Priority depending on Right to Possession of Deeds.**]—Where trustees to raise money grant annuity as a security, and, retaining the title deeds, mortgage the premises, without notice, as a further security, the mere retaining the deeds does not postpone the annuitant to the mortgagee. It depends on whether or not the first incumbrancer ought to have, and was remiss in not having, the deeds in his possession. *Harper* v. *Faulder*, 4 Madd. 129; 20 R. R. 279.

**Mortgagee's Right to Deeds—Solicitor's Lien.**]—A mortgagee is entitled to the possession of the title deeds of the mortgaged estate, and the mortgagor cannot, by depositing the deeds with his solicitor, with a view of creating a lien, thereby defeat the right of the mortgagee. *Smith* v. *Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

—— **Negligently Leaving Deeds.**]—An incumbrancer negligently leaving title deeds in grantor's possession, a lien may be obtained on them by grantor delivering them to a solicitor. *Bernard* v. *Drought*, 1 Moll. 38.

**Retention of Deed by Mortgagor—Subsequent Deposit.**]—Mortgage by demise for term of years. The mortgagor does not deliver to the mortgagee the purchase deed conveying the freehold to the mortgagor, but keeps it back, and subsequently deposits it with another person as a security for a loan. The conveyance to the mortgagor and the mortgage were executed within a day of each other, and were both registered on the same day, and deposit was not made for a considerable time afterwards; but, no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer, it was held that he was entitled to the benefit of the deposit as against the mortgagee, and was not bound to deliver up to him the conveyance. *Wiseman* v. *Westland*, 1 Y. & J. 117; 30 R. R. 765.

—— **Omission by Mortgagee.**]—A party entitled to an estate, subject to terms vested in trustees for securing a jointure and portions, mortgaged it, but retained the title deeds in his possession:—Held, that this omission on the part of the mortgagee was not sufficient to postpone him in favour of a subsequent purchaser for valuable consideration. *Farrow* v. *Rees*, 4 Beav. 18; 4 Jur. 1028.

—— **Subsequent Mortgages—First Mortgagee Postponed.**]—P. mortgaged estates to M., and was allowed to retain possession of the title deeds. He subsequently mortgaged one of the estates to A. B., who obtained possession of the deeds, and all the estates to C., who advanced his moneys after ascertaining the position of the deeds, and upon the faith that A. B. was the only prior mortgagee:—Held, that M., by not obtaining possession of the deeds, enabled P. to deal with his estates as an unincumbered owner; that A. B. having been diligent in obtaining the deeds acquired priority; and that, C. also having been diligent in ascertaining that A. B. had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over M. *Perry-Herrick* v. *Attwood* (25 Beav. 205; 2 De G. & J. 21) explained and followed. *Clarke* v. *Palmer, Palmer, In re*, 51 L. J., Ch. 634; 21 Ch. D. 124; 48 L. T. 857.

—— **Leaving Deeds in Hands of Mortgagor.**]—To postpone the first mortgagee on the ground of leaving the title deeds in the possession of the mortgagor, the case must amount to fraud. *Barnett* v. *Weston*, 12 Ves. 130.

If a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or fraud, but intentionally, to enable him to raise a sum of 15,000*l.*, which should take

precedence, the mortgagee cannot complain if, instead of 15,000*l.*, he raised 50,000*l.*, because he puts it in his power to raise any sum of money he pleases. *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; 27 L. J., Ch. 121; 4 Jur. (N.S.) 101; 6 W. R. 204.

Mortgagee by devise postponed for allowing the mortgagor to retain the title deeds. *Ib.*

—— **Mortgagee leaving Deeds is Accessory to Second Mortgage.**]—The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor, showing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessory to the drawing in of the second. *Head* v. *Egerton*, 3 P. Wms. 281.

—— **Deeds asked for.**]—A legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage:—Held, in an action by the legal mortgagee for foreclosure, that he had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that. Held also, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice; and that s. 25, sub-s. 11, of the Judicature Act, 1873, did not alter the rule of law on the subject. *Manners* v. *Mew*, 54 L. J., Ch. 909; 29 Ch. D. 725; 53 L. T. 84.

—— **Estoppel by Conduct.**]—The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants:—Held, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants. *Hall* v. *West End Advance Co.*, 1 Cab. & E. 161.

**Retention of Deed by Solicitor—Fraud—Priority of Transferee.**]—A. executed a mortgage to B. for 1,000*l.* This was not acted on, but A. afterwards executed another mortgage for 2,000*l.* to B. The solicitor employed retained the first deed, and afterwards fraudulently induced B., without consideration, to sign a memorandum, undertaking to transfer the first mortgage to C., and he executed such transfer. C. on the faith of B.'s acts, advanced 1,000*l.*, which was received by the solicitor and misapplied:—Held, that B. must be postponed to C. *Hiorns* v. *Holtom*, 16 Beav. 259; 16 Jur. 1077.

**Fraud of Solicitor—Negligent Mortgagee Postponed to Subsequent Depositee.**]—A second mortgagee, with a power of sale, was fraudulently induced by his confidential solicitor to join with the first mortgagee in executing a conveyance upon a pretended sale to the solicitor, and to sign a receipt for the purchase-money; but no money was paid to him, the solicitor representing that it was a mere matter of form, and that the mortgages would remain as before. The solicitor afterwards deposited the deeds with C. by way of equitable mortgage:—Held, that, the second mortgagee having by his negligence enabled the solicitor to commit the fraud, C.'s. equitable mortgage was entitled to priority. *Hunter* v. *Walters*, 41 L. J., Ch. 175; L. R. 7 Ch. 75; 25 L. T. 765; 20 W. R. 218.

**Purchaser leaving Deeds with Vendor—Subsequent Mortgagee by Deposit without Notice.**]—A purchaser, between whom and his vendor there were unsettled accounts, agreed to purchase Blackacre, and paid part of the purchase-money but made no appropriation of the balance due to him by way of satisfaction of the residue, and allowed the vendor to retain the title deeds, who deposited them by way of equitable mortgage without notice, and afterwards became bankrupt:—Held, that the mortgagee was entitled to priority to the extent of the unpaid purchase-money. *Rayne* v. *Baker*, 1 Giff. 241; 6 Jur. (N.S.) 366.

—— **Purchaser not calling for Deeds, affected with Notice of Prior Deposit.**]—A purchaser of a leasehold, having paid part of the price without calling for the title deeds, held fastened with notice of a mortgage by deposit which was concealed by the vendor, but not with notice of an equitable mortgage which the vendor had fraudulently effected on the security of a spurious lease of the same property; and the purchaser, having obtained an assignment of the valid mortgage, was declared entitled to hold the property as security for the mortgage debt, and for all moneys paid by him on the purchase, and for subsequent improvements. *Hipkins* v. *Amery*, 2 Giff. 292; 6 Jur. (N.S.) 1047; 8 W. R. 360.

**Omission to Require Production of Deed.**]—A solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon after he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as solicitor for all the parties to the transaction, and suppressing all mention of the sub-mortgage:—Semble, that, even if the second mortgagee had not been the solicitor of the new mortgagee, the omission on the part of the new mortgagee to require production of the second mortgage deed was such negligence as to postpone him. *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; 25 L. J., Ch. 792; 2 Jur. (N.S.) 117; 4 W. R. 734.

—— **Notice—Purchaser Postponed to Equitable Mortgagee.**]—Upon an assignment of a lease to a purchaser, the absence of the counterpart of an underlease of a portion of the property comprised in the lease is notice to the purchaser of the title of a person holding such counterpart by way of equitable mortgage, and, if the purchaser does not inquire, or obtain possession of such counterpart, he will be guilty of gross negligence, and will, therefore, be postponed to the equitable mortgagee. *Franklin* v. *Howes*, 24 L. T. 348; 19 W. R. 581.

—— **Mortgagee of Leaseholds by Deposit preferred to Sub-demisee.**]—Where B. deposited with C., to secure advances, the title deeds relating to leasehold property in Middlesex, together with a memorandum of deposit (which was never

registered), and afterwards sub-demised the property to D. and M., by an indenture, which was duly registered, but D. and M., on taking such demise, neglected to inquire after or require the production of the title deeds:—Held, that they were bound by constructive notice of the deposit of the deeds with C., who had, therefore, priority over their claim. *Wormald* v. *Maitland*, 12 L. T. 535; 13 W. R. 832.

—— **Constructive or Actual Notice.**]—In such a case there is no difference in effect between actual notice and constructive notice. *Ib.*

—— **Prior Mortgagee omitting to Call for Deed not Postponed.**]—A., to secure a loan, deposited with B. title deeds relating to an estate, but not the deed of conveyance to himself, and signed a memorandum of deposit, which represented that these were all the deeds. A. afterwards deposited with C., who had no notice of B.'s claim, the conveyance to himself, and duplicates of some of the earlier deeds, and also signed a memorandum of deposit as to this loan:—Held, that B. was entitled to priority, the omission to call for the other deeds not amounting to such gross negligence as to postpone her. *Roberts* v. *Croft*, 2 De G. & J. 1; 27 L. J., Ch. 220; 3 Jur. (N.S.) 1069; 6 W. R. 144.

—— **Solicitor acting for both Parties—Misrepresentation—Subsequent Purchaser.**]—S., the the owner of an estate subject to an outstanding term, mortgaged it to F. H., who acted as the solicitor of both parties, handed over certain documents to F., which he represented to be, and which F. on his representations believed to be, the title deeds of the property. S. subsequently sold the estate, unknown to F., to C., without notice of the prior incumbrance:—Held, in a foreclosure suit by F. against S. and C., that F. was not guilty of laches in respect to the possession of the deeds, so as to deprive him of his security; also that C. could not avail himself of the defence of purchaser without notice. *Finch* v. *Shaw*, 18 Jur. 935; 2 W. R. 655.

—— **Contemporaneous Mortgages—Fraud of Solicitor.**]—The plaintiff having agreed with E. to advance him money on mortgage, the plaintiff's solicitor sent the mortgage deed to W., the solicitor of E., to obtain its execution. W., who was also the solicitor of K., sent by his clerk the plaintiff's mortgage deed, and also a mortgage of the same property from E. to K., for execution by E. E. signed the plaintiff's deed before K.'s, and gave both at once to the clerk, saying, "That is my delivery." The title deeds were handed to the plaintiff when he advanced his money, having no notice of the transaction with K.:—Held, by the vice-chancellor, that the delivery of the two mortgage deeds was contemporaneous; that they took effect at the same instant; that the plaintiff and K. were tenants in common, or joint tenants, of the legal estate; and that their mortgages were payable pari passu:—Held, on appeal, that, assuming this decision to be correct as to the legal estate, still K. must be postponed to the plaintiff, because the title deeds had been delivered to the plaintiff without any notice of K.'s title, and without K.'s asking after the deeds, or making any claim to them; and that, assuming her, by reason of W.'s committing a fraud, not to be affected with notice of the plaintiff's title through W.'s knowledge of it, she still must be affected by his negligence in not asking for the deeds. *Hopgood* v. *Ernest*, 3 De G. J. & S. 116; 13 W. R. 1004.

**Prior Equitable Mortgage — Omission to Inquire.**]—A legal mortgagee is not to be postponed to a prior equitable one on the ground of not having got in the title deeds, unless there has been fraud or gross and wilful negligence on his part; and the court will not impute such fraud or negligence to the mortgagee if there has been a bonâ fide inquiry after the deeds, and a reasonable excuse given for the non-delivery of them; but the court will impute such fraud or negligence to the mortgagee if he has omitted all inquiry as the deeds. *Hewitt* v. *Loosemore*, 9 Hare, 449; 21 L. J., Ch. 69; 15 Jur. 1097.

Where in a mortgage transaction, the mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor is considered as the agent or solicitor of the mortgagee in the transaction, and it makes no difference that the mortgagor is not paid by the mortgagee. *Ib.*

—— **Assignment without producing Deeds to Assignee.**]—Where an assignee of a lease upon the occasion of the assignment, made bonâ fide inquiries for the deeds, and a reasonable excuse was given for their not being produced, he was held to be entitled to the benefit of the assignment, free from a previous equitable charge which had been made by the assignor by deposit of the deeds. *Hewitt* v. *Loosemore* (21 L. J., Ch. 69) observed upon. *Espin* v. *Pemberton*, 3 De G. & J. 547; 28 L. J., Ch. 311; 5 Jur. (N.S.) 157; 7 W. R. 221. Affirming 4 Drew. 333.

—— **Lease — Surrender — Prior Equitable Mortgage—Negligence—Notice.**]—A lessee who had deposited his lease by way of equitable mortgage with B. afterwards by deed surrendered the term to the lessor. The surrenderee at the time of surrender had asked the lessee to deliver up the instrument of lease, and was falsely informed by the lessee that he had left it with a friend, but that he (the lessee) had neither assigned nor charged his interest nor pledged the instrument of lease. The surrenderee had no actual notice that the lease had been deposited by way of mortgage with B.:—Held, that the surrenderee had not, under these circumstances, been guilty of gross or wilful negligence, and was consequently entitled, as the holder of the legal estate, to priority over B., the prior equitable mortgagee. *Hewitt* v. *Loosemore* (9 Hare, 449) and *Espin* v. *Pemberton* (3 De G. & J. 547) followed. *Brown* v. *Stedman*, 44 W. R. 458.

—— **Reasonable Excuse for Non-production of Deeds.**]—When the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the title deeds with a creditor (which equitable mortgage was not registered), and afterwards, on being asked for them by a solicitor who was about to prepare for another creditor a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents, and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:—Held,

that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds. *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

**Evidence of Negligence or Fraud.**] —The non-production, in Ireland, of title deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to effect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case. *Ib.*

**Delivery of Part of Deeds.**]—P. purchased, in 1814, three roods twenty-three perches of land by the description of "about one acre," and in 1815 thirty perches of land immediately adjoining, all which he threw into one piece, and built a house. In 1819 he mortgaged the whole of the premises to W. for 5,000*l.*, by a description sufficient to pass the whole, and delivered up the title deeds relating to the purchase of 1814. In 1820 he mortgaged the whole of the premises to L. for 2,000*l.*, by the same description as in 1819, and delivered up to L. the title deeds of 1815. He acted on this occasion as L.'s solicitor. There was also a subsequent incumbrancer, H. In 1823 P. died, having devised all his property to trustees for sale. In 1829 the trustees for sale contracted to sell to G., who was at that time a yearly tenant. G. sent in requisitions on the title, paid about one-third of the purchase-money, and continued in unmolested enjoyment of the whole of the premises up to the time of the filing of the bill. W., L. and H. had all assented to the contract with G. :—Held, on a bill by the persons beneficially interested in the first mortgage to have the contract carried out and the sales moneys applied, that they were entitled in priority to full satisfaction out of the sales moneys, or as far as they would extend. *Wallis* v. *Woodyear*, 2 Jur. (N.S.) 179.

—— **Legal Mortgagee with some, prior Equitable Mortgagee with rest — Right to Delivery.**]—A., being indebted to B., delivered to him, by way of further security, a parcel purporting to contain the title deeds to lands, and also executed a legal mortgage to him of the same lands. It being afterwards discovered that the deeds relating to part of the mortgaged lands were in the possession of C., with whom they had been deposited by way of equitable mortgage previous to the mortgage to A. :—Held, that A. had no equity as against C. to have the deeds delivered up to him. *Barnard* v. *Bywater*, 17 W. R. 71.

—— **Negligence.**]—An equitable mortgagee, with whom some of the title deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee, whose solicitor had omitted to examine a parcel which was given to him, previously to the execution of the mortgage deed, and purported to contain all the title deeds, but contained only the earlier deeds : —Held, that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee. *Ratcliffe* v. *Barnard*, 40 L. J., Ch. 777 ; L. R. 6 Ch. 652 ; 19 W. R. 764. Affirming 24 L. T. 215.

**Mortgagee innocently Parting with Deeds.**]—Where a mortgagee has, without fraud or gross neglect, parted with the possession of title deeds, which are deposited with another person equally innocent, whether the court will take the possession from him, quære. *Cawthorne, Ex parte*, 1 Glyn & J. 240.

—— **Fraud of Mortgagor.**]—A. deposited a lease of a public-house with B. by way of security for a debt, and subsequently obtained it from B. on a representation that it was required to be produced before the justices for the purposes of obtaining a licence, and signing an undertaking to restore it. A. then deposited this lease with C. as a security for money advanced by C. :—Held, that B.'s equity was prior to that of C. *Reid, Ex parte, Buckland, In re*, 17 L. J., Bk. 19 ; 12 Jur. 533.

—— **Subsequent Purchaser for Value — Notice.**]—A mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shown to an intending purchaser who wished to see what the covenants in it were ; the mortgagor concealed from the purchaser the fact of the existence of an incumbrance on the property, and produced the lease to him, and left it in his possession. Within a week afterwards, the purchaser accepted a conveyance, paid his purchase-money, and took possession of the house, without any notice of the existence of the mortgage ; but the solicitor of the mortgagee deposed that, in an interview which he had before the completion of the purchase with the solicitor of the purchaser, he had informed the latter that a client of his was to receive a considerable sum out of the purchase-money, and had requested to have notice of the time when the money was to be paid ; and, though the solicitor of the purchaser denied that any such interview had taken place before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagee :—Held, that the mortgagee was not to be postponed to the purchaser. *Martinez* v. *Cooper*, 2 Russ. 198 ; 26 R. R. 49.

**Mortgagee redelivering Deeds to Mortgagor —Accessory to Fraud.**]—A. having a mortgage of a leasehold estate, the mortgagor borrows the original lease of A., with an intention to borrow more money on the premises. If A. was privy to the mortgagor's intention of taking up more money on the premises, A.'s mortgage shall be postponed to the subsequent mortgage, as being accessory to the fraud ; otherwise, if A. was not privy to the subsequent loan, but innocently lent the lease to the mortgagor. *Peter* v. *Russell*, 2 Vern. 726 ; Gilb. Eq. Rep. 122.

—— **Fraud or Negligence, what.**]—A mortgagee of leasehold property died, having by his will appointed his widow and his son executrix and executor, and he left all his estate to his widow for her life, with remainder to his son, and also gave to them, as joint tenants, his trust and mortgage estates. The widow and son duly proved the will. The widow took possession

of the title deeds, and on the representations of the mortgagor handed them over to him; he never returned them. The widow died, and shortly afterwards the mortgagor also died. The son found the deeds missing; and it then appeared that the mortgagor had, in the lifetime of the widow, but without giving any notice of the existing mortgage, mortgaged the leasehold property to a bank, and had deposited the title deeds with them. The son, who had no knowledge of the deeds having been sent to the mortgagor, claimed to be entitled to his security in priority to the bank:—Held, that, whatever might have been the rights of the bank as against the widow, the son had not been guilty of fraud or of any such negligence as would postpone him to the bank; that he was entitled to priority, and that the deeds should be delivered to him. *Ingham, In re, Jones* v. *Ingham*, 62 L. J., Ch. 100; [1893] 1 Ch. 352; 3 R. 126; 68 L. T. 152; 41 W. R. 235.

—— **Laches.**]—S. in 1833 mortgaged certain real estate to R. with a power of sale, under which the property was sold, in 1842, to a purchaser, who transferred his contract to R. There was a balance after paying off S.; and, there being accounts between S. and M., this balance was placed, under a deed of 25th June, 1842, in the hands of trustees, to be dealt with by arbitration between S. and M. In 1834 S. had made an equitable mortgage of the property to M. In January, 1840, M. deposited these deeds with W., the plaintiff, by way of equitable mortgage. In April, 1842, M. applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, M. deposited the deeds by way of mortgage with P., who now held them. In 1846 M. became bankrupt. W. filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him:—Held, that, as between W., the plaintiff, and P., the plaintiff had by his laches enabled M. to commit a fraud, and had no equity against the defendant, P. *Waldron* v. *Sloper*, 1 Drew. 193.

—— **Conversion into Personalty—Notice.**]—Semble, the real estate being converted into personalty before the bankruptcy, the right of M. was merely a right to receive a certain sum of money; and that, no notice having been given by the plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of M. and passed to his assignees. *Ib.*

**Puisne Mortgagee.**]—T. being the equitable owner of a moiety in lands, under the will of a testator who had, in 1806, purchased the entirety, in 1812 conveyed the moiety upon trust to pay an annuity, and, subject thereto, for himself in fee. In 1823 he purchased the legal fee simple in the second moiety. By a settlement in 1825, he charged the two moieties with a sum to be raised at his death. In 1830 he again mortgaged the first moiety only, and he, or his solicitor (who was also a trustee of the settlement), deposited with the second mortgagee the purchase deeds of 1806, and the deeds of charge of 1812. In 1832 the second mortgagee first had notice of the settlement, and in 1835 she bought in the annuity. The annuitant died in 1837. In 1851 the trustee of the settlement died. Since 1832, the second mortgagee had been in possession. T. died in 1866:—Held, that possession of the title deeds did not give the second mortgagee priority. *Thorpe* v. *Holdsworth*, 38 L. J., Ch. 194; L. R. 7 Eq. 139; 17 W. R. 394.

Held, also, that the second mortgagee could not be deprived of the custody of the deeds; but, upon a sale being decreed, the deeds were ordered to be produced, at the instance of the parties interested in the second moiety, who would be at liberty to take attested copies. *Ib.*

—— **Getting Possession of Deed.**]—A subsequent incumbrancer, without notice, protected by getting possession of the deed creating an outstanding term. *Knott, Ex parte*, 11 Ves. 613; 8 R. R. 254.

**Deposit by Trustee—Beneficiary Preferred.**]—A fund, the property of A., was, together with moneys the property of a third party, lent to X., who secured the same by a legal mortgage to B. as A.'s trustee. B.'s trusteeship not appearing on the face of the mortgage, he, by a separate instrument, declared the trusts of A.'s fund in favour of A. B. afterwards wrongfully deposited the mortgage deeds with C. to secure an advance to himself. The fund being paid into court by arrangement on paying off the mortgage:—Held, that A. was entitled to receive his portion to the exclusion of C.'s right as depositee. *Stackhouse* v. *Jersey (Countess)*, 1 J. & H. 721; 7 Jur. (N.S.) 359; 4 L. T. 204; 9 W. R. 453.

—— **Mere Possession.**]—The mere possession of the deeds by C. gave him no advantage which he could actively assert. *Ib.*

**Transfer of Mortgage by Trustee in Breach of Trust—Cestui que Trust Preferred to Transferee without Notice and with Deed.**]—A sum of 135,000*l.* was advanced to B., on mortgage, in the name of S., who at the same time executed three declarations or trust by which he declared that he held the mortgage on trust as to 105,000*l.* for E., as to 5,000*l.* for W., and as to 10,000*l.* for N., the rest of the money belonging to himself. N. was the solicitor both of E. and S., and was intrusted by E. with the investment of the 105,000*l.* E. appeared to have trusted to N., and to have made no inquiries as to the precise mode of investment, and it did not appear that he knew of the existence of the declaration of trust in his favour. He denied having known that the security was not taken in his own name, and it was not shown that he had any actual notice that it was not. S. afterwards transferred the mortgage for value to C., who had no notice of the trust, and delivered the deed to him. The legal estate in the property was during the whole of the transactions outstanding:—Held, that E., assuming him to have known S. to be his trustee, was not bound to make any inquiry into the acts or conduct of S. with regard to the security, and that his trusting N., and omitting to make any inquiry as to the person in whom the mortgage was vested, or in whose possession it was, were not sufficient grounds for depriving him, as against C., of the benefit of the prior equitable title obtained by

the declaration of trust, and that C.'s possession of the mortgage deed being obtained through a breach of an express trust on the part of S. did not alter the case, and that, in the absence of evidence that E. had notice of the dealings of S. with the security, E. was entitled to priority over C. *Cory* v. *Eyre*, 1 De G. J. & S. 149.

**Second Mortgagee of Leaseholds, receiving Lease, Preferred to First Mortgagee.**]—S., in 1841, executed a legal mortgage of leasehold property to J. to secure 300*l.* and interest. In 1865 he purported to execute another legal mortgage of the property to R. to secure 121*l.* 16*s.* and interest. R. had no notice of the first mortgage, and the lease of the property was given up to him:—Held, that R.'s mortgage was entitled to priority, inasmuch as no explanation was given of the fact of S. being in possession of the lease. *Jones* v. *Rhind*, 17 W. R. 1091.

**Deeds of a Term, with Declaration of Trust.**]—The custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer without notice of the prior mortgage, held to give him an advantage over the first incumbrancer, which a court of equity would not deprive him of. *Stanhope* v. *Verney* (*Earl*), 2 Eden, 81.

**Priority of Possession, how Lost.**]—The person claiming under such second incumbrancer, upon purchasing the equity of redemption from the mortgagor, was held not to have relinquished such advantages by having covenanted to retain part of the purchase-money to redeem the prior mortgage, as it was also agreed that he might use the money adversely, in case he could not adjust the matter amicably. *Ib.*

**Priority of Subsequent Mortgagee over Vendor's Lien for unpaid Purchase-money.**]—A vendor conveyed without receiving his purchase-money; the receipt of it was indorsed on the deed, and the title deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded:—Held, as between the vendor's lien for his unpaid purchase-money and the right of the mortgagee, that the possession of the title deeds and the fact of the indorsement of the receipt on the deed gave the mortgagee the better equity. *Rice* v. *Rice*, 2 Drew. 73; 2 Eq. R. 341; 23 L. J., Ch. 289; 2 W. R. 139.

**Purchase of Equity of Redemption in Name of Trustee—Fraudulent Charge by Trustee—Negligence, what.**]—The plaintiff purchased an equity of redemption in leaseholds, and for his own convenience took the assignment in the name of C. as trustee, who executed a declaration of trust in favour of the plaintiff. C. fraudulently borrowed money of the defendants, representing himself as the absolute owner, executed an equitable charge by demise of the equity of redemption to the defendants, deposited with them the deed of assignment, and absconded. C. was a confidential clerk, whose duty it was to put away in the safe the plaintiff's securities. In an action by the plaintiff for a declaration that the defendants had no interest or claim in the leaseholds, and for delivery up of the deed of assignment:—Held, that the fact that the plaintiff had under the circumstances allowed C. to have the custody of the deed of assignment was not negligence sufficient to deprive him of the benefit of his prior equitable title. *Carritt* v. *Real and Personal Advance Co.*, 58 L. J., Ch. 688; 42 Ch. D. 263; 61 L. T. 163; 37 W. R. 677.

**Mortgagee not Postponed, in absence of Fraud or gross Negligence.**]—Mortgagee of a reversion not having the title deeds shall not be postponed to another mortgagee, whose mortgage was made after mortgagor came into possession, who has the title deeds; there being neither fraud nor gross negligence. *Tourle* v. *Rand*, 2 Bro. C. C. 650.

**Neglect of Transferee of Equitable Mortgage to give Notice to Mortgagor—Giving up Title Deed.**]—A. deposited deeds with his confidential solicitor, with a memorandum of deposit by way of equitable mortgage to secure the repayment of 3,000*l.* The solicitor handed the deeds and memorandum to B. as security for 2,000*l.*, together with a memorandum signed by himself that the 2,000*l.*, part of the annexed 3,000*l.* security, then belonged to B., with interest at 5 per cent The solicitor afterwards obtained a return of the deeds from B., upon an assurance that in lieu thereof others of equal value should be deposited. Other deeds were subsequently deposited, which proved to be worthless. The mortgage of 3,000*l.* was paid off by A.'s representatives, and the genuine deeds were given up to them by the solicitor without the memorandum of deposit. No notice of B.'s security had been given to A. B. then claimed payment of the 2,000*l.* against the estate of A., upon the ground of constructive notice to A., through his confidential solicitor:—Held, that B., by neglecting to give notice to A. of the transfer of the mortgage, and by giving up the documents originally deposited with him, had lost any right he might have had against A.'s estate. *Southampton's* (*Lord*) *Estate, In re, Allen* v. *Southampton* (*Lord*), *Banfather's Claim*, 50 L. J., Ch. 218; 16 Ch. D. 178; 43 L. T. 687; 29 W. R. 231.

**Contract to Mortgage on Completion of Purchase—Negligence of Mortgagee—Deposit by Mortgagor with Third Party.**]—A mortgagor, who had contracted for the purchase of an advowson, covenanted with A., in consideration of money advanced, to complete the purchase and execute a legal mortgage of the advowson to him. A. gave no notice to the vendor of the advowson and took no steps to perfect his security. Two years afterwards, upon the completion of the purchase, the mortgagor took possession of the title deeds and deposited them with B. as security for money advanced, at the same time covenanting to execute a legal mortgage of the advowson to B. B. had no notice of A.'s charge:—Held, upon a bill by A. for foreclosure, that B., being in possession of the title deeds, was entitled to priority over A. *Layard* v. *Maud*, 36 L. J., Ch. 669; L. R. 4 Eq. 397; 16 L. T., 618; 15 W. R. 897.

**Mortgage of Building Agreement—Leases granted under it—No Notice to Landlord.**]—A company obtained a building agreement of a certain piece of land, by which they covenanted to erect houses thereon, and as they erected houses a separate lease of each house was to be

granted to them. They then executed a mortgage deed by which they gave to the mortgagees an equitable mortgage of their interest under the building agreement, and covenanted to give them legal mortgages by demise of the houses when the leases had been granted. The mortgagees did not give notice of their mortgage to the freeholder. Afterwards the company obtained leases of certain houses which they had erected, and deposited them with their bankers by way of equitable security:—Held, that it was not necessary for the first mortgagees to give notice of their mortgage to the landlord in order to complete their security, and that their omission to give such notice was not such negligence as would postpone them to the subsequent equitable mortgagees. *Mumford* v. *Stohwasser* (L. R. 18 Eq. 556) considered. *Layard* v. *Maud* (L. R. 4 Eq. 397) distinguished. *Union Bank* v. *Kent*, 57 L. J., Ch. 1022; 39 Ch. D. 238; 59 L. T. 714; 37 W. R. 364—C. A.

**Prior Equitable Mortgagee—When Postponed.**]—The cases where a prior equitable mortgagee has been postponed on the ground of negligence are cases where he has taken no steps although he knew that the mortgagor had made default in performing his obligations, and his omission to take such steps has enabled the mortgagor to commit a fraud; but no case decides that he is to be postponed because he has not taken precautions against a future default by a mortgagor who has not yet, to the knowledge of the mortgagee, been guilty of default—Per Fry, L.J. *Ib.*

**Prior Equitable Mortgage—Subsequent Mortgagee with Title Deeds and Legal Estate without Notice.**]—A. voluntarily gave to his sisters, in 1848, a mortgage for a term of 200 years, to secure an antecedent debt. The sisters allowed him to retain the title deeds, that he might give security on the estate for another debt, for which he was being sued by L. Shortly afterwards, A. agreed, in writing, to give L. a mortgage on the estate for the debt, and the deeds, in pursuance of this agreement, were deposited with P. & B., the London agents of A.'s solicitor, and who shortly afterwards became his solicitors, to be held by them for the purpose of giving effect to the security. A., in 1851, made a mortgage in fee to C., who had no notice of the prior incumbrances, and P. & B. handed over to C. the title deeds. In 1855 the sisters made a submortgage of the term by assignment:—Held, that the mortgage of 1848 was void under 27 Eliz. c. 4, as against C., who therefore took the legal fee discharged of the term; that C., having no notice, was not affected by the fraud committed by P. & B. in parting with the title deeds; and that, having the title deeds, and having acquired the legal estate for value without notice, he was entitled to priority over the sisters and their assignee, and over the equitable security of L. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

—— **Fraud of Mortgagor.**]—C., an equitable mortgagee (1851) of property, with notice of a prior legal mortgage of it to A. and B. (as the executors of their brother), filed a bill for redemption or foreclosure against A., B., and the mortgagor. The bill stated that A., who was also an unsecured creditor of the mortgagor, proposed to him to make a transfer of the joint mortgage, to secure the last-mentioned debt. The mortgagor, without expressly assenting to that offer, wrote to A., telling him he thought of selling some part of the mortgage security, and, if he did so, he would give A. another security for his debt; but that he (A.) could hold the "legal assignment," as executor of his brother, until he was paid off or received the substituted security. The joint mortgage was paid off and A. and B. prepared and executed a reassignment to A. of the mortgage security, ready for execution by the mortgagee, but did not deliver it to him. The mortgagor subsequently mortgaged the equity of redemption in the property of D., when all the deeds relating to it (including the reassignment executed by A. and B.) were deposited with D. The mortgagor then (1858) absconded without having repaid or given A. the substituted security for his unsecured debt, when also A. and B. first expressly heard of the equitable mortgage to C. A. and B. then (1859) conveyed all their interest in the mortgage property to D.:—Held, on appeal, that the plaintiff was entitled to priority; that D. having advanced his money without notice of the plaintiff's mortgage, and having received the title deeds, ought not to be deprived of them, or required to produce them without payment of what was due to him. *Fagg* v. *James*, 8 L. T. 5—L. C.

**Agreement to Mortgage—Mortgagee in Possession of Deeds before Mortgage — Interim Mortgage.**]—A. agreed to sell an estate to B. for 1,400*l.*, on which 400*l.* was to be paid on the execution of the conveyance, and 1,000*l.* was to be secured on mortgage of the estate. B. paid A. the 400*l.*, and A. conveyed the estate to him, but kept possession of the conveyance and of the title deeds. Some time afterwards B. mortgaged the estate to A. for the 1,000*l.* but, in the interim, he had, unknown to A., mortgaged the estate to C., but C. did not investigate the title to the estate, or make any inquiry relative to the title deeds:—Held, that A. was entitled to priority over C. *Worthington* v. *Morgan*, 16 Sim. 547; 18 L. J., Ch. 233; 13 Jur. 316.

**Equitable Mortgagees.**]—The rule that the court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence does not apply as between two equitable claims. *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A.

In order to postpone an equitable mortgagee to another equitable mortgagee whose security is of later date, it is not necessary, as it would be in order to deprive a legal mortgagee of the advantage of the legal estate, to show that the first mortgagee has been guilty of negligence amounting to, or which is evidence of, fraud. Negligence, such as omission to obtain possession of or to make inquiries about the title deeds, may be sufficient. *Northern Counties Fire Insurance Co.* v. *Whipp* (26 Ch. D. 482) distinguished. *Farrand* v. *Yorkshire Banking Co.*, 58 L. J., Ch. 238; 40 Ch. D. 182; 60 L. T. 669; 37 W. R. 318.

—— **Negligence.**]—In the case of two innocent persons taking equitable mortgages from a fraudulent mortgagor, mere carelessness or want of prudence on the part of the first mortgagee in taking his security is not sufficient to postpone

him to the second; for that purpose the negligence must be "gross"; that is, so great as to make the first mortgagee responsible for the fraud committed on the second mortgagee; and, semble, the amount of negligence necessary to postpone a first mortgagee is the same whether his mortgage is legal or equitable. *Taylor* v. *Russell*, 59 L. J., Ch. 756; [1891] 1 Ch. 8; 62 L. T. 922; 38 W. R. 663. *S. C.* in C. A., col. 1571, and H. L., col. 1570.

—— **Negligence, what.**]—The owner of a farm deposited deeds dated 1774 as security for money due, writing at the same time that the deeds were the title deeds of the farm and were to be a security. He afterwards deposited later title deeds with his bankers by way of security; the bankers had no notice of the prior charge:—Held, that the owner of the prior charge had not been guilty of negligence so as to lose her priority. *Dixon* v. *Muckleston*, 42 L. J., Ch. 210; L. R. 8 Ch. 155; 27 L. T. 804; 21 W. R. 178.

### b. Recitals, Notice by.

**Effect of general Recital.**]—A general recital in a deed that there were mortgages on the estate, held to affect parties claiming under the deed with notice of a mortgage not specified therein. *Farrow* v. *Rees*, 4 Beav. 18; 4 Jur. 1028.

**False Recital, Effect of.**]—P. being indebted to B. makes a mortgage of an equity of redemption of real estate to B. for the purpose of securing the debt, and by the indenture of mortgage it was falsely recited that the mortgaged estate was subject to an equitable charge for moneys due to J., secured by the deposit of a deed. P. retained the deed in his own possession, and subsequently deposited it with J., as a security for money partly lent to P. by J. before and partly after the mortgage of the estate to B. J. at the time of the deposit had no notice of the prior mortgage to B.:—Held, that, inasmuch as an actual prior charge on the estate, if afterwards paid off by P. or otherwise avoided, would have left B. in the position of the first mortgagee of the equity of redemption, the recital of a charge, which had in fact, no existence, could not have the effect of postponing B.; that the interest acquired by J., by the subsequent mortgage by way of deposit, could not be enlarged by the effect of the false recital, and was only an interest in the equity of redemption subject to the mortgage to B.; and that B., in a suit for that purpose, was entitled, as against J., to the ordinary decree for payment, or for foreclosure and delivery up of the deed on default. *Frazer* v. *Jones*, 5 Hare, 475. Affirmed, on appeal, but with some variations in form, *S. C.* 17 L. J., Ch. 353; 12 Jur. 443.

Quære, as to delivery up of deed if J. had not had notice of the mortgage. *Ib.*

W., a solicitor, purchased an estate, subject to a mortgage, taking the conveyance in the name of G., who by it covenanted to pay the mortgage-money. The solicitor, being afterwards indebted to E., and pressed for the money, offered E. the security of the estate, and a mortgage deed was accordingly executed between W. and E. in the usual form, as if W. had borrowed the money of E. W. paid the interest for some time, and then E. sued W. on his covenant to pay principal and interest contained in the mortgage deed, and G. filed a bill to restrain him:—Held, that, though the recitals in the deed were not true, that did not give the mortgagee any notice of fraud, or prevent him from suing on the covenants. *Greenfield* v. *Edwardes*, 11 Jur. (N.S.) 419; 12 L. T. 411; 13 W. R. 668.

—— **Surety—Fraud of Principal.**]—Held, also that, considering G. as a surety, he would not be discharged by the fraud of his principal, of which E., the mortgagee, had no notice. *Ib.*

**Security notwithstanding Recital.**]—Mortgagee held, notwithstanding a recital in the declaration of trusts, to have obtained a security to the extent of the interest of mortgagor in the premises. *Sheldon* v. *Cox*, 2 Eden, 224.

**Recital working Estoppel—Deed void under 27 Eliz. c. 4.**]—In 1872 T. mortgaged property to the plaintiffs, which they wished to foreclose. At that time they had notice only of a prior mortgage to the reversionary society. In 1874 T. filed a petition for the liquidation of his affairs by arrangement, and his stepdaughter P. then produced, for the first time, a mortgage of the same property dated the 15th August, 1871, to secure a sum of money lent by her to T. in 1864. She proved her debt in the liquidation, and handed her security to the trustee, who claimed to have it paid off. The deed contained a recital that T. had agreed to give her a mortgage as a security for the money:—Held, that the deed had not been communicated to P., that it was voluntary and void against the plaintiffs under 27 Eliz. c. 4, and that, though the recital would have worked an estoppel against the mortgagor and persons simply claiming under him, it had no such effect against the plaintiffs, who obtained their title under the statute. *Cracknell* v. *Janson*, 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851—C. A. Affirming 48 L. J., Ch. 168.

**Negligence of Mortgagee—In not Inquiring.**]—A mortgage given by B. in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by A. and B., for the settlement of certain family estates, and for the payment of some of A.'s debts, and recited that in that deed a sum of 3,200*l.* was due to D., as trustee for an infirmary, on a judgment against A. and B.; that that money, with interest, had been paid off; and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of D., against A. and against B., dated in 1810 and 1812; but a warrant of attorney, given by D. in 1819, authorised satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgagee caused satisfaction to be entered on the roll as to the separate judgments of 1810 and 1812, but made no farther inquiries:—Held, that, as the mortgage itself had recited a joint judgment for a specific sum, the mortgagee had been guilty of negligence in not looking farther into the matter, and must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823. *Montefiore* v. *Browne*, 7 H. L. Cas. 241; 4 Jur. (N.S.) 1201.

—— **In not Verifying Recital.**]—A testator gave his real estate for a term of 800 years to A.,

his son, and B., a stranger, to secure payment of so much of his debts and legacies as his personal estate should be insufficient to pay. Subject thereto he gave his residuary real estate to A. and C., another son. A. and C. were his executors; they paid his debts and legacies except two legacies of 1,500*l.* each. At the testator's death, his personal estate was sufficient to pay the two 1,500*l.* legacies; but the executors wasted it, and the two legacies of 1,500*l.* each were not paid. A. and C. (B. being dead) made two mortgages; one to persons who knew, or had the means of knowing, that the advance was for the personal use of A. and C., but the money was paid into the hands of A. alone, the surviving trustee of the term; the other mortgage was to a person without notice of any improper application of the money; and the deed recited truly that the debts were paid, but untruly that the two legacies not paid were provided for, and the trusts satisfied:—Held, that the second mortgagee was liable to be postponed, by his own neglect in verifying the recital of the deed. *Howard* v. *Chaffers*, 2 Dr. & Sm. 236; 32 L. J., Ch. 686; 9 Jur. (N.S.) 767; 9 L. T. 243; 11 W. R. 1057.

Held, secondly, that the payment of the money by the first mortgagee to the trustee of the term alone did not prevent the effect of the mortgage, knowing it was not advanced on the trust. *Ib.*

**In Lease.**]—Mortgagee of a lease which recited the surrender of a former lease which was in consideration of the surrender of a former lease, in which plaintiff's title appeared:—Held, to have notice of the title. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291.

**In Deed of Assignment of Equity of Redemption.**]—A., first mortgagee, after an order for foreclosure against the mortgagor, purchased from C., the trustee in bankruptcy of his mortgagor, the equity of redemption in the mortgaged premises. N. was a second mortgagee of the same, besides other property. The deed of assignment contained recitals that C. had agreed to sell to A., subject to the claim of N., at the price of 1,400*l.*, and that 1,380*l.*, the first mortgage debt, should be retained by A. out of the purchase-money, and it was thereby witnessed that, in consideration of the sum of 1,380*l.* so retained in full satisfaction of the mortgage debt of 1,380*l.*, which sum A. did thereby declare to be fully satisfied, and also in consideration of 20*l.* paid to C. by A., the receipt whereof making, with the 1,380*l.* so retained, the purchase-money of 1,400*l.*, he, C., did grant, bargain, &c., all those hereditaments, . . . subject to the claim of N.:—Held, that upon the deed itself there was no intention shewn on the part of the first mortgagee to postpone his own mortgage debt. *Adams* v. *Angell*, 25 W. R. 139. Affirmed, 46 L. J., Ch. 352; 5 Ch. D. 634; 36 L. T. 334—C. A.

**In Deeds Deposited—Constructive Notice.**]—Among title deeds deposited by way of equitable mortgage was a deed which formed an essential link in the mortgagor's title; this deed stated that the mortgagor was a widow, and contained recitals of proceedings in chancery, and an award of arbitrators, in pursuance of which she became entitled to premises, the subject of an intended mortgage. The proceedings and award, if referred to, would have shewn that the mortgagor was entitled as administratrix:—Held, that the mortgagees had constructive notice of the mortgagor's representative character, and that the mortgage could not prevail against the right of those beneficially entitled; and this on the supposition that a statement had been made to the mortgagee that the mortgagor was entitled absolutely. *Stein* v. *Stein*, 16 W. R. 69.

*See also* NOTICE.

7. MORTGAGES OF PERSONALTY—NOTICE TO LEGAL OWNER.

**Notice to Trustee—Charge of Mortgage Debt by First Mortgagee—Subsequent Mortgage—Notice by sub-Mortgagee.**]—Several persons were incumbrancers upon a fund due to E. in the hands of W. By agreement between E. and the incumbrancers it was arranged that the money should be paid over to C., to be distributed between himself and the other incumbrancers according to their priorities. Prior to this arrangement, M., who was the first incumbrancer for 1,300*l.*, charged that sum with 400*l.* in favour of C. No notice of the charge was given to W., neither was it mentioned in the agreement. M. afterwards assigned to N. the whole of the 1,300*l.* as a security for a loan. N. had no notice of C.'s charge. He gave notice both to W. and to C.:—Held, that N.'s charge was entitled to priority. *Public Works Commissioners* v. *Harby*, 23 Beav. 508; 26 L. J., Ch. 472; 3 Jur. (N.S.) 478; 5 W. R. 400.

—— **By Second Mortgagee — Subsequent Judgment Creditor.**]—By his will a testator devised and bequeathed his real and personal estate to two trustees to sell the same, and, after paying an annuity, to divide the proceeds among a certain class, of which F. P. D. was one. A suit was instituted for the administration of the testator's estate. F. P. D., by deed, dated in 1837, assigned his share to B. D. (one of the trustees), to secure advances. By deed, dated in 1844, he assigned his share to S. S., to secure advances, and notice of that deed was given by S. S. to the trustees. By an order in the cause, dated in 1845, the real estates of the testator were directed to be sold, and the produce to be paid into court and invested, and the stock representing the purchase-money stood to the credit of the cause. In 1846 C. J. obtained and registered a judgment against F. P. D., and by a judge's order, under the statutes 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, it was ordered, that the stock should stand charged with the amount for which the judgment was obtained; and the judge's order was filed in November, 1848, in the office of the accountant-general. B. D., the first assignee, took no steps beyond his deed, nor did S. S. obtain any stop-order:—Held, under these circumstances, that C. J. did not obtain any priority over S. S. *Bearcliffe* v. *Dorrington*, 19 L. J., Ch. 331; 14 Jur. 1101.

—— **Prior Annuitant—Subsequent Mortgagee, Claiming through Notice given by Another.**]—By indenture of the 21st of January, 1820, executed upon the marriage of D. C. M., two sums, of 2,000*l.* and 3,000*l.*, secured by the several bonds and warrants collateral of Lord K. and his son, were vested in trustees, upon trust for D. C. M. for life, with an ultimate remainder to him absolutely, in case there should be no children of the

marriage. Judgments were subsequently entered upon these bonds. In May, 1825, the trustees transferred to D. C. M. the bond for 2,000*l.* and the warrant collateral, but did not assign the judgment; and in the following month D. C. M. assigned this bond and warrant to W. S. as a security for 1,998*l.* 17*s.* advanced by W. S. to D. C. M.; and subsequently W. S. pledged these same securities with his bankers, by whom, in 1833, for the first time, notice was given to one of the trustees of the settlement of 1820. Payments were, from time to time, made by D. C. M. to W. S., and in the year 1837 200*l.* only remained due to W. S., which having been then paid off, the securities were got up by W. S. from his bankers, and reassigned to a trustee for D. C. M.; and within a few days afterwards that trustee and D. C. M. assigned the same securities to the plaintiff in the second cause, in consideration of a pre-existing debt and moneys then advanced. Previously to this, in the month of November, 1829, D. C. M. had granted to the plaintiff in the first cause an annuity charged upon his life-estate. It appeared, in evidence, that in the year 1831, and even prior thereto, application had been addressed by the plaintiff in the first cause to Lord K., one of the obligors, and to his agent, and that payments had been made by the latter to the plaintiff in respect of the annuity, and, further, that in the year 1833 a suit had been instituted in the court of exchequer, by the same plaintiff, for enforcing payment of the annuity, in which suit the trustees of the settlement of 1820 were made defendants. A question of priority having arisen between the plaintiffs in the first and second causes:—Held, that the plaintiff in the second cause could not be regarded as a party claiming through or under W. S., and therefore that the notice given on the part of W. S., in 1833, could not be considered as operating for his benefit, and consequently that his claim was to be postponed. *M'Carthy* v. *Kingston* (*Earl*), Dr. 439.

—— **Sole Surviving Trustee alleging no Notice.**]—By a marriage settlement, executed in 1834, trust funds were vested in three trustees, for the wife for her life, without power of anticipation, and (in the event which happened) as she should by deed or will appoint. In 1843 the husband joined with his wife in appointing part of the trust funds to secure a debt due from him to D., and notice of that appointment was given to the two then surviving trustees of the settlement. In 1848 the then surviving trustee of it was released from the trusts and three new trustees appointed. The two survivors of those trustees, and afterwards the sole survivor of them, joined with the wife in various dealings with the trust funds. In 1867 the wife appointed a portion of the funds to the sole surviving trustee of the settlement by way of indemnity to him, and the estate of the other trustee who had dealt with the funds at her request. There were other subsequent dealings with the funds. Bills were filed to administer the trusts of the settlement, and ascertain the priorities of the various incumbrancers. The sole surviving trustee of the settlement alleged that he had had no notice of the appointment of 1843:—Held, that the appointees under that deed were entitled in priority to all other incumbrancers on the funds. *Phipps* v. *Lovegrove*, 42 L. J., Ch. 892; L. R. 16 Eq. 80; 28 L. T. 584; 21 W. R. 590.

**Notice to Executor.**]—G., by will, gave to his wife the use of all his household goods so long as she continued his widow; he also gave the rents arising from his freehold and leasehold houses to her so long as she lived and continued to be his widow, for the maintenance of his children; and he also gave the rents arising from another house to his wife so long as she lived and continued to be his widow; and, if at the death or marriage of his wife his youngest child should have attained twenty-one, then he ordained that his executrixes, or the survivor of them, and the executor or administrator of such survivor, should sell all his freehold and leasehold property and household furniture, and the moneys arising therefrom he gave amongst his children and R., the son of his wife, equally; but, if any should die leaving no lawful issue, before the death or marriage of his wife, then the whole of the money was to be divided equally amongst the surviving children and R. The testator appointed his wife and his three sisters executrixes, two of whom died some time after, leaving the widow and one sister of the testator (who subsequently married L.) surviving. The widow had not married again. In June, 1855, R. assigned to the plaintiff all his share, to which he was or might become entitled under the will, in the real and personal estate, and the proceeds thereof, and the rents of the same, to secure the payment to the plaintiff of money lent by them; and in July following the plaintiff gave notice to the two executrixes surviving of the indenture of June. D. alleged that R., by an indenture dated in March, 1854, assigned his reversionary interest under the will to him to secure the payment of money lent; but in May, 1855, one of the executrixes wrote to the plaintiff, stating that R. had not, to her knowledge, made any assignment or mortgage. The question, on a bill to redeem or foreclose, was whether the plaintiff, whose assignment was later in date, but of which notice had been given, was entitled to priority over D., who had neglected to give notice to the executrixes: and the court held that the plaintiff was entitled to priority. *Consolidated Investment and Insurance Co.* v. *Riley*, 1 Giff. 371; 29 L. J., Ch. 123; 5 Jur. (N.S.) 1283; 8 W. R. 102.

—— **Grant of Annuity out of Legacy—Covenant by Third Person to answer Annuity—Subsequent Mortgage of Legacy.**]—A testatrix bequeathed a sum of 1,000*l.* to trustees in trust to invest the same, and to pay the annual produce during the life of M. F. H. into her proper hands, or to her order, for her separate use. The testatrix died in 1838, and by deed dated the 24th of October, 1840, M. F. H., in consideration of 300*l.*, granted an annuity of 30*l.* to J. H., payable half-yearly during M. F. H.'s lifetime, out of the dividends and interest to accrue on the legacy of 1,000*l.* or the securities for the same. This annuity was afterwards assigned to trustees for J. H. By another deed of like date, and made between C. H. and the several parties to the other deed, C. H. covenanted with J. H. to pay to her the annuity of 30*l.* as often as default should be made in payment thereof by M. F. H., until the legacy should be invested by the testatrix's executor, and it was by the same deed agreed that C. H. should stand in the place of J. H., as regarded the interest and dividends to accrue due to the extent of any sums that might be paid by him to J. H. previously to the

investment of the legacy. C. H. paid divers sums to J. H. under his covenant, and in November, 1840, the executor received notice of J. H.'s security, and in 1846 he received notice of a subsequent mortgage executed by M. F. H. of her interest in the same dividends and interest to S., but no express notice was given to the executor of the deed to which C. H. was a party until May, 1848. In July, 1848, the legacy of 1,000*l.*, less the duty, and the interest thereon amounting to 339*l.* 10*s.*, were paid into court by the executor under the statute 10 & 11 Vict. *c.* 96, to an account intituled "The account of M. F. H. and her incumbrancers" :—Held, that C. H. was entitled to priority over S. to the extent of the payments made by him to J. H. *Cawthorne, In re*, 12 Beav. 56 ; 18 L. J., Ch. 116.

**Notice of Deed not Notice of Contents.**]—Notice of an assignment upon the purchase of a part of a fund, to which the vendor was contingently entitled, is not notice of a covenant by the vendor in the same deed to pay the premiums for keeping up a policy of assurance, or of a declaration that any payment which may be made by the purchaser shall be a charge upon the entire fund. *Bright's Trusts, In re*, 21 Beav. 430 ; 25 L. J., Ch. 449 ; 2 Jur. (N.S.) 300 ; 4 W. R. 381.

The vendor of part of a fund, to which he was contingently entitled, covenanted in the deed of assignment to insure his life against that of the tenant for life, and to keep the policy on foot ; but it was declared that, in case of default, the purchaser might pay the premiums, and that such payments should be a charge on the entire fund. The purchaser gave notice to the trustees of the assignment made to him, but he omitted all notice of the policy or the possibility of his having to pay the premiums. The vendor afterwards mortgaged the remainder of his interest in the fund to other persons. The mortgagees gave notice of their securities, and, after the death of the tenant for life, the purchaser gave notice of his claim, including in it the sums he had paid for premiums upon the policy :—Held, that the first notice was insufficient to give the purchaser a priority for the premiums paid, and that, so far, he must be postponed to the mortgagees. *Ib.*

**Priority depending on Notice to Trustees of original Settlement.**]—The priority of assignments of the equitable interest in personal estate settled upon such trusts as A. shall appoint, and appointed by A. to trustees for the assignor, depends upon priority of notice to the trustees of the original settlement, so long as the trust estate is under their control ; consequently, a mortgagee of such interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees of the original settlement, was postponed to a subsequent mortgagee without notice of the prior mortgage, who gave notice to both sets of trustees. *Bridge* v. *Beadon*, L. R. 3 Eq. 664 ; 15 W. R. 527.

**Notice before Fund comes into Possession.**]—Notice of a charge on a fund given to one before the fund comes into his possession is wholly ineffectual. *Somerset* v. *Cox*, 33 Beav. 634.

Notice of an equitable assignment having been given to the trustees before the fund actually reached their hands :—Held, to give priority over a subsequent assignment, of which earlier notice was given. *Buller* v. *Plunkett*, 30 L. J., Ch. 641 ; 7 Jur. (N.S.) 873 ; 9 W. R. 190.

*See also* ASSIGNMENT.

## H. TACKING.

1. *Successive Mortgages*, 1606.
2. *Further Advances*, 1611.
3. *Judgments*, 1614.
4. *Bonds*, 1616.
5. *Simple Contract Debts*, 1618.
6. *Ireland and Irish Registry Act*, 1619.

### 1. SUCCESSIVE MORTGAGES.

**Generally.**] — As to taking securities, see *Morret* v. *Paske*, 2 Atk. 52.

Third mortgagee buying up first, becomes prior to second. *Hasket* v. *Strong*, 2 Str. 689.

**Equitable Mortgagees.**] — Where several mortgagees have all equal equity, and the legal estate is obtained by none of them, but remains in trustees throughout, the incumbrances are available according to their several dates only, and there can be no preference inter se :— Held, therefore, first mortgagee being also third cannot tack the two securities, so as to exclude the mesne one. *Frere* v. *Moore*, 8 Price, 475 ; 22 R. R. 759.

**Against Creditors.**] — Tacking securities against creditors or assignees for valuable consideration. *Adams* v. *Claxton*, 6 Ves. 226 ; 5 R. R. 263.

**Notice.**]—Purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice. *Toulmin* v. *Steere*, 3 Mer. 210 ; 17 R. R. 67.

**Without Notice.**]—It is an established rule, in equity, that a third mortgagee without notice of second, may, by paying off first incumbrance, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, until he shall be paid what is due to him on both mortgages. *Belchier* v. *Renforth*, 5 Bro. P. C. 292.

An owner mortgaged first to A., secondly to B., and he then conveyed to C. "in trust" to sell and pay A., and a debt due to D., and another due to C., and the residue to the owner. C. had no notice of B.'s mortgage ; afterwards got a transfer of A.'s mortgage, and with it the legal estate :—Held, that C. was entitled to tack the third charge to the first mortgage, and exclude B. *Spencer* v. *Pearson*, 24 Beav. 266.

—— **Against Writ of Elegit.**]—A mortgagee, although without notice of any writ of elegit having been issued, is not entitled to tack a subsequent charge to his first mortgage on redemption by the tenant by elegit. *Champneys* v. *Burland*, 23 L. T. 584 ; 19 W. R. 148.

—— **Through Solicitor.**]—A., having previously mortgaged property to B., entered into an agreement with his bankers for a second mortgage to secure an overdrawn balance. The original mortgage, after several transfers, became

vested in C. C. transferred to D., who at the same time advanced a further sum. C.'s son acted as his solicitor in the transfer to C., and as the solicitor of C. and D. in the transfer to D. At the time of the transfer to C. notice was given to his son of the second mortgage:—Held, that, inasmuch as he did not acquire his knowledge while acting as D.'s solicitor, D. was not bound by notice, and was entitled to tack his further charge to his first mortgage. *Bulpett* v. *Sturges*, 22 L. T. 739; 18 W. R. 796.

**Extent of Principle.**]—The doctrine of tacking is applicable only in the case of an existing debt. *Kirkwood, In re*, 1 L. R., Ir. 108.

A mortgagee cannot tack to his debt another mortgage debt, the property mortgaged to secure which has ceased to exist. *Banner* v. *Berridge*, 50 L. J., Ch. 630; 18 Ch. D. 254; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

The right to tack in equity not affected by the relation to the act of bankruptcy. *Knott, Ex parte*, 11 Ves. 619.

—— **Foreclosure — Trusts for Sale.**]—The rules as to tacking one mortgage to another apply to foreclosure as well as to redemption suits, and to mortgages of equitable personalty, by way of trusts for sale, as well as to ordinary mortgages of real estate. *Watts* v. *Symes*, 1 De G. M. & G. 240; 16 Jur. 114.

—— **On Petition for Sale.**]—A mortgagee is entitled to tack one mortgage to another on his petition for a sale, if the assignees decline an offer made by him to abandon all right of proof on their releasing the equity of redemption in both mortgages; and semble, that he would be so entitled whether such offer were made or not, and that the right of tacking is the same whether the party seeking relief is the mortgagor or the mortgagee. *Berridge, Ex parte, Loosemore, In re*, 3 Mont. D. & D. 464; 7 Jur. 1141.

—— **Equity of Redemption coming to First Mortgagee as Executor.**]—The right of the first mortgagee with the legal estate to take as against mesne mortgagee does not cover a mortgage of the equity of redemption coming to him as executor. *Barnett* v. *Weston*, 12 Ves. 130; 8 R. R. 319.

**Equity of Redemption in different Persons.**]—The principle upon which a court of equity allows the tacking of mortgages does not apply to a case where the equity of redemption belongs to different persons at the time when the mortgagee's title to both estates accrues. *White* v. *Hillacre*, 3 Y. & C. C. C. 597; 4 Jur. 102. See S. P., *Marcon* v. *Bloxam*, 11 Ex. 586; 25 L. J., Ex. 193.

**Rights of Transferee.**]—Two estates subject to distinct first mortgages vested in different mortgagees were both again mortgaged to the same second mortgagees; afterwards the two first mortgages were transferred to one person, with notice of the second mortgagee:—Held, that the transferee was, in a foreclosure suit by him instituted against the second mortgagee, entitled to tack the two first mortgages together. *Vint* v. *Padgett*, 2 De G. & J. 611; 28 L. J., Ch. 21; 4 Jur. (N.S.) 1122; 6 W. R. 641.

**After Bill brought.**]—After a bill brought by a second mortgagee against the first and third mortgagees to discover incumbrances, the last mortgagee may get in the first incumbrance, and protect himself against the second. *Hawkins* v. *Taylor*, 2 Vern. 29.

**Pending Bill.**]—Third mortgagee buys in the first, though pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee shall tack the first mortgage to his third mortgage. *Brace* v. *Marlborough (Duke)*, 2 P. Wms. 491; Moseley, 50. *See also* 9 Mod. 38.

**Pendente lite.**]—Third mortgagee, buying in the first mortgage pendente lite, shall exclude the second. *Robinson* v. *Davison*, 1 Bro. C. C. 63.

Third mortgagee having pendente lite, and after the first mortgagee had by his answer submitted (on payment of the money due to him) to assign to the plaintiff, the second mortgagee, obtained an assignment of the first mortgage, decreed to be entitled to hold the estate against the second mortgagee, till he should be paid what was due to him upon both, he having had no notice of the second mortgage when he advanced his money. *Belchier* v. *Butler*, 1 Eden, 522.

A subsequent incumbrancer, though pendente lite, may buy in a prior mortgage, which, though satisfied, shall not be taken from him until all the money due to him on the subsequent incumbrance be paid him. *Turner* v. *Richmond*, 2 Vern. 81.

**After Decree.**]—A third mortgagee cannot take in a prior security, to displace a second mortgagee, after a decree to account, and before the master has made his report. *Wortley* v. *Birkhead*, 3 Atk. 811.

Tacking allowed up to a decree to settle priorities, not afterwards. *Knott, Ex parte*, 11 Ves. 619; 8 R. R. 254.

**Commission of Bankruptcy.**]—A. makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and commissioners make an assignment of his estate, and then B. lends 200*l.* to the bankrupt on a second mortgage, having notice of the bankruptcy, and afterwards he gets in the first mortgage: this prior mortgage shall not protect the mortgage subsequent to the bankruptcy. *Hitchcock* v. *Sedgwick*, 2 Vern. 157.

The claim to tack by a third mortgagee, having taken in the first mortgage of the inheritance, but subject to a term outstanding, given up as against a mesne incumbrancer; as against the assignees under the bankruptcy of the mortgagor, quære; the commission being subsequent to the last mortgage; whether the act of bankruptcy was previous, doubtful. No objection that the consideration for the last mortgage was a debt originally by simple contract. *Knott, Ex parte*, 11 Ves. 609; 8 R. R. 254.

Distinction as to tacking between a commission of bankruptcy, and a decree to settle priorities. *Ib.* 619.

Mortgagee not permitted to tack as against the assignees in bankruptcy a mortgage subsequent to an act of bankruptcy, though without notice, and previous to the commission, and though he had the legal estate. *Herbert, Ex parte*, 13 Ves. 183.

**Second Legal Mortgagee Paying off Equitable Mortgage—Effect on Prior Legal Mortgage.**]—W. was owner in fee of certain property, and prior to the 1st May, 1879, mortgaged it by deposit of title deeds to secure an advance by G. On the 1st May, 1879, W. gave a legal mortgage

of the same property to B. to secure a debt owed by him. B. at the time of the execution of the mortgage did not know of the equitable mortgage to G. In June, 1879, W. applied to the defendant to make an advance to pay off the charge held by G. The defendant advanced the money; G. handed the deeds back to W., who handed them to H., who was acting for all parties; and H. in his turn handed them to the defendant. W. on or about the same date executed a legal mortgage of the same premises to the defendant to secure his advance. This deed did not recite the mortgage of the 1st May to B., nor was the defendant aware of its existence. B. subsequently became insolvent, and his trustee in liquidation claimed priority for the mortgage to B. of the 1st May, over that of June, 1879, to the defendant:—Held, that, as from the nature of the transaction between the parties it was intended that the defendant should stand in the place of the equitable mortgagee, he was entitled to priority over the first legal mortgagee to the extent of the amount of the equitable mortgage. *Mason* v. *Rhodes*, 53 L. T. 322.

**Mortgagor, Fraud of—Deeds left with—Negligence—Priority.**]—By two separate mortgage deeds, dated the 7th August, 1877, N., who was S.'s solicitor, mortgaged to W. and S. two separate estates, A. and B., to secure 1,250*l.* on each estate. The B. estate comprised five separate properties, which were separately described and numbered 1, 2, 3, 4, 5. S. asked N., as it was a trust matter, to send him the deeds, and N. sent a parcel, which S. sent on to his bankers without examination. It was afterwards found to contain only the two mortgage deeds. On the 20th October, 1880, N. deposited the title-deeds relating to 5 with L. to secure 300*l.* On the 18th May, 1881, he deposited the deeds relating to 1, 2, 3, and 4, to secure an overdraft of 3,000*l.* with his bankers, the plaintiffs. The deed relating to the A. estate had been previously deposited with the plaintiffs to secure his overdraft. Neither L. nor the plaintiffs had at the time of their advances any notice of the first mortgage, nor had the plaintiffs any notice of the advance to L. In June, 1882, N. became bankrupt. In July, 1882, the plaintiffs took a transfer of the mortgages to W. and S. They then brought this action for foreclosure, claiming to tack the sum due on their equitable mortgage to that due on the first mortgage of B., so as to gain priority over L.:—Held (1), that S. had not been guilty of such negligence as to postpone his legal mortgage to the subsequent equitable incumbrances; (2), that the general rule as to tacking applied, though the third mortgage did not include that part of the property in the first which was comprised in the second, and that the plaintiffs had a right to recover the whole of their debt in priority to L. out of all the B. estate. *Atherley* v. *Burnett*, 52 L. T. 736; 33 W. R. 779.

**Trustee for Mortgagor getting in Legal Estate.**]—The trustee of a mortgagor is not entitled to avail himself of the legal estate for the purpose of altering the priorities of the mortgagees. *Ledbrook* v. *Passman*, 57 L. J., Ch. 855; 59 L. T. 306.

The owner of a farm mortgaged it in succession to three persons, the third mortgagee having no notice of the second mortgage. By a deed made between the mortgagor and P., in order (as was recited to stop) a forced sale by the mortgagees, the equity of redemption was conveyed to P. upon trust for sale, with power to postpone the sale and raise money by mortgage or otherwise to pay off the mortgagees, and the proceeds were to be held by P. upon trust to pay his costs and expenses, and, after payment of the same and the mortgages, to pay the residue to the mortgagor. P., having notice of the second mortgage, paid off the first and third out of his own moneys and took a transfer of the benefit of them, and he subsequently got in the legal estate. Upon an action by the second mortgagee for redemption:—Held, that P. acted as trustee for the mortgagor, and that he was not entitled to tack to the prejudice of the second mortgagee, but that he was entitled to add his costs to his security. *Ib.*

**Buying in Satisfied Mortgage, or Statute.**]—If A. mortgages land to B., and then makes another mortgage of it to C. without notice, and C. purchases a precedent mortgage outstanding at law, though nothing be due upon it, or a statute whereon money is due which he extends, he shall hold the land until he is satisfied, though he had notice of B.'s mortgage before his second purchase of the prior security; for, as he lent his money innocently at first, he may do what he can to secure it, and it is of no consequence that money is not due on the first incumbrance, since the legal title is bought up. *March* v. *Lee*, 1 Ch. Ca. 162, 163, 166; 2 Vent. 337. *Churchill* v. *Grove*, 1 Ch. Ca. 36. *Edmunds* v. *Povey*, 1 Vern. 187. *Higgon* v. *Syddal*, 1 Ch. Ca. 149. *Hacket* v. *Wakefield*, Hardr. 172. *Bovey* v. *Skipwith*, 1 Ch. Ca. 201.

When a purchaser buys in an old estate or mortgage, though nothing is due upon it, yet in equity he shall defend himself by it. *Hitchcock* v. *Sedgwick*, 2 Vern. 159.

—— **By Undue Means.**]—So he shall though he got in this prior incumbrance by undue means. *Ib.*

**Mortgage after Release of Equity of Redemption.**]—A man makes a first mortgage and afterwards for a further consideration absolutely releases the equity of redemption, and then makes a second mortgage: the second mortgagee shall protect himself under an old statute. *Hitchcock* v. *Sedgwick*, 2 Vern. 160.

**Protection by Old Statute.**]—One articles to sell lands to A., and afterwards articles to sell the same lands to B. B. pays the money and gets a conveyance, and A. assigns his articles to C., who gets in an old statute: he shall defend himself by it. *Ib.*

**Legal Mortgagee Tacking Subsequent Equitable Interest.**]—A legal mortgagee, acquiring a subsequent equitable interest, is entitled to tack the subsequent equitable interest to the legal mortgage, so as to exclude an intermediate equitable charge, if he had not notice of that intermediate equitable charge. *Lloyd* v. *Attwood*, 3 De G. & J. 614; 29 L. J., Ch. 97; 5 Jur. (N.S.) 1322.

**By Mortgagee of Contract of Sale as against Purchaser of Estate.**]—A., having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase-money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money, and,

having also raised a further sum from E. on the security of his contract without giving him notice of C.'s mortgage, became insolvent and absconded. D. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due, and E., to secure himself, took an assignment of B.'s mortgage. But the balance of the purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B.:—Held, that E. was not entitled to tack his security to B.'s mortgage, first, because his security was not a security on the estate, but only on the purchase-money; and secondly, because, although E., at the time he advanced his money, had no notice of any particular incumbrance on the estate except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject, and therefore the equities of D. and E. were not equal. *Lacey* v. *Ingle*, 2 Ph. 413.

**Priority, how Lost.**]—If third incumbrancer, having constructive notice of second mortgage, fails to keep on foot first security for his protection, he is not entitled to stand in place of first mortgagee against second. *Parry* v. *Wright*, 1 Sim. & S. 369; 6 L. J. (O.S.) Ch. 174; 24 R. R. 191. Affirmed, 5 Russ. 142. And see *Parry* v. *Parry* and *Parry* v. *Maddocks*, 1 L. J. (O.S.) Ch. 161.

A subsequent title which is both legal and equitable destroys a prior title in equity only. *Hagshaw* v. *Yates*, 1 Str. 240.

**Proof of Loan.**]—Third mortgagee buys in the first, and brings bill to foreclose the second. He need not prove the money actually lent on the third mortgage, the producing an acquittance being sufficient. *Holt* v. *Mill*, 2 Vern. 279.

### 2. Further Advances.

**As against Judgment.**]—A. mortgaged to B., which was registered, then A. borrowed from C. on a judgment also registered. B. lent farther sum without express notice of C.'s registry, &c.:—Held, B. was entitled to foreclosure, unless both debts paid. *Wrightson* v. *Hudson*, 2 Eq. Abr. 498. S. P., *Bedford* v. *Backhouse*, *id.* 615.

—— **After Notice.**]—Mortgagee, having notice of a judgment, cannot tack against the judgment creditor sums advanced after such notice on security of the mortgaged premises. *Sish* v. *Hopkins*, Amb. 793.

**As against Mesne Judgment.**]—A. mortgages to B., then confesses a judgment to C., and afterwards B., without notice of the judgment, advances a further sum of money to A., who executes to him a further mortgage of the same lands for the old debt and the further advance. C. cannot redeem the first mortgage without also redeeming the second. *Tenison* v. *Sweeny*, 1 Jo. & Lat. 710; 7 Ir. Eq. R. 511.

A judgment obtained against a mortgagor subsequent to the mortgage, but prior to a further loan advanced by the mortgagee under a borrowing clause not noticed in the memorial of registry of the mortgage, will be postponed to such subsequent loan. *Purdon* v. *Gumbleton*, Wall. Lyn. 249.

—— **After Notice.**]—An estate was mortgaged to A. for a sum, and further advances. Afterwards, B. obtained a charge on the estate, by means of a judgment:—Held, that further advances made to the mortgagor by A., after notice of the judgment, had no priority over B.'s claim. *Shaw* v. *Neale*, 20 Beav. 157; 24 L. J., Ch. 563; 1 Jur. (N.S.) 666; 3 W. R. 350.

The doctrine of the case of *Gordon* v. *Graham* (2 Eq. Ca. Ab. 598) doubted. *Ib.*

**As against Jointure.**]—If a tenant in tail mortgages his land for a term, and on his marriage suffers a recovery, and settles a jointure in consideration of the marriage portion, and then borrows more money of the mortgagee, and appoints the term as a security, the recovery enures to make good the term, and if the mortgagee had no notice of the jointure, he shall be allowed the second money lent, as well as the first. *Goddard* v. *Complin*, 1 Ch. Ca. 119.

**As against Charge for Younger Children.**]—An attorney, having obtained a conveyance from his client of real estate, out of which his wife was dowable, to secure a debt and further advances, afterwards became party to a deed whereby the wife (ignorant of the previous deed) relinquished her dower in consideration of a jointure and a charge on the lands for the younger children:—Held, that further advances made by the solicitor were not entitled to priority over the charge for younger children. *Brown* v. *Lynch*, 2 Jones, 706.

**As against Rights of Younger Children.**]—A testator in 1832 devised his copyhold estate, which was subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated in 1845, leaving his eldest son in possession of the estate as her agent. In 1851 the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate, and the original mortgage being transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860:—Held, that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. *Young* v. *Young*, L. R. 3 Eq. 801.

**As against Surety.**]—A. made a mortgage to B., and by the same deed A. and C., his sureties, covenanted for payment of the mortgage money. B. recovered the amount from C., previously to which he lent a further sum to A. and took a further charge for it on the mortgaged property:—Held, that C. could not compel B. to assign the mortgage to him, unless he paid off the further sum. *Williams* v. *Owen*, 13 Sim. 597; 13 L. J., Ch. 105; 7 Jur. 1147.

A. mortgaged his freehold and copyhold estates and some drainage bonds, and, by the same deed, his daughters mortgaged their freehold and copyhold estates, to B., to secure 6,000*l.* lent by B. to A., and the deed declared that, without prejudice to any of the rights or remedies of B., his heirs, executors, &c., as between A., his heirs, executors, &c., on the one hand, and the daughters and their heirs, executors, &c., on the other hand, A., his heirs, executors, &c., should be primarily liable to the payment of the 6,000*l.*, and that his freehold

and copyhold estates therein comprised should be primarily liable to answer and make good the 6,000*l.* Six years afterwards, A. mortgaged his freehold and copyhold estates comprised in the prior mortgage, and also the drainage bonds, to B., to secure 700*l.* lent to him by B.:—Held, that B. was not entitled, as against A.'s daughters, to tack his second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of the 6,000*l.* *Bowker* v. *Bull*, 1 Sim. (N.S.) 29; 20 L. J., Ch. 47; 15 Jur. 4.

**As against Mesne Mortgagee.**]—A. mortgaged to B., to secure present and future advances, and afterwards executed a similar mortgage of the same property to C. B. and C. had mutually notice of each other's deeds. B. made advances after the date of C.'s mortgage:—Held (affirming 4 Jur. (N.S.) 919), that C. was, in respect of his advances, entitled to priority over B., on account of such subsequent advances made by him. *Rolt* v. *Hopkinson*, 3 De G. & J. 177. Affirmed, 9 H. L. Cas. 514; 34 L. J., Ch. 468; 7 Jur. (N.S.) 1209; 9 W. R. 900.

**Second Mortgage—Notice to first Mortgagee.**]—A. mortgages an estate to B. to secure future advances. He then mortgages the same property to C., who gives notice of his security to B. Quære, whether the rights of B. under his mortgage security are affected by the transaction between A. and C. *Johnson* v. *Bourne*, 2 Y. & C. C. C. 268.

**Advances after Notice of Mesne Mortgage.**]—Quære, how far a person having a mortgage for a running account is entitled to charge against a second mortgagee advances made subsequent to notice of his mortgage. *Ib.*

**As against Mesne Mortgagee—Notice, Effect of.**]—A. made a mortgage for years to B., to secure a sum already lent, and all sums thereafter to be lent, by B. to A. A. made a second mortgage to C., with notice of the first, and then B., with notice of C.'s mortgage, lent more money. Per cur. The second mortgagee having notice, shall not redeem without paying the whole due to B. *Gordon* v. *Graham*, 7 Vin. Abr. 52, pl. 3; 2 Eq. Ca. Abr. 598.

—— **Forgiveness of old Debt — Creation of new Debt.**]—S., who had a mortgage for 4,000*l.*, forgave the mortgagor 800*l.*, and three years afterwards lent him 800*l.* again; during the intervening time, a mortgage was made to J. for 2,000*l.* on the same estate:—Held, that the loan of 800*l.* cannot be considered as a continuance of the old mortgage, and in respect of an intervening incumbrance is a new one, admitting S. to have notice. *Shepherd* v. *Titley*, 2 Atk. 350.

**Advances between Agreement for, and Actual, Mortgage.**]—A mortgage in fee, made in compliance with an agreement to charge a sum of money upon an estate, the deeds of which were deposited with the equitable mortgagee at the date of the agreement, will give him and all persons taking an assignment of his debt, and the securities a right to tack to his mortgage in fee all sums advanced to the mortgagor between the date of the agreement and the conveyance in fee, if they are made bonâ fide, and without notice of advances made by other persons. *Cooke* v. *Wilton*, 29 Beav. 100; 30 L. J., Ch. 467; 7 Jur. (N.S.) 280; 9 W. R. 220.

**Priority over Judgment Creditor.**]—A legal mortgage so made will relate back to the date of the equitable mortgage, and give priority over a judgment creditor to the mortgagee, who had no notice of the judgment. *Ib.*

**As against Creditors under Trust to pay Debts.**]—Where mortgagee is creditor of trustee under will of estate to pay debts, and advances further moneys to trustee for payment of them, and takes mortgage of estate, knowing trust, he cannot have a sale of the estate in prejudice of other creditors of testator. *Turner, Ex parte*, 9 Mod. 418.

**Advances Referable to Borrowing Clause in Mortgage.**]—Where in an indenture of mortgage there was contained a borrowing clause, and subsequently small sums were advanced by the mortgagee to the mortgagor:—Held, that the mortgagee was justified in referring these payments to the borrowing clause. *Cairncross* v. *Bradley*, 2 Dr. & Wal. 482.

**Notice, What Sufficient.**]—A., having previously mortgaged property to B., entered into an agreement with his bankers for a second mortgage to secure an overdrawn balance. The original mortgage, after several transfers, became vested in C. C. transferred to D., who at the same time advanced a further sum. C.'s son acted as his solicitor in the transfer to C., and as the solicitor of C. and D. in the transfer to D. At the time of the transfer to C. notice was given to his son of the second mortgage:—Held, that, inasmuch as he did not acquire his knowledge while acting as D.'s solicitor, D. was not bound by notice and was entitled to tack his further charge to his first mortgage. *Bulpett* v. *Sturges*, 22 L. T. 739; 18 W. R. 796.

**Practice.**]—Where a bill states a mortgage to the defendant, then a mortgage to the plaintiff (with notice to each party), and claims for the second mortgage priority over any sums advanced by the first mortgagee after he had notice of the second mortgage, if the first mortgagee means to set up a distinct understanding between all the parties to the first mortgage (of whom the plaintiff was one). that the first mortgage should be a continuing guarantee for any sums advanced to the mortgagor at any subsequent time, such defence must be distinctly averred and proved. *Rolt* v. *Hopkinson*, 3 De G. & J. 177. Affirmed, 9 H. L. Cas. 514; 34 L. J., Ch. 468; 7 Jur. (N.S.) 1209; 9 W. R. 900.

### 3. JUDGMENTS.

**By First Mortgagee against Second.**]—It is a settled rule that a prior mortgagee may tack a judgment to his mortgage, though subsequent in time to a second mortgagee, provided he has no notice of the second, for qui prior est in tempore potior est in jure. *Shepherd* v. *Titley*, 2 Atk. 350.

—— **By Judgment Creditor.**]—Mortgagee may tack a subsequent judgment, but a mere judgment creditor cannot tack; not contracting for an

interest in the land, though he has a lien. *Knott, Ex parte*, 11 Ves. 617 ; 8 R. R. 254.

A prior mortgagee may tack a subsequent judgment, but a prior judgment creditor for obtaining a subsequent mortgage cannot. *Anon.*, 2 Ves. 662.

Whether a judgment creditor may as well secure himself by buying in a prior incumbrance as a third mortgagee may by taking an assignment of the first mortgage. *Wright* v. *Pilling*, Pre. Ch. 494 ; Gilb. Exch. Rep. 150.

**After Assignment of Equity of Redemption.**]—A. mortgaged leasehold property to B. in 1839. In 1841 A. assigned his equity of redemption to C., which assignment was registered on the 23rd September, but no actual notice of that assignment was given to B. until the 11th December, 1841 ; at which time B. had obtained a judgment against A. in Michaelmas Term, 1841, which judgment was signed but not registered on the 10th December :—Held, that B. was not entitled to tack his judgment as against C. *Simmons* v. *Pettit*, 8 Jur. 209.

Assignee of equity of redemption shall not be affected by judgment after confessed by the mortgagor, though the judgment creditor purchase in the mortgage ; but shall redeem upon payment of the first mortgage money only. *Brereton* v. *Jones*, 1 Eq. Abr. 325.

So also if first mortgagee buys up a judgment. *Ib.*

**By Puisne Mortgagee.**]—If a puisne mortgagee buys in a judgment or statute, being the first incumbrance, he shall hold till by law he can be evicted. *Brace* v. *Marlborough* (*Duke*), 2 P. Wms. 493 ; Moseley, 50. *See also* 9 Mod. 38.

—— **Elegit.**]—So if a puisne mortgagee buys in a prior judgment, extended on an elegit at an undervalue, he shall hold the extent till evicted. *Ib.*

—— **Further Advance.**]—So where the first mortgagee lends a further sum to the mortgagor, upon a statute or judgment, he shall retain against mesne mortgagees till the statute or judgment is paid. *Ib.*

—— **Notice.**]—But in all these cases there must not be notice of the mesne incumbrances when the money is lent. *Ib.*

—— **Satisfied Judgment.**]—Third mortgagee, without notice at the time of his mortgage, buys in the first incumbrance, being a satisfied judgment ; he shall have the benefit of it. *Edmunds* v. *Povey*, 1 Vern. 187.

**Judgment Obtained after Satisfaction of Mortgage.**]—Two sums were due to A. from B., one on mortgage of lands, and the other by covenant. A. having brought an action for both sums, B. paid the amount due on the mortgage into court. A. took this sum out of court, and he proceeded in the action and recovered judgment on the covenant :—Held, that the mortgage having been satisfied before the judgment had been obtained, A. had no right to tack his judgment. *Brecon Corporation* v. *Seymour*, 26 Beav. 548 ; 28 L. J., Ch. 606 ; 5 Jur. (N.S.) 1069 ; 7 W. R. 380.

**Interest on Judgment Debt.**]—Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of his judgment, but he is entitled to interest upon his judgment debt, though it should exceed the penalty. *Godfrey* v. *Watson*, 3 Atk. 518.

**Bankruptcy.**]—First and second mortgagees, the mortgagor a bankrupt ; the first mortgagee entitled to tack a subsequent judgment, docketed, though no execution had issued at the time of the bankruptcy. *Baker* v. *Harris*, 16 Ves. 397.

A mortgagee by demise enters up judgment against the mortgagor on another debt, and dies. His executors take from the mortgagor a memorandum empowering them to hold the title deeds of the mortgaged property as a security for a part of the judgment debt, in addition to the original mortgage debt :—Held, on the mortgagor becoming bankrupt, that the executors might, as against a second mortgagee, tack the whole of the judgment debt to the mortgage. *Cox, Ex parte, Squibb, In re*, 2 Mont. D. & D. 486.

**Copyhold.**]—A mortgagee of a copyhold cannot tack a judgment to his mortgage, because no judgment can affect that estate. *Cannon* v. *Pack*, 6 Vin. Abr. 222, pl. 6.

**Practice.**]—When a first incumbrancer, by judgment, has likewise a mortgage ; though there is another judgment prior to the mortgage, yet, if the mortgagee had no notice of it, the court will not direct a sale in favour of the second judgment creditor, unless he will pay off the first incumbrancer. *Smithson* v. *Thompson*, 1 Atk. 520.

A registered judgment creditor, without having sued out an elegit, and within a year from the entering up of the judgment, filed a bill to redeem a prior mortgage, and to foreclose. The plaintiff afterwards redeemed the mortgage, and amended his bill, seeking to tack the two debts : —Held, that the suit, as originally framed, could not be sustained ; and that the case was not bettered by the amendment. *Godfrey* v. *Tucker*, 33 Beav. 280 ; 33 L. J., Ch. 559 ; 9 Jur. (N.S.) 1188 ; 9 L. T. 359 ; 12 W. R. 33.

Held, also, that the defendant should have demurred, and he was accordingly not allowed the extra costs occasioned by his not doing so. *Ib.*

### 4. Bonds.

**Against Mortgagor.**]—Where bond is tacked to mortgage, mortgagor cannot redeem without paying the whole, though exceeding the penalty. *Peers* v. *Baldwyn*, 2 Eq. Abr. 611.

Second sum of money lent to mortgagor on bond, he cannot redeem one loan without the other. *Anon.*, 3 Salk. 84.

**Against Heir or Devisee but not Mortgagor.**]—A mortgagor who borrows more money from the mortgagee on his bond shall redeem without paying the bond debt ; but his heir cannot ; neither can the devisee of the equity of redemption, since the statute against fraudulent devises. *Challis* v. *Casborn*, Pre. Ch. 407 ; Gilb. 96.

**Not against Assignee of Equity of Redemption.**]—A prior mortgagee cannot tack a bond debt against the mortgagor, his assignee of the equity of redemption, or creditors ; though he may, as against the mortgagor's heir, to prevent a circuity. *Anon.*, 2 Ves. 662.

**As against Heir or Devisee.**]—Mortgagee may tack a bond debt as against heir or devisee. *Price* v. *Fastnedge*, Amb. 685.

**Against Heir.**]—If a mortgagor borrows more money of the mortgagee on bond, and dies, the heir shall not redeem without paying both debts: for the mortgagee's interest is become absolute by breach of the condition. Secus, if the mortgagee brings a bill to foreclose, and the heir tenders the principal, interest and costs, for the bond originally was not a lien on the land. *Anon.*, 1 Ch. Ca. 164; *Taylor* v. *Beversham*, 2 Ch. Ca. 194; *Windam* v. *Jennings*, 2 Ch. Rep. 247.

Mortgagee lends more money to the mortgagor on bond, his heir shall not redeem without paying off the bond as well as the mortgage, in case the heir is bound. Where a man has two mortgages and one is defective, if the heir will redeem he shall take both. *Shuttleworth* v. *Laycock*, 1 Vern. 245. S. P., *Baxter* v. *Manning*, id. 244.

—— **Covenant to pay Mortgage Debt.**]—Where there is a mortgage of land, and a covenant by the mortgagor, for himself and his heirs, to pay the mortgage money and interest, the mortgagee may tack the personal liability on the covenant as against the heir. *Elvy* v. *Norwood*, 5 De G. & Sm. 240; 21 L. J., Ch. 716; 16 Jur. 493.

Secus, if the suit were by the mortgagor, semble. *Ib.*

**Not against Alienee of Heir.**]—A man mortgages lands and after borrows more money of the mortgagee on bond; the alienee of the heir of the mortgagor is not obliged to pay both the mortgage money and the bond debt. *Coleman* v. *Wince*, Pre. Ch. 511; 1 P. Wms. 775.

**Not against Purchaser from Heir.**]—Where mortgagor borrows more money on bond, the purchaser from the heir of the mortgagor may redeem without paying bond debt. *Bayly* v. *Robson*, Pre. Ch. 89.

**Not against Creditors.**]—Bond not to be tacked to a mortgage against creditors. *Hamerton* v. *Rogers*, 1 Ves. J. 513.

**By Executor—Against Heir or Devisee, but not Creditors.**]—Executor of a mortgagee lends a further sum on bond; he may tack against the heir or devisee of mortgagor, but not against other creditors, if the estate be charged with or devised for payment of debts. *Price* v. *Fastnedge*, Amb. 685.

**Against Heir but not Specialty Creditors.**]—Mortgagee, having also bond, cannot tack it against other specialty creditors, though he may against the heir. *Lowthian* v. *Hasel*, 3 Bro. C. C. 162.

**Against Executor.**]—Lessee for years mortgages his term, and afterwards borrows more money of the mortgagee on bond and dies; his executor shall not redeem without paying the bond as well as the mortgage. *Anon.*, 2 Vern. 177.

An executor shall not redeem mortgaged term without paying a debt contracted after. *Eccles* v. *Thawill*, Pre. Ch. 18.

**Against Mesne Judgment Creditors.**]—Upon lending a sum of money on mortgage, the mortgagee procured, as an additional security, an assignment of a judgment on a bond in a penalty, which had been obtained against the mortgagor prior to the mortgage, and in payment of which part of the money advanced by the mortgagee had been applied. The principal sum only was due at the period of its assignment:—Held, that the mortgagee is entitled as against judgment creditors of the mortgagor, intervening between his judgment and his mortgage, to levy under his judgment the full amount of principal, and all interest thereon (the same not exceeding the sum due on foot of the mortgage), although he has been paid the interest which accrued due on the mortgage. *Kirby* v. *O'Shee*, 1 Jones, 565.

**Equitable Assets.**]—A mortgagor died, having made his real estate equitable assets. Defendants, who were both mortgagees and bond creditors, were held not entitled to tack. *Irby* v. *Irby*, 22 Beav. 217.

### 5. Simple Contract Debts.

**Since 3 & 4 Will. 4, c. 104.**]—It is very doubtful whether a mortgagee can, even since the passing of 3 & 4 Will. 4, c. 104, tack a simple contract debt to his mortgage. *Uppington* v. *Bullen*, 1 Con. & L. 291; 2 Dr. & War. 184.

A mortgagee or his transferee, under the 3 & 4 Will. 4, c. 104, may tack his simple contract debt to his security against an heir or a devisee. *Rolfe* v. *Chester*, 20 Beav. 610; 25 L. J., Ch. 244.

Since the 3 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debts as against the heir. *Thomas* v. *Thomas*, 22 Beav. 341; 25 L. J., Ch. 391; 4 W. R. 345.

—— **Copyhold.**]—Since the 3 & 4 Will. 4, c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. *Rolfe* v. *Chester*, 20 Beav. 610; 25 L. J., Ch. 244.

**Where Personal Estate Unadministered.**]—A simple contract creditor, though a mortgagee, has no right as against an heir or a devisee, to tack his simple contract debt to his mortgage where there is personal estate unadministered. *Ib.*

**Where Equity of Redemption is Assets for Payment of Debts.**]—Semble, a mortgagee may tack a simple contract debt to his mortgage debt as against the heir, devisee or executor whenever the equity of redemption is assets in their hands for payment of simple contract debts. *Ib.*

A mortgagee may tack simple contract debts to his mortgage as against the heir where the property descended is assets in his hands for payment of simple contract debts. *Thomas* v. *Thomas*, 22 Beav. 341; 25 L. J., Ch. 391; 4 W. R. 345.

**Not against Creditors.**]—The owner of freehold property mortgaged it and died insolvent, having devised his real and personal estate to trustees for payment of debts. In a suit for the administration of his estate the mortgagee consented to an order directing the property to be

sold and the proceeds to be carried to a separate account, the order being expressly without prejudice to his right to have simple contract debts due to him from the mortgagor satisfied out of the proceeds:—Held, that he had no right to tack simple contract debts to the prejudice of other creditors, and that the proceeds were not to be regarded as sale moneys in his hands so as to give him a right of retainer in respect of such debts; and, consequently, that the balance left after payment of the mortgage debt must be carried to the account of the general estate. *Pile* v. *Pile*, 23 W. R. 440.

**Against Mesne Incumbrancer.**]—M. gave plaintiff at different times three notes to secure different sums of money, and expressed in each "to be secured on his Stoke Hall estate," which was mortgaged to defendant; plaintiff took in a prior mortgage, to protect the money lent on the notes:—Held, that the plaintiff, the noteholder, on his having notice of the second mortgage to defendant, and paying off the first incumbrance, shall protect himself against defendant's mortgage, and shall be paid, not only the money due on the first mortgage, but the money due on the notes also. *Matthews* v. *Cartwright*, 2 Atk. 347.

6. IRELAND AND IRISH REGISTRY ACT.

**Tacking, how far Applicable.**]—The doctrine of tacking securities applies in Ireland as well as in England, except where in Ireland it has been excluded by the operation of the Registry Act. *Tenison* v. *Sweeny*, 1 Jo. & Lat. 710; 7 Ir. Eq. R. 511.

——**6 Anne, c. 2.**]—A mortgagee is prevented by the operation of the Registry Act (6 Anne, c. 2), from tacking so as to gain priority against mesne registered incumbrances; and, for the purpose of adjusting the priorities between deeds under this act, judgments also obtain priorities, although not generally within the contemplation of the act. *Latouche* v. *Dunsany* (*Lord*), 1 Sch. & Lef. 137.

The Registry Act in Ireland does not permit tacking. *Id.* 157.

I. CONSOLIDATION.

**Restriction on.**]—By 44 & 45 Vict. c. 41, s. 17, (1.) *A mortgagor seeking to redeem any one mortgage shall, by virtue of this act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.*

(2.) *This section applies only if, and as far as, a contrary intention is not expressed in the mortgage deeds or one of them.*

(3.) *This section applies only where the mortgages or one of them are or is made after the commencement of this act.*

**Extent of Principle.**]—The right of a mortgagee, to unite two securities from the same mortgagor, exists equally in foreclosure and redemption suits. *Selby* v. *Pomfret*, 1 J. & H. 336; 30 L. J., Ch. 770. Affirmed, 7 Jur. (N.S.) 835; 4 L. T. 314; 9 W. R. 583.

Where there are two or more mortgages, the court of chancery will not compel a redemption of one without the rest. *Roe* d. *Kaye* v. *Soley*, 2 Wm. Bl. 726.

The owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately. *Hall* v. *Heward*, 55 L. J., Ch. 604; 32 Ch. D. 430; 54 L. T. 810; 34 W. R. 571—C. A.

One makes two mortgages of several estates for several sums, and one of the mortgages is deficient in value. If the mortgagor brings his bill to redeem one, he must redeem both. *Pope* v. *Onslow*, 2 Vern. 286.

Two separate mortgages of different estates to the same person: purchaser of the equity of redemption of one of them cannot redeem that mortgage only, but must redeem both. *Carter*, *Ex parte*, Amb. 733.

Where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum:—Held, that the purchaser of the equity of redemption of both estates could not redeem one without redeeming both. *Vint* v. *Padgett*, 1 Giff. 446. Affirmed, 2 De G. & J. 611; 28 L. J., Ch. 21; 4 Jur. (N.S.) 1122; 6 W. R. 641—L.JJ.

If A. make two several mortgages, and die, and one of the mortgages is of an entailed estate, or is deficient in value, the heir of the mortgagee shall not be admitted to redeem one without redeeming the other. *Margrave* v. *Le Hooke*, 2 Vern. 207.

A mortgagee, having a number of mortgages over different properties, all created by the same mortgagor, is entitled, as against a puisne mortgagee of one of these properties, to consolidate all his mortgages. And this right is not affected by the circumstance that such puisne mortgagee is really prior in point of date, and merely postponed by the operation of the Registry Act; nor by the circumstance that the mortgage, in respect whereof the right to consolidate is claimed, is equitable merely, and that the puisne mortgagee had no notice thereof. *Neve* v. *Pennell*, 2 H. & M. 170; 33 L. J., Ch. 19; 9 L. T. 285; 11 W. R. 986.

A mortgagee of two estates, A. and B., of which A. was subject to a first mortgage, in exercise of a power of sale in his mortgage, sold the estate A. The first mortgagee, to whom another debt was due upon an equitable deposit of a policy of assurance and other documents by the mortgagor, refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due to him on both his mortgages. That amount was paid to him accordingly, and the documents comprised in the equitable deposit were delivered to the second mortgagee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mortgagee:—Held, reversing the court below, that, as the equitable mortgage was paid with money which, had the first mortgagee not claimed the right to consolidate, would have belonged to the second mortgagee, it was in fact paid by the second mortgagee, who by the fact of such payment became equitable transferee, and was entitled to consolidate that mortgage with his mortgage on estate B. *Cracknell* v. *Janson*, 48 L. J., Ch. 168; 11 Ch. D. 1; 40 L. T. 640; 27 W. R. 851.

Quære, whether a second mortgagee, who upon payment of the first mortgage gets in the legal estate, can tack this mortgage to another mortgage previously executed to him by the

same mortgagor of a different property. *Grugeon* v. *Gerrard*, 4 Y. & C. C. C. 119.

**Bill of Sale.**]—The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a fi. fa. to take a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus. *Chesworth* v. *Hunt*, 49 L. J., C. P. 507; 5 C. P. D. 266; 42 L. T. 774; 28 W. R. 815; 44 J. P. 605.

**Bankruptcy.**]—Assignees cannot redeem one of several mortgages by bankrupt to same person without redeeming all. *Alsager, Ex parte, Breeds, In re*, 2 Mont. D. & D. 328.

**Where Equities of Redemption in one Person.**]—The principle, that, where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates as long as the equities of redemption remain united in the same person. *Willie* v. *Lugg*, 2 Eden, 78.

**Debt ceased to Exist.**]—Two persons, partners in a mercantile firm, who held a leasehold house, made an equitable mortgage of it to W. Afterwards the firm took in another partner who acquired a share in the equity of redemption. The firm then mortgaged their interest in another house, which they held as joint tenants, to W. for a further debt. The firm having become bankrupt, the lease on the first-mentioned house was determined by the bankruptcy, and the lessor re-entered. W. claimed to consolidate both debts, so that the second-mentioned house should not be redeemed without paying both debts:—Held, that, one mortgaged property having ceased to exist, there could be no consolidation of the two debts. *Williams, Ex parte, Raggett, In re*, 50 L. J., Ch. 187; 16 Ch. D. 117; 44 L. T. 4; 29 W. R. 314—C. A.

**Default on Securities.**]—Consolidation only applies where default has been made on all the securities in respect of which it is claimed. *Cummins* v. *Fletcher*, 49 L. J., Ch. 563; 14 Ch. D. 699; 42 L. T. 859; 28 W. R. 772.

**Principles discussed.**]—The principles of consolidation discussed and explained. *Ib.*

**Mortgage subsequent to Second Mortgage.**]—The right of a first mortgagee of two separately-mortgaged estates belonging to one mortgagor, to consolidate his mortgages as against a second mortgagee of one of the estates, does not extend to a case in which the mortgage of the other estate is subsequent in date to such second mortgage. *Baker* v. *Gray*, 45 L. J., Ch. 165; 1 Ch. D. 491; 33 L. T. 721; 24 W. R. 171.

**Consolidating Bond and Mortgage.**]—A mortgagor who borrows more money from the mortgagee on his bond shall redeem without paying the bond debt, but his heir cannot; neither can the devisee of the equity of redemption since the statute against fraudulent devises. *Challis* v. *Casborn*, Pre. Ch. 407; Gilb. Eq. Rep. 96.

**In favour of Equitable Mortgagee as against subsequent Legal Mortgagee.**]—A. made two equitable mortgages of two several estates, the one to A. and the other to B. He then executed a legal mortgage of both to C., who had constructive notice of the prior equitable mortgages. B. obtained a transfer of A.'s mortgage:—Held, that C. could only redeem B. on payment of both debts. *Tweedale* v. *Tweedale*, 23 Beav. 341.

**In favour of Second Mortgagee who has redeemed First Mortgagee.**]—If two estates are mortgaged to B., and then one of them is again mortgaged to C. and the other to D., and C. redeems B.'s whole mortgage, he shall hold both estates (though one only was comprised in his own mortgage) till he is reimbursed his own money and what he has paid in discharge of B.'s mortgage; and D. shall not be admitted to redeem, but upon those terms; for C. could not have redeemed B. but by entirety, and, having so done, he stands in his place, and has the same right to be redeemed in the same manner. *Titley* v. *Davies*, 15 Vin. 447, pl. 20. *S. C.*, 2 Y. & C. C. C. 399, n. And see *Clarke* v. *Abbot*, 2 Eq. Abr. 606, pl. 41.

**Equity of Redemption purchased before Second Mortgage got in.**]—A person holding two mortgages, created by the same mortgagor, on two separate estates, by distinct deeds, may charge each estate with the aggregate of the two debts, even as against a person who purchased the equity of redemption in the estate first mortgaged before the second mortgage was got in. *Beevor* v. *Luck*, 36 L. J., Ch. 865; L. R. 4 Eq. 537; 15 W. R. 1221.

**Mortgage subsequent to Assignment of Equity of Redemption.**]—The rule, that the mortgagee of two estates belonging to the same mortgagor may consolidate them so that one cannot be redeemed without the other, does not apply to a case in which one of the mortgages was created subsequently to the assignment of the equity of redemption to the person seeking to redeem. *Tassell* v. *Smith* (2 De G. & J. 713; 27 L. J., Ch. 694) overruled. *Beevor* v. *Luck* (L. R. 4 Eq. 537) commented on. *White* v. *Hillacre* (3 Y. & C. 597) approved. *Jennings* v. *Jordan*, 51 L. J., Ch. 129; 6 App. Cas. 698; 45 L. T. 593; 30 W. R. 369—H. L. (E.)

**Union after Mortgage of Equity of Redemption.**]—A. B. mortgaged one estate to C. D., and mortgaged another estate to E. F.; he then mortgaged his equity of redemption in both estates to G. H., and notice of this was given to the two original mortgagees. The two original mortgagees ultimately became vested in K., who filed a bill to foreclose G. H., in default of payment of all that was due. G. H. insisted that he was entitled to redeem one estate without redeeming the other, but:—Held (affirming 4 Jur. (N.S.) 254; 1 Giff. 446), that he had no such right, and that the fact of C. D. and E. F. having had notice of the mortgage of the equity of redemption made no difference. *Vint* v. *Padgett*, 2 De G. & J. 611; 28 L. J., Ch. 21; 4 Jur. (N.S.) 1122; 6 W. R. 641.

**Union of Mortgages after Assignment of Equity of Redemption of one.**]—When two mortgages made by the same mortgagor to different mortgagees on different estates become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of the equity of redemption, even though both the

mortgages were created before the assignment. The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it at the date of the assignment, but the possibility that the mortgage may, by virtue of its subsequent union in the same person with a mortgage of another estate made previously to the assignment, by the same mortgagor to a different mortgagee, become liable to consolidation, is not such an equity. *White* v. *Hillacre* (3 Y. & C. 597) approved and followed. *Beeror* v. *Luck* (L. R. 4 Eq. 537) disapproved and not followed. *Vint* v. *Padgett* (2 De G. & J. 611) distinguished. *Harter* v. *Colman*, 51 L. J., Ch. 481; 19 Ch. D. 630; 46 L. T. 154; 30 W. R. 484.

A transferee of several mortgages made by the same mortgagor to different mortgagees has, as against a person to whom the equity of redemption of one of the mortgages was assigned prior to the union of all the mortgages in one hand, no right of consolidation. *Hinter* v. *Carr*, 63 L. J., Ch. 705; [1894] 3 Ch. 498; 7 R. 558; 71 L. T. 526—C. A. Affirming 42 W. R. 619.

The right of the assignee of the equity of redemption to resist consolidation is not affected by the fact that he is also puisne mortgagee of some or all of the properties comprised in the mortgages. *Vint* v. *Padgett* (2 De G. & J. 611) doubted. *Ib.*

Where owner of several properties has mortgaged them to different mortgagees, and all the mortgages are afterwards transferred to one person, such transferee is entitled to consolidate all these mortgages, and to refuse to allow the mortgagor or his assignee to redeem any of the mortgages without redeeming all. *Tweedale* v. *Tweedale* (23 Beav. 341) and *Vint* v. *Padgett* (2 De G. & J. 611) followed. *White* v. *Hillacre*, (3 Y. & C. 547), *Jennings* v. *Jordan* (6 App. Cas. 698) and *Harter* v. *Colman* (19 Ch. D. 630) distinguished. *Pledge* v. *Carr*, 64 L. J., Ch. 51; [1895] 1 Ch. 51; 8 R. 253, 255, n.; 71 L. T. 598; 43 W. R. 50—C. A.

Where several mortgages originally vested in several persons for distinct sums become united in one holder, the right of consolidation can be enforced not only against the original mortgagor, but also against the assignee of the equity of redemption, notwithstanding that the mortgages which it is sought to consolidate were not united in title in the mortgagee with the mortgage which it is sought to redeem until after the assignment of the equity of redemption. *Vint* v. *Padgett* (1 Giff. 446; 2 De G. & J. 611; 28 L. J., Ch. 21) approved. *Jennings* v. *Jordan* (51 L. J., Ch. 129; 6 App. Cas. 698) distinguished. *Pledge* v. *White*, 65 L. J., Ch. 449; [1896] A. C. 187; 74 L. T. 323; 44 W. R. 589—H. L. (E.)

**As against Surety.**]—C. borrowed 5,000*l.* of a life assurance company. This was advanced in two sums, one of 2,000*l.* and the other of 3,000*l.* Each sum was separately secured upon different property, and by different sets of deeds. F. became surety for payment of the 2,000*l.* and interest only. C. afterwards made default in payment of the 2,000*l.* and interest. The company then sued F. under his bond to obtain payment of the 2,000*l.* and interest. He offered to pay the sum due on having the securities assigned. The company, however, refused to give up the deeds securing the 2,000*l.*: and upon a bill by F., as merely to restrain the proceedings at law, and asking that the deeds might be delivered to him upon payment of the 2,000*l.* and interest:—Held, that the company had a right to retain the securities relating to the 2,000*l.*, and that the property was not redeemable even by F. without payment of the 3,000*l.*, for which he was not surety, as well as the 2,000*l.*, for which he was surety. *Farebrother* v. *Wodehouse*, 23 Beav. 18; 26 L. J., Ch. 81; 2 Jur. (N.S.) 1178; 5 W. R. 12.

**Suretyship not disclosed.**]—By a deed dated the 11th March, 1875, G. mortgaged to I. certain real estate for securing 1,050*l.*, and by a deed dated the 10th December, 1875, G. mortgaged to I. certain Hudson Bay shares, and by the same deed A. and wife mortgaged to I. certain railway shares. A. and wife were, in fact, sureties for G., but that fact was not disclosed on the deed. G. subsequently executed other mortgages of the Hudson Bay shares to other persons, including M. The proceeds of the Hudson Bay shares had been paid into court under the Trustee Relief Act. M. presented a petition for payment out of court of that fund, and in August, 1887, the petition was referred to chambers to ascertain the priorities of the various mortgagees on the fund. The chief clerk found that the first mortgagee was I., and that he was entitled to consolidate his mortgage of the 11th March, 1875; that the second mortgagees were A. and wife to the extent of the value realised from the railway shares (which had gone in part payment of I.'s securities of the 10th December, 1875), and that the other mortgagees were entitled subject to those priorities. The petition then came on upon further consideration, together with a summons by A. and wife, to vary the certificate by declaring that I. was not entitled to consolidation as against them:—Held, that I. was entitled to consolidate, on the ground that the suretyship not being disclosed by the deed of the 10th December, 1875, the only right of A. and wife against the trust fund was through G., and was therefore subject to I.'s rights against G. *Toogood's Legacy Trusts, In re*, 61 L. T. 19.

**As against prior Voluntary Settlement.**]—A. B. having executed a voluntary settlement of the W. estate, mortgaged it in fee to X. Y. He afterwards mortgaged the Q. estate, and that mortgage became vested in X. Y.:—Held, that X. Y. was not entitled to consolidate as against the persons claiming under the voluntary settlement the mortgages on the W. and Q. estates. *Walhampton's Estate, In re*, 53 L. J., Ch. 1000; 26 Ch. D. 391; 51 L. T. 280; 32 W. R. 874.

**Partner and Firm.**]—A. mortgaged certain leaseholds, and the mortgage was subsequently transferred to C. Afterwards A., in conjunction with his partner B., mortgaged other leaseholds to C.:—Held, that C. was entitled to consolidate the mortgages as against the legal personal representatives of A. *Harris* v. *Tubb*, 60 L. T. 699.

Semble, there can be no consolidation between a mortgage by A. for his own debt and a mortgage by A. and B. of other property for their partnership debt. *Cummins* v. *Fletcher*, 49 L. J., Ch. 563; 14 Ch. D. 699; 42 L. T. 859; 28 W. R. 772.

**Surplus of Money received on Policy—Arrears of Annuity.**]—G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his

own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—Held, that they had no right to set off the balance against the executor in respect of arrears of the annuity. *Gregson, In re, Christison* v. *Bolam*, 57 L. J., Ch. 221; 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.

**Two Mortgagees Trustees for same Person.**]—In 1832 A. mortgaged property for securing 1,700*l.* and interest. In 1856 A. joined as surety in a mortgage by B., and A. thereby assigned a policy of insurance on his own life, for securing 2,000*l.* and interest. The persons named in the two deeds as mortgagees were different, but both sets of mortgagees were trustees for one and the same insurance company, and at the respective periods of the two mortgages A. knew that the advances thereby secured were severally made by such company. In 1841, and in 1847, A. mortgaged the equity of redemption of the property comprised in the first-mentioned mortgage to C. to secure advances made at those periods respectively by C. A sale having, by arrangement between all the parties interested, taken place of the properties comprised in the mortgages of 1832 and 1856, the property comprised in the last-mentioned mortgage proved insufficient to pay the amount secured thereon. It was agreed that the case should be treated as if no sale had taken place:—Held, that, as the mortgages of 1832 and 1856 were held in trust for the same persons, the same principle applied to them as if the same persons had been named in each as mortgagees; and that C. could not have redeemed the first mortgage, dated in 1832, without also redeeming that which was dated in 1856. The deficiency arising on the mortgage of 1856 was therefore directed to be made good out of the proceeds of the sale of the property comprised in the mortgage of 1832. *Tassell* v. *Smith*, 2 De G. & J. 713; 27 L. J., Ch. 694; 4 Jur. (N.S.) 1090; 6 W. R. 803.

**Mortgage by Trustee for Mortgagor.**]—Whether a mortgage by three persons can be consolidated with a mortgage by two in trust for the three, quære. *Williams, Ex parte, Raggett, In re*, 50 L. J., Ch. 187; 16 Ch. D. 117; 44 L. T. 4; 29 W. R. 314.

**When allowed.**]—A mortgagor mortgaged A. to the defendant and the plaintiff as first and second mortgagees respectively, and also mortgaged B. to the defendant. The plaintiff commenced an action against the defendant to redeem the mortgage on A.:—Held, that the defendant was not entitled to consolidate his mortgage on B. with that of A. *Squire* v. *Pardoe*, 66 L. T. 242; 40 W. R. 100—C. A.

**Where Inapplicable — Bailment of Deeds to secure Debts.**]—A mortgage was made of estate A. for 300*l.*, in which sureties joined to secure the debt. Another mortgage of estate B. was made by the mortgagor to the mortgagee to secure 1,500*l.*, and the title deeds of other property belonging to the mortgagor's wife were deposited as collateral security for 300*l.*, part of the 1,500*l.* The first 300*l.* was paid off partly by the sureties. Afterwards the other principal security was realised, and the 1,500*l.* paid off. The mortgagee resisted the delivery of the deposited deeds on the ground that the sureties might have an equity against them, and the sureties were made parties to a suit for delivery of the deeds. The sureties did not assert any claim in the suit:—Held, that the mortgagor was entitled to a decree for delivery of the deeds, and to the costs of the suit against the mortgagee, and that the principle of consolidating securities did not apply to a mere bailment of deeds to secure one of the debts. *Crichmore* v. *Freeston*, 40 L. J., Ch. 137.

—— **Proper Remedy.**]—In such a case the proper remedy is by interpleader. *Ib.*

—— **Mortgage by Testator—Mortgage of Equity of Redemption by one of several Devisees as Tenants in Common.**]—In 1830 W. conveyed certain real estates to R. and T., and their heirs, by way of mortgage, for securing a sum of 400*l.*, with a power of sale in case of default. W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons, A., B. and C., as tenants in common in fee. In 1839, after W.'s death, B. conveyed all his one-third share and interest, under his father's will, to R., H. and N., by way of mortgage, with power of sale in case of default. R., who was the surviving mortgagee of the deed of 1830, threatened to sell under the power in that deed, unless A., the acting executor of W., would redeem both mortgages. Upon a bill by A. to redeem, and for an injunction, the court, upon motion, on payment into court by A. of the money due upon the first mortgage, restrained R. from selling under the power of sale contained in the deed of 1830, and from conveying the legal estate in the one-third share of B. comprised in the mortgage of 1839. *Whitworth* v. *Rhodes*, 20 L. J., Ch. 105.

—— **Further Charge and further Security.**]—In 1843 A. mortgaged freeholds and leaseholds to B. for 200*l.* In 1845, after reciting that mortgage, he charged the freeholds and leaseholds with the further sum of 400*l.* which he then owed B., and assigned other property to B. as a further security for that sum, and empowered B. to sell the property, and to retain the 400*l.* out of the proceeds:—Held, that the property assigned in 1845 was redeemable on payment of the 400*l.* only. *Watts* v. *Symes*, 16 Sim. 647. And see *S. C.*, 13 Jur. 245.

A testator devised real estates in settlement, and empowered tenants for life to grant mining leases. A tenant for life, in 1843, demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage, to secure 6,000*l.* and interest. On the 26th of April, 1850, the term of ninety-nine years and mortgage debt thereby secured were transferred to S. & Co., and by the same deed the tenant for life mortgaged his life estate to S. & Co. to secure further sums, and thereby made the term of ninety-nine years redeemable only on payment of the further sums as well as of the original mortgage debt:—Held, that the term of ninety-nine years was validly charged with the further sums. *Mostyn* v. *Lancaster*, 52 L. J., Ch. 848; 23 Ch. D. 583; 48 L. T. 715; 31 W. R. 686—C. A.

**Notice by Mortgagees under s. 20 of Conveyancing Act, 1881, to pay off one Mortgage — Election.**] — Mortgagees holding several

mortgages executed by the same mortgagor, who have excluded s. 17 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), are entitled to consolidate, although they have given notice, under s. 20, to the mortgagor to pay off one of the mortgages, in order to acquire a power of sale, and the mortgagor has prepared for the payment and tendered the money, the doctrine of election having no application. *Griffith* v. *Pound*, 45 Ch. D. 553.

**Right, how Lost.**]—The right of consolidation is not lost by a sale of one of the mortgaged estates under a power in the mortgage deed, but the balance of the proceeds, after satisfying the one mortgage debt, may be applied to the other. *Selby* v. *Pomfret*, 1 J. & H. 336; 30 L. J., Ch. 770. Affirmed, 7 Jur. (N.S.) 835; 4 L. T. 314; 9 W. R. 583.

Where a mortgagee took a transfer of a mortgage of another estate of the same mortgagor, and sold the second estate under a power in the mortgage deed:—Held, that he was entitled to apply the surplus of the proceeds to the first mortgage. *Ib.*

**Construction—"Redeemable."**]—H. advanced money to P., and by agreement was to receive the whole amount due from P. in acceptances of the D. company to C.'s drafts at six, twelve and eighteen months, "but, if not sufficient bills at such dates are received from the D. company, then the balance to be made up in similar bills at twelve, twenty-four and thirty-six months, upon which 10*l.* per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time":—Held, that the word "redeemable" implied that the debtor P. might take up the last-mentioned bills at any time, irrespective of the other debts due by him to H. *Hills* v. *Parker*, 14 L. T. 107.

**Practice—Right insisted on.**]—When the owner of an equity of redemption brings an action to redeem the mortgaged property, and the defendant insists on his admitted right to consolidate the mortgage with a mortgage of other land, the equity of redemption in which is vested, not in the plaintiff, but in a third party, the court will not make any decree in the absence of such third party. *Mills* v. *Jennings*, 39 L. T. 442.

—— **Parties.**]—A purchaser of an equity of redemption filed his bill against the mortgagee to redeem. The original mortgagor having made a mortgage of other premises to the same mortgagee for a distinct debt, the purchaser cannot redeem the first without redeeming the second mortgage, and the parties interested in the equity of redemption of the second mortgage are necessary parties to the suit. *Ireson* v. *Denn*, 2 Cox, 425; 2 R. R. 97.

## J. MARSHALLING.

**Personalty first Liable.**]—There being a borrowing and lending in the case of a mortgage, the real estate is considered only as a pledge, and the personal liable in the first place. *Lanoy* v. *Athol* (*Duke*), 2 Atk. 444.

**Established Doctine.**]—The doctrine is well established that a second mortgagee of property held by a first mortgagee, with other property not included in the second mortgage, has a right to compel the first mortgagee to resort for payment from the property to which the second mortgage does not extend. *Lawrance* v. *Galsworthy*, 3 Jur. (N.S.) 249.

Two properties, X. and Y., were mortgaged to A., and afterwards X. alone was mortgaged to B.:—Held, that B. is entitled to have the securities marshalled, so as to throw A.'s mortgage, in the first instance, on estate Y. *Gibson* v. *Seagrim*, 20 Beav. 614; 24 L. J., Ch. 782.

—— **Marshalling Proceeds.**]—The court will marshal the proceeds arising from several mortgaged estates, so as to prevent the first and second mortgagees of different estates from exhausting the proceeds of one estate upon which alone a third mortgagee had taken a security. *Ib.*

**Mortgaged Estates Sold—Apportionment of Proceeds.**]—The mortgage of a mesne incumbrancer extended over the whole of certain estates, parts of which had been previously mortgaged to other persons, and parts of which were also subsequently mortgaged. The mesne incumbrancer filed his bill for an account, and for redemption of the prior and foreclosure of the subsequent mortgages; and a decree was made, by consent of all parties interested, that the whole of the estates should be sold; that the proceeds of the sale should be paid into court, and apportioned according to the value of the parts of the estates comprised in the several mortgages; and that the priorities of the incumbrancers should be ascertained on further directions. No question was raised as to the incumbrances or their priorities, but only as to the costs:—Held, that each of the prior mortgagees was to be paid his principal, interest and costs out of the sum in court apportioned in respect of his mortgage, and not out of the general fund. *Wild* or *Lee* v. *Lockhart*, 10 Beav. 320; 16 L. J., Ch. 519.

—— **Charge of Legacies.**]—A bankrupt, to whom two estates were devised, charged with the payment of legacies, had mortgaged each of them separately, and the assignees held the estates, subject to the unpaid legacies and the mortgages. One of the estates was sold for 1,000*l.* more than the amount of the mortgage money with which it was charged, and which surplus was sufficient to pay the legacies; but the proceeds of the other estate were scarcely sufficient to satisfy the mortgage on it:—Held, on the application of the mortgagees on the last-mentioned estate, that the outstanding legacies should be charged exclusively on the surplus proceeds of the first estate. *Hartley, Ex parte*, 1 Deac. 288; 2 Mont. & Ayr. 496; 5 L. J., Bk. 13.

**Two Estates Mortgaged—Second Mortgage of One.**]—Where two estates are mortgaged to A., and one only of the estates to B., A. shall take his satisfaction out of that which is not in mortgage to B., though the estates descend to two different persons. *Lanoy* v. *Athol* (*Duke*), 2 Atk. 444.

**As between Puisne Incumbrancers.**]—A., having two estates, mortgages both to B., and then one to C.; then both again to B., to secure both the original and a further advance; then

both to D. The puisne incumbrancers have notice of the prior charges. The estates are not sufficient to pay all the mortgages, but one of the estates, called No. 32, is sufficient to pay B. in full. The court will not, as between C. and D., marshal the securities by directing B. to take his full payment out of No. 32, so as to leave C. the first incumbrancer on the other estate; but B.'s debt must be thrown ratably on both estates. *Barnes* v. *Rackster*, 1 Y. & C. C. C. 401; 11 L. J., Ch. 228; 6 Jur. 595.

Where a person mortgages Blackacre and Whiteacre to A., and then mortgages Blackacre to B. and Whiteacre to C., the rights between B. and C. are to compel the payment of A.'s debt out of the two estates ratably, so that there shall be left of those estates the proper proportion for B. and C. respectively. So, also, where there are two funds, either or both of which A. has the right to apply in paying himself, and one of such funds is assigned to B. and the other to C., then, whether that right arises from a positive charge or by operation of law, in the circumstances under which the two funds came into A.'s hands, it is a right which he can exercise against both B. and C., and an equity to an apportionment of A.'s debt exists between B. and C. *Moxon* v. *Berkeley Building Society*, 59 L. J., Ch. 524; 62 L. T. 250.

A second mortgagee having the security of estates A. and B., and offering to redeem a prior mortgagee (having the security of estate A. only, and also leases affecting the equity of redemption of the same estate, but subsequent to the second mortgage), cannot be compelled by the prior mortgagee to resort to estate B. in the first instance. *Gregg* v. *Arrott*, Ll. & G. t. Sugd. 246.

A. mortgages Blackacre to B., and gives him, as a collateral security, a judgment which attaches on both Blackacre and Whiteacre. Subsequently B. assigns his debt and securities to C., and A. at the same time mortgages Blackacre to C. for a further sum, with a covenant against all incumbraneers except the mortgage to B.:—Held, that C., as a puisne incumbrancer, is entitled to be paid the debt assigned to him by B. out of Whiteacre first, so as to leave Blackacre unimpaired to meet the second mortgage made to C. himself. *Roddy, In re*, 11 Ir. Ch. R. 369.

A mortgagor being entitled in reversion to funds A. and B., made three mortgages. Mortgage 1 included both funds; mortgage 2 included A. only; and mortgage 3 included both funds. Mortgages 1 and 2 were in the form of assignments of the funds to the mortgagees, upon trust to receive the same when payable, to pay the mortgage debts thereout, and then transfer or pay the surplus to the mortgagor. Mortgage 3 was an assignment of the funds to which the mortgagor was entitled under mortgages 1 and 2, after payment of the debts thereby secured. Fund A. was absorbed in payment of mortgage 1:—Held, that, although fund B. was not included in mortgage 2, it must be applied in satisfaction of that mortgage in full, in priority to mortgage 3. *Mower, In re*, L. R. 8 Eq. 110; 20 L. T. 838.

When a mortgagor having two funds mortgaged both to A., then one to B., then both to C.; and B. claimed that A. should pay himself first out of the one on which he, B., had no charge, C. objecting to B.'s claim, it was refused. *Wellesley* v. *Mornington* (*Lord*), 17 W. R. 355.

P. purchased, in 1814, three roods twenty-three perches of land, by the description of "about one acre," and in 1815 thirty perches of land immediately adjoining, all of which he threw into one piece, and built a house. In 1819 he mortgaged the whole of the premises to W. for 5,000*l.*, by a description sufficient to pass the whole, and delivered up the title deeds relating to the purchase of 1814. In 1820 he mortgaged the whole of the premises to L. for 2,000*l.*, by the same description as in 1819, and delivered up to L. the title deed of 1815. He acted on this occasion as L.'s solicitor. There was also a subsequent incumbrancer, H. In 1823 P. died, having devised all his property to trustees for sale. In 1829 the trustees for sale contracted to sell to G., who was at that time a yearly tenant. G. sent in requisitions on the title, paid about one-third of the purchase-money, and continued in unmolested enjoyment of the whole of the premises up to the time of the filing of the bill. W., L. and H. had all assented to the contract with G.:—Held, on a bill by the persons beneficially interested in the first mortgage to have the contract carried out and the sales-moneys applied, that H. could not in this suit have the securities marshalled, notwithstanding that the possibility was pointed out of W. and L. having other securities of sufficient value to cover their advances. *Wallis* v. *Woodyear*, 2 Jur. (N.S.) 179.

**Between Freehold and Copyhold.**]—One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend. *Tidd* v. *Lister*, 10 Hare, 157.

A., being seised in fee of a freehold and copyhold estate, borrows various sums of money of B., amounting in the whole to 4,000*l.*, upon mortgage of the freehold estate alone. A. afterwards, in 1832, borrows 500*l.* more of B., on the security of both the freehold and copyhold estates. This mortgage is effected by distinct instruments, relating to each property respectively, neither of them referring to the other. In 1833 A. borrowed a sum of 400*l.* of C., on mortgage of the freehold estate alone, subject to B.'s incumbrances thereon. Again, in 1838, A. mortgages to D. for 600*l.* the copyhold estate alone, without notice of the 500*l.* incumbrance. In 1837 B. has notice of C.'s security, and in 1838 (after having sold both the estates, under powers of sale, and received the purchase-money) he has notice of D.'s security. The produce of the freehold estate being insufficient to pay B. and C. in full, but that of the freehold and copyhold being sufficient for that purpose, C. claims to have the whole of the 500*l.* charge thrown upon the produce of the copyhold estate, in order that he may receive payment out of that of the freehold. On the other hand, D. claims to be paid the whole of his debt out of the produce of the copyhold estate in priority to C.:—Held, that the claim of neither party can prevail to the fullest extent; but that, the 500*l.* being, by the security of 1832, charged on the freehold and copyhold estates ratably (that is to say, in proportion to their respective net values), and without preference, C. has an equity, of the nature claimed by him, to the extent of that proportion of the 500*l.* which is charged upon the copyhold estate, while, in other respects, in relation to that estate, D. has priority over C. *Bugden* v. *Bignold*, 2

Y. & C. C. C. 377. And see *Titley* v. *Davies*, *Id.* 399, n.

**Mortgage by Married Woman—Restraint on Anticipation.**]—C., a widow, was entitled to the income of one-third of a fund in court for her life for her separate use without power of anticipation, and was also entitled to the income of the remaining two-thirds of the fund for her life, but subject to certain deductions. She mortgaged all her interest in the fund, and some policies of assurance on her life, to F., and an order was made for payment of the income of the mortgaged property to him. C. then married M.; and after her marriage she charged all her interest in the fund in favour of P. After this T. obtained a judgment against her, and the appointment of a receiver of her separate estate. The income received by F. was more than sufficient for payment of the interest on his mortgage and the premiums on the policies, and he did not desire to reduce his principal:—Held, that, as between F. and the subsequent incumbrancers of the fund, there ought to be a marshalling of securities, and that F. ought to pay the interest on his mortgage and the premiums on the policies out of the income of the one-third with respect to which the restraint on anticipation existed, so as to leave the income of the remaining two-thirds to satisfy the subsequent incumbrances. *Loder's Trusts, In re*, 56 L. J., Ch. 230; 55 L. T. 582; 35 W. R. 58.

**Mortgage of Life Estate and Insurance Policy.**]—A mortgagee of a life estate and policies of assurance had also obtained subsequent judgments, being charges under 1 & 2 Vict. c. 110, on the life estate. There were intervening incumbrances on the life estate only. On his first mortgage being discharged out of the life estate:—Held, that the next incumbrancer was entitled, on the principle of marshalling, to be paid out of the policies, and that the first mortgagee could not by consolidating his securities throw his subsequent charges on the policies so as to prevent this. *Ford* v. *Tynte*, 41 L. J., Ch. 758; 27 L. T. 304.

**Realty and Insurance Policy.**]—A trader, who was entitled to certain real estate, and certain policies of insurance, mortgaged the estate and policies to one person to secure the same debt. He afterwards mortgaged the estate alone to another person, and subsequently became bankrupt:—Held, that the general rule respecting the marshalling of securities applied, and that the second mortgagee was entitled to have the proceeds of the policies of insurance applied, in the first instance, in payment of the debt due to the first mortgagee. *Cornwall, In re*, 6 Ir. Eq. R. 63; 3 Dr. & War. 173; 2 Con. & L. 131.

**As between Heir and Administratrix.**]—Land already charged with a mortgage debt was comprised, together with other land and a policy of assurance, in a further mortgage for the original debt, and an additional debt; and the mortgagor died intestate:—Held, that (as between the heir and administrator of the deceased mortgagor) the land originally charged with the first-mentioned debt remained primarily liable to it, and that the additional debt must be borne by the lands and the policy ratably. *Lipscomb* v. *Lipscomb*, 19 L. T. 342.

**Voluntary Settlement.**]—A. being seised in fee of lands, subject to a charge for marriage portions, gave judgments for the amount of the charges upon the occasions of the marriages. Subsequently, on his own marriage, he executed a voluntary settlement reciting those charges and settling the lands on himself for life, remainders over in strict settlement. He afterwards executed two separate mortgages of the lands, and still later, on the marriage of his son, executed articles of agreement, reciting the voluntary settlement and the mortgages. During his life some of the incumbrances were paid out of his life estate, and after his death a judgment creditor, whose debt was later in date than the mortgage debts and secured by judgment on his life estate, sought that so much of the mortgage debts as had been paid out of his life estate as should be necessary to satisfy the demands of creditors whose demands affected the life estate alone, should be raised by sale of part of the inheritance in exoneration of the life estate:—Held, that he was not entitled to the relief sought, since courts of equity will not, where there has been a voluntary settlement, interfere to disturb that settlement in favour of a person whose claim is derived only through the settlor. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49.

—— **Against subsequent Mortgagees.**]—Where a voluntary settlement of freeholds contained a covenant by the settlor with the trustees for quiet enjoyment, and the settlor afterwards mortgaged the settled, together with some unsettled, property:—Held, that all those who claimed under the settlement might throw the payment of the mortgage debt in the first instance upon the unsettled property, and prove on the covenant for quiet enjoyment against the settlor's estate. *Hales* v. *Cox*, 32 Beav. 118; 8 L. T. 134; 11 W. R. 331; 1 N. R. 344.

—— **Against Prior Mortgagees.**]—The settlor, after making the settlement, but before the mortgage, purchased the share of his son (who had become bankrupt) under the settlement; and after the mortgage he resettled that share for the benefit of that son and another, but did not covenant for quiet enjoyment. After the resettlement the son again became bankrupt. With respect to the parties claiming his interest under the resettlement:—Held, that they were also entitled to throw the payment of the mortgage debt, in the first instance, upon the unsettled property, but were not entitled to prove under the covenant in the original settlement. *Ib.*

—— **Against Mortgagee with Notice.**]—The daughter of a mortgagor entitled, under a voluntary settlement, to a charge on one of two estates comprised in a mortgage, is entitled to have the other estate first applied in satisfaction of the mortgage, as against a subsequent mortgagee of the two estates, with notice of her charge. *Aldridge* v. *Forbes*, 9 L. J., Ch. 37; 4 Jur. 20.

—— **Against unsecured Creditors.**]—A mortgagee of lands, part of which is comprised in a voluntary settlement, must first resort to the unsettled lands, and will not be thrown upon the settled property, in order to favour unsecured creditors, against whom the voluntary settlement is good. *Anstey* v. *Newman*, 39 L. J., Ch. 769.

**Charge for Younger Sons—Consent to Mortgage.**]—A testator by will, made in 1836, charged

his lands of X. with 2,000*l.*, which he appointed amongst his three younger sons. After his death his eldest son conveyed the lands of X. to trustees to secure 600*l.* by way of mortgage, the younger sons being parties to the mortgage, and consenting to postpone their charges to the mortgage. In 1841 the eldest son purchased the lands of Y., and in 1845 a judgment was obtained against him by S., the lands of X. and Y. having been sold:—Held, that the produce of the lands of X. were to be applied, in the first instance, in payment of the mortgage, and any deficiency was to be made up out of the produce of the lands of Y.; that the balance of the produce of Y. was to be applied in payment of S.'s judgment; and that the appointees of the charge of 2,000*l.* were not entitled to have the proceeds of Y. marshalled in their favour. *Lawder, In re*, 11 Ir. Ch. R. 346; 5 L. T. 188.

**Two Moieties—Conveyance of one to Purchaser with Covenant for further Assurance.**]—A person absolutely entitled to one moiety of an estate and contingently entitled to the other moiety mortgaged both moieties to secure a sum of 1,500*l.* and subsequently made an absolute conveyance of the contingent moiety to a purchaser. The conveyance did not refer to the mortgage, and the only covenant it contained was one for further assurance:—Held, that the covenant for further assurance was sufficient to protect the purchaser, and that as between the two owners the unsold portion must bear the whole mortgage debt. *Jones, In re, Farrington* v. *Forrester*, 62 L. J., Ch. 996; [1893] 2 Ch. 461; 3 R. 498; 69 L. T. 45.

**Effect of Covenant against Incumbrances in Marriage Settlement.**]—In the year 1810, a testator devised his real estates to E. R. in fee, subject to the payment of his debts and legacies, and died in the same year. A legacy of 800*l.* was never paid off. The property consisted of four estates, T., F., P. and C. In 1818 E. R. mortgaged estates T. and C. to W. In 1822 E. R., on his marriage, settled estates T., P. and C. on himself for life, remainder in strict settlement upon the first and other sons, &c., of the marriage: and he covenanted therein against incumbrances. In 1836 E. R. mortgaged estate F. to L. In 1843 the plaintiff H. registered a judgment against E. R. In 1844 E. R. became insolvent, and C. was appointed his assignee. H., the judgment creditor, filed her bill against all the above incumbrancers, against C., and the first tenant in tail under the settlement, praying to be permitted to redeem prior incumbrances, &c., and that C. should redeem her, or be foreclosed:—Held, that the effect in equity, of the covenant against incumbrances contained in the settlement of 1822, as between the settlor and the children of the marriage, was to throw the debts, which were then charged upon the four estates, upon that estate which was left out of settlement (F.), or upon the life-interest in the settled estates. *Hughes* v. *Williams*, 1 De G. M. & G. 393; 3 Macn. & G. 683; 16 Jur. 415.

**Two Estates mortgaged—Devise of one Subject to Debts, &c.**]—J. B. being entitled to the lands of P. and K. mortgaged the same, and by his will, having given his son H. B. all his interest in the lands of P., devised thus: "I give, devise and bequeath unto my son A. B., but in trust to and for the sole use and behoof of my daughter H. C., without the control of her husband, all my interest in and to my lands of K., &c., with full power to dispose thereof with the consent of H. C., but subject to my debts, legacies," &c. After his father's death, H. B. took an assignment of the mortgage, and went into possession of all the mortgaged premises. On a bill filed by H. C. and her husband against H. B. and A. B., praying a redemption, and charging that the mortgage was then paid off by the perception of the rents and profits:—Held, that the lands of K. were not bound to exonerate the lands of P., but that both should contribute ratably to the payment of the mortgage; but, the bill having been filed before the mortgage was paid off, the costs of the mortgagee should be borne by the lands of K. exclusively. *Clarke* v. *Brereton*, 1 Jones, 165.

**Devise of Equities of Redemption to pay Debts—Mortgage of one with Recital that Debts were paid.**]—B. being seised in fee of estates P. and C. and also of other estates, made separate mortgages of P. and C., and devised all the estates to trustees, upon trust by sale or mortgage, to raise money to pay his debts and legacies, and subject thereto upon trust for his daughter, Mrs. H., for life, for her separate use, with remainder upon such trusts as she should, by deed or will appoint. Mrs. H., by virtue of her power, mortgaged P. to A. in fee, by a deed reciting that the testator's debts and legacies had been paid (which was not the fact), and containing an unqualified covenant by Mr. and Mrs. H., against incumbrances. Subsequently, Mrs. H., by virtue of her power, mortgaged C. to Holmes in fee, and made similar mortgages of other parts of the estates:—Held, that, however the case might have stood, if these mortgages had been made by virtue of an ownership in fee, the recital and covenant in A.'s mortgage gave him no right to have P. exonerated from the testator's debts and legacies out of C. and the other estates, as against Holmes' and the other subsequent mortgages under the power of appointment. *Stronge* v. *Hawkes*, 4 De G. & J. 632.

—— **As between Puisne Mortgagees.**]—Held, also, that the charge of debts contained in the will did not give A. any right, as against Mrs. H.'s other mortgages, to have the testator's mortgage on P. paid out of all the devised estates ratably, but that it must be borne by P. *Ib.*

**Devise of two Estates—Mortgage of one, subsequent Mortgage of other, to Bank—Debt, how payable.**]—A person, having devised estates A. and B., deposited the title deeds of A. with his bankers to secure any balance that might be due from him, and, being largely indebted and unable to satisfy the debt, and, requiring further small advances, deposited with the bank the title deeds of B. The debt remaining due at his death:—Held, that the amount due up to the time of the second deposit was payable out of A.; and the amount accrued subsequently out of A. and B. ratably; the value of A. to be computed after payment of the previous mortgage. *De Ruchefort* v. *Dawes*, 40 L. J., Ch. 625; L. R. 12 Eq. 540; 25 L. T. 456.

**Trader—Mortgage by Consignee.**]—A firm in Ceylon employed a firm in England as their agents and factors, the course of business being

that the Ceylon firm consigned cargoes to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent, and executed a creditor's deed under the act of 1861, and then T. sold the coffee (which produced more than sufficient to cover the bills drawn against it) and enough of the other securities to satisfy his debt :—Held, that the Ceylon firm were entitled, as against the English firm in liquidation, to have the remaining securities in T.'s hands marshalled, and to have a lien thereon for the balance due to them upon the coffee transaction. *Alston, Ex parte, Holland, In re*, L. R. 4 Ch. 168 ; 19 L. T. 542 ; 17 W. R. 266.

—— **In Favour of Mortgagee — Against Assignee in Bankrupty.**]—Mortgagee of trader's furniture, stock in trade, &c. :—Held, entitled, as against the assignee of the trader who had become bankrupt, to the benefit of the doctrine of marshalling ; and the goods not in his security held first applicable to the payments of the landlord's demand. *Stephenson, Ex parte*, 1 De G. 586 ; 17 L. J., Bk. 5 ; 12 Jur. 6.

**Between Judgment Creditors—Debts thrown on unsettled Estates.**]—A party seised of several estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments :—Held, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute. *Averall* v. *Wade*, Ll. & G. t. Sugd. 252.

**As against Surety.**]—Mortgage of two funds to A. with a covenant by a surety. Second mortgage of one of the funds to B. ; B.'s funds having been exhausted in part payment of A.'s debt, and A.'s mortgage having been transferred to the surety on payment by him of the balance :—Held, that B. had a right to marshal the securities as against the surety. *South* v. *Bloxham*, 2 H. & M. 457 ; 34 L. J., Ch. 369 ; 11 Jur. (N.S.) 319 ; 11 L. T. 264.

—— **Tacking Costs.**] — Held, also, that the surety could not tack, as against B., the costs of a defence to an action on his covenant, from which B. derived no benefit, but that he might charge, as against B., all costs incurred for the common benefit of the persons interested in the estate after the first mortgage. *Ib.*

Semble, also, that, as against the original mortgagor, the surety might have tacked to his security all costs not improperly incurred as surety. *Ib.*

**Debt to Crown—Contribution between Settled and Unsettled Estates.**]—A debt due to the crown, overriding the entire estate of the debtor, having been levied out of one portion of it only vested in a mortgagee, the mortgagee is not entitled to contribution from purchasers of other portions of the estate of the crown debtor, who derive title under a settlement for valuable consideration prior to such mortgage. *Hartley* v. *O'Flaherty*, Ll. & G. t. Plunk. 208.

**Collateral Security.**]—P. D. mortgaged estates X. and Y., and, as a collateral security, his sons assigned their estates in N. P. D. afterwards sold X. to the defendant, covenanting against incumbrances, the mortgagee purporting to be a party to but never executing the conveyance ; and P. D.'s sons executing a bond of indemnity to the defendant against all incumbrancers. In 1805 the mortgagee filed a bill of foreclosure against P. D., his sons, and the defendant, and in 1806 the sons made an equitable mortgage of N. to the plaintiff, who took without notice of the defendant's claim :—Held, that the defendant had a right to have N. applied in payment of the mortgage before the lands sold to him, and that the plaintiff took subject to the same liability ; held, also, that the plaintiff had a right to have Y. sold, and to redeem the mortgage on N. *Going* v. *Farrell*, Beat. 472.

Semble, but for the pendency of the suit, the plaintiff, as equitable mortgagee, would have had priority to the defendant. *Ib.*

## K. PAYMENT OFF, RECONVEYANCE, AND DEEDS.

1. *Payment and Discharge*, 1636.
2. *Reconveyance*, 1646.
3. *Deeds*, 1652.

### 1. PAYMENT AND DISCHARGE.

*a.* What Amounts to, 1636.
*b.* Title to Money, 1642.
*c.* Presumption of, 1643.
*d.* Joint Receipt, 1643.
*e.* Tender, 1644.
*f.* Interest and Costs after Tender—*See* INTEREST, ante, C. 2, col. 1470, *and* COSTS AND EXPENSES, post, S. 3, e, col. 1843.

#### a. What Amounts to.

**Half-payment.**]—A mortgagee is not bound to accept half of his debt. *Robinson* v. *Cumming*, 2 Atk. 410.

**Security held till Debt Paid.**]—Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the court will not direct a release upon payment into court of the largest sum to which the debt can in probability amount ; the incumbrancer being entitled to retain the security till the debt is discharged. *Postlethwaite* v. *Blythe*, 2 Swanst. 256.

**Time of.**]—A lessee assigned the demised premises to A. by way of mortgage, and afterwards made two equitable mortgages of them, one to B. and the other to C., and died. C. agreed to purchase the lease of his executors free from incumbrances, and afterwards took possession of the premises, but did not pay the purchase-money :—Held, that, as between C. and the executors, the purchase-money must be considered to have been applied on the day on which C. took possession, towards satisfaction of the incumbrances, according to their priorities. *Greenwood* v. *Taylor*, 14 Sim. 505 ; 9 Jur. 480.

**Premature Payment.**]—A payment of the mortgage-money before the day limited by the

deed to the general agent of the mortgagee, but without the mortgagee having authorised a premature repayment, and without his privity, is not a good discharge of the mortgage debt. *Burrough* v. *Cranston*, 2 Ir. Eq. R. 203.

**Payment before Expiration of Notice.**]—A son who was residuary legatee under his father's will, mortgaged his interest under that will to H. The son died, having made P. his executor, and A. his residuary legatee, A., as residuary legatee, and H., on behalf of himself and the other creditors, brought an action against the executors of the son for administration of the son's estate, and H. brought an action against the executors of the father for administration of the father's estate. Shortly after this, P. gave notice to H. that he should pay off the mortgage in six calendar months, and this notice was accepted by H.:—Held, that, notwithstanding the giving and acceptance of the notice, H., having taken proceedings to recover his mortgage-money, was bound to accept, in satisfaction of his claims, his principal money and costs with interest up to the time of payment, though such payment was made before the expiration of the notice. *Alcock, In re, Prescott* v. *Phipps*, 23 Ch. D. 372; 49 L. T. 240—C. A.

**Interest in lieu of Notice.**]—After default in payment of the mortgage-money according to the proviso for redemption in the mortgage deed, the mortgagor is at liberty to pay off the mortgage-money without giving the mortgagee six months' notice if he pays six months' interest in advance in lieu of the notice. *Johnson* v. *Evans*, 61 L. T. 18—C. A.

—— **Right of Equitable Mortgagee.**]—An equitable mortgagee by deposit of title deeds is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of such notice, but he is entitled to a reasonable time to look up the deeds. *Fitzgerald's Trustee* v. *Mellersh*, 61 L. J., Ch. 231; [1892] 1 Ch. 385; 66 L. T. 178; 40 W. R. 251.

**Payment before Default—Dishonour.**]—On the 2nd of May, 1837, freehold and copyhold estates were mortgaged by C. to I., subject to a proviso for redemption on payment of 10,000*l.*, on the 2nd of May, 1844, with half-yearly interest in the meantime. Prior to any default, C. paid to I. 7,000*l.* by cheque, and gave him two bills of exchange drawn by C. & Co., upon and accepted by C. for 1,620*l.*, at three months after date, and 1,500*l.* at six months after date, and for which he signed a receipt which concluded as follows: "and which cheque for 7,000*l.* and bills for 3,120*l.*, making together 10,120*l.*, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for 10,000*l.*, and I do hereby undertake whenever required to execute a conveyance of the said property." I. gave this memorandum, together with the title and mortgage deeds of the premises, to C. The cheque for 7,000*l.* was paid, but both the bills of exchange were dishonoured. C. afterwards conveyed all his estate to a trustee for the benefit of his creditors, and then became bankrupt. I. never reconveyed the premises:—Held, that, as between I. and C. and his assignees by deed and his assignees in bankruptcy, the receipt of the cheque and bills, and the giving the above memorandum, did not discharge the mortgaged premises from the mortgage; but that on their dishonour I. was entitled to a decree against them all for the restoration of the title and mortgage deeds, and to a decree for foreclosure. *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; 6 Jur. 987.

**Interest paid where no Charge.**]—Interest was paid on a mortgage of 360*l.*, from 1829 to 1852, but the court, in 1857, decided that 110*l.* of the 360*l.* was not well charged on the property:—Held, in taking the accounts, that the interest thus paid for twenty-three years on the 110*l.* ought not to be treated as payments in discharge of the capital of the remaining 250*l.* *Blandy* v. *Kimber*, 25 Beav. 537.

**Depreciation of Security.**]—Where a mortgagee permitted an executor and devisee of mortgaged estates under the mortgagor's will to remain in possession of mortgaged leaseholds for fifteen years, and received interest from him during that time, on the security becoming of less value than the debt, he was not allowed to have the unpaid portion of his mortgage made good out of a legacy given by the mortgagor's will, and which had been paid into court. *Ridgway* v. *Newstead*, 9 W. R. 31.

**Payment to what Attributable.**]—A. B., an equitable mortgagee, lent the title deeds to C. D., the mortgagor, to enable him to arrange a sale of the property. C. D. was indebted to A. B., both on the mortgage and on a trade account. C. D. paid to A. B. a part of the produce of the sale, but there was no evidence of his having made any express appropriation of that payment:—Held, that it must be understood that the payment was made on the mortgage account, and that A. B. had no right to appropriate it to a trade account. *Young* v. *English*, 7 Beav. 10; 13 L. J., Ch. 76.

**Mortgagee concurring in Sale.**]—A mortgagee concurred with the transferee of the equity of redemption in selling the property, and he allowed such transferee to receive the purchase-money:—Held, that the mortgagee could not afterwards sue the mortgagor for the debt, and he was perpetually restrained from doing so, and ordered to pay the costs of the suit. *Palmer* v. *Hendrie*, 28 Beav. 341.

**Redemption of Guarantee — Security not affected.**]—Husband and wife deposited title deeds of real estate, to which the wife was entitled, with certain bankers, to secure a running account, not exceeding 2,000*l.* The father of the husband gave a written guarantee as a further security. The father subsequently paid a portion of the amount due on the security, and redeemed his guarantee:—Held, that the security was not thereby released or affected. *Waugh* v. *Wren*, 9 Jur. (N.S.) 365; 7 L. T. 612; 11 W. R. 244.

**Receipt of Composition from Partner's Estate.**]—A solicitor invested money of a client on an improper security (a fourth mortgage). It being supposed that the security was worthless, and the solicitor having absconded, the client received a composition of 5*s.* in the pound from the estate of the deceased partner of the solicitor, under a general scheme of compromise between the executors and creditors of such deceased partner. The mortgaged estate having subse-

quently proved sufficient to pay the fourth mortgage:—Held, that the amount received under the composition must be repaid to the partner's estate, and did not enure to the benefit of subsequent incumbrancers on the mortgaged property. *Sawyer* v. *Goodwin*, 45 L. J., Ch. 289; 1 Ch. D. 351; 34 L. T. 635; 24 W. R. 493—C. A.

**Solicitor-Agent to receive Interest only.**]—Where a solicitor employed by mortgagor and mortgagee received the interest on the mortgage debt regularly, and after a time fraudulently obtained part of the principal from the former; and, although the interest was not regularly paid to the mortgagee, he made no complaint to the mortgagor:—Held, that the solicitor was agent of the mortgagee to receive the interest, but not the principal. *Kent* v. *Thomas*, 1 H. & N. 473.

A. lent to B. 1,000*l.* upon the security of a deed, which contained a covenant by him to surrender copyhold premises to A.'s use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, and the title deeds were delivered to him, and he prepared and delivered to B., but without A.'s knowledge, a schedule of the deeds, at the foot of which was a memorandum, signed by D., acknowledging the receipt of the deeds, and undertaking to deliver them up on payment of the principal money and interest. The mortgage deed remained in D.'s possession, and he from time to time received the interest, and paid it over to A. The principal money was paid to D., who appropriated it to his own use, and died insolvent:—Held, first, that D.'s receipt for the principal, and the memorandum signed by him, were admissible in evidence for A. *Wilkinson* v. *Candlish*, 5 Ex. 91; 19 L. J., Ex. 166.

Held, secondly, that neither the possession of the mortgage deed, nor the receipt of the interest, was any evidence of an authority to D. to receive the principal, and consequently that A. was entitled to recover it from B. *Ib.*

**Giving up Deeds.**]—Mere delivery up of deeds does not cancel mortgage debt; but, when accompanied with mortgage bond, on purpose to release debt, in case donor should die of then present illness, is, as it seems, a good donatio causâ mortis. *Hurst* v. *Beach*, 5 Madd. 351; 21 R. R. 304.

If the scrivener, having the custody of the security, delivers it up, being a bond, payment of the principal is good. *Whitlock* v. *Waltham*, 1 Salk. 157; 1 Vern. 150.

—— **Absence of Consideration.**]—By an indenture made in 1858, G. mortgaged to his father a share of personal estate to which G. was entitled in reversion, expectant on his mother's death. The father died in 1872, having made another son, C., his executor and residuary legatee. The mother died in 1887. C. shortly afterwards sent a letter to G., enclosing the indenture, and stating that he handed it over to G. in compliance with the wish of their late mother. C. afterwards changed his mind and claimed the share under the mortgage. No interest had ever been paid on the mortgage debt by G., and no acknowledgment given by him in respect of it:—Held, that, in the absence of any consideration, the letter, though coupled with delivery of the mortgage deed, was not an effectual release, and was incomplete as a gift, and did not amount to a declaration of trust, and that C. was entitled to the share. *Hancock, In re, Hancock* v. *Berrey*, 57 L. J., Ch. 793; 59 L. T. 197; 36 W. R. 710.

**Deed omitting to assign Debt.**]—A deed was executed by a legal mortgagee of leaseholds, the executor of the mortgagor, and a new mortgagee, whereby, in consideration of the payment by the new mortgagee of the old mortgage debt, the discharge of which the old mortgagee thereby acknowledged, and in consideration of a further advance to the executor of the mortgagor by the new mortgagee, the old mortgagee and the executor assigned the mortgaged premises to the new mortgagee, with a new covenant by the executor of the mortgagor for payment of the aggregate sum, and a new proviso for redemption. The deed contained no assignment of the old mortgage debt, but the operative words extended to all the right and title of the old mortgagee in the premises:—Held, that the old mortgage was not extinguished as far as regarded priority over a subsequent incumbrance. *Phillips* v. *Gutteridge*, 4 De G. & J. 531.

**Deed not executed by Wife claiming Dower.**]—A lessee of land for ninety-nine years created a mortgage term which ultimately became vested in a trustee for a mortgagee and subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of the mortgagor, who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after his death she filed a bill to enforce her right to dower:—Held, that the mortgage debt was not extinguished, and that the term was not satisfied within the Satisfied Terms Act (8 & 9 Vict. c. 112), s. 2, and that the term afforded the purchaser protection against the right of dower. *Anderson* v. *Pignet*, 42 L. J., Ch. 310; L. R. 8 Ch. 180; 27 L. T. 740; 21 W. R. 150.

**Payment by Wife, Tenant for Life under Will of Husband.**]—Where a second wife takes large benefits under her husband's will, and pays off a mortgage on lands devised by the husband to her for life, with remainder to the issue of the former marriage, and by her consent the mortgage term is assigned to attend the inheritance; this payment is primâ facie a gift to the remainder-woman, and the wife cannot afterwards set it aside, except on the ground of fraud or mistake. *Toplis* v. *Van der Heyde*, 4 Y. & C. 173; 9 L. J., Ex. Eq. 27.

**Payment of Mortgagee by Purchaser.**]—A., having a reversionary interest in personalty, which he had mortgaged first to B. and next to C., agreed to sell it to D. for 1,500*l.*; and, D. having, at his request, paid off B. out of the 1,500*l.*, he agreed that, until the sale should be completed, D. should stand in the place of B., and have the full benefit of her security:—Held, that B.'s debt was extinguished by the payment made to her by D., and, consequently, that D. was not entitled to priority over C. *Watts* v. *Symes* 16 Sim. 640; 13 Jur. 245.

**Taking Conveyance of Equity of Redemption.**]—A second mortgagee took a conveyance of the equity of redemption, in consideration of the debts due to himself and the other mortgagees, which he thereby took upon himself and covenanted to pay:—Held, that his debt was extinguished, and therefore that in a foreclosure suit instituted against him, by the parties entitled to the first and third mortgages, he was not entitled to be paid his debt, in priority to the third mortgage. *Brown* v. *Stead*, 5 Sim. 535; 2 L. J., Ch. 45.

**Transfer to Correspondent, not Satisfaction.**]—A. having borrowed money on mortgage from B., such mortgage was afterwards, with the concurrence of A., transferred to C., the correspondent of C., who paid the money to B. by bills, for which he charged A. in the general account between them:—Held, that this was a transfer, and not a satisfaction, of the mortgage. *Campbell* v. *Dent*, 2 Moore P. C. 292.

**Bond in Substitution of Mortgage.**]—A bond from the owner of an estate, charged, to the incumbrancer, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security; and the estate not thereby released. *Saunders* v. *Leslie*, 2 Ball & B. 509; 12 R. R. 114.

**Evidence.**]—It is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it lies on the owner of the estate to make out that the estate is discharged. *Ib.*

**Payment into Court—7 Geo. 2, c. 20.**]—When a mortgagor who is being sued at law for the mortgage debt obtains an order under 7 Geo. 2, c. 20, for payment into court of the money due from him, and pays such money into court accordingly, such payment operates as a complete discharge from the mortgage debt, and the mortgagor is not bound to see to the application of the money. *Bourton* v. *Williams*, 39 L. J., Ch. 800; L. R. 5 Ch. 655; 18 W. R. 1089.

**Payment under Protest.**]—If mortgagee makes unfounded claims and refuses to reconvey unless they are paid, and mortgagor pays under protest, he can maintain bill for repayment. *Chapple* v. *Mahon*, Ir. R. 5 Eq. 225.

**Practice—Relief.**]—The mortgagee, on her marriage, settled the mortgaged estate on herself for life, remainder to the issue of that marriage. The mortgagor brings a bill to redeem. Mortgagee omits setting forth the settlement in her answer; the mortgagor has a decree to redeem, and pays the mortgage money; afterwards the issue of the mortgagee brings an ejectment on the settlement and recovers the mortgaged premises. The mortgagor relieved, having paid his money pursuant to the decree, and having been in no fault. *Chapman* v. *Duncombe*, 2 Vern. 142.

—— **Non-payment on Day.**]—Where a mortgagee agrees to take a portion of his debt in lieu of the whole, upon payment on a given day, the court will not relieve against the effect of its non-payment on that day. *Ford* v. *Chesterfield (Earl)*, 19 Beav. 428.

—— **Letters cancelling Mortgage.**]—Letters by a mortgagee to defendants beneficially interested in the equity of redemption, promising that her executors should cancel the mortgage, and containing words of gift:—Held, to be no defence to a suit of foreclosure by the executors of the mortgagee. *Scales* v. *Maude*, 6 De G. M. & G. 43; 25 L. J., Ch. 433; 1 Jur. (N.S.) 1417; 4 W. R. 109.

### b. Title to Money.

**Executor, not Heir, Entitled.**]—The executor, not the heir, of a mortgagee in fee is entitled to the money secured by the mortgage. *Thornborough* v. *Baker*, 3 Swanst. 628.

**Several Mortgagees.**]—Where a mortgage is made to several persons jointly, they are in equity tenants in common of the mortgage money. *Vickers* v. *Cowell*, 1 Beav. 529; 3 Jur. 864.

**Devisees for Life and in Fee.**]—Where mortgagee devises mortgage to A. for life, remainder in fee to B., and mortgage in fee is redeemed, tenant for life takes one-third, and remainderman two-thirds of mortgage money. *Brent* v. *Best*, 1 Vern. 70.

**Tenant for Life and Remaindermen.**]—The bill was to redeem a mortgage. It was objected that the defendant was only tenant for life of the equity of redemption, and the remaindermen over were not made parties. Court directed a bill to be brought, the defendant to have a sale, the mortgage debt paid, and the surplus distributed amongst the tenants for life, and the remaindermen in proportion according to their respective interests. *Thynn* v. *Ducall*, 2 Vern. 117.

**Payment into Court.**]—Testator, having a debt secured on lands, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest therein to a third person. The mortgagor, selling the estate, shall bring the mortgage money into court for the use of the devisee, subject to the life estate. *Lewis* v. *King*, 2 Bro. C. C. 600.

—— **Sale of Property.**]—A mortgagee having commenced an action against the mortgagor to recover the mortgage money upon a collateral security, the mortgagor obtained an injunction against the action, upon the terms of his paying into court the sum which appeared to be really due upon the mortgage. The sum was accordingly paid in and invested in stock, and that stock was afterwards blended with other stock, purchased with another sum of money paid into court in the same suit. The mortgaged property having been afterwards sold under a decree in a different suit between the mortgagee and mortgagor, the mortgagee became the purchaser, and he was allowed to deduct from the purchase-money the amount due to him on the mortgage:—Held, that the mortgagor was entitled to receive back the stock which had been purchased with the sum paid in by him upon obtaining the injunction, and also the accumulated dividends which had accrued on that stock. *Taylor* v. *Waters*, 1 Myl. & Cr. 266; 5 L. J., Ch. 210.

**Joint Tenancy or Tenancy in Common.**]—Mortgages in fee were taken in the name of

three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—Held, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage money as tenants in common. *Jackson, In re, Smith* v. *Sibthorpe*, 56 L. J., Ch. 593; 34 Ch. D. 732; 56 L. T. 562; 35 W. R. 646.

*See also* EXECUTOR AND ADMINISTRATOR.

### c. Presumption of.

**After Twenty Years.**]—Satisfaction of a mortgage to be presumed after twenty years' possession by the mortgagor, without payment of interest, demand or acknowledgment. Semble. *Christophers* v. *Sparks*, 2 J. & W. 223.

**Twenty-five Years.**]—Mortgage presumed satisfied, no interest having been received for twenty-five years. *Hillary* v. *Waller*, 12 Ves. 266.

**Rebuttal.**]—Twenty years are not an absolute bar to a mortgagee. It is merely a case of presumption which may be rebutted. *Stewart* v. *Nicholls*, Tam. 307.

**Practice.**]—There is no general rule in this court for presuming a mortgage satisfied after twenty years, or any other period of time, elapsing without payment or demand of principal or interest; and, if a jury should on that ground presume the bond satisfied which is given as a collateral security to the mortgagee, yet the mortgagee is not thereby prevented from shewing the truth of the case in this court, if in fact the money has not been paid. *Toplis* v. *Baker*, 2 Cox, 119; 2 R. R. 21.

—— **Reference to Inquire.**]—Although nonpayment of interest for twenty years on a mortgage, where clear, and no demand, raises a presumption of payment, yet on doubtful circumstances, and the original mortgage admitted, it was referred to the master, to inquire whether any interest had been paid. *Trash* v. *White*, 3 Bro. C. C. 289.

*See also* LIMITATIONS, STATUTE OF.

### d. Joint Receipt.

**Equitable Charge.**]—When an equitable charge is vested in two persons even as joint tenants, the money cannot be paid to one without special authority from the other, so as to discharge the estate which forms the security. *Matson* v. *Dennis*, 4 De G. J. & S. 345; 10 Jur. (N.S.) 461; 10 L. T. 391; 12 W. R. 926.

**Several Mortgages—Payment by Purchaser.**]—A. being entitled to 4,500*l.* secured on his father's estate, and payable after his father's death, borrowed 1,500*l.* of B., and assigned to him the 4,500*l.*, with power to sell the same and give an effectual discharge to the purchaser. A. afterwards borrowed money of other persons and gave similar securities to them. The estate was subsequently sold under the father's will:—Held, that the purchaser of the estate could not safely pay the whole 4,500*l.* to B. on his sole receipt, but that all the other persons who had charges on that sum must be made parties to the conveyance and give receipts for the portions of it to which they were respectively entitled. *Brasier* v. *Hudson*, 9 Sim. 1.

**Deed executed by One Joint Mortgagee Only.**]—A mortgage made to A., B. and C., was paid off. The deed of release recited that the sum of 3,000*l.*, part of the mortgage debt, was not the money of A., B. and C., but belonged to D. and E., upon a joint account. D. and E. were parties to the deed, and purported to acknowledge the receipt of the money. The deed was not executed by D., and E. received the 3,000*l.* The estate being subsequently sold:—Held, that the purchaser could not refuse to complete, on the ground that there was no sufficient discharge of the 3,000*l.* mortgage debt. *Matson* v. *Dennis*, 10 L. T. 391; 12 W. R. 596.

### e. Tender.

**Not Payment.**]—In cases of legal or equitable mortgage, a tender properly made and improperly rejected is not equivalent to payment. *Bank of New South Wales* v. *O'Connor*, 58 L. J., P. C. 82; 14 App. Cas. 273; 60 L. T. 467; 38 W. R. 465—P. C.

**Cheque instead of Cash—Solicitor's Authority.**]—A solicitor, having authority from the mortgagees to accept a tender of the amount due under the mortgage, has no implied authority to accept the tender of a cheque in lieu of cash, so as to make such a tender good in law as against the mortgagees. *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, 66 L. J., Ch. 127; [1897] 1 Ch. 171; 75 L. T. 627; 45 W. R. 246. Affirmed on the facts, 67 L. J., Ch. 118; [1898] 1 Ch. 27; 77 L. T. 506—C. A.

**Absolute or Conditional.**]—Under the circumstances of the case, a tender of mortgage money held to be absolute and not conditional. *Morley* v. *Bridges*, 2 Coll. C. C. 621.

**Place of.**]—Six months' notice given to pay in the mortgage money at —— Hall, though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country. *Gyles* v. *Hall*, 2 P. Wms. 378.

**Lapse of Time After.**]—Tender of payment by mortgagor to agent of mortgagee, and refusal to accept, and twenty-four years thereafter suffered to elapse by mortgagee without demand of principal or interest. Payment of principal and interest for whole time decreed under the circumstances. *Meade* v. *Bandon* (*Earl*), 2 Dow, 268.

**Notice.**]—As to a tender of mortgage money there ought to be reasonable notice of paying it in, and, if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be always ready. *Gyles* v. *Hall*, 2 P. Wms. 378.

**Practice — Refusal to Accept.**] — Upon the expiration of a notice to pay off mortgage money, the mortgagees are bound to know and to state the amount due for principal, interest, and costs. And, if the mortgagees refuse to receive the amount tendered by the mortgagor, as due for principal, interest, and costs, they do so at their own risk. And a sum having been tendered and refused :—Held, upon a claim to redeem, that the mortgagors were entitled to a decree for an account of the principal, interest, and costs, and that the interest (if the principal did not appear to have been lying idle) must be continued to the time of taking the account; and that, if the sum tendered did not amount to the sum due, the plaintiffs must pay the costs; but, if it exceeded the amount found due, the defendants must pay the costs. *Harmer* v. *Priestley*, 16 Beav. 569; 22 L. J., Ch. 1041; 1 W. R. 343.

—— **Refusal to Reconvey.**] — A mortgagee having refused to reconvey and deliver up the title deeds, though the amount of the mortgage money and interest was tendered to him on the day on which the mortgage was redeemable, a decree was made against him, with costs; and, the money having been paid into court, no interest was allowed to him subsequent to the tender. *Robarts* v. *Jefferys*, 8 L. J. (o.s.) Ch. 137.

—— **What amounts to Tender.**]—The defendants having mortgaged a house to the plaintiffs assigned the equity of redemption to a purchaser, who executed a further charge to the plaintiffs. The plaintiffs then sued the defendants upon the covenants of the mortgage. The defendants took out a summons for a stay of proceedings upon payment within a month of principal, interest, and costs, and for a reconveyance of the mortgaged premises; but no order was made upon the summons, in consequence of the refusal of the plaintiffs to reconvey except on payment of the further charge. The question between the parties was subsequently stated in a special case, and was decided in favour of the defendants, the costs being reserved. In taking the mortgage accounts the chief clerk computed the interest down to the date of payment. The defendants took out a summons to vary the certificate by disallowing all interest from the date of the hearing of the summons to stay proceedings :—Held, that the summons to stay was not equivalent to a tender, and that the application failed —that the plaintiffs, having in effect disputed the right of the defendants to redeem, ought to be deprived of the costs occasioned by their unsuccessful claim, but that they were entitled to the other costs of the action. *Kinnaird* v. *Trollope*, 58 L. J., Ch. 556; 42 Ch. D. 610; 60 L. T. 892.

—— **Injunction against Ejectment.**] — The plaintiff, being the purchaser from a co-heir of a mortgagor, had tendered the mortgage money. An injunction was granted to restrain the mortgagee in possession from proceeding in ejectment against a lessee of the property, the plaintiff undertaking to make the other co-heirs parties. *Herries* v. *Griffiths*, 2 W. R. 72.

—— **Perusing Assignment.**] — On tender of redemption of mortgage, mortgagee is entitled to have a reasonable time to peruse the assignment. *Wilshaw* v. *Smith*, 9 Mod. 441.

Where covenants are inserted in a deed of assignment, on the part of a mortgagee, he may refuse to take the principal and interest, though tendered, till he had advised with his attorney on the safety of executing the assignment. *S. C.*, 3 Atk. 89.

### 2. Reconveyance.

*a.* Right to, 1646.
*b.* Presumption of, 1650.
*c.* None Executed, 1650.
*d.* Obtained by Fraud, 1650.
*e.* Under Conveyancing Act, 1881, s. 15. *See* Assignment and Transfer, ante, D. 6, col. 1490.

#### a. Right to.

**Generally.**] — Bill against a mortgagee, to compel him to reconvey upon payment of principal and interest. *Cox* v. *Caffin*, 9 Mod. 120.

Equitable mortgagees by deposit of title deeds took, at the time of the mortgage, a conveyance from the mortgagor of the legal estates in the mortgaged properties. They were subsequently paid off, when they surrendered to the mortgagor his title deeds, but did not give up the conveyance. They afterwards claimed a right to retain it as against his subsequent mortgagees of the same properties, on the ground that it comprised other property besides those specifically mortgaged to them :—Held, that those claiming under the mortgagor were entitled to a reconveyance of the legal estates in the specifically mortgaged properties. *Young* v. *Whitchurch and Ellesmere Banking Co.*, 37 L. J., Ch. 186; 17 L. T. 406.

**Not till Payment.**]—Until a mortgagee is paid off, he is not obliged to re-convey. *Lacey* v. *Waghorne*, 59 L. T. 208.

**Before Period fixed for Repayment.**]—A mortgagor cannot compel a mortgagee to reconvey the premises prior to the period fixed in the proviso for redemption for repayment of the mortgage money, although the mortgagor tenders the principal and full amount of interest which would be due at that period. *Brown* v. *Cole*, 14 L. J., Ch. 167; 9 Jur. 290.

**After Money in Mortgagee's Hands.**]—Mortgagee cannot be compelled to reconvey till the money due is actually in his hands. On payment into court, is not sufficient. *Postlethwaite* v. *Blythe*, 3 Madd. 242.

**After Payment.**] — A purchaser of property collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase-money, is not entitled to insist on having the property reconveyed to him, free of incumbrance, before he pays the sum so secured by mortgage; and, if he file a bill to have the estate reconveyed to him, and a declaration of court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered as merely a mortgagor filing bill to redeem, and must pay all costs, although he has paid the money into court. *Drew* v. *Harman*, 5 Price, 319.

Every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such reconveyance upon such payment

being made. *Walker* v. *Jones*, 35 L. J., P. C. 30; L. R. 1 P. C. 50; 12 Jur. (N.S.) 381; 14 L. T. 686; 14 W. R. 484.

**Collateral Security — Severance.**] — Where, therefore, a mortgagee, having, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities:—Held, is not entitled so to sever the debt from the security. *Ib.*

**Injunction.**]—An injunction, granted against his proceeding at law to recover the amount of one of his notes, pending a suit instituted by the mortgagor to redeem and to settle the equities of the parties, was sustained. *Ib.*

**After Payment on Collateral Security.**] — Where a debt is secured by mortgage, covenant and bond, if the mortgagee obtain full payment on the bond or covenant, the mortgagor becomes entitled to the estate. *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J., Ch. 347; 10 Jur. 532.

**To Whom.**]—A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase a part of the mortgaged estate, and has not accepted the title. *Pearce* v. *Morris*, 39 L. J., Ch. 342; L. R. 5 Ch. 227; 22 L. T. 190; 19 W. R. 196. Varying 38 L. J., Ch. 566; L. R. 8 Eq. 217; 21 L. T. 287; 17 W. R. 1001.

A mortgagee cannot be compelled to place another person in his stead as mortgagee, and he may therefore refuse to convey the mortgaged premises to any person who should become mortgagee by that conveyance. In the absence of contract, he can only be called upon to reconvey to the mortgagor or his assignee. A petition of a tenant for life of an equity of redemption for a transfer of the first mortgage on payment by her into court of the moneys secured thereby, while a second mortgagee was in possession, was dismissed with costs. *Colyer* v. *Colyer*, 3 De G. J. & S. 676; 9 L. T. 214; 11 W. R. 587, 1051.

**In Accordance with Limitations.**]—The same tenant for life having filed her bill to redeem that and a second mortgage, the case was considered as though the plaintiff were tenant in fee, and a decree was made, but with a direction that the reconveyance should be made according to the limitations of the will under which the plaintiff was tenant for life. *Ib.*

**On Tender by Person partially Interested.**]—On tender by a person having a partial interest giving a right to redeem, the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested. *Pearce* v. *Morris*, supra.

**To Administrator—Notwithstanding Infants Interested.**]—In a suit for the foreclosure of a mortgage of leasehold premises created by an administrator and next-of-kin, an order was made on motion for the mortgagee to assign the mortgaged premises to the administrator, upon payment of principal, interest, and costs; notwithstanding that some of the persons interested in the equity of redemption were infants, and that the case was not within the stat. 7 Geo. 2, c. 20. *Grane* v. *Mitchell*, 10 Sim. 484; 9 L. J., Ch. 171.

**No Party to Convey.**]—An executor of a mortgagee restrained from enforcing payment, and the money ordered into court, where there was no heir of the mortgagee who could reconvey. *Schoole* v. *Sall*, 1 Sch. & Lef. 176.

**Construction.**]—Where in a deed of mortgage it was recited that the mortgagor was entitled under his father's will to a life estate in the hereditaments comprised in the said deed, with remainder to his children as tenants in tail general, with cross-remainders between them, and that for the purpose of increasing the mortgagee's security one of his daughters and her husband (parties thereto of the second part) nad agreed to bar the estate tail in remainder vested in them, the reconveyance to be made to the mortgagors respectively according to their original respective estates and interests therein:—Held, that, according to the true construction of the proviso for redemption, the parties were entitled to a re-conveyance of the estates as originally created by the will, and not as altered for the purposes of the mortgage. *Plomley* v. *Felton*, 58 L. J., P. C. 50; 14 App. Cas. 61; 60 L. T. 193—P. C.

**Notice.**]—An equitable mortgagee, who had proved his debt before the master, was ordered to reconvey to the purchaser, upon receiving his money, without the usual notice. *Matson* v. *Swift*, 5 Jur. 645.

**Under 7 Geo. 2, c. 20.**] — A first mortgagee brought an action on the covenant in the mortgage deed, having received a notice from a second mortgagee not to deliver up the deeds. The mortgagor applied to the court to compel the plaintiff, under the 7 Geo. 2, c. 20, to reconvey the premises upon payment of the principal, interest and costs; and the court held it to be a case within the statute, and made the order. *Dixon* v. *Wigram*, 2 C. & J. 613; 1 L. J., Ex. 233.

The 7 Geo. 2, c. 20, s. 1, applies only to cases in which the mortgagee is not in possession, and in which he has not attempted to exercise the right of sale. *Sutton* v. *Rawlings*, 3 Ex. 407; 6 D. & L. 673; 18 L. J., Ex. 249.

Therefore, where a mortgagee, in pursuance of a power of sale, attempted to dispose of the property, but without success, the court refused to compel him to reconvey the premises and deliver up the deeds, except on payment of the costs of the abortive attempt at sale, and of shewing cause against the rule. *Ib.*

—— **Notice Disputing Right to Redeem.**]—To a rule calling upon the mortgagee to shew cause why, upon payment of principal and interest, he should not reconvey the mortgaged premises, and deliver up the deeds, it is an answer that the mortgagee has delivered a notice in writing that he disputes the right of the mortgagor to redeem, although the delivery of such notice has been made since the rule was obtained. *Filbee* v. *Hopkins*, 6 D. & L. 264.

Where a mortgagee, by notice to the mortgagor, under 7 Geo. 2, c. 20, s. 3, seeks to deprive the latter of taking advantage of an application to a court of common law, such notice should contain sufficient to enable the court to form an

opinion as to the nature of the objection upon which the right to redeem is disputed, and whether or not a case for the exercise of its jurisdiction exists. *Doe* d. *Harrison* v. *Louch*, 6 D. & L. 270; 18 L. J., Q. B. 278; 14 Jur. 853.

If such a notice contains a mere statement that the mortgagee insists that the mortgagor has no right to redeem, by reason of the mortgaged premises being chargeable with other principal sums than those appearing on the face of the mortgaged deed, or admitted by the mortgagor to be due, it is insufficient. *Ib.*

**Practice—Right disputed—7 Geo. 2, c. 20.**]—The court will not interfere under the 7 Geo. 2, c. 20, upon an application by the mortgagor to compel the mortgagee to reconvey the mortgaged premises, where the right to redeem is disputed upon the affidavits. *Goodtitle* d. *Fisher* v. *Bishop*, 1 Y. & J. 344.

—— **Setting aside Sale.**]—Where an owner of an estate has first mortgaged the property, and then parted with the whole interest, he may, even upon a bill framed as a redemption bill, obtain a reconveyance of the estate, if the facts are such as to entitle him to have the transaction set aside on any established ground of equitable relief. *Jenkins* v. *Parry*, 14 L. T. 503.

But where a plaintiff alleges that the defendants who purchased the property were acting at the time as his professional advisers, and they by their answer admitted that they had acted in that capacity, but that they had ceased to do so for some time previously to the transaction, and the plaintiff did not amend the bill and put the fact in issue; and where the case made by the bill was in several material points varied by the evidence, the plaintiff is disentitled to relief, and the decree of the court below was reversed. *Ib.*

—— **Concurrence of Beneficiaries.**]—A mortgagee, in whom a satisfied mortgage term was vested:—Held, under the circumstances, bound to assign it to the trustee of the will of the mortgagor, without the concurrence of the parties beneficially interested in the property under the will. *Poole* v. *Pass*, 1 Beav. 600; 8 L. J., Ch. 325.

—— **Perusal of Assignment.**]—On tender of redemption of mortgage, mortgagee is entitled to have a reasonable time to peruse the assignment. *Wilshaw* v. *Smith*, 9 Mod. 441.

—— **Form of Deed.**]—Where all the persons interested in an equity of redemption concur in the deed of reconveyance, the mortgagee cannot insist on having the dealings with the equity of redemption stated in the deed, or object to the deed because it contains no recitals whatever. *Hartley* v. *Burton*, L. R. 3 Ch. 365; 16 W. R. 876.

—— **In Chambers.**]—Semble, that a judge in chambers will not order a reconveyance of mortgaged premises. *Morley* v. *Bridges*, 2 Coll. C. C. 621.

—— **At Common Law.**]—A court of common law has no power to compel a reconveyance of a mortgaged estate after payment of the mortgage debt, interest and costs. *Gorely* v. *Gorely*, 1 H. & N. 144.

### b. Presumption of.

**Generally.**]—In 1711 a mortgage for a term of years was made to A. In 1712 a mortgage in fee of the estate was made to S., in trust for A. In 1714 the term was assigned to C. in trust for A., to attend, &c., and then the equity of redemption in fee was conveyed to A. In 1717 A., reciting that he was seised in fee, subject to a lease for ninety-nine years made by a prior owner, grants and confirms that lease. Subsequent owners in their wills and deeds used terms adapted to pass the legal estate, granted leases for long terms, and exercised other acts of ownership. A reconveyance of the legal fee was presumed. *Noel* v. *Bewley*, 3 Sim. 103.

**After Lapse of Time.**]—Reconveyance of the legal estate presumed under obscure circumstances after a great lapse of time, though the possession originally not adverse, but under a trust: upon that presumption a specific performance decreed against a purchaser. *Hillary* v. *Waller*, 12 Ves. 239.

A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed where no demand of either principal or interest has been made for several years, and mortgage deeds have been long in possession of the owner and his ancestors. *Cooke* v. *Soltau*, 2 Sim. & S. 154; 2 L. J. (o.s.) Ch. 30.

### c. None Executed.

**Generally.**]—It is the rule of the court that, if the scrivener have the custody of the security, payment of the interest is good; if he delivers it up, being a bond, payment of the principal is good: but, payment of the principal in case of a mortgage deed, the giving up the deed is not sufficient to restore the estate; there must be a reconveyance. So payment of interest good, if mortgagee consents, or after his death his executor, either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond. *Whitlock* v. *Waltham*, 1 Salk. 157; 1 Vern. 150.

**Lapse of Time.**]—When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years' adverse possession of the mortgagor. *Sands to Thompson*, 52 L. J., Ch. 406; 22 Ch. D. 614; 48 L. T. 210; 31 W. R. 397.

**Release without Revesting.**]—If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond, but there must be some deed to revest the estate in the mortgagor. *Harrison* v. *Owen*, 1 Atk. 520.

### d. Obtained by Fraud.

**Generally.**] — Mortgagees transferred their mortgage to the plaintiff, who gave no notice to the mortgagors. Afterwards the mortgagors, intending to redeem, paid the amount secured by the mortgage to the solicitors of the mortgagees, without ascertaining that they were authorised to receive it, and the solicitors

misappropriated the money. The mortgagees executed a deed prepared by their solicitors, but without perusing the same or knowing its contents, which contained a recital acknowledging the receipt of the money, and purported to convey the property by the direction of the mortgagors to their nominees. There was no proper receipt indorsed on the deed :—Held, that the plaintiff was entitled to the usual foreclosure decree against the mortgagors. *Withington* v. *Tate*, L. R. 4 Ch. 288 ; 20 L. T. 637 ; 17 W. R. 559.

**Purchaser without Notice.**]—In 1851 a mortgage of real estate was made to three persons, the mortgage deed disclosing the fact that the mortgage money was held by the mortgagees upon trust. In 1856 the mortgagor induced the survivor of the three trustee mortgagees, in breach of his duty as trustee, to execute a reconveyance of part of the mortgaged property of such a character as to put anyone who saw it upon inquiry which would have disclosed the breach of trust. The mortgagor then made a fresh mortgage to other persons, from whom he concealed the existence both of the mortgage of 1851 and the reconveyance :—Held, that the mortgagees of 1856 could claim the benefit of the legal estate which passed by the reconveyance without admitting that they had notice of the mortgage of 1851, and of the trusts upon which the mortgage money was held ; and could set up the defence of purchaser without notice against the persons beneficially interested in the mortgage of 1851. *Pilcher* v. *Rawlins*, 41 L. J., Ch. 485 ; L. R. 7 Ch. 259 ; 25 L. T. 921 ; 20 W. R. 281.

The mortgagor executed a deed purporting to convey to the surviving trustee another part of the property, in consideration of a sum of money not actually paid, but the receipt for which was indorsed. This conveyance did not refer to the mortgage of 1851 :—Held, that a subsequent mortgagee from the surviving trustee could set up the defence of purchaser without notice against the person beneficially interested in the mortgage of 1851, although this mortgage had been concealed from him. *Ib.*

Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee simple. The solicitor-trustee received the purchase-money, and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solicitor-trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against them : —Held, that, though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled ; and that they had purchased only the equity of redemption. *Heath* v. *Crealock*, 44 L. J., Ch. 157 ; L. R. 10 Ch. 22 ; 31 L. T. 650 ; 23 W. R. 95.

Held, that, under the form of conveyance adopted, neither the plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers. *Ib.*

Held, that a decree must be made against the purchasers, but for foreclosure and not for sale ; and that the purchasers would not be ordered to deliver up the deeds which were in their possession. *Ib.*

In 1854 a mortgage was executed of real estate in Ireland to E. In 1855 the mortgagor conveyed the estate, with other property, to B., to secure a debt and a further advance made to him. B. had no notice of the prior mortgage, the property being conveyed to him as free from incumbrances. Before the mortgage to B. was completed by registration of the deeds the mortgage to E. was discovered, and B. then insisted upon the mortgagor obtaining a release of the estate from E. This the mortgagor agreed to do, and subsequently obtained a reconveyance to himself from E. of the estate, on an assignment to him of other securities. After the execution of the reconveyance to the mortgagor, no further conveyance was made to B., but B. was apprised of its execution, and allowed the mortgage to continue. The other securities assigned by the mortgagor to E. turned out fictitious, having been fabricated by the mortgagor for the purpose of obtaining the reconveyance. E. claimed the benefit of the original mortgage, on the ground that the reconveyance was obtained by fraud. The court in Ireland held that B. was a purchaser for value of the release, as having been procured by the mortgagor in pursuance of the covenants in the mortgage deed, and that he, being in ignorance of the fraud of the mortgagor, was entitled to retain the advantage which the release had given him. On appeal this decision was reversed. *Eyre* v. *Burmester*, 10 H. L. Cas. 90 ; 8 Jur. (N.S.) 1019 ; 6 L. T. 838 ; 10 W. R. 587. And see *S. C.*, 4 De G. J. & S. 435 ; 33 L. J., Ch. 652 ; 10 Jur. (N.S.) 687 ; 10 L. T. 673 ; 12 W. R. 993.

The claim of E. was against the mortgagor, by paramount right to recover the estate, of which he had been deprived by fraud ; and the mortgagor acquired no interest by the reconveyance to feed his prior contract with by virtue of that fraudulent transaction. *Ib.*

Although all matters affecting the title to property, or the interest of other persons in connection with it, all circumstances which would entitle parties to equitable priorities, or change the character of rights which depend upon want of notice, if known to the solicitor, have the same effect as if actually known to the client, this imputed knowledge has never been extended to matters which have no reference to rights created or affected by the transaction, but which merely relate to the motives and objects of the parties. *Ib.*

### 3. DEEDS.

*a.* Right to, 1652.
*b.* Loss of, 1654.
*c.* Production of, 1656.
*d.* Costs of obtaining—*See* COSTS AND EXPENSES, post, S. 2, c, col. 1836.

#### a. Right to.

**Put in Court.**]—Deeds sometimes ordered into court for their security. *Dixies* v. *Hillary*, Cary, 19.

**Between Mortgagees.**]—Where there is a subsequent mortgagee without notice, who has possession of the title deeds, the first mortgagee shall not compel a delivery of the writings from him, without paying him his mortgage money. *Head* v. *Egerton*, 3 P. Wms. 280.

**Between adverse Claimants.**]—One who lends money on a security, which he is advised by a lawyer to be a good one, yet, if it is otherwise and he has notice that another made title to it, he must deliver up all the writings relating to it, but not the mortgage deed, for there may be covenants in that for payment of the money. *Opie* v. *Godolphin*, Pre. Ch. 548.

**Trust of Mortgage Moneys.**]—Where mortgagee declared trusts of the mortgage moneys, and transferred the mortgages by the same deeds:—Held, that, on redemption the trust deeds must be delivered to the mortgagor, or, in the case of one of them (being a marriage settlement), the mortgagees, retaining it by his consent, were bound to furnish him, at their expense, with attested copies, and a covenant for production. *Dobson* v. *Land*, 4 De G. & Sm. 575; 8 Hare, 216; 19 L. J., Ch. 484; 14 Jur. 288.

**On Forgery.**]—Mortgagees ordered to deliver up title deeds of estate mortgaged to them by a fraudulent or forged mortgage deed. Since the judicature act, the chancery division has jurisdiction on the application of the legal owner of title deeds to order them to be delivered up by a purchaser for value without notice. *McLeod* v. *Drummond* (14 Ves. 353; 17 *id.* 152) distinguished. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 80; 30 W. R. 648—C. A.

**After Payment—Copies.**]—A mortgagee or transferee of a mortgage, though entitled to keep a fair copy of the draft deed for his own protection until the transaction is completed, has no right to keep copies of the mortgage deed or deed of transfer after he is paid off, but whatever copies he has are, as a general rule, copies paid for by the mortgagor, and to be delivered up to him when he pays off the mortgage. *Wade and Thomas, In re*, 50 L. J., Ch. 601; 17 Ch. D. 348; 44 L. T. 599; 29 W. R. 625.

**After Reconveyance.**]—After a reconveyance by a mortgagee to the mortgagor, the attorney of the mortgagee cannot retain the deeds against the mortgagor as a security for the expenses of the transaction due from the mortgagee to the attorney. *Wakefield* v. *Newbon*, 6 Q. B. 276; 13 L. J., Q. B. 258; 8 Jur. 735.

**On Redemption — After Reconveyance and Re-mortgage—Right to Original Deeds.**]—When there have been an assignment of a mortgage and a reconveyance to the mortgagor, and afterwards a re-mortgage to the same mortgagee, upon an order on redemption for delivery up of deeds relating to the title of the mortgaged property, the original mortgage and reconveyance, as they form links in the title, ought to be delivered up. *Hudson* v. *Malcolm*, 10 W. R. 720.

**On Foreclosure.**]—The common decree in foreclosure does not direct the delivery up of the title deeds by the mortgagor to the mortgagee in the case of foreclosure, but merely that the mortgagor shall be absolutely barred and foreclosed of all right and equity of redemption; and it is only where there is a covenant to deliver them in case of default in payment of the principal money and interest, that the court makes such a decree. *Wiseman* v. *Westland*, 1 Y. & J. 117; 30 R. R. 765.

A decree for foreclosure being made against a purchaser, at the suit of a mortgagee, who was a mortgagee only for a term:—Held, that the purchaser ought not to be directed to deliver up the deeds to the mortgagee. *Hunt* v. *Elmes*, 2 De G. F. & J. 578; 30 L. J., Ch. 255; 7 Jur. (N.S.) 200; 3 L. T. 796; 9 W. R. 362.

When a judgment for foreclosure is given against a puisne mortgagee, the plaintiff is not entitled to delivery up of deeds of subsequent date to his own mortgage, dealing only with the title to the equity of redemption. *Greene* v. *Foster*, 52 L. J., Ch. 470; 22 Ch. D. 566; 48 L. T. 411; 31 W. R. 285.

**On Purchase.**]—A purchaser who, in a suit to realise a mortgage security, has paid the purchase money of the mortgaged property into court is entitled, before its distribution, to the delivery of the title deeds. *Fowler* v. *Scott*, 25 L. T. 784; 20 W. R. 199.

—— **As against Bankrupt's Assignees.**]—In April, 1826, A. having contracted to purchase an estate from B., and having had the title deeds delivered to him, agreed to deposit the same with C. as a security for the loan of 5,000*l.*, and to give him the mortgage as soon as the legal estate was conveyed to him. B. afterwards conveyed the estate to A.; but before such conveyance was made, and after the title deeds had been deposited with C., the latter refused to complete the mortgage, unless A. would agree to pay usurious interest upon the sum of 5,000*l.* A., having so agreed, delivered to C. the deed of conveyance of the estate from B. to A. A. afterwards became bankrupt. In an action of trover brought to recover the deeds:—Held, that the original possession of the title deeds, being perfectly good, gave C. a right to the estate whenever B. should have conveyed that estate to A.; and that he, and not A.'s assignees, had a right, therefore, to the deed of conveyance from B. to A. *Wood* v. *Grimwood*, 10 B. & C. 679; 8 L. J. (O.S.) K. B. 192.

**Practice—Deeds to be given up.**]—Defendant stating himself trustee for mortgagees, decreed to deliver up deeds, because he did not name them; so that plaintiff could amend. *Scarborough (Earl)* v. *Parker*, 1 Ves. J. 267.

Where the court establishes a prior equitable title to an estate as against a person who took an equitable mortgage by deposit of the title deeds from the legal owner without notice:—Semble, that it will go on to order him to deliver up the deeds, though he acquired them for value and without notice from the person who at law was the absolute owner of them. *Newton* v. *Newton*, 38 L. J., Ch. 145; L. R. 4 Ch. 143; 19 L. T. 588; 17 W. R. 238.

### b. Loss of.

**Indemnity.**]—Upon bill of foreclosure, mortgagee having lost title deeds, payment of mortgage money within limited time was decreed, and on payment of the same a reconveyance was directed, with a bond of indemnity. *Shelmardine* v. *Harrop*, 6 Madd. 39; 22 R. R. 232.

Where mortgagee had lost some of the title deeds, he was ordered, on a bill to redeem, to give an indemnity, approved by the master. *Midleton (Lord)* v. *Eliot*, 15 Sim. 531; 11 Jur. 742.

Form of bond of indemnity from mortgagee to mortgagor on redemption as to title, where mortgage deeds have been lost. *Stokoe* v. *Robson*, 6 Madd. 41, n. *See* 22 R. R. 234, n.

Under a bill of foreclosure by devisee of a mortgagee, the mortgage deed being lost, a reconveyance directed with an indemnity, and costs against plaintiff. *S. C.*, 19 Ves. 385; 3 V. & B. 51.

**Compensation.**]—A mortgagee having inadvertently burnt the mortgage deed and the documents relating to the title to the mortgaged estate, some of which were original, and others attested and office copies, was ordered, in a foreclosure suit, not only to procure fresh attested and office copies, but to make compensation for the damage done to the estate by the destruction of the deeds, the amount to be settled by the master, and deducted from the mortgage debt. *Hornby* v. *Matcham*, 16 Sim. 325; 17 L. J., Ch. 471; 12 Jur. 825.

**Compensation and Indemnity.**]—S. being in the position of a mortgagee whose mortgage was paid off, being called upon for a reconveyance and redelivery of the deeds, and unable to produce many of the most important, B., the mortgagor, filed his bill praying for the redelivery of the deeds, and, in case they should not be delivered up to him, for an inquiry into the circumstances, and for indemnity, and for general relief. The Master found that the deeds had been lost, but when lost was wholly uncertain. At the bar, B. prayed compensation as well as indemnity:—Held, that he was entitled to both, and that compensation could be given under the prayer for general relief. *Brown* v. *Sewell*, 22 L. J., Ch. 1063; 17 Jur. 708.

—— **Measure of.**]—The court refused to take into consideration the speculative damages which the title or marketable value of the estate might sustain upon any future dealing with it, from the absence of the deeds, yet held that the mortgagor was upon the authorities entitled to relief in respect of the additional expense of producing evidence of his title, and directed a reference (as in *Hornby* v. *Matcham*, 16 Sim. 325), to ascertain what ought to be allowed to him as a sufficient compensation for the damage done to the estate by the loss of the deeds. *S. C.*, 11 Hare, 49.

**Inquiry.**]—Title deeds being stolen from mortgagee, account decreed, with an inquiry as to them. *Stokoe* v. *Robson*, 3 Ves. & B. 51. *S. C.*, 6 Madd. 41, n.; 19 Ves. 385. *See* 22 R. R. 234, n.

**Practice.**]—Notice to redeem a mortgage having been given, a title deed was missing; and the mortgagor brought his action for redemption and for an indemnity:—Held, that the action was rightly brought, in order that the loss of the deed might be established and that the plaintiff's title justified, although the defendants had before the action offered an indemnity, the terms of which were in controversy. *James* v. *Rumsey*, 48 L. J., Ch. 345; 11 Ch. D. 398; 27 W. R. 617.

—— **Interest.**] — Held, also, that interest ceased to run on the day fixed for redemption under the notice. *Ib.*

—— **Fraud.**]—It having been found in the suit that the deed was in the hand of a third party, to whom the defendants' former solicitor had fraudulently pledged it, leave was given to plaintiff to take proceedings for its recovery. *Ib.*

—— **Search and Inquiry.**]—A mortgage deed being lost, the execution of it was admitted in the answer of a foreclosure bill, but the defendant swore there was an indorsement of certain payments on it. The memorial executed by the mortgagor and a counterpart in his possession were offered in evidence, but a sufficient search for the original was not proved:—Held, that there should be a decree to account, with an inquiry as to the original deed and the indorsement. *Coulson* v. *Williams*, 9 Ir. Eq. R. 287.

—— **Proof.**]—Where a deed has been lost, it is not necessary to prove the actual fact of the loss. *Abington* v. *Green*, 14 W. R. 852.

A policy had been mortgaged to secure a debt, and the deed was missing after the death of the mortgagee, but had been in existence a short time before. The court refused to assume that the mortgagee had cancelled the deed when in extremis, and allowed secondary evidence of its existence. *Ib.*

An equitable mortgagee, by deposit of deeds, is not deprived of his right to recover his debt by his inability to produce either the deeds deposited or any memorandum of the deposit, when the court believes that there was such deposit, and that the deeds have been really lost. *Baskett* v. *Skeel*, 11 W. R. 1019. *S. C.*, 2 N. R. 547.

### c. Production of.

i. Of Mortgage Deed, 1656.
ii. Of Title Deeds and other Securities, 1658.

#### i. *Of Mortgage Deed.*

**Generally.**]—Mortgage deed in the hands of of the mortgagee ordered, on the application of the mortgagor, to be produced for the purpose of inspecting an indorsement on the instrument. *Phillips* v. *Evans*, 2 Y. & C. C. C. 647.

It was held, upon a question raised as to the costs of a foreclosure suit, that the mortgagee was not bound, until payment of principal and interest, to produce his mortgage deed to the devisee of the mortgaged estate, though requested to do so by the latter for the purpose of ascertaining the amount due, and the other particulars of the security; and the refusal to produce it will not subject the mortgagee to costs. *Browne* v. *Lockhart*, 10 Sim. 421; 9 L. J., Ch. 167; 4 Jur. 167.

Unless a special case is made out, a plaintiff is not entitled to inspect the mortgage deeds either of a prior or of a subsequent mortgagee, though the mortgagee by his answer craves leave to refer to the deed. *Howard* v. *Robinson*, 4 Drew. 522; 5 Jur. (N.S.) 136; 7 W. R. 223.

A bill was filed by a legatee of a legacy charged on a term against the trustee and against the mortgagee of the term under a mortgage made by the surviving trustee, who had power to give receipts. The bill made a case against the mortgagee of knowledge of circumstances which affected him

with a breach of trust; but did not allege that the deed disclosed those circumstances. The mortgagee's answer admitted the deed, and craved leave to refer to it when produced, but denied the notice:—Held, that the plaintiff could not have production of the mortgage deed. *Ib.*

In a suit by assignees in trust from T. of two policies of assurance (which formed part of a trust estate in T.'s hands as surviving executor of J.) to impeach an alleged prior mortgage of the policies by T. to the company which issued them, the bill, in effect, alleged (though the answer denied) that the giving of the prior mortgage was a breach of trust on T.'s part of which the company was aware at the time. The bill also alleged, and the answer admitted, that the company intended to surrender the policies or sell them by auction. On summons by the plaintiffs for production of documents:—Held, that the plaintiffs had not shewn sufficient interest in the mortgage deed to entitle them to its production. *Carter* v. *Hubback*, 24 W. R. 354.

The policies being the plaintiffs' title deeds, were ordered to be produced. *Ib.*

A mortgagee, though not bound generally to produce deeds which he has obtained in that character, will always be ordered to produce the actual mortgage deed to the mortgagor, because that deed shewed the mortgagor's right to redeem. *Patch* v. *Ward*, L. R. 1 Eq. 436; 12 Jur. (N.S.) 2; 13 L. T. 496; 14 W. R. 166.

In a suit by a mortgagor to open a foreclosure decree, the court, on a motion by the mortgagor, will order the production of the mortgage deeds in the possession of the mortgagee. *Ib.*

Where a solicitor has acted for both mortgagor and mortgagee in the preparation of a mortgage, and he afterwards acquires a right to the money thereby secured, and a decree is made in a suit to foreclose the mortgage, the mortgagor is entitled, in a suit instituted by him to impeach that decree, to call for the production of the mortgage deed against a person holding it as trustee for the solicitor, although no fraud is alleged in the preparation of the deed. *Ib.*

Under a commission against a bankrupt mortgagor, the commissioners have authority by the 6 Geo. 4, c. 16, ss. 33, 34, to enforce from a mortgagee of the bankrupt's property the production of his mortgage deed. The rule that a purchaser for valuable consideration, without notice, cannot be compelled to discover his title deeds, does not extend to the mortgage or purchase deed itself. *Caldecott, Ex parte, White, In re*, Mont. 55.

On a bill by a mortgagor for redemption, the mortgagee is bound to produce the mortgage deed for proof at the hearing; but the mortgagor is not entitled to see the deed for any other purpose. *Beaumont* v. *Foster*, 5 L. J., Ch. 4.

In a bill to redeem, the plaintiff contested the validity of one of several mortgages held by the defendant:—Held, that he was not entitled to a production. *Crisp* v. *Platel*, 8 Beav. 62.

In a redemption suit the mortgagor is not entitled to have the mortgage deed produced and left with the clerk in court for the usual purposes, although admitted by the defendant, the mortgagee, to be in his possession. He is, however, entitled to the production in an account of rental. *M'Comb* v. ——, 5 L. J., Ch. 2.

ii. *Of Title Deeds and Other Securities.*

**Generally.**]—A mortgagee has no right to shew the title of his mortgagor. *Lambert* v. *Rogers*, 2 Mer. 489; 16 R. R. 204.

A mortgagor is always entitled to inspect the mortgage deed, although not the other title deeds in the hands of his mortgagee. *Patch* v. *Ward*, L. R. 1 Eq. 436; 12 Jur. (N.S.) 2; 13 L. T. 496; 14 W. R. 166.

**By Mortgagee—Before Payment.**]—Mortgagee may refuse to part with the deeds till the money is paid, but ought not to deny an inspection in his hands. *Thornhill* v. *Evans*, 2 Atk. 332; 9 Mod. 331.

—— **Also Executor.**]—A defendant, the trustee and executor, was also mortgagee of part of the estate. Upon a bill for the administration of the estate:—Held, that the defendant was not bound to produce the mortgage and title deeds, but that he must produce all accounts in his possession relating to the mortgage. *Freeman* v. *Butler*, 33 Beav. 289.

**By Tenant in Common.**]—Motion on the part of the plaintiff for the production of a deed alleged to be in possession of the defendant as tenant in common with the plaintiff, refused; it appearing by the answer that defendant had sold his share, and was in possession of the deed in question only as mortgagee to the purchaser. *Lambert* v. *Rogers*, 2 Mer. 489; 16 R. R. 204.

**By Purchaser for Value.**]—A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered to be produced. *Kennedy* v. *Green*, 6 Sim. 6.

**Between Mortgagee and Purchaser.**]—Bill by mortgagee of a term of years, against a defendant claiming to be purchaser of the fee for valuable consideration without notice. The plaintiff held not to be entitled to production of title deeds in the defendant's possession; but the defendant held bound to produce one of the deeds, the contents of which he partially described in his answer. *Hunt* v. *Elmes*, 5 Jur. (N.S.) 645; 7 W. R. 471.

**Mortgagee Purchaser of Equity of Redemption.**]—Order for the production of title deeds of a mortgagee, who also claimed to be a purchaser of the equity of redemption, refused. *Greenwood* v. *Rothwell*, 7 Beav. 291; 13 L. J., Ch. 226.

In 1799 A. executed a mortgage of his estate, by demise thereof for a term of 1,000 years, for securing 400*l.* and interest. A. afterwards made his will, dated in 1811; devised the same estate to J. G. for life, with remainder to all and every issue of J. G., share and share alike; and died in 1812. After the death of A., and about the year 1823, J. G., together with the executors and trustees named in his will, sold and conveyed the mortgaged premises to A. T. absolutely. A. T. laid out a large sum of money, on the premises, in erecting a mill and other buildings, and afterwards mortgaged the same for 3,000*l.* to W. R., to whose trustee the term of 1,000 years was assigned. W. R. had, by means of recitals contained in the deeds in his possession, constructive notice of the title of the plaintiffs, the issue of J. G., under A.'s will, but he claimed to be paid not only the original mortgage sum of

400*l*., and interest, but also the amount expended on the premises, before he could be required to produce the deeds relating to the same. On motion for production of the deeds in W. R.'s possession, relating to the premises, it was held that he was not bound to produce them for the plaintiff's inspection. *Ib.*

**On Sale.**]—A mortgagee, who was a party to the suit, consented to a sale of the mortgaged property:—Held, that he must produce and leave in the Master's office the title deeds which were necessary in order to complete such sale. *Livesey* v. *Harding*, 1 Beav. 343.

**Documents depending on Impeached Deed.**]—If a title deed in the defendant's possession be impeached, all subsequent documents which depend upon and proceed from it may be required to be produced, as well as the deed itself; and, therefore, in a suit to set aside a conveyance of an equity of redemption to the defendant, a receipt for the mortgage-money obtained by him after the date of the deed must be produced. *Jones* v. *Jones*, 1 Kay (App.) vi.

**Copies retained by Mortgagor—Production to Chargee.**]—The defendant being entitled to an estate, subject to a charge thereof, belonging to the plaintiff, mortgaged it, and delivered the title deeds to the mortgagees, but he retained copies:—Held, that he was bound to produce the copies, though the mortgagees were not parties to the suit. *Hercy* v. *Ferrers*, 4 Beav. 97; 10 L. J., Ch. 273.

**Settlement reversing general Power of Appointment.**]—By a deed of settlement a general power of appointment over estates was reserved to the settlors, subject to which, the estates were limited to the settlors for their lives, with remainder to other persons in strict settlement. The settlors executed their power of appointment by mortgaging the estates:—Held, that the mortgagees could not, in a suit for redemption brought by one of the remaindermen, be ordered to produce the deed of settlement or to give any discovery as to it. *Chichester* v. *Donegall* (*Marquis*), 39 L. J., Ch. 694; L. R. 5 Ch. 497; 22 L. T. 458; 18 W. R. 531.

**Security for Delivery.**]—Mortgagee has a right to proceed on his mortgage and bond at the same time; but mortgagor shall not be obliged to pay upon his bond unless secure of his title deeds being delivered up. *Schoole* v. *Sall*, 1 Sch. & Lef. 176.

**Covenant to produce.**]—A mortgagee, being decreed to reconvey one undivided moiety of an estate included in his security (a part of the debt being satisfied) to the mortgagor, and being entitled to retain the title deeds of the whole estate, is bound to covenant to produce the deeds. *Yates* v. *Plumbe*, 2 Sm. & G. 174; 2 W. R. 242.

**Practice—Admission.**]—A. was a transferee of a mortgage for 4,000*l*., and claimed also under a judgment 880*l*. A bill was filed by a subsequent mortgagee to redeem the mortgage for 4,000*l*., and for payment of the plaintiff's incumbrance in priority over the judgment debt. The bill alleged that A. had in his possession a deed of conveyance of the estate, in which was a recital that the judgment debt had been paid off. A. admitted the possession of the deed, and set out a portion of it, by which it was recited that the judgment debt was paid off; but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt:—Held, that if he had not been a mortgagee he must have produced the deed; and 4,000*l*. having been paid to him, without prejudice to any question in the cause:—Held, that he could not set off 880*l*. of that as due to the judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed. *Cannock* v. *Jauncey*, 1 Drew. 497; 1 W. R. 378.

—— **Excuse for non-Production.**]—Where, in a suit for the administration of a testator's estate, a mortgagee was ordered to produce before the Master all deeds and writings relating to the estate which were in his custody or power, he does not sufficiently account for the non-production of them, by stating that several years before the decree he had deposited them with a third person as a collateral security for money advanced by him. *Rogers* v. *Rogers*, 6 Jur. 497.

—— **Denial of Mortgage.**]—The plaintiff impeached a certain deed in the defendant's possession, and stated in his bill that this deed had been left with the defendant as a security for a loan of money which had been since repaid. The defendant, in his answer, admitted the possession and relevancy of the impeached deed, and stated that it was a bonâ fide conveyance to him for valuable consideration, and denied that it had ever been so deposited with him as in the bill mentioned:—Held, that, as the defendant denied that he was a mortgagee, the plaintiff's whole statement, that there had been such a mortgage, and that it was paid off, must be regarded, and that the plaintiff was entitled to the production of the deed. Secus, if the defendant had claimed the privilege of a mortgagee to refuse production of the deed. *Jones* v. *Jones*, 1 Kay (App.) vi.

—— **Privilege.**]—In a suit for redemption by a mortgagor against the transferee of the mortgage only, the plaintiff confessing the defendant's title, but stating that he was unable to discover, and seeking discovery, by what means the defendant made it out:—Held, that the defendant was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, and to be relevant to the matters in question, on the ground that it was privileged as the defendant's title deed. *Lewis* v. *Davis*, 17 Jur. 253.

—— **Trust for Sale.**]—The purchaser from the trustee of an equity of redemption devised in trust for sale cannot, in a suit for redemption instituted by some of the cestuis que trustent, refuse to produce the agreement for sale and conveyance, on the ground that they relate exclusively to his title. *Smith* v. *Barnes* 35 L. J., Ch. 109; 11 Jur. (N.S.) 924; 13 L. T. 402; 14 W. R. 96.

—— **Answers to Inquiries.**]—Mortgagee insisting by his answer that he is not bound to produce his title deeds, but admitting that he is mortgagee of part of certain estates, he is not bound in answer to the inquiries of the bill to say what part, as that would be stating the

contents of his title deeds. *Addison* v. *Walker*. 4 Y. & C. 442.

—— **Answer refusing Particulars.**]—A second mortgagee of premises filed a bill to redeem against the first mortgagees, who were a firm of bankers, and alleged that one partner had died and another had retired, and asked that the defendants might set forth a short statement of all deeds and transactions whereby the mortgage had become vested in the remaining partners. The defendants admitted the death and retirement of the two partners, and that by certain deeds the mortgage had become vested in them, but refused to set forth the particular statements required:—An exception to this answer was overruled. *Bridgwater* v. *De Winton*, 33 L. J., Ch. 238; 9 Jur. (N.S.) 1270; 9 L. T. 568; 12 W. R. 40.

The mortgage stated a settled account between the parties shewing 5,000*l.* to be due; but the bill alleged that there was no settled account, and that no such amount was due, and asked how the defendants made out the amount. The defendants answered that the account was not made out in writing, but was stated orally to the mortgagor, and was admitted by him to be correct, and that they believed 5,000*l.* was due from the mortgagor to the defendants, who were bankers, upon the balance of account current, at the date of the mortgage, and in respect of bills held by the defendant's firm, upon which they had made advances; and they refused to state further particulars:—An exception to this answer was allowed. *Ib.*

—— **Disclosing Accounts with Third Parties.**]—Where a bill, to redeem, charges that a secret partnership existed between the mortgagees, who were bankers, and other persons whom the mortgagees declared to be customers merely, the mortgagees will not be compelled to disclose the accounts between themselves and the other persons. *Ib.*

—— **Inconsistency.**]—Where there is an accidental inconsistency between the answer and the schedule, a defendant will be compelled to put in a further answer. *Ib.*

—— **Mortgagor only Surety.**]—Where a bill alleged that the mortgagors were sureties only, the mortgagees were compelled to set out their dealings with the alleged principals. *Ib.*

—— **Order before Defence.**]—In an action for redemption against a mortgagee in possession, an order for production of documents made before the defence was delivered, and without any special case for production being made, was affirmed. *Hancock* v. *Guerin* (4 Ex. D. 3) considered. *Union Bank of London* v. *Manby*, 49 L. J., Ch. 106; 13 Ch. D. 239; 41 L. T. 393; 28 W. R. 23.

—— **After Replication.**]—Where a plea of the statute of limitations was pleaded to a bill for redemption against a mortgagee in possession, and the bill stated that interest had been paid within twenty years, but contained no charge of documents, and the plaintiff had filed a replication:—Held, that the plaintiff might nevertheless compel production of documents by the defendant, for the purpose of obtaining evidence upon the issue tendered by the bill as to payment of interest within twenty years. *Parkinson* v. *Chambers*, 1 K. & J. 72; 24 L. J., Ch. 47; 3 Eq. R. 234; 3 W. R. 130.

—— **Person Interested.**]—Person interested in issue devisavit vel non, refusing to be party to it, is yet allowed to attend trial by counsel, and ordered to produce deeds, &c., except those she held as mortgagee. *Pindar* v. *Smith*, 6 Madd. 48.

—— **Fraud.**]—Where, as a security for money advanced from time to time to A., the creditor of A. had taken various bills of sale and assignments of A.'s personal property, but had left A. in the visible user and enjoyment of that property; upon a bill filed by a subsequent judgment creditor of A., impeaching the prior securities for fraud:—Held, upon motion before hearing, that plaintiff was entitled to production of the several bills of sale and assignments. *Neate* v. *Latimer*, 2 Y. & C. C. C. 257. Affirmed, 11 Bligh (N.S.) 112.

—— **Transfer after Bill.**]—After a bill for redemption had been filed, but before the subpœna had been served, the mortgagee transferred his mortgage, and his transferee was brought before the court by supplemental bill. It was alleged that the transfer had been made for fraudulent and vexatious purposes:—Held, that the plaintiff was not entitled to the production of the deed of transfer. *Gill* v. *Eyton*, 7 Beav. 155.

**Notice—Costs.**]—In a mortgagee's suit for payment at a fixed time and place, or for a sale, the mortgagor has a right to require the production of an affidavit of documents by the mortgagee, but he must give notice that he requires it, and it must be at his own expense. *Weeks* v. *Stourton*, 12 L. T. 71; 13 W. R. 489.

Where an affidavit of documents was not made, and a power of attorney refused to be produced on the one hand, and payment refused on the other, payment was ordered on a future day on production of such affidavit, but no costs of a summons to determine the right in point of practice given, there being no rule on the subject. *Ib.*

**Effect of Solicitor's Lien.**]—*See* SOLICITOR.

## L. REDEMPTION.

1. *Right to*, 1663.
2. *Concealment of Prior Mortgage*, 1677.
3. *Equity of Redemption*, 1678.
4. *Time for*, 1683.
   *See also* B. 2, ante, col. 1449.
5. *Proceedings for*, 1686.
6. *Costs and Expenses*. *See* post, S. 4, col. 1849.

### 1. RIGHT TO.

*a.* General Principles, 1663.
*b.* Crown, 1666.
*c.* Joint Right, 1666.
*d.* Puisne Mortgagee, 1667.
*e.* Other Cases, 1669.
*f.* Judgment Creditors—*See* JUDGMENT.

### a. General Principles.

**Covenant against.**] — Covenant against redemption of mortgage is unreasonable, and not enforced. *East India Co.* v. *Athyns*, 1 Comyn, 349.

No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body. *Howard* v. *Harris*, 1 Vern. 190.

**Fetter on.**]—Where mortgagee by agreement, either in the mortgage deed or a separate one, fetters the redemption with a fraudulent design to get the estate, it will not avail. *Mellor* v. *Lees*, 2 Atk. 494.

**Absence of Covenant to repay.**] — In common mortgages, the want of a covenant for repayment of the mortgage-money is no bar to a redemption. *Ib.*

**Right strictly adhered to.**]—Where a clause of redemption is in a separate deed, the court adheres to it strictly, to prevent the equity of redemption from being entangled to the prejudice of the mortgagor. *Baker* v. *Wind*, 1 Ves. 161.

**Price of.**]—The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem as it would be in the like circumstances in a suit by the mortgagee to foreclosure. *Du Vigier* v. *Lee*, 2 Hare, 326; 12 L. J., Ch. 345; 7 Jur. 299.

**Compulsion to.**]—The owner of the equity of redemption of one of two estates comprised in the same mortgage cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested. *Hall* v. *Heward*, 55 L. J., Ch. 604; 32 Ch. D. 430; 54 L. T. 810; 34 W. R. 571—C. A.

**Title—Must be shewn.**]—He that comes to redeem a mortgage must shew a title to the equity of redemption. *Lomax* v. *Bird*, 1 Vern. 182.

Upon a bill to redeem, a primâ facie title is sufficient; and an issue shall not be directed, though the title is complicated, if uncontradicted. *Pym* v. *Bowreman*, 3 Swanst. 241; 19 R. R. 201.

**Who may redeem.**]—The rule laid down, that no person shall be allowed to redeem in equity but he that has the legal estate, is right; therefore, if an executor, or an assignee of a bankrupt, will industriously get in the mortgagor's estate, the creditors shall not have a bill to redeem; but otherwise, the minor part, or even one creditor, may bring a bill at the peril of costs. *Franchlyn* v. *Fern*, Barnard. 30.

—— **Collusion.**]—The mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shewn that there is collusion between them and the mortgagee. *White* v. *Parnther*, 1 Knapp, 179.

—— **After being foreclosed.**]—A party to a foreclosure suit, whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate by devise or otherwise from another person who was not a party to the foreclosure, may bring his bill of redemption. *Bromitt* v. *Moor*, 9 Hare, 374.

Relief will not be given in such a case, on a claim for redemption stating only that the plaintiff is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the suit for foreclosure or the grounds on which the plaintiff seeks to set it aside. *Ib.*

**Against whom.**]—Courts of equity, with a view to remedy the great inconveniences which formerly arose from the mortgagee's estate becoming absolute at law, if the mortgagor did not pay off the money borrowed on the day appointed, have uniformly maintained the mortgagor's right of redemption, not only against tenants in dower, and by the curtesy, but against the lord by escheat, and all persons claiming under the feoffee. *Pawlett* v. *Att.-Gen.*, Hardr. 460, 465.

—— **Purchaser from Trustee for Sale.**] — Semble, that a mortgagor having conveyed to trustees for sale cannot redeem as against a purchaser under the trustees; his remedy is to set aside the sale and have a new sale made. *Manser* v. *Dix*, 3 Jur. (N.S.) 253—L.JJ.

—— **Second Mortgagee buying under Power of Sale.**] — A second mortgagee buying under a power of sale contained in the first mortgage is not subject to redemption by the mortgagor. *Kirkwood* v. *Thompson*, 2 De G. J. & S. 613; 12 L. T. 111; 13 W. R. 495, 1052. Affirming 2 H. & M. 392; 34 L. J., Ch. 305, 501; 11 Jur. (N.S.) 385.

The circumstance that the second mortgagee is in the shape of a trust for sale does not alter the case. *Ib.*

—— **Inns of Court Chambers.**]—A bill in equity will not lie to redeem a mortgage of chambers in the inns of court, but the plaintiff must apply to the bench, or to the judges of the society. Secus, if on application to the bench, they refer the plaintiff to his remedy in equity. *Rakestraw* v. *Brewer*, Sel. Ch. Ca. 55; Moseley, 189; 2 P. Wms. 511.

—— **Tenant in Tail.**]—A. B., on his marriage, settled certain estates, then in mortgage, on himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances; he afterwards mortgaged other estates, and became insolvent. A bill was filed by his assignee under the insolvency against the several incumbrancers on all the estates, and against the tenant in tail, praying an account of what was due on the several incumbrances, that their priorities might be ascertained, and for a sale or a redemption. A decree was made in the suit directing that, on the plaintiff and defendant, the tenant in tail, paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, and that the settled estates should be conveyed on the trusts of the settlement; and, in default of redemption, that the bill should be dismissed:—Held, by the Lord Chancellor, that the decree for redemption being permissive only as against the tenant in tail was correct, and that a decree for a sale would have been improper. *Chappell* v. *Rees*, 1 De G. M. & G. 393; 16 Jur. 415.

—— **By Remainderman, against Mortgagee of Particular Estate in Equity of Redemption.**]—A mortgagee who is also assignee or mortgagee of a particular estate in the equity of redemption is not, during the continuance of that particular estate, subject, without his consent, to redemption at the hands of a remainderman. *Ravald* v. *Russell* (Younge, 9, 21) followed. *Prout* v. *Cock*, 66 L. J., Ch. 24; [1896] 2 Ch. 808; 75 L. T. 409; 45 W. R. 157.

—— **Usurious Loan.**]—If A. mortgage stock to B., by a conveyance, which is apparently absolute, and B. assigns it to C. as a security for an usurious loan, A.'s right of redemption is not affected by the transaction between B. and C., but is as extensive against C. as against B. *Johnson* v. *Williamshurst*, 1 L. J. (o.s.) Ch. 112.

**4 & 5 Will. & M. c. 16.**]—If a mortgage by the statute 4 & 5 Will. & M. c. 16, becomes irredeemable, it will remain so in the hands of the assignee, though assigned in consideration of the principal, interest and costs due thereon. *Stafford* v. *Selby*, 2 Vern. 590.

If a subsequent mortgagee redeems such mortgage, he shall hold the estate irredeemably. *Ib.*

If there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the statute; but the adding an acre or two shall not exempt it, for that may be a contrivance to evade the statute. *Ib.*

**Fraud.**]—Where possession is gained against a mortgagee by fraud, pending a suit, it must be restored before there can be any redemption. *Lant* v. *Crisp*, 15 Vin. Abr. 467, pl. 16.

**Mortgagee's Right to Retain Securities.**]—A mortgagee who is being redeemed cannot retain any of his securities to answer contingent liabilities of the mortgagor to him, in the absence of an express agreement to that effect. *Merchants' Bank of London* v. *Maud*, 18 W. R. 312.

**Disputing Right to Redeem — Estoppel.**]—Service of notice of foreclosure by the mortgagee on the occupant of the mortgaged premises does not estop the mortgagee from disputing the occupant's title to redeem. *Prannath Roy Chowdry* v. *Ramrutton Roy*, 8 W. R. 29—P. C.

**Construction—"Redeemable."**]—H. advanced money to P., and by agreement was to receive the whole amount due from P. in acceptances of the D. company to C.'s drafts at six, twelve and eighteen months, "but, if not sufficient bills at such dates are received from the D. company, then the balance to be made up in similar bills at twelve, twenty-four and thirty-six months, upon which 10*l.* per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time":—Held, that the word "redeemable" implied that the debtor P. might take up the last-mentioned bills at any time, irrespective of the other debts due by him to H. *Hills* v. *Parker*, 14 L. T. 107.

**Practice—Redemption not Prayed.**]—Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage security and contains no prayer for redemption, yet such rule does not apply where the issues disclosed by the pleadings are not merely mortgage or no mortgage, but whether the defendant, by means of his acts subsequent to the impeached mortgage, had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying for an account and offering to allow to the mortgagee all just credits. *National Bank of Australasia* v. *United Hand-in-Hand, &c., Co.*, 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889—P. C.

### b. Crown.

**Equity of Redemption in.**]—A. died intestate, unmarried and illegitimate, having mortgaged his real estates to B. for 500 years, and having subsequently mortgaged them to B. for an additional sum by deposit of the title deeds. The fee simple was not worth the mortgage money:—Held, nevertheless, that the mortgagor could not be deemed a bare trustee for the mortgagee within the statute 4 & 5 Will. 4, c. 23, s. 2, so as to deprive the crown of the equity of redemption; but it was ordered that the estate should be sold in the administration of assets, and P. declared a purchaser with liberty to apply to the crown for a grant of the fee simple. *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.

**Escheat.**]—A., having mortgaged freeholds for a term, with a proviso for cesser on payment, died, intestate and without heirs:—Held, that the crown was entitled to the legal reversion in fee by escheat; and would have been a necessary party to a suit by the administratrix, could it have been maintained. *Cuttley* v. *Sampson*, 33 Beav. 551; 34 L. J., Ch. 96; 12 W. R. 927.

**Redemption by Outlawry.**]—J., having made a mortgage of his estate, was afterwards indicted and outlawed for high treason. The attorney-general thereupon exhibited a bill in the court of exchequer to discover the consideration of the mortgage, and what was due upon it, and that the crown might redeem if anything was due. The court directed several issues to be tried at their own bar, relative to the consideration of this mortgage, &c. Upon the trial, verdicts were found in favour of the mortgagee; but these verdicts were so general that application was made on behalf of the crown for a new trial. This was not only refused, but the court, on hearing the cause upon the equity reserved, ordered the information to stand dismissed. On an appeal, this decree was reversed; and the attorney-general, on behalf of the crown, was admitted to redeem. *Att.-Gen.* v. *Crofts*, 4 Bro. P. C. 136.

### c. Joint Right.

**Generally.**] — Where several persons take interests in an equity of redemption by one and the same instrument, only one common right of redemption is given to them all by the decree; but, if they take under different instruments, they are entitled to have the mortgaged property offered to them successively, according to the dates of the instruments under which they take. The latter rule applies where a purchaser or a mortgagee of an equity of redemption of one estate is compelled to redeem another also by virtue of the doctrine of consolidation. *Beevor*

v. *Luck*, 36 L. J., Ch. 865; L. R. 4 Eq. 537; 15 W. R. 1221.

J. devised a lease for lives (after payment of his debts) to his two grandchildren, H. and W., but, if either of them died without heirs of their own bodies, then the share of him so dying should go to the testator's other grandchild, C. W. died without issue; and, on a bill filed by a mortgagee to foreclose, it was held that H. and C. were entitled to redeem in equal moieties. *Wastneys* v. *Chappell*, 3 Bro. P. C. 50.

**Lapse of Time—Acknowledgment of one Joint Mortgagee.**]—Two joint mortgagees of lands had been in possession of the mortgage property for more than twenty years, but within the twenty years one of the mortgagees had written letters which were held to amount to a recognition by him of the mortgagor's title:—Held, that such recognition by one of the joint mortgagees did not operate as an acknowledgment within 3 & 4 Will. c. 27, s. 28, and that the equity of redemption was barred. *Richardson* v. *Younge*, 39 L. J., Ch. 475; L. R. 10 Eq. 275; 18 W. R. 800. Affirmed, 40 L. J., Ch. 338; L. R. 6 Ch. 478; 25 L. T. 230; 19 W. R. 612.

**Jointure.**]—An estate in jointure was subject to mortgage. The jointress and reversioner must redeem in proportion; the jointress one-third, and the reversioner two-thirds. So and if estate, subject to a mortgage, is devised to A. for life, remainder to B. in fee, they may redeem in the same proportion. *Flud* v. *Flud*, 2 Freem. 210.

### d. Puisne Mortgagee.

**Must Redeem Entirely.**]—Subsequent mortgagee redeeming a prior mortgage must redeem it entirely. *Palk* v. *Clinton*, 12 Ves. 59; 8 R. R. 283.

If a man mortgages all his estate to one person, he may notwithstanding slip it into ten puisne mortgages more. But if all such puisne mortgages should have a right to redeem, on payment of proportionable contributions, the first mortgagee could never come to his due, until all those proportions were settled; and an original mortgagee ought not to be entangled with questions arising among subsequent mortgages, for he has a right to be redeemed entire, and not by parcels. Lord Chancellor said, such a redemption was never allowed. *Titley* v. *Davies*, 15 Vin. Abr. 447, pl. 19. *S.C.*, 2 Y. & C. C. C. 399, n.

**What Entitled to.**]—The only relief to which a second mortgagee is entitled is to a decree for the redemption of the first mortgagee, and for the foreclosure or redemption of the mortgagor. He has no right to compel the first mortgagee to transfer to him his first mortgage, on payment of what is due, or to call on the mortgagor to join in such transfer. *Ramsbottom* v. *Wallis*, 5 L. J., Ch. 92.

**Right, how Extinguished.**]—A purchase, by a trustee in bankruptcy, from the first mortgagee of the bankrupt does not extinguish the right of the second mortgagee to redeem. *Bell* v. *Sunderland Building Society*, 53 L. J., Ch. 509; 24 Ch. D. 618; 49 L. T. 555.

**After Foreclosure of Mortgagor.**]—Subsequent incumbrancers may redeem the first mortgagee, though the mortgagor is foreclosed by a decree, and the account taken in the suit where such decree was obtained will not bind the subsequent incumbrances. *Morrett* v. *Westerne*, 2 Vern. 663.

**First Mortgagee, Duty of.**]—First mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor. *Smith* v. *Green*, 1 Coll. C. C. 555.

**Declining to be Redeemed.**]—Where a first mortgagee refuses to accept an offer rightly made by a second mortgagee to redeem him, and an action for redemption is commenced, the defendant was ordered to pay the plaintiff's costs of the action up to and including the trial as well as the costs of a successful appeal by the plaintiff. *Squire* v. *Pardoe*, 66 L. T. 242; 40 W. R. 100—C. A.

—— **Injunction.**]—A puisne incumbrancer offered to pay off the first mortgagee, which being declined, he filed a bill to compel a transfer. The first mortgagee having afterwards proceeded to sell the property was restrained from transferring the first mortgage and parting with the legal estate and title deeds. *Rhodes* v. *Buckland*, 16 Beav. 212.

**Practice.**]—Where there was a suit by a first mortgagee (in possession) against the mortgagor and numerous other mortgagees, the court, having regard to the rights of all parties, refused a motion by the second mortgagee that, on payment of the plaintiff's principal, interest and costs, the estate might be conveyed to him and all proceedings stayed; but directed inquiries as to the priorities and incumbrances of the parties. *Paine* v. *Edwards*, 8 Jur. (N.S.) 1200; 6 L. T. 600; 10 W. R. 709.

—— **Absence of Mortgagor.**]—There cannot be an adverse redemption between mortgagees, in the absence of the mortgagor; if, therefore, by contract or other circumstances, a second mortgagee is precluded from bringing, or is unable to bring, the mortgagor before the court, a suit by such second mortgagee to redeem the first cannot proceed. *Ramsbottom* v. *Wallis*, 5 L. J., Ch. 92.

—— **First Mortgagee not Appearing.**]—If, in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham* v. *Shrewsbury*, 5 Sim. 395.

—— **Several Parties entitled to Redeem—One Time fixed for Redemption.**]—In an action by second mortgagees against subsequent incumbrancers and the mortgagor's trustee in liquidation, there being evidence that the sale of the property would leave a very small margin for the subsequent incumbrancers, only one of whom appeared, one time certain was fixed for all the defendants to redeem or be foreclosed. *Cripps* v. *Wood*, 51 L. J., Ch. 584.

—— **Answer to Interrogatories.**]—In a redemption suit by a second mortgagee against the first mortgagee, he is bound to state in

answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt. *West of England and South Wales Bank* v. *Nickolls*, 6 Ch. D. 613.

—— **Account, how Taken.**]—In a redemption action by a second mortgagee against the first mortgagee, the account to be taken at the instance of the second mortgagee must be taken in all respects as though it were being taken at the instance of the mortgagor himself; and the second mortgagee may assert such equity as the mortgagor himself might have had to exclude any particular item from the account. *Mainland* v. *Upjohn*, 58 L. J., Ch. 361; 41 Ch. D. 126; 60 L. T. 614; 37 W. R. 411.

### e. Other Cases.

**Who may Redeem—Personal Representative.**]—The personal representative of a mortgagor of freehold estate has no right to file a bill against the mortgagee to redeem. *Catley* v. *Sampson*, 33 Beav. 551; 34 L. J., Ch. 96; 12 W. R. 927.

C., being entitled to real estate, demised it for 1,000 years, by way of mortgage, subject to a proviso for cesser of the term on payment of the mortgage money by C., his heirs, executors or administrators. C. was illegitimate, and he died intestate and without issue. His wife having taken out letters of administration to her husband, filed a bill to redeem:—Held, that she could not sustain the suit. *Ib.*

A bill by an administratrix, with the will annexed, of a mortgagor, having also a beneficial interest, but becoming an insolvent debtor after the commencement of the suit for redemption against a mortgagee and others, including the heir-at-law of the mortgagor, who refused to be joined as plaintiff, the assignees in insolvency being made defendants, and the trustees of the mortgagor's will having died in the testator's lifetime, dismissed with costs; there being no authority for the proposition that where a trustee is appointed for the payment of debts, and he neglects his duty, a legal personal representative, having no beneficial interest, may maintain a suit; and the bill not stating what means there were for effecting a redemption. *Fray* v. *Drew*, 11 Jur. (N.S.) 130; 11 L. T. 730; 13 W. R. 367.

Where an administrator mortgages leasehold premises, reserving the equity of redemption to himself and his executors, administrators and assigns, the right to redeem after his death belongs to his own representatives, and not to the administrator de bonis non of his intestate. *Sheffington* v. *Whitehurst*, 3 Y. & C. 1; 7 L. J., Ex. Eq. 65. But this was questioned on appeal. *S. C.*, nom. *Sheffington* v. *Budd*, 9 Cl. & F. 219; 6 Jur. 809.

—— **Personal Representative.**]—R., in 1840, assigned, by way of mortgage, his two fourth shares in a newspaper to the defendant. The deed contained a proviso for redemption, and a power of sale in default of payment to the mortgagee. Part of the mortgage money was paid off by R., but default was made in payment of the balance; and thereupon the defendant acquired a right to exercise the power of sale. By deed, in 1841, for an expressed consideration of 1,000*l.*, the defendant assigned the two shares to his brother, absolutely freed from the mortgage debt. The owner of the other two fourth shares assigned them for the benefit of his creditors to trustees, who in 1847 assigned them to the defendant; and the defendant afterwards procured from his brother an assignment to himself of the two first-mentioned shares, who thus became legal owner of the whole four shares in the newspaper. R. died in 1852, and the plaintiff became personal representative. In 1855 the plaintiff filed a bill for redemption, alleging that there was no sale in 1841 by the defendant to his brother; that the assignment was a mere fraud on the part of the defendant to acquire the absolute ownership, and to exclude the mortgagor from the property; that no consideration passed; and that the defendant never accounted to the mortgagor:—Held, that the plaintiff was entitled to redeem. *Robertson* v. *Norris*, 4 Jur. (N.S.) 443—L. C.

—— **Unconscionable Bargain.**] — A man twenty-six years of age, entitled to a reversion of 600*l.*, but wholly without present means, applied to a money-lender, who advanced him 85*l.* on a mortgage of the reversion for 100*l.*, with a provision that, if default should be made in payment of the 100*l.*, the 100*l.* should bear interest at 5 per cent. per month. Twelve years afterwards the reversion fell into possession, and, on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at 5 per cent. *Beynon* v. *Cook*, L. R. 10 Ch. 389; 32 L. T. 353; 23 W. R. 531.

—— **Equitable Mortgagor by Deposit.**]—When there has been an equitable deposit of deeds to secure repayment of a loan, an action of detinue cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with a proper margin. *Bank of New South Wales* v. *O'Connor*, 58 L. J., P. C. 82; 14 App. Cas. 273; 60 L. T. 467; 38 W. R. 465—P. C.

—— **Mortgagor after Assignment of Equity of Redemption.**]—A mortgagor, who has absolutely assigned his equity of redemption in the mortgaged property, acquires, when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem, and is entitled upon paying the mortgage money to a reconveyance to himself, subject to any equity of redemption vested in any other person. And he is so entitled even if, after the assignment of the equity of redemption, the assignee has further charged the property either to the original mortgagee or to some other person. *Kinnaird* v. *Trollope*, 57 L. J., Ch. 905; 39 Ch. D. 636; 59 L. T. 433; 37 W. R. 234.

—— **Under Mortgage by Way of Trust.**]—Under a mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt and to pay the surplus moneys to the mortgagor, the only right of the mortgagor is to redeem, and he cannot file a bill for a sale. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113.

—— **Assignee.**]—Proviso in a mortgage, that the mortgagor, or the heirs male of his body, might redeem:—Decreed, the assignee might

redeem. *Howard* v. *Harris*, 1 Vern. 33; 2 Ch. Ca. 147.

—— **Volunteer.**]—One that claims under a voluntary conveyance may redeem a mortgage. *Howard* v. *Harris*, 1 Vern. 193.

—— **Tenant for Life.**]—Where property subject to a mortgage is settled, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the trusts of the settlement. *Wicks* v. *Scrivens*, 1 J. & H. 215.

The same principle applies where the security is in the form of a trust for sale. *Ib.*

—— **Tenant in Tail.**]—A father (tenant for life), and a son (tenant in tail), in 1831, joined in mortgaging the estate to secure payment of a debt of the son, under an agreement between them to suffer a recovery, and resettle the estate. As to the remainder, after the death of the tenant for life, in case the father should at any time be obliged to pay any part of the interest of the mortgage debt, or the son should not pay off that debt by a certain day, and the father should then pay it off and release the son therefrom, to the use of the father in fee; the father covenanting to convey or devise a seventh part of the estate to the son; and, in case the son should pay off the mortgage by the time mentioned, then to the son and the heirs of his body, charged with 500*l.* for such persons as the father should by deed or will appoint. The son did not pay off the mortgage debt, nor did the father pay it off, or release the son therefrom, but the father paid the interest until his death in 1841, and after his death his devisees paid off the mortgage:—Held, that, neither party having performed the agreement, or apparently acted upon it, in the lifetime of the father, the court would not, after the death of the father, enforce the specific performance of the agreement, nor would the court in such a case enforce the specific performance of an agreement, which, apparently, was an agreement for the sale of the son's reversionary interest in the estate at an under-value; that, as the agreement could not be specifically performed, the original rights of the parties remained; and the son was therefore entitled to redeem the estate upon payment of the mortgage debt and the interest. *Playford* v. *Playford*, 4 Hare, 546.

Testator devised his real estates to E. R. in fee, subject to the payment of his debts and legacies, and died in 1810. A legacy of 800*l.* was never paid off. The property consisted of four estates, T., F., P. and C. In 1818 E. R. mortgaged T. and C. to W. In 1822 E. R., on his marriage, settled T., P. and C. on himself for life, remainder in strict settlement upon the first and other sons, &c., of the marriage; and he covenanted therein against incumbrances. In 1836 E. R. mortgaged F. to L. In 1843 the plaintiff H. registered a judgment against E. R. In 1844 E. R. became insolvent, and C. was appointed his assignee. C. filed a bill against all the prior incumbrancers, and against the tenant in tail, praying a sale of the estates, &c., or permission to redeem:—Held, by Lord St. Leonards, first, that the decree was right in not granting a sale; secondly, that the decree was not vicious by reason of there being a permission to the tenant in tail as well as the plaintiff to redeem, the decree being, that, upon either of them paying off the charges, the settled estates should be conveyed upon the trusts of the settlement of 1822. *Hughes* v. *Williams*, 3 Mac. & G. 683; 1 De G. M. & G. 393; 16 Jur. 415.

—— **Tenant for Years.**]—A tenant for years under an agreement for lease made subsequently to a mortgage on the demised property, and by which the mortgagee is not bound, is entitled to redeem the mortgage. The principle is the same whether the tenancy is beneficial or otherwise. *Tarn* v. *Turner*, 57 L. J., Ch. 1085; 39 Ch. D. 456; 59 L. T. 742; 37 W. R. 276—C. A.

—— **Protestant Kin.**]—The next protestant of kin may redeem a mortgage by a popish heir. *Jones* v. *Meredith*, Bunb. 346; 2 Comyn, 661.

—— **Tenant by Elegit, Staple, Curtesy, Dower.**]—So may a tenant by elegit, statute merchant, staple, or tenant by curtesy, or in dower, as well as the mortgagor, his heir, assignee or subsequent incumbrancer. *S. C.*, Bunb. 347.

—— **Doweress.**]—A doweress may redeem a term against a mortgagee, and remove it out of the way against an heir. *Swannock* v. *Lyford*, Amb. 7. *S. C.*, sub nom. *Hill* v. *Adams*, 2 Atk. 200.

A doweress has a right to redeem a mortgage, and hold over till satisfied. *Palmes* v. *Danby*, Pre. Ch. 137.

The wife joins in a mortgage, and levies a fine to bar her dower; under consideration thereof the husband agrees the wife shall have the equity of redemption in lieu of her dower, and afterwards he makes a second mortgage. This agreement is fraudulent as against the second mortgagee, so far as to entitle the wife to the whole equity of redemption, but decreed she should have her dower notwithstanding the fine. *Dolin* v. *Coltman*, 1 Vern. 294.

The widow of a mortgagor who had joined with him in the mortgage for the purpose of barring her dower, and to whom he subsequently left an annuity in lieu of dower (not charged, however, on his real estate), has no equity as a bonâ fide purchaser of the annuity, to have it paid out of the mortgaged estate, and her representatives cannot file a bill for the purpose of redeeming it. *White* v. *Parnther*, 1 Knapp, 179.

—— **Lord by Escheat.**]—Where the lord of the manor took by escheat, on the death of the tenant without heirs, the fee simple subject to a mortgage for a term created by the tenant;—Held, that as against the mortgagee the lord had a right in equity to redeem. *Downe* (*Viscount*) v. *Morris*, 3 Hare, 394; 13 L. J., Ch. 337; 8 Jur. 486.

—— **Trustee for Payment of Debts.**]—Trustee in receipt of the rents and profits of mortgaged estate under an old conveyance of equity of redemption, on trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. *James* v. *Biou*. *Owen* v. *Flack*, 2 Sim. & S. 600; 4 L. J. (o.s.) Ch. 202.

—— **Creditors.**]—The plaintiff in a creditors' suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee or a party entitled to a lien on the title deeds. *Christian* v. *Field*, 2 Hare, 177; 11 L. J., Ch. 97; 5 Jur. 1130.

Creditors under deed of trust cannot have a decree for redemption of mortgage against mortgagee unless on special case, as collusion, that trustee refuses, &c. *Troughton* v. *Binkes*, 6 Ves. 573 ; 5 R. R. 401.

In 1850 H. conveyed estates to trustees for the benefit of creditors, and Y., who prepared the deed, was appointed the solicitor, and acted in the matters of the trust. Y., in 1857, in reply to inquiries on behalf of H., stated that he had, in February, 1853, purchased interests in the property, and was willing, on receiving the amount that would be due to him, to deliver up all the deeds in his possession, but limiting the offer to that month. The statement of account sent with the letter was disputed. Y. refused to furnish a copy of the deed of 1850, as the document was his title deed. The original bill of H. was filed in March, 1859, and was dismissed in July, he residing abroad, and not being able to comply with an order obtained by Y., requiring security for costs. The bill was again filed in July, 1862, and prayed for declarations that Y. was a mortgagee in possession, and entitled to such sums as had been actually paid by him, and for accounts. On the 6th December, 1862, Y. put in his answer, stating that he ceased to be the solicitor to the trustees in October, 1852 ; that the interests in the estates and certain policies were conveyed and assigned to him in April, 1853 ; that he had never set up any title as purchaser, but was willing to be treated as a mortgagee. On the 7th January, 1863, Y. filed a bill for foreclosure, to which H. put in an answer in March. H. filed an amended bill in February, 1863, setting forth all the correspondence, for the purpose of shewing that Y. had insisted upon his position of purchaser, and to that bill Y. filed a voluntary answer in March :—Held, that H. was entitled to redeem ; that Y. must pay the costs of the litigation up to the time of filing his answer in December, 1862, when he consented to be considered as a mortgagee in possession ; and that H. must pay all the costs of the subsequent litigation. *Yetts* v. *Hilton*, 9 Jur. (N.S.) 1273 ; 9 L. T. 502.

**Covenant to pay Principal and Interest on Specified Day, but no Covenant for Payment of Subsequent Interest.**]—A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day, but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made :—Held, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years. *Mellersh* v. *Brown*, 60 L. J., Ch. 43 ; 45 Ch. D. 225 ; 63 L. T. 189 ; 38 W. R. 732.

**Mortgage before Bankruptcy Petition.**]—The plaintiff filed his petition in the court of bankruptcy under the provisions of the act 5 & 6 Vict. c. 116, for the relief of insolvent debtors, not owing more than 300*l.*, and passed his examination, and obtained his interim and final orders for protection ; he then filed an affidavit in the court of bankruptcy, stating that he had satisfied and obtained a discharge from all the creditors named in his schedule, and that he had notified such satisfaction and discharge by public advertisement : the plaintiff then applied to the official assignee for a release of his estate, which, according to the provisions of the act, vested in such assignee on the presentation of the petition, but, in the absence of any proviso in the act for determining the duties of the official assignee in such a case, the plaintiff was unable to obtain any release or reconveyance ; the plaintiff then filed his bill against the defendant as mortgagee, for the redemption of an estate which had been mortgaged before he presented his petition to the court of bankruptcy. Upon the objection of the defendant that the estate of the plaintiff (if any) was vested in the official assignee :—Held, that, in the absence of any statutory jurisdiction on the subject in the court of bankruptcy, and upon the submission of the assignee, the plaintiff was entitled to sustain the suit at the hearing. Whether, if the defendant had demurred, the bill would have been sustained, quære. *Preston* v. *Wilson*, 5 Hare, 125 ; 16 L. J., Ch. 137 ; 11 Jur. 201.

**Account between Mortgagor, Mortgagee and Attorney.**]—On bill for account of all transactions between mortgagor and mortgagee, and attorney who acted as agent for both, and agent and quasi banker for mortgagor, such account having been decreed, the court will order, on application, if any of the transactions developed in the investigation appear to warrant it, that deputy-remembrancer take a separate account (and report it specially) of the mortgaged account strictly speaking ; and, if found to have been satisfied (however less the amount may be than the money actually advanced by the attorney), they will admit the mortgagor to redeem, or where the whole has not been satisfied, on paying what shall not have been already paid. *Lewes* v. *Morgan*, 5 Price, 42 ; 19 R. R. 566.

**Two Estates — Successive Incumbrances—Apportionment.**]—Prior to 1885 the owner of two estates X. and Y. made a first mortgage of both to H. for 6,000*l.* ; a second mortgage of both to the plaintiff for 5,000*l.* ; and a third mortgage of X. alone to the plaintiff for 2,500*l.* In 1885 a deed was executed by which the plaintiff transferred his mortgage of 2,500*l.* on X. to H., and also released the X. property from his mortgage of 5,000*l.*, so that H. thereby became first and second mortgagee of X. as well as remaining first mortgagee of Y. The plaintiff subsequently, by means of an order of foreclosure absolute, became the owner of the equity of redemption of the Y. estate, subject to H.'s first mortgage of 6,000*l.* thereon. The plaintiff then brought an action to redeem the Y. estate on the payment off of H.'s mortgage of 6,000*l.* thereon, and claimed to be entitled also to have the X. estate conveyed to him as one of the securities for the 6,000*l.* :—Held, that the plaintiff was entitled by the payment of 6,000*l.* to redeem H.'s mortgage on Y. and to have Y. conveyed to him absolutely ; that he was also, on making such payment, entitled to have X. conveyed to him, but only as a security for such part of 6,000*l.* as was proportionate to the relative values of X. and Y. respectively ; and that there was nothing in the terms of the deed of 1885 inconsistent with these rights of the plaintiff. *Barnes* v. *Racster* (1 Y. & C. C. C. 401), and *Bugden* v. *Bignold* (2 Y. & C. C. C. 377), approved. *Flint* v. *Howard*, 62 L. J., Ch. 804 ; [1893] 2 Ch. 54 ; 2 R. 386 ; 68 L. T. 390—C. A.

**First Mortgagee agreeing to postpone Debt —Parol Evidence.**]—A mortgagee of leaseholds for 1,150*l.* entered into a parol agreement with the mortgagor to concur in a new mortgage for 750*l.*, to be paid to the original mortgagee in reduction of her debt, so that the new mortgage should be the first charge, but upon an express understanding that the mortgagor should execute to her a second mortgage for the balance. The new mortgage was executed accordingly; and the deed witnessed that, in consideration of 750*l.* paid to the original mortgagee, she and the mortgagor assigned the mortgage premises to the new mortgagee for 750*l.*, discharged from the original mortgage. Afterwards the 750*l.* was paid off by another person, to whom the mortgagor applied for that purpose, on an agreement for an assignment; but all parties had notice of the agreement with the original mortgagee. On the original mortgagee filing a bill to be declared first incumbrancer or to redeem:—Held, that she might adduce parol evidence of the agreement with her, and was entitled to redeem on payment of the 750*l.* and interest, but had not a lien prior to that of the person who had last advanced that sum. *Banks* v. *Whittall*, 1 De G. & Sm. 536. Affirmed, 17 L. J., Ch. 352.

**Specific Performance of Agreement for Redemption.**]—Specific performance decreed of an agreement by a purchaser to allow the mortgagor to redeem an estate sold under a power of sale by the mortgagee. *Orme* v. *Wright*, 3 Jur. 19.

**Preventing Forfeiture.**]—A. mortgaged his lands, on condition to re-enter if he or his heirs should pay 100*l.* at such a day; A. died, leaving a daughter, and his wife enceinte with a son; the daughter paid the money at the day, and then the son was born. The daughter shall keep the lands, for she became a purchaser, and by her vigilance prevented the lands from being forfeited at law. *Kirton's Case*, Cro. Cas. 87.

**Right of Re-purchase—Assignment of.**]—A. in consideration of a cash payment covenanted with an assurance company, if he should survive his father, to pay to the company an annuity during his life; and as beneficial owner conveyed to the company certain property as security for the annuity. The deed provided that A. might on giving the company notice pay off the sum advanced and re-purchase the annuity, and thereupon the company should reconvey the property charged as security. A. assigned all his interest in the property charged to B., who tendered the amount of the re-purchase to the company, which they refused to accept:—Held, that the deed was a mortgage, and that the right of re-purchase was not personal to A., but was capable of assignment, and, therefore, that B. was entitled to redeem. *Secretary of State for India* v. *British Empire Mutual Life Assurance Co.*, 67 L. T. 434.

—— **Barring.**]—O., a cotton-spinner, being under advances from B., a cotton-broker, for which B. held an equitable mortgage of the mills and premises, came to a general composition with his creditors in July, 1850, paying them the amount of their compositions by means of promissory notes, in which B. joined, and which B. had ultimately to pay. B. got no composition, but the whole spinning mills and business, as a going concern, was sold to B. by O., with a proviso that, if within ten years O. should repay B. principal and interest, or if the profits of the business, after deductions for necessaries and repairs, should within ten years repay the principal and interest, then B. should reconvey to O. It was further agreed that, if at any period of the ten years the result of six months' business, on an account thereof being taken, should be that there was not enough net profit to pay interest on the whole principal moneys advanced by B., B. might give O. two months' notice to bar the right of repurchase; and, if within that period of two months O. should not pay up to B. all principal and interest then due, all the right and equity of redemption should be barred. B. further agreed to continue to employ O. as manager at 3*l.* per week. In November, 1850, stock was taken, and showed sufficient profit. In September, 1851, an account was taken, which showed, as B. alleged, a loss of 3,000*l.* Thereupon B. sent a notice dismissing O. from his situation as manager, on the ground of disobedience, and calling on him to pay up in two months the amount of principal and interest, or to stand barred:—Held, that the notice to bar the right of repurchase might well be given on the account in question, although it was a nine months' account, not a six months' account, as required by the provision, provided that it could be shown that a loss upon the business for the six months ending July, 1851, had actually been incurred; and an inquiry was directed accordingly, notwithstanding a statement in the answer that the amount of profit or loss could not now be accurately ascertained. *Ogden* v. *Battams*, 1 Jur. (N.S.) 791.

**Charging Commission or Profit.**]—Held, that under the circumstances B. was not entitled to charge commission or profit on cotton supplied to the mills, and, therefore, in estimating the profits made by him at the mills, he was to be allowed to charge for the cotton delivered at the mills by him only the price which he had actually paid for the same; and, where that could not be ascertained, then he was to be allowed the market price of the day. *Ib.*

**Liberty to Surcharge and Falsify.**]—The books being kept by B. while O. was not manager:—Held, not binding on O.; but O. having free access to the said books, they were to be taken as primâ facie evidence, with liberty to O. to surcharge and falsify. *Ib.*

**Right of Purchaser from Administrator.**]—A sale having been made by a party claiming as administrator cum testamento annexo, certain mortgagees on the property sold refused to give an account of the moneys due to them, or to concur in the conveyance to the purchaser on being paid, whereupon a bill was filed by the vendor and purchaser, as co-plaintiffs, against the mortgagees, to redeem. The defence set up by the mortgagees being that the administrator had no right to redeem, on the ground that the original executor had assented to a bequest made by the testator of the property, the administrator refused to prosecute the suit, or to permit the purchaser to do so. A bill was then filed by the purchaser against the administrator to compel him to put him (the purchaser) in a situation to prosecute the suit against the mortgagees: and it was ordered, on the application of the plaintiff for leave to prosecute that suit, &c., that the plaintiff should be at liberty to pay his

purchase-money into court; and that the defendant should concur in paying the deposit into court, and should execute an assignment to the plaintiff; and that the defendant should dismiss the bill in the suit to redeem, at his own expense, and the plaintiff should be at liberty to institute a suit against the mortgagees to redeem them. *Birch* v. *Davies*, 5 Jur. 909.

**Consolidation.**]—Property in M. and S. was mortgaged separately to A. at different times. The property in S. was then mortgaged to B., and afterwards the property in M. to C. The second mortgagees had no notice of the first mortgage, and B.'s security turned out to be insufficient. A. having obtained a decree for foreclosure:—Held, that, A. being entitled to consolidate, and B.'s mortgage being prior in point of date to that of C., B. was entitled to redeem both properties, and hold them as security not only for the amount paid to A. on account of his debt, but also for the whole of B.'s own debt; and that C. was entitled to redeem B., but only on payment of the whole amount then due to B. *Bradley* v. *Riches*, 39 L. T. 78.

—— **Sale of Equities of Redemption—Rights of Purchasers to Redeem.**]—When a mortgagee has consolidated several mortgages of different properties made by the same mortgagor, who has conveyed away the respective equities of redemption to different purchasers, upon foreclosure by the mortgagee, the earliest purchaser of any part in point of time, or a subsequent purchaser of that part from him who stands in his shoes, will have the first right of redeeming the whole; and, if he does not do so, then the purchasers of other parts will be entitled successively in order of date to redeem the whole. *Loveday* v. *Chapman*, 32 L. T. 689.

If the first purchaser of a part has bought that part subject to a mortgage debt, he, or whoever stands in his place at the time of the consolidation and redemption, must pay that mortgage debt. *Ib.*

2. Concealment of Prior Mortgage.

**4 & 5 Will. & M. c. 16.**]—On a bill filed against a mortgagor to enforce a forfeiture under 4 & 5 Will. & M. c. 16, for concealment of a prior mortgage:—Held, that the statute confers no active remedy in the court of chancery, and the bill was dismissed against the mortgagor without costs, and against a puisne incumbrancer with costs. *Kennard* v. *Futvoye*, 2 Giff. 81; 29 L. J., Ch. 553; 6 Jur. (N.S.) 312; 2 L. T. 30.

—— **Who is Within.**]—The statute is penal in its character, and must receive strict construction; therefore neither an equitable mortgagee by deposit of title deeds, nor by deed of further charge without any proviso for redemption, is an after mortgagee within the meaning of the act. *Ib.*

**Practice—Clean Hands.**]—A person who will take advantage of the statute against clandestine mortgages must be a honest mortgagee, and therefore if a man has used any fraud or ill practice in obtaining a second mortgage he shall not have the benefit of the statute. *Stafford* v. *Selby*, 2 Vern. 590.

3. Equity of Redemption.

*See also* E. ante, col. 1491.

*a.* General Incidents of, 1678.
*b.* Sale of.
i. In General, 1679.
ii. Purchase by Mortgagee, 1680.

**a. General Incidents of.**

**Whether an "Estate."**]—It is a misapplication of words to call an equity of redemption an "estate" in the proper technical legal sense. *Paget* v. *Ede*, 43 L. J., Ch. 571; L. R. 18 Eq. 118; 30 L. T. 228; 22 W. R. 625.

**Qualities of.**]—The equity of redemption in this court is the fee simple of the land; will descend, may be granted, devised, and entailed, and barred by a common recovery; which proves that, in consideration of this court, it is such an estate as there may be a seisin of. *Burgess* v. *Wheate*, 1 Eden, 225; 1 Wm. Bl. 121.

The owner of the equity of redemption is in equity considered as the owner of the estate; it descends to his heir, may be the subject of settlement, limited in the same manner, and those limitations barred in the same manner, as those of the legal estate; the mortgagee being considered in equity as a mere incumbrance. *Blake* v. *Foster*, 2 Ball & B. 402.

An equity of redemption may be devised, granted, or entailed, and such entail may be barred by fine and recovery, and the person entitled to it is the owner of the land. *Casborne* v. *Scarfe*, 1 Atk. 603.

By a devise of land, mortgaged in fee, the equity of redemption alone passes; if for years, the reversion and equity of redemption passes. *Forrester* v. *Leigh*, Amb. 174.

**Agreement to Convey must be Written.**]—An agreement to convey an equity of redemption is not binding unless in writing. *Massey* v. *Johnson*, 1 Ex. 241; 17 L. J., Ex. 182.

**Distinguished from Trust.**]—Distinction between an equity of redemption and a mere trust. *Downe* (*Viscount*) v. *Morris*, 3 Hare, 394; 13 L. J., Ch. 337; 8 Jur. 486.

**Execution.**]—Equity of redemption of a term cannot be taken in execution. *Lyster* v. *Dolland*, 1 Ves. J. 431; 3 Bro. C. C. 478.

**Judgment.**]—A judgment against mortgagee obtained subsequent to mortgage does not attach upon assets produced by a release of the equity of redemption. *Freeman* v. *Taylor*, 1 Mod. 115.

**Annuity Act.**]—An equity of redemption is within the exception in the Annuity Act (stat. 17 Geo. 3, c. 26, s. 8) repealed, and see 53 Geo. 3, c. 141, s. 10. *Tucker* v. *Thurstan*, 17 Ves. 131.

**4 & 5 Will. & M. c. 16.**]—Until the legal right to redeem is determined, there can be no equity of redemption within the provisions of the 4 & 5 Will. & M. c. 16. *Kennard* v. *Futvoye*, 2 Giff. 81; 29 L. J., Ch. 553; 6 Jur. (N.S.) 312; 2 L. T. 30.

**Curtesy.**]—Husband may be tenant by curtesy of the wife's equity of redemption. *Casborne* v. *Scarfe*, 1 Atk. 603.

**Dower.**]—A widow is not dowable of an equity of redemption. *Dixon* v. *Saville*, 1 Bro. C. C. 325.

Husband seised in fee mortgages for years, and marries; the mortgagee never enters: the wife, on the death of her husband, shall be endowed. *Hamilton* v. *Mohun*, 1 P. Wms. 121.

**Equity to Settlement.**]—Where a person entitled jure mariti to chattels real mortgages them, the wife has not any equity to a settlement thereout as against the mortgagee seeking a foreclosure and sale. *Hatchell* v. *Eggleso*, 1 Ch. Rep. 215.

### b. Sale of.

#### i. *In General.*

**Sale of Portion—Application of Residue.**]—If a mortgagor sell a portion of the equity of redemption for good or valuable consideration, the entire residue is applicable in the first instance to the discharge of the mortgage, in ease of the bonâ fide purchaser, and a subsequent purchaser from the mortgagor cannot be in a better situation than the mortgagor himself. *Hartley* v. *O'Flaherty*, Ll. & G. t. Plunk. 216.

**Agreement by Purchaser to Pay Mortgage.**]—Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler* v. *Butler*, 5 Ves. 534.

**Implied Covenant to Indemnify.**]—Independently of any contract, a court of equity will compel the purchaser of an equity of redemption to indemnify the vendor against the mortgage debt; and he may be required to covenant to do so. *Bridgman* v. *Daw*, 40 W. R. 253.

**Death before Completion.**]—If a mortgagor contracts to sell his equity of redemption, and dies before completion, his heirs are necessary parties to the conveyance. *Duly* v. *Nalder*, 35 L. J., Ch. 52; 11 Jur. (N.S.) 921; 13 W. R. 269; 14 W. R. 45.

**Keeping Mortgage on Foot.**]—Where a mortgagor contracts to sell the fee simple of a mortgaged estate free from incumbrances, the purchaser, with the concurrence of the mortgagee, is entitled, on procuring a discharge of the vendor from all liability in respect of the mortgage debt, and bearing any extra expense occasioned by his demand, to require a conveyance of the equity of redemption, so as to keep the mortgage on foot. *Cooper* v. *Cartwright*, 1 John. 697.

**Setting up Prior Mortgage on.**]—Purchaser of an equity of redemption cannot set up a prior mortgage of his own, on which he has got in, against subsequent incumbrances of which he had notice. *Toulmin* v. *Steere*, 3 Mer. 210; 17 R. R. 67.

**Recovery.**]—Equitable tenant in tail aliens in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee. *Nouaille* v. *Greenwood*, Turn. & R. 26; 22 R. R. 174.

**Fine.**]—Mortgagee is not bound by fine by mortgagor in possession. *Pomfret (Earl)* v. *Windsor (Lord)*, 2 Ves. 482.

**Liability of Assignee—Bankruptcy.**]—The mere fact of assignment of the equity of redemption of a mortgage does not create a personal liability in the assignee, so as to enable the mortgagee to prove for arrears of interest of the mortgage debt against the estate in bankruptcy of the assignee. But it may be that such a liability may be created by the circumstances of some particular case. *Errington, In re, Mason, Ex parte*, [1894] 1 Q. B. 11; 10 R. 91; 69 L. T. 766.

Such a liability will not, however, necessarily be inferred from the fact that the assignee has paid the interest for a period of two years in the absence of the mortgagor, who could not be heard of, and that the days on which interest was to be paid under the mortgage have been altered by arrangement between the assignee of the equity of redemption and the mortgagees, who were not parties to the assignment. *Ib.*

Section 26 of the Conveyancing Act, 1881, does not create a statutory liability in the assignee to the mortgagee for arrears of interest, so as to give a right of proof. *Ib.*

**Right of Mortgagee to, on rejection by Assignees.**]—A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption and became bankrupt:—Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. *Tuffnell, Ex parte, Watts, In re*, 1 Mont. & Ayr. 620.

**Pendente lite.**]—Assignee of equity of redemption pendente lite for redemption is subject to decree. *Metcalfe* v. *Pulvertoft*, 2 Ves. & B. 207; 13 R. R. 63.

Pending a suit by a mortgagor for redemption, the plaintiff became an insolvent, and he also aliened property. Neither his assignees nor his alienee were made parties, and in their absence an order was made foreclosing the plaintiff:—Held, that the assignees in insolvency were not bound by it, the assignment to them by the insolvent being in invitum; but that it was binding on the alienee pendente lite, and those claiming under him. *Wood* v. *Parr*, 19 Beav. 551.

Held, also, that the latter could not avail themselves of the objection of the absence in the suit of the former. *Ib.*

**Practice—Bill for Account and Redemption.**]—A., entitled to a remainder in tail, to take effect on the death of B., joined B. in levying fines and suffering recoveries for the purpose of selling those lands to pay the debts of B., who, in consideration thereof, in June conveyed to A. other lands not included in the settlement, but then under mortgage. In October B. conveyed the equity of redemption in these latter lands to the mortgagee, whereupon A. filed his bill in the exchequer for an account and redemption, which bill the barons dismissed; but, on appeal, the lords reversed their decree. *Wrixon* v. *Cotter*, 1 Ridgw. P. C. 295.

#### ii. *Purchase by Mortgagee.*

**Mortgagor may Sell.**]—A mortgagor may sell his equity of redemption to his mortgagee, although the sale is coupled with a right of repurchase within a given time upon fixed

terms. *Gossip* v. *Wright*, 32 L. J., Ch. 648 ; 9 Jur. (N.S.) 592 ; 8 L. T. 627 ; 11 W. R. 632.

**Relation of Parties to Each Other.**]—Where a mortgagor in consideration of the mortgage debt releases the equity of redemption to the mortgagee, the parties should be regarded, until the contrary is shewn by the party impeaching the deed, as on the ordinary footing of vendor and purchaser. *Knight* v. *Marjoribanks* (2 Mac. & G. 10) approved. If such a release is voidable on the ground of misrepresentation or mutual mistake, an equity to set it aside is an equitable interest in the property to which it relates. *Melbourne Banking Corporation* v. *Brougham*, 51 L. J., P. C. 65 ; 7 App. Cas. 307 ; 46 L. T. 603 ; 30 W. R. 925.

**Collusion.**]—A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company, (obtained collusively between the mortgagee and the directors,) does not operate to vest an absolute title in the mortgagee. *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391 ; 40 L. T. 697 ; 27 W. R. 889—P. C.

**Agreement not Carried Out—Lapse of Time.**]—When a mortgagor had executed an agreement to deliver up possession of the mortgaged property, and to release all his interest to the mortgagee, and the agreement was not acted upon for twelve years, when the property was sold :—Held, that, under the circumstances, the mortgagor was entitled to the surplus of the purchase-money. *Rushbrook* v. *Lawrence*, L. R. 5 Ch. 3 ; 21 L. T. 477 ; 18 W. R. 101—C. A.

**Priority, Loss of.**]—A first mortgagee purchased the equity of redemption, which was conveyed to him :—Held, under the circumstances, that the second mortgagee had not thereby obtained priority over the first. *Hayden* v. *Kirkpatrick*, 34 Beav. 645 ; 11 Jur. (N.S.) 836 ; 13 L. T. 56 ; 13 W. R. 1010.

A. and B. mortgaged their estate to C. Afterwards B. conveyed all his interest in the estate to A., in consideration of a second charge on the estate. A. afterwards sold and conveyed the equity of redemption to C., in consideration of the mortgage debt :—Held, that the first mortgage was not extinguished as against B., so as to give him priority over A. *Ib.*

If a creditor with a prior incumbrance buys the estate, which is subject to a puisne incumbrance, he lets in the second incumbrance to the injury of the prior incumbrance, the benefit of which is completely lost. *Garnett* v. *Armstrong*, 2 Con. & L. 458 ; 5 Ir. Eq. R. 533 ; 4 Dr. & War. 82.

A second mortgagee took a conveyance of the equity of redemption in consideration of the debts due to himself and the other mortgagees, which he thereby took upon himself and covenanted to pay :—Held, that his debt was extinguished, and, therefore, in a foreclosure suit instituted against him by the parties entitled to the first and third mortgages, he was not entitled to be paid his debt in priority to the third mortgagee. *Brown* v. *Stead*, 5 Sim. 535 ; 2 L. J., Ch. 45.

—— **Intention to Postpone Debt.**]—A., first mortgagee, after an order for foreclosure against the mortgagor, purchased from C., the trustee in bankruptcy of his mortgagor, the equity of redemption in the mortgaged premises. N. was a second mortgagee of the same, besides other property. The deed of assignment contained recitals that C. had agreed to sell to A., subject to the claim of N., at the price of 1,400*l.*, and that 1,380*l.*, the first mortgage debt, should be retained by A. out of the purchase-money, and it was thereby witnessed that, in consideration of the sum of 1,380*l.* so retained in full satisfaction of the mortgage debt of 1,380*l.*, which sum A. did thereby declare to be fully satisfied, and also in consideration of 20*l.* paid to C. by A., the receipt whereof making, with the 1,380*l.* so retained, the purchase-money of 1,400*l.*, he, C., did grant, bargain, &c., all those hereditaments, . . . subject to the claim of N. :—Held, that upon the deed itself there was no intention shewn on the part of the first mortgagee to postpone his own mortgage debt. *Adams* v. *Angell*, 25 W. R. 139. Affirmed, 46 L. J., Ch. 352 ; 5 Ch. D. 634 ; 36 L. T. 334—C. A.

**Relief.**]—The mortgagor of estate releases equity of redemption to mortgagee for a valuable consideration ; the mortgagee at same time gives mortgagor a note that, if he should within a year pay a certain sum, being the original mortgage money and the consideration for the release of the equity, he (the mortgagee) would sell and convey to him the premises :—Held, that this was an original agreement between the parties, and did not operate as a defeasance of the release or raise any new equity to the mortgagor, and that, the money not being paid, the party was not entitled to any relief. *Emsworth* v. *Griffiths*, 5 Bro. P. C. 184 ; 15 Vin. Abr. 468, pl. 8.

**Setting Aside.**]—A release of the equity of redemption was set aside at the instance of the mortgagee, he having been induced to accept of it, and in consideration thereof to covenant for the payment of a perpetual annuity to the mortgagor, and to give the mortgagor a perpetual right of redemption, by means of misrepresentations by the mortgagor and his solicitor (who was also the solicitor for the mortgagee) as to the title of the mortgagor, the value of the premises, and the nature of the contract he was entering into. *Roddy* v. *Williams*, 3 Jo. & Lat. 1.

A conveyance by a mortgagor to the defendant of the equity of redemption in real estate, part of which was at the date of such conveyance in mortgage to the defendant, and other part of which was in mortgage to another person, set aside at the suit of the assignee in bankruptcy of the mortgagor, upon the ground of the relation of mortgagor and mortgagee, of pressure, of the insolvency of the mortgagor at the time of the conveyance, and of inadequacy of consideration. *Ford* v. *Olden*, 36 L. J., Ch. 651 ; L. R. 3 Eq. 461 ; 15 L. T. 558.

**Practice.**]—Plea (to a bill to redeem a mortgage) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage money, with interest and costs ; ordered to stand for an answer, with liberty to except. *Stabback* v. *Leatt*, G. Cooper, 46.

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4. TIME FOR.

**Before Day of Payment.**]—Mortgagor admitted to redeem before the day of payment in the deed. *Talbot* v. *Braddill*, 1 Vern. 183.

A., in 1657, conveys to B., subject to redemption on payment of 380*l.* in 1688, and possession is immediately delivered. Redemption decreed, and an account of profits before the day of payment in the proviso. *S. C.*, 1 Vern. 394.

—— **Demurrer.**]—Where a mortgage was in the form of a demise, with a proviso that, if the money secured should be paid on a fixed day, or on full payment thereof, either previously or subsequently, and before the execution of the trust for sale therein contained, the term should cease, and a trust for sale was declared in case the mortgagor should not pay the mortgagee the sum secured on the day fixed:—Held, that a demurrer would not lie to a bill by the mortgagor for an account, and for reconveyance on payment of what should be found due, filed on the day before the day fixed. *Harding* v. *Tingey*, 34 L. J., Ch. 13; 10 Jur. (N.S.) 872; 10 L. T. 323; 12 W. R. 684.

—— **Where Mortgagee in Possession.**]—Where a mortgagee takes possession he may be redeemed before the time limited by the mortgage for payment of the mortgage money expires. *Brown* v. *Cole* (14 Sim. 427; 14 L. J., Ch. 167) distinguished. *Borill* v. *Endle*, 65 L. J., Ch. 542; [1896] 1 Ch. 648; 44 W. R. 523.

**After Day of Payment.**]—The parties entitled to redeem at law, at the appointed time, are in equity entitled to redeem afterwards. *Skeffington* v. *Whitehurst*, 3 Y. & C. 1; 7 L. J., Ex. Eq. 65. And see *S. C.*, nom. *Skeffington* v. *Budd*, 9 Cl. & F. 219; 6 Jur. 809.

**After Forfeiture.**]—Bill to redeem a lottery annuity, mortgaged to defendant upon the common terms, for paying principal and interest; defendant insisted upon the benefit of 6 Geo. 1, c. 24, s. 23, having subscribed the annuity afterwards into the South Sea Company, but it appeared that he subscribed the annuity after the mortgage was forfeited. Redemption decreed as prayed. *Thomas* v. *Pendlebury*, 2 Eq. Abr. 601.

**After Foreclosure Order.**]—In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute, and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the court and depends on the circumstances of each particular case. *Campbell* v. *Holyland*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128; 26 W. R. 109.

**On Final Hearing of Bill for Foreclosure and Sale.**]—A puisne mortgagee filed a bill for a foreclosure and sale against a prior mortgagee in possession. Upon the final hearing, the prior mortgagee, for the first time, insisted upon being redeemed:—Held, that he had not waived his right by not having made this claim by his answer. *Rotheram* v. *Webb*, 4 Ir. Eq. R. 52.

**After Foreclosure, on Payment.**]—After judgment in a foreclosure action, and the certificate of the master, finding the amount due for principal, interest and costs up to the date of the certificate, and adding the amount of interest due up to the time allowed by the judgment for redemption—that is, six months from the date of the certificate—the mortgagor cannot redeem before the expiration of the six months upon payment of the principal and interest up to the time of payment only, but must pay the full amount found due by the certificate. *Hill* v. *Rowlands*, 66 L. J., Ch. 689; [1897] 2 Ch. 361; 77 L. T. 34; 46 W. R. 26—C. A.

**Mortgage of Rent.**]—Mortgage of a rent redeemable at a greater distance of time than a mortgage of lands. *Floyer* v. *Lavington*, 1 P. Wms. 269.

**Restricting Payment Off.**]—The court will not give effect to a stipulation contained in a mortgage by a client to his solicitor, whereby the client is restricted from paying off the mortgage money for so long a period as twenty years. *Cowdry* v. *Day*, 1 Giff. 316; 29 L. J., Ch. 39; 5 Jur. (N.S.) 1200; 1 L. T. 88.

**Confirming Equity of Redemption.**]—In case of a mortgage, no clause can confine the equity of redemption to the lifetime of the mortgagor, or to him and the heirs male or heirs only of his body. *Floyer* v. *Lavington*, 1 P. Wms. 269.

**Equitable Mortgage without Interest.**]—Where a deposit of a lease was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee, to have the lease sold, is entitled to the usual time to redeem. *Meller* v. *Woods*, 1 Keen, 16; 5 L. J., Ch. 109.

**Absolute Conveyance Redeemable.**]—A. made an absolute conveyance to B. of the reversion of an estate pur autre vie, and by another deed, of equal date, the lands were made redeemable at any time during the life of the grantor only. A. died, not having paid the money. Lord Nottingham decreed that the heir might redeem, but it was against the sense of the bar. Lord North, however, reversed the decree, it appearing that A. had a kindness for B., and was related to him by marriage, which made it in nature of a settlement; and the case was more strong, as B. could not have compelled A. to redeem during his life. *Newcomb* v. *Bonham*, 1 Vern. 7, 214, 232; 2 Vent. 364; 2 Free. C. C. 67.

**No Proviso for Redemption.**]—A. conveyed lands to B., on trust, in case a sum and interest should not be paid by a day named, to sell, and after payment of principal, interest and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and B. covenanted not to sell without giving six months' notice, but the deed contained no proviso for redemption:—Held, that this was a mere mortgage, and that A. was therefore entitled to six months' time to redeem. *Bell* v. *Carter*, 17 Beav. 11; 22 L. J., Ch. 933; 17 Jur. 478; 1 W. R. 270.

**Judgment Creditors.**]—Judgment creditors are not allowed successive periods of three months for redemption. *Bates* v. *Hillcoat*, 16 Beav. 139.

But one period of three months is given to

them, or any of them. *Radcliff* v. *Salmon*, 4 De G. & Sm. 526.

**Barred by Lapse of Time.**]—Where twenty years have elapsed from entry by a mortgagee, and there has been no subsequent acknowledgment, the mortgagor's right of redemption becomes extinct, under the Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 28, 34; and, if in such a case the mortgage deed contained a power of sale with a trust of surplus proceeds for the mortgagor and his representatives, and that power of sale has not been exercised within the twenty years from entry by the mortgagee, the trust of surplus proceeds becomes equally extinct, and cannot be enforced with respect to surplus proceeds resulting from a subsequent sale. *Chapman* v. *Corpe*, 41 L. T. 22; 27 W. R. 781. *See also Cases under* LIMITATIONS (STATUTE OF).

**Calendar.**]—The nine months allowed by the stat. 3 Geo. 1, c. 2, s. 4, to a mortgagee of an evicted lease to redeem, are calendar months. *Biddulph* v. *St. John*, 2 Sch. & Lef. 521.

**Practice—Demurrer.**]—A bill to redeem a mortgage, filed before the mortgage has become absolute at law, is demurrable, notwithstanding the mortgagor may have tendered to the mortgagee the principal money, together with interest up to the day named in the proviso for redemption. *Brown* v. *Cole*, 14 Sim. 427; 14 L. J., Ch. 167; 9 Jur. 290.

—— **Tender after Day appointed.**]—If the plaintiff in a suit for redemption does not pay the principal and interest at the time appointed, he will not be allowed to redeem, although, before the motion to dismiss is made, he has tendered the amount reported due with the subsequent interest. *Faulkner* v. *Bolton*, 7 Sim. 319; 4 L. J., Ch. 81.

—— **Motion of Course.**]—Upon a bill to redeem a mortgage and nonpayment at the time appointed, it is a motion of course to dismiss the bill. *Stuart* v. *Worrall*, 1 Bro. C. C. 581.

—— **Enlarging Time.**]—The time not enlarged upon a bill of redemption as upon a bill of foreclosure. *Nevosielski* v. *Wakefield*, 17 Ves. 417.

—— **Terms.**]—Where the amount of principal and interest found due upon a mortgage has been found by the master's report, the rule now is to compute subsequent interest upon the principal only, and the time for payment of the money found due upon a mortgage is enlarged upon the terms of paying the interest and costs found due. *Whatton* v. *Craddock*, 1 Keen, 267; 6 L. J., Ch. 178.

—— **Order dismissing Action in default of Payment into Court within a Specified Time—Extension of Time—Mistake.**]—Where in a redemption action liberty is given to lodge a sum of money in court before a certain day, and in default that "the action be dismissed with costs," the action will not be treated as wholly dead and at an end if the money is not lodged before the specified day, so as to preclude an application made after that day for extension of the time for lodgment. If the failure to make the lodgment within the time limited is due to an honest mistake, the court will favourably consider an application for extension of time. *Collinson* v. *Jeffery*, 65 L. J., Ch. 375; [1896] 1 Ch. 644; 74 L. T. 78; 44 W. R. 311.

5. PROCEEDINGS FOR.

*a.* In General, 1686.
*b.* Offer to Redeem, 1689.
*c.* Accounts, 1690.
*d.* Decree, 1691.

### a. In General.

**Pendente lite.**]—After a bill brought in the exchequer to foreclose, the defendants may bring a bill in this court to redeem; the pendency of the former suit is not pleadable. *Newbury* v. *Wren*, 1 Beav. 220.

**What must be Alleged.**] — In a bill for redemption, against a mortgagee stated to be in possession without acknowledgment of a mortgage title, it is not necessary to allege that such possession without acknowledgment of mortgage title has not been for twenty years. *Green* v. *Nicholls*, 4 L. J. (O.S.) Ch. 118.

**Disputing Mortgagor's Title.**]—A mortgagee cannot dispute his mortgagor's title; therefore, a plea, that the mortgagor was an uncertificated bankrupt at the time of his purchasing the estate, to a bill of redemption, cannot be sustained. *Wroe* v. *Clayton*, 8 L. J., Ch. 356; 9 *Ib.*, 107; 4 Jur. 82. And see *S. C.*, 10 Sim. 185.

**Objection to Bill.**]—On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. *Roberts* v. *Clayton*, 3 Anst. 715.

**First Hearing.**]—If a prior mortgagee does not insist on being redeemed at the first hearing, he cannot do so at the final hearing. *Foster* v. *Ker*, 12 Ir. Eq. R. 51.

**Dismissing Bill.**]—Dismission on default of payment under decree upon bill for redemption operates as a foreclosure. *Winchester (Bishop)* v. *Paine*, 11 Ves. 199.

The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of deeds. *Marshall* v. *Shrewsbury*, 44 L. J., Ch. 302; L. R. 10 Ch. 250; 32 L. T. 418; 23 W. R. 803.

—— **Effect of.**] — Dismission of a bill for redemption for want of prosecution has not the effect of foreclosure, not preventing another bill. *Hansard* v. *Hardy*, 18 Ves. 460.

**Praying Relief.**]—Praying relief where mortgagee is a party is the same as praying to redeem; and, if on a reference to a master they do not redeem him, the court will dismiss the bill, which is equivalent to a foreclosure. *Cholmley* v. *Oxford (Lord)*, 2 Atk. 267.

**Absconding Mortgagee.**]—The proceedings to be taken against an absconding mortgagee, under 7 Geo. 2, c. 14, in Ireland are similar to those adopted in England to have a bill taken pro confesso, and, if the plaintiff should obtain the common conditional decree on sequestration,

it must be vacated. *Brien* v. *Murphy*, 1 Hog. 480.

**Setting up Incumbrance.**]—Subsequent mortgagee prays redemption of first mortgagee, upon payment of what was due, and pending suit, first mortgagee sets up another mortgage prior to all:—Decreed, a trial of its validity at law, and an account of money paid, &c. *Dowse* v. *Rue*, 9 Mod. 38.

**Setting up Contract.**]—In defence to a bill for redemption, the mortgagee set up a contract entered into with him by the mortgagor for the sale to him of the equity of redemption. This the mortgagor insisted had been abandoned:—Held, that this defence could only be made available by a cross bill. *Howells* v. *Wilson*, 34 Beav. 573; 34 L. J., Ch. 593; 12 L. T. 818; 13 W. R. 1011.

**Enforcing Agreement for Compromise.**]—In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day, and the mortgagee was to carry on the business in the meantime and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay the money at the time appointed:—Held, that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance. *Pryer* v. *Gribble*, 44 L. J., Ch. 676; L. R. 10 Ch. 534; 32 L. T. 238; 23 W. R. 642.

**Failure of Suit.**]—A suit for redemption which fails cannot, under the prayer for general relief, be turned into a suit for an account. *Patch* v. *Ward*, 7 L. T. 413; 11 W. R. 135.

**Revival.**]—Mortgagor brings bills to redeem; an account is decreed, and a report is made, and divers proceedings are had in the cause, and plaintiff is ordered to pay costs and deliver possession. The defendant, the mortgagee, dies: his executor can revive the suit. *Stowell (Lady)* v. *Cole*, 2 Vern. 296.

**Supplemental Suit.**]—Heir-at-law filing a bill to redeem a mortgage, having also brought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot, by supplemental bill, have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill. *Tonkin* v. *Lethbridge*, G. Cooper, 43.

**Counter-claim.**]—When a question arises as to the rights of mortgagees and sub-mortgagees who are co-defendants, the proper course to pursue is to raise it by counter-claim, and to deliver it to the co-defendants. *Shephard* v. *Beane*, 2 Ch. D. 223; 24 W. R. 363.

**Notice.**]—In the Judicature Act, 1873, s. 24, sub-s. 3, and Rules of Court, 1875, Ord. XVI., rr. 17, 18 and 19, "notice" is applicable to third parties, and not to co-defendants. *Ib.*

—— **Deed Missing after.**]—Notice to redeem a mortgage having been given, a title deed was missing; and the mortgagor brought his action for redemption and for an indemnity:—Held, that the action was rightly brought in order that the loss of the deed might be established and the plaintiff's title justified, although the defendants had before the action offered an indemnity, the terms of which were in controversy. *James* v. *Rumsey*, 48 L. J., Ch. 345; 11 Ch. D. 398; 27 W. R. 617.

It having been found in the suit that the deed was in the hands of a third party to whom the defendants' former solicitor had fraudulently pledged it, leave was given to plaintiff to take proceedings for its recovery. *Ib.*

**Loss of Mortgage Deed and other Documents —Indemnity.**]—In 1867 M. mortgaged his life interest in certain funds subject to the trusts of his marriage settlement, and three policies of insurance on his own life. In 1876 he executed a second mortgage of his life interest to the plaintiffs. This mortgage did not include the policies of insurance. In 1886 an action was brought by the plaintiffs against the mortgagor and H., the legal personal representative of the first mortgagee, to redeem the first mortgage and foreclose the mortgagor. Pending the progress of the action it was discovered that the mortgage of 1867 and the policies were not in the possession of H., and an inquiry was directed as to the loss of the documents, and whether any and what indemnity should be given in respect of the loss in case it should be found that any of them had been lost. In the meanwhile the plaintiffs had paid into court the amount which had been certified to be due to the defendant H. under the mortgage of 1867, and for her taxed costs of the action. The chief clerk, in answer to the inquiry, found that the mortgage of 1867 and the policies had been lost, and he also found that the plaintiffs were entitled to "such an indemnity as will equal that which the insurance company may require." The plaintiffs took out a summons to vary this certificate, by which they asked that the whole of the fund in court might be retained until further order by way of indemnity to them. The insurance company declined to make any arrangement with regard to an indemnity until claims should be made on the policies:—Held, that the plaintiffs were entitled to a bond of indemnity, to be given by the defendant H. as executrix, the bond to be settled in chambers in case the parties differed, and that they were also entitled to have retained in court the sum of 100*l.*, and no more, to meet any possible costs that might be incurred when the policies should become claims. *Caldwell* v. *Matthews*, 62 L. T. 799.

**Notice for Affidavit of Documents.**] — If a mortgagor, intending to redeem under the usual decree in a foreclosure suit, requires an affidavit of the documents to be delivered to him, he should give previous notice to that effect to the mortgagor. *Weeks* v. *Stourton*, 11 Jur. (N.S.) 278; 12 L. T. 71; 13 W. R. 489.

Where a mortgagor had not given such notice, and the mortgagee was not prepared with such affidavit, a new day and place for payment were fixed on an application by summons. *Ib.*

**Production of Documents.**]—In an action for redemption against a mortgagee in possession an order for production of documents made before the defence was delivered, and without any special case for production being made, was affirmed. *Union Bank of London* v. *Manby*, 49

L. J., Ch. 106 ; 13 Ch. D. 239 ; 41 L. T. 393 ; 28 W. R. 22—C. A.

**Costs.**]—Bill by the owner against his mortgagees and the trustee of a fund to compel payment :—Held, to be a suit for administration, and not redemption, and the costs of all parties were ordered to be paid out of the fund in the first instance. *Bryant* v. *Blackwell*, 15 Beav. 44.

### b. Offer to Redeem.

**Rule as to.**]—Although neither a mortgagor, nor any person deriving title under him, can make a mortgagee defendant to a suit without offering to redeem him, this rule does not apply where other relations besides those of the mortgagor and mortgagee subsist between the parties. *Jefferys* v. *Dickson*, 35 L. J., Ch. 376 ; L. R. 1 Ch. 183 ; 12 Jur. (N.S.) 281 ; 14 L. T. 208 ; 14 W. R. 322.

Accordingly, where a mortgagor, by deed to which his mortgagees were parties, conveyed the mortgaged estates to trustees for better securing to the mortgagees payment of the interest on their incumbrances, and to accumulate the surplus rents as a fund to satisfy the incumbrances, and, subject thereto, for the mortgagor, with a proviso that, when the incumbrances should be satisfied, the trusts should cease :—Held, that a subsequent judgment creditor could make the mortgagees defendants to a bill against the trustees for an account without offering to redeem them. *Ib.*

Held, also, that, although a receiver, appointed by a mortgagee under the ordinary power is the agent of the mortgagor, who may file a bill against him for an account without making the mortgagee a party, in this case the trustees were not mere receivers, and, therefore, the mortgagees were properly made parties to the suit. *Ib.*

Held, also, that the account should be taken as from the filing of the bill only. *Ib.*

**Bill Without.**]—A bill by a person claiming under a mortgagor against the mortgagee is irregular, unless it offers to redeem. *Hughes* v. *Cook*, 34 Beav. 407.

The plaintiff was entitled to an estate, subject to a mortgage created by his ancestor. He instituted a suit against the mortgagee and the representatives of his ancestor, praying to have the mortgage paid out of his assets or by sale of the estate, and also for the delivery up of independent securities given by the plaintiff to the defendant :—Held, that the suit was multifarious, and a demurrer to it was allowed. *Ib.*

A bill by a person entitled to a mortgaged estate under the mortgagor's will, against the mortgagee and the mortgagor's representatives, to have the mortgagor's estate applied in payment of the mortgage, cannot be sustained. *Ib.*

Demurrer by mortgagee to a bill by a trustee under the will of the mortgagor to carry into execution the trusts of the will, without offering to redeem the mortgage, allowed. *M'Donough* v. *Shewbridge*, 2 Ball & B. 555.

A. being entitled to an annuity out of an estate, it was afterwards conveyed to a trustee, in trust, out of the rents, or by a sale, to raise a sum due to A. The owner of the estate afterwards mortgaged it to B., who filed his bill, praying the execution of the trusts of the first deed, and a sale of the estate, but the bill did not offer to redeem :—Held, that it was demurrable. *Cave* v. *Foulks*, 5 L. J., Ch. 206.

A person entitled to an equity of redemption cannot make the mortgagee a party to a suit respecting the mortgaged estates, without offering to redeem ; but where a mortgagor by deed, to which the mortgagee was not a party, had conveyed another estate to trustees to sell and pay off the mortgage, so as to exonerate the mortgaged estate, it was held that a person interested in the equity of redemption might file a bill, not offering to redeem, against the mortgagee and trustees, to have an execution of the trust. *Dalton* v. *Hayter*, 7 Beav. 313.

—— **Summons to determine Construction.**]—A mortgagor may proceed by originating summons, under Ord. LIV.A. r. 1, to have a question of construction arising on the mortgage-deed determined without making an offer to redeem. *Nobbs* v. *Law Reversionary Interest Society*, 65 L. J., Ch. 906 ; [1896] 2 Ch. 830 ; 75 L. T. 309.

**What Sufficient.**]—A mortgagor filed a bill against a mortgagee for an account, and to restrain him from selling the mortgaged premises, and prayed that, "on payment by the plaintiff to the defendant of what, on taking such accounts, might be found due, the defendant might be ordered to" reconvey the property :—Held, that this was not a sufficient offer to pay what should be found due, and a demurrer to the bill allowed, with leave to amend the bill by inserting a formal offer to pay. *Harding* v. *Tingey*, 34 L. J., Ch. 13 ; 10 Jur. (N.S.) 872 ; 10 L. T. 323 ; 12 W. R. 684.

**Effect of.**]—If a bill is not for redemption, but for a totally different object, and is quite incapable of being used as a bill of redemption, an offer at the bar to redeem will not sustain it as such. *Gordon* v. *Horsfall*, 5 Moore, P. C. 393 ; 11 Jur. 569.

**Courts of Equity Exchequer and Chancery.**]—In the court of equity exchequer, a puisne mortgagee need not, on a bill of foreclosure and sale, offer to redeem a prior mortgage ; aliter, in the court of chancery. *Perrott* v. *O'Halloran*, 2 Ir. Eq. R. 428.

**Practice—Demurrer.**]—The objection by a prior mortgagee brought before the court in a foreclosure suit, that the plaintiff has not offered by his bill to redeem him, if valid, ought to be taken advantage of by demurrer. *Balfe* v. *Lord*, 4 Ir. Eq. R. 648 ; 2 Dr. & War. 480 ; 1 Con. & L. 519.

**Order.**]—Where a mortgagor obtains a decree for an account, but neither the bill nor the decree contains the usual offer by the mortgagor to pay any balance found due to the mortgagee, if a balance is found due, the court cannot order the payment ; but, if the bill contains allegations which fail, will direct all the costs to be paid by the mortgagor. *Hollis* v. *Bulpett*, 12 L. T. 293 ; 13 W. R. 492.

### c. Accounts.

**Setting out.**]—A defendant in a redemption suit, who admits that the plaintiff is entitled to a decree, cannot refuse to set out in his answer his accounts as mortgagee. The rule as to answering applicable to redemption suits is the same as for any other suits for accounts. *Elmer* v.

*Creasy*, 43 L. J., Ch. 166; L. R. 9 Ch. 69; 29 L. T. 632; 22 W. R. 141.

**Death of Mortgagor after Taking.**]—A mortgagor brings a bill to redeem, obtains a decree for an account, &c., in the usual manner, and the account is accordingly taken by the master. Before any further proceedings, the plaintiff dies, and his infant son and heir revives and carries on the suit:—Held, that he is bound by the account already taken, but he shall be at liberty to surcharge and falsify it if he can. *Badham* v. *Odell*, 4 Bro. P. C. 349.

**Particulars.**]—It was alleged by counter-claim to a redemption action that the mortgage comprised:—(1) certain commission; (2) a sum also secured by bills of exchange; (3) a sum due on open account; and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counter-claimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and open account were ordered to be given. *Kemp* v. *Goldberg*, 36 Ch. D. 505; 56 L. T. 736.

### d. Decree.

**Generally.**]—As to decree to redeem, and delivery up of title deeds, see *Kendall* v. *Hulls*, 11 Jur. 864.

**Against first Mortgagee not Appearing.**]—If in a suit for redemption against several successive mortgagees, the first mortgagee does not appear at the hearing, a subsequent mortgagee will be allowed to make the decree absolute against him. *Cottingham* v. *Shrewsbury*, 5 Sim. 395.

**In Absence of Party.**] — Real and personal estate were mortgaged together. The mortgagor died leaving a will of personalty, but intestate as to real estate. It was not known who was the heir-at-law, and the mortgagee entered into possession. The executrix of the mortgagor claimed to redeem the whole of the mortgaged property, which claim was resisted by the mortgagee, who insisted that her only right was to redeem the mortgaged personalty on payment of a proportionate part of the mortgaged debt. The executrix brought an action for redemption, and the court made a decree for the usual accounts as against a mortgagee in possession, directing that on payment of what was found due the mortgagee should convey and assign the mortgaged properties, real and personal, to the plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. The defendant appealed:—Held, that, although the heir-at-law, if known, ought to have been a party, the court would not delay making a decree until he was ascertained and made a party. *Hall* v. *Heward*, 55 L. J., Ch. 604; 32 Ch. D. 430; 54 L. T. 810; 34 W. R. 571—C. A.

**Form.**]—Form of decree in a suit for redemption of a first mortgagee (in possession), and foreclosure of the mortgagor. *Scholefield* v. *Ingham*, C. P. Cooper, 477.

In a suit against A., an incumbrancer, and B., a sub-incumbrancer, to redeem the securities:—Held, that the proper form of decree was that, upon the amount due from the plaintiff to A. being paid into court, both A. and B. should reconvey the estate and deliver the deeds to the plaintiff, and that the plaintiff was not bound to wait until the accounts had been taken and the equities settled between A. and B. *Lysaght* v. *Westmacott*, 33 Beav. 417.

In a suit for redemption by the heir of the mortgagor, against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the court, besides the usual decree for redemption, declared the plaintiff entitled to have the balance which should be found due from him, and which should be paid by him to the defendant, in respect of the mortgage debt, interest, and costs of the redemption, repaid to him out of the personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief. *Lloyd* v. *Wait*, 1 Ph. 61; 6 Jur. 456.

—— **Future Account.**]—In decrees against a mortgagee on a bill for redemption, or against an executor to account, it is the course of the court to direct it without future words; and yet, if the person decreed to account receive any sums subsequently to the decree, they must bring such sums into the account before the master. *Bulstrode* v. *Bradley*, 3 Atk. 582.

—— **Conditional Redemption.**] — Form of decree of conditional redemption where a second mortgage by another has been given to secure the first. *Beckett* v. *Micklethwaite*, 6 Madd. 199; 22 R. R. 274.

**Production for Correction.**]—The representative of a mortgagor, who had obtained a decree for redemption, ordered, on the petition of the mortgagee, to produce the original decree, for the purpose of correction. *Bird* v. *Heath*, 6 Hare, 236.

**Summons under Ord. XV. r. 1, after Writ.**]—The plaintiff, after issuing the writ in a redemption action, took out a summons for an account under Ord. XV. r. 1:—Held, that the order under the summons must be limited to preliminary accounts, and that the usual terms of a final judgment for redemption ought not to be added without the plaintiff's consent. *Clover* v. *Wilts and Western Benefit Building Society*, 53 L. J., Ch. 622; 50 L. T. 382; 32 W. R. 895.

## M. REMEDIES OF MORTGAGEE.

(*See also*, post, FORECLOSURE (col. 1707 foll.), SALE BY COURT (col. 1757 foll.), SALE UNDER POWER (col. 1770 foll.), RECEIVER (col. 1797 foll.).)

1. *In General*, 1692.
2. *On Covenant*, 1696.
3. *On Collateral Securities*, 1699.
4. *Distress—Attornment Clause*, 1701.
5. *Ejectment*, 1706.

### 1. IN GENERAL.

**Right to every Security.**]—A mortgagee, if he is not redeemed, is entitled to every possible security for his title, and has a right to buy in an anterior mortgage at any price he pleases. *Kirkwood* v. *Thompson*, 11 Jur. (N.S.) 385. Affirmed, 2 De G. J. & S. 613; 34 L. J., Ch. 501; 12 L. T. 811; 13 W. R. 1052.

Where a debt is secured by mortgage, covenant and bond, the mortgagee may pursue all his remedies at the same time. *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J., Ch. 347; 10 Jur. 532.

**Mortgagee of Lease as against Devisee.**]—Relief in favour of the mortgagee of a lease against the devisee of the mortgagor. *Gregson* v. *Hindley*, 7 Jur. 248.

**Right of Eigné against Puisne Mortgagee.**]—Right of eigné as against a puisne mortgagee to enforce all his remedies at the same time. *Cockell* v. *Bacon*, 16 Beav. 158.

**Equitable Mortgagee.**]—An equitable mortgagee is entitled, at his option, either to a foreclosure or sale. *Perry* v. *Keane*, 6 L. J., Ch. 67.

—— **By Deposit.**]—The right of an equitable mortgagee by deposit of deeds without a written memorandum is a decree of foreclosure, not sale. *Backhouse* v. *Charlton*, 8 Ch. D. 444; 26 W. R. 504.

The proper remedy for an equitable mortgagee with a deposit of title-deeds is by a decree of foreclosure, and not a sale. *James* v. *James*, 42 L. J., Ch. 386; L. R. 16 Eq. 153; 21 W. R. 522.

An equitable mortgagee by deposit of deeds, accompanied by an agreement to execute a legal mortgage, is entitled to either sale or foreclosure. *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205; 27 W. R. 704.

—— **Right of, in Administration.**]—Where, in an administration suit, the personal estate is insufficient to pay the debts in full, an equitable mortgagee, who is also a simple contract creditor in respect of the same debt, and whose security is also insufficient, is entitled to prove for and take a dividend upon the entire debt for the time being actually unpaid, notwithstanding that the security has been realised by order of the court, and the proceeds have been carried on to a separate account to meet the mortgage claim. But such creditor must not ultimately receive more than twenty shillings in the pound from all sources. *Rhodes* v. *Moxhay*, 10 W. R. 103.

**Under Mortgage by Way of Trust.**]—Under a mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion, and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, the only right of the mortgagee is to have the property sold, and he is not entitled to foreclose. *Locking* v. *Parker*, 42 L. J., Ch. 257; L. R. 8 Ch. 30; 27 L. T. 635; 21 W. R. 113.

**Treating Mortgagor, and Claimants under him, as Trespassers.**]—Semble, the mortgagee can in all cases treat the mortgagor, and all who claim under him, as trespassers. *Evans* v. *Elliott*, 9 Ad. & E. 342; 1 P. & D. 256; 8 L. J., Q. B. 51.

**Against Infants.**]—Where a decree had been made in two suits, framed for the purpose of administering the testator's personal estate only, and the devisee of the real estate was an infant, a suit by mortgagees, for the purpose of realising their security by a sale of the mortgaged premises, was properly instituted. *Davis* v. *Dowding*, 2 Keen, 245; 7 L. J., Ch. 169.

**In Suit by Settlor, as Co-plaintiff.**]—In a bill filed by the settlor for the purpose of a setting aside the settlement, the mortgagee of her interest under the settlement joined as a co-plaintiff. He can obtain no relief in such a suit. *Bill* v. *Cureton*, 2 Myl. & K. 503; 4 L. J., Ch. 98.

**Bankruptcy.**]—A mortgagee may petition to stay bankrupt's certificate. The circumstance of his not having tendered proof till third meeting will not prevent him from presenting such a petition. Where the amount of mortgage debt was disputed, the certificate was lodged in bankrupt office till it should be ascertained. *Whitchurch*, *Ex parte*, 2 J. & W. 548; 1 Glyn & J. 71.

**After taking Debtor in Execution.**]—A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is nevertheless entitled to the benefit of his mortgage security. *Davis* v. *Battine*, 2 Russ. & M. 76.

**Arrest pending Foreclosure.**]—A party having a mortgage, and also a bond as a security for the same debt, may arrest the defendant on the bond pending a suit in equity for a foreclosure. *Burnell* v. *Martin*, 2 Dougl. 417.

**After giving up Mortgage, and Proof in Bankruptcy.**]—Mortgagee having given up mortgage, and proved under a commission of bankruptcy against the mortgagor, not allowed to retract. *Robinson* v. *Grant*, 18 Ves. 290.

**Where Mortgagor Outlawed.**]—Mortgagor having been outlawed, the first mortgagee obtained a decree to foreclose subsequent mortgagees, and if they should not redeem, to sell against the crown. *Scott* v. *Roberts*, 4 W. R. 499.

**After Foreclosure—Impossibility of Restoring Estate.**]—A mortgagee who has foreclosed is not debarred from taking proceedings against the general estate of the mortgagor to recover his debt in cases where it has become impossible, through no default of the mortgagee, to restore the mortgaged estate. *Burrell, In re, Burrell* v. *Smith*, 38 L. J., Ch. 382; L. R. 7 Eq. 399; 17 W. R. 516.

**Mortgage of Trust Fund.**]—The assignee of a trust fund by way of mortgage, with power to give receipts in the name of the mortgagor, cannot compel the trustees of the fund to pay the whole over to him, notwithstanding the existence of puisne incumbrancers. All that he is entitled to demand is the amount due upon the mortgage. *Bell, In re, Jeffery* v. *Sayles*, 65 L. J., Ch. 188; [1896] 1 Ch. 1; 73 L. T. 391; 44 W. R. 99—C. A.

**Depreciation.**]—Where, at the death of a mortgagor of leaseholds, the value of the mortgaged property exceeded the mortgaged debt, and the mortgagee took no steps to realise his security for fourteen years after the death of the mortgagor, and in the meantime the property became very much deteriorated in value:—Held (affirming 2 Giff. 492), that the mortgagee was not entitled to recover the deficiency arising on his security from those legatees of mortgagor who had been paid. *Ridgway* v. *Newstead*, 30 L. J., Ch. 889; 7 Jur. (N.S.) 451; 4 L. T. 6; 9 W. R. 401—L. C.

—— **Right against Residuary Legatees.**]—The right of mortgagees of real estate whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the court will not enforce it if there are circumstances which would make it inequitable to do so. *Blake* v. *Gale*, 55 L. J., Ch. 559; 32 Ch. D. 571; 55 L. T. 234; 34 W. R. 555—C. A.

—— **Proof in Administration for Deficiency.**]—In a suit to foreclose by a mortgagee (all parties consenting), the premises were ordered to be sold and the proceeds paid into court. The purchase-money was invested, at the instance of the mortgagee, in consols, without objection on the part of the personal representative of the mortgagor; but, when again converted into money, (owing to a fall in the price of stock,) was insufficient to satisfy the plaintiff's claim:—Held, that the plaintiff was entitled to come in and prove for the deficiency in a suit to administer the mortgagor's estate. *Tompsett* v. *Wickens*, 3 Sm. & G. 171; 2 Jur. (N.S.) 10; 4 W. R. 136.

**By Action—For Money Lent.**]—When a mortgage deed contains no covenant for repayment, so that no action can be maintained on the deed, an action for money lent will lie. *Yates* v. *Aston*, 3 G. & D. 351; 4 Q. B. 182; 12 L. J., Q. B. 160; 7 Jur. 83.

A deed of mortgage, and conditional sale, contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage money:—Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest on the money advanced. *Raja Oodit Purkash Sing* v. *Martindell*, 4 Moore, Ind. App. 444.

The plaintiff was mortgagee under a mortgage from the defendant to him, with a power of sale in the event of nonpayment of a sum of money, which was further secured by a bond given by the defendant to him. The property was afterwards sold by the plaintiff under the power, but did not produce sufficient to discharge the debt. An account was then stated between the plaintiff and the defendant, charging the defendant with the full amount of the principal and interest, and giving him credit for the net proceeds of the sale. The defendant admitted the correctness of the account, and promised to pay the balance, to recover which the plaintiff brought an action for money lent and due on an account stated:—Held, that, the debt having been secured by specialty, the action could not be maintained, except upon the deed. *Middleditch* v. *Ellis*, 2 Ex. 623; 17 L. J., Ex. 365.

**After Robbery of Title Deeds.**]—Upon a bill of foreclosure, the mortgagee having been robbed of the title deeds, payment of the mortgage money within a limited time was decreed; and on payment of the same a reconveyance was directed, with a bond of indemnity. *Shelmardine* v. *Harrop*, 6 Madd. 39; 22 R. R. 232.

**Practice—Right of Equitable Mortgagee against Legal Estate.**]—In an action by an equitable mortgagee for sale or foreclosure the court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an ex parte application by the plaintiff; there being ground for believing that the defendants intended to part with the legal estate pendente lite. *London and County Banking Co.* v. *Lewis*, 21 Ch. D. 490; 47 L. T. 501.

—— **Staying Proceedings.**]—Bill by a mortgagee for an account, and for foreclosure, and a sale after a decree in a creditors' suit, under which the plaintiff in the second suit had gone in before the master, and proved his charge before he filed his bill: application to stay the proceedings in the second cause, as involving the same accounts, refused: the plaintiff having more speedy and effectual relief is entitled to go on; as, where there are litigated points beyond that of the amount of his demand, he is required to go on, in his separate suit, up to such point as all ulterior relief can be equally had in the suit first instituted: and, as to staying the proceedings in the first suit, while properly conducted, the court, however anxious to guard against unnecessary expense, has no authority. *Uniacke* v. *Rochford*, 1 Moll. 216.

—— **In Absence of Parties Interested.**]—The court cannot make a decree for foreclosure or sale in the absence of any of the parties interested in the equity of redemption. *Caddick* v. *Cook*, 32 L. J., Ch. 769; 9 Jur. (N.S.) 454; 7 L. T. 844; 11 W. R. 395.

—— **Order to Pay—Stamping.**]—Where plaintiffs were mortgagees in fee of freeholds in M., and of a lease for lives of a rectory, &c., in R., and had appointed H. and W. as receivers as to both, but the defendant, as tenant of the tithes, &c., in R. under an agreement with the mortgagor, was allowed to receive them, and the mortgagor, being in arrears, by letter directed him to pay a sum, part of the arrears, to H. and W., and charge it in the account of the year's tithes, &c.:—Held, to be, in effect, an order to pay money due from the defendant to the mortgagor as arrears, and not as receiver to the mortgagees; and, therefore, void for want of a stamp. *Braybrooke* (*Lord*) v. *Meredith*, 13 Sim. 271; 12 L. J., Ch. 289; 7 Jur. 144.

2. On Covenant.

**Right to Remedy on all Securities.**]—A mortgagee having filed a bill of foreclosure, and having proceeded to execution in ejectment, and being in possession of the rents and profits under an ejectment, and having brought an action for the mortgage money, and obtained execution; the court refused to discharge the defendant out of execution; for a mortgagee has a right to his remedy on all his securities. *Colby* v. *Gibson*, 3 Smith, 516; 8 R. R. 738.

**Remedy at Law not Compulsory.**]—A mortgagee coming into equity, or being before the court, not sent to avail himself of his securities at law, since the matter must finally come round to the same end, on a bill to redeem. *Jacomb* v. *Harwood*, 2 Ves. 265.

**Merger—Suing for Difference between Interests on Mortgage and under Judgment.**]—By a mortgage deed the mortgagor covenanted to pay the debt on a day named, and (by a separate covenant) to pay interest at 7*l.* per cent., so long as the 3,000*l.* or any part thereof should remain

due. The mortgagee obtained a judgment for the principal and interest due at the date of the judgment with interest at 4*l.* per cent. on the sum made up by such principal and interest:—Held, that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to sue for the difference between interest at 7*l.* per cent. on the mortgage debt and the interest at 4*l.* per cent. paid under the judgment. *Popple* v. *Sylvester*, 52 L. J., Ch. 54; 22 Ch. D. 98; 47 L. T. 329; 31 W. R. 116. Distinguished in *Fewings, Ex parte, Sueyd, In re*, 53 L. J., Ch. 545; 25 Ch. D. 338; 50 L. T. 100; 32 W. R. 352.

**After Foreclosure and Sale.**]—After foreclosure and sale of the mortgaged estate, injunction was granted to restrain the mortgagee from recovering the difference at law. *Perry* v. *Barker*, 8 Ves. 527; 9 R. R. 171.

After foreclosure and sale, the mortgagee may bring an action for the residue. *Tooke* v. *Hartley*, 2 Bro. C. C. 125.

**Ground for Restraining.**]—It is no ground for restraining a mortgagee from enforcing his security at law that he has contracted to buy from the mortgagor another estate, from the purchase-money from which the mortgage debt is to be deducted. *Pell* v. *Stephens*, Coop. t. Brough. 266.

The circumstance of the mortgagee with power of sale having contracted to sell a portion for a sum exceeding the amount due to him:—Held, not a sufficient ground for restraining him from enforcing by action the covenant for payment. *Willes* v. *Levett*, 1 De G. & Sm. 392.

The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought his bill to foreclose; this is regular, and the court will not stop the proceedings at law, unless the defendant brings in the money. *Rees* v. *Parkinson*, 2 Anst. 497; 3 R. R. 618.

—— **Impossibility of Restoring Estate.**]—If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, a court of equity will prevent him suing at law to recover the mortgage money. *Palmer* v. *Hendrie*, 27 Beav. 349.

A mortgagor having transferred the equity of redemption, the transferee and mortgagee joined in a partial alienation of the property, but the money was received by the transferee alone:—Held, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay. *Ib.*

**Since Judicature Act.**]—Since the Judicature Acts, a second action brought to recover arrears of interest on the mortgage while the foreclosure action is still pending will be stayed as vexatious. *Poulett* v. *Hill*, 62 L. J., Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503—C. A.

**Devisee in Trust.**]—A devisee in trust of mortgaged premises, for sale and payment of the debts of the mortgagor, borrowed 200*l.* of the plaintiff, for the purpose of paying off a portion of the debts of the mortgagor; and by deed between him and the plaintiff, reciting these facts, charged the premises with payment of that amount, and covenanted that he and his heirs should, out of the money that should come to his hands as such trustee, or out of the personal estate, if any, of the mortgagor, pay to the plaintiff the principal and interest secured by the deed:—Held, that the plaintiff was not entitled to sue the devisee in an action for money lent, but that his remedy was upon the covenant contained in the deed. *Mathew* v. *Blackmore*, 1 H. & N. 762; 26 L. J., Ex. 150; 5 W. R. 363.

**Deed not executed by Mortgagees.**]—There were cross covenants in a mortgage deed, and the mortgagees did not execute it:—Held, that they might nevertheless bring their action against the mortgagor, who did execute. *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193.

**Delivery up of Deeds—7 Geo. 2, c. 20, s. 1.**]—Where an action is brought on the covenant for payment in the mortgage deed, the case is within the act, and an order may be made for the delivery up of deeds. *Smeeton* v. *Collier*, 5 D. & L. 184; 1 Ex. 457; 17 L. J., Ex. 57.

The order may be made at chambers. *Ib.*

**Practice—Agreement not to call in is Conditional.**]—When, default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal conditional on the punctual payment of interest. *Seaton* v. *Twyford*, 19 W. R. 200.

—— **Pleading—Effect of Exercise of Power of Sale.**]—To a declaration on a mortgagor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee, after giving credit for the money realised on the sale of the property, the defendant pleaded, by way of equitable defence, a plea which shewed that the plaintiff had taken possession of the property, and had sold it under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property conveyed to him upon payment of the money and interest due on the mortgage:—Held, that the plea was clearly bad, since it did not shew that sufficient had been realised by the sale to satisfy the debt. *Rudge* v. *Richens*, 42 L. J., C. P. 127; L. R. 8 C. P. 127; 28 L. T. 537.

—— **Concurrent Actions—Costs.**]—A mortgagee by deed, of lands, after commencing an action in the Chancery Division for an account of what was due on the mortgage, and for sale of the mortgaged premises, brought a personal action in a common law division on the covenant in the mortgage deed for payment of the principal debt and interest, and moved for final judgment. The defendant had not moved to stay the second action:—Held, that the plaintiffs were entitled to judgment, but without costs

of the action or motion. *Bourke* v. *Donoghue*, 20 L. R., Ir. 324.

3. On Collateral Securities.

**Generally.**]—Mortgagee has a right to proceed on his mortgage and bond at the same time. *Schoole* v. *Sall*, 1 Sch. & Lef. 176.

In a suit by an assignee of a policy of insurance upon trust, as a collateral security accompanying a mortgage of real estate:—Held, under the circumstances, that the mortgagee was not entitled to a decree for the sale of the policy. *Dyson* v. *Morris*, 1 Hare, 413; 11 L. J., Ch. 241; 6 Jur. 297.

**Waiver.**]—If a mortgagee has a bond as a counter-security, his issuing process or making use of his counter-security is not a waiver of his mortgage. *Birch's Case*, Gilb. Exch. Rep. 186.

**Donatio Mortis Causâ.**]—Mortgage or bond given as collateral security for money due on mortgage cannot be made subject of donatio mortis causâ. *Duffield* v. *Elwes*, 1 Sim. & S. 239; 1 L. J. (o.s.) Ch. 213.

**Lease.**] — The defendant having taken a deposit of a lease as a collateral security, decreed to take an assignment. *Lucas* v. *Comerford*, 3 Bro. C. C. 166; 1 Ves. J. 235. *But see* 8 Sim. 499.

**Equitable Mortgage to secure Bond Debt.**]—Where the assignee of a bond debt had obtained from his debtor an equitable mortgage, by way of collateral security, which having been sold under a decree of a court of equity did not produce sufficient for payment of the full amount of the debt:—Held, that the creditor was not entitled to have the balance paid him, under an order of a court of equity. *Keys* v. *Williams*, 3 Y. & C. 462; 3 Jur. 950.

**After Bill by First Mortgagee.**]—A. mortgaged to B. an oat mill and certain lands. He afterwards erected additional mills and machinery, and mortgaged the equity of redemption to C., to whom he also gave a bond collateral:—Held, that, after a bill of foreclosure filed by B. to which C. was made a party defendant, C. could not, under an execution sued out on his bond, seize the movable machinery erected after the date of B.'s mortgage. *M'Cluney* v. *Lemon*, Hayes, 154.

**After Foreclosure and Sale.**]—After foreclosure, the mortgagee fairly sold the estate for less than what was due to him:—Held, that he could not afterwards recover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid. *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J., Ch. 347; 10 Jur. 532.

**After Part Payment on Foreclosure.**]—Where a debt is secured on mortgage, covenant, and bond, if the mortgagee forecloses first, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant. *Ib.*

Representatives of mortgagee, after foreclosure, sell the mortgaged premises, and, the amount not being sufficient to pay the debt, bring an action on the bond. Injunction to restrain their proceeding dissolved. *Tooke* v. *Hartley*, 2 Bro. C. C. 125.

**Extent of Security—Claim in Bankruptcy for Deficiency.**]—A mortgagee, who has a bond as a collateral security, received part of his debt under a decree of foreclosure and sale. The mortgagor having become bankrupt, the mortgagee, upon giving up all the remaining benefit of the decree, was allowed to come in for the deficiency under the commission. *Wyly, Ex parte*, Vern. & Scriv. 518.

**Mortgage of Policy—Entering up Judgment on Warrant of Attorney.**]—A debt having been secured by a policy of insurance effected on the life of one of the debtors, the debtors, by way of further security, executed a warrant of attorney to their creditor to enter up judgment for the debt, the defeasance of the warrant providing that, so long as the policy was kept on foot by the debtors, judgment should not be entered up, nor execution issued on the warrant; by indenture of even date with the warrant, and executed by the debtors, a similar stipulation was made as to execution on the warrant, with a further provision that, on default by the debtors in payment of the premiums within a certain period after they should become due, the creditor might himself either keep the policy on foot, or effect a new policy in his own name, at the expense of his debtors. The debtors having failed to pay the premiums in due time, and the creditor not exercising his right to keep it on foot, the policy became forfeited; four days afterwards, the creditor, who was a director of the insurance company, paid up the premium, and induced the office to renew the policy:—Held, that he was nevertheless entitled to enter up judgment, and issue execution on the warrant of attorney; and a bill by the debtors, seeking to restrain him from so doing, was dismissed. *Winthrop* v. *Murray*, 8 Hare, 214; 19 L. J., Ch. 547; 14 Jur. 302.

**Suing in Two Capacities.**]—A creditor by mortgage and collateral bond cannot sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other; nor for the purpose of obtaining payment out of the real assets of his debtor can he sue as sole specialty creditor, unless he make all persons interested in contesting that fact parties to the suit. *White* v. *Hillacre*, 3 Y. & C. 597; 4 Jur. 102.

**Limitation by Lapse of Time.**]—Where a bond is entered into as a collateral security for money by mortgage, and the interest being in arrear the mortgagee takes possession, and remains in possession upwards of twenty years without taking interest otherwise than by receipt of rents and profits, quære whether his remedy on the bond is not barred in equity as well as at law by the Statute of Limitations. *Ib.*

**Transfer on Redemption.**]—In a foreclosure action personal judgment for the mortgage debt being given against the mortgagor, and a foreclosure judgment against the mortgagor and a purchaser from him:—Held, that the purchaser, in the event of his redeeming the mortgage, would be entitled to have transferred to him the personal judgment against the mortgagor, as being one of the securities held by the mortgagee

for the debt. *Greenough* v. *Littler*, 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

Leave was given to the purchaser to apply in chambers for a sale of the property. *Ib.*

**Restraining.**]—Mortgagee having possession of mortgagor's title deeds lodged them with an attorney, who claimed a lien on them for business done for mortgagee. On application of mortgagor, mortgagee was restrained from proceeding at law upon his collateral security. *Schoole* v. *Sall*, 1 Sch. & Lef. 176.

—— **Right to Interest—Practice.**]—On an application to stay proceedings in an action on a bond securing the principal and interest payable on a mortgage, if the mortgagee seeks to obtain interest for the interval between granting the rule and the actual payment of the principal into his hands, he must make his claim to it at the time of discussing the rule, for he cannot afterwards sustain it. *Jordan* v. *Chowns*, 8 D. P. C. 709.

4. DISTRESS—ATTORNMENT CLAUSE.

**Distress—Amount of.**]—B. executed a mortgage of certain real property to secure the payment of 12,500*l.*, with interest at 4*l.* 15*s.* per cent., payable half-yearly, on the 8th May and 9th November in each year; and the deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagees at the yearly rent of 593*l.* 15*s.*, that being the exact amount of the interest reserved by the deed, and payable on the same days, namely, the 1st July and the 1st January. The mortgagor subsequently filed his petition, and, composition resolutions having been resolved upon, the mortgagees, on the 19th November, 1880, distrained for a half-year's rent under the attornment clause, although at that time, in accordance with an arrangement which had been previously entered into and acted upon by both parties, the interest had been paid by the trustees appointed under the composition proceedings down to July 1st, 1880. Upon the application of the trustees, the county court judge decided that the mortgagees were only entitled to receive the amount of rent or interest from the 1st July:—Held, that the mortgagees were entitled to the full amount for which they had distrained, and that the balance, after payment of the interest then due, was applicable for the reduction of the principal debt. *Harrison, Ex parte, Betts, In re*, 50 L. J., Ch. 832; 18 Ch. D. 127; 45 L. T. 290; 30 W. R. 38—C. A.

—— **Creation of Relation of Landlord and Tenant—Notice.**]—A mortgage deed by which a messuage and premises were conveyed to the trustees of a building society to secure payment by the mortgagor of the sums payable by him under the rules of the society contained a provision that, in case of default in such payment, then immediately, or at any time after such default should have been made, the mortgagor should and would hold the premises, expressed to be thereby conveyed, as yearly tenant to the trustees from the day of the date of the deed at a certain yearly rent, and that the trustees should have the same remedies for recovering the rent as if the same had been reserved by a common lease. Default was made by the mortgagor under the deed, and in the following year the trustees distrained, for a year's rent, the goods of the plaintiff which were upon the premises. No notice was ever given to the mortgagor by the trustees of the society that they intended to treat him as tenant. The plaintiff brought trover for the goods so distrained against the trustees:—Held, that the trustees were not entitled to treat the mortgagor as a tenant until they had given him notice of their intention to alter the relation in which he stood to them, from that of mortgagor and mortgagee to that of tenant and landlord; and that consequently the distress could not be justified, and the plaintiff was entitled to recover. *Clowes* v. *Hughes*, 39 L. J., Ex. 62; L. R. 5 Ex. 160; 22 L. T. 103; 18 W. R. 459.

—— **On Partnership Property.**]—P. and F. were in partnership as brickmakers, and they mortgaged lands which they used for their partnership purposes, and of which they were seised as tenants in common, and also each of them separately attorned as tenants to the mortgagees in respect of a moiety of the property which was in their joint occupation and at a separate rent. Subsequently the mortgagees took out separate distresses against the mortgagors for six years' rent due from each for his one equal undivided moiety of the premises, and they seized chattels on the partnership premises. The mortgagors became bankrupt, and the receiver in the bankruptcy claimed the goods as against the mortgagees:—Held, that the mortgagees, having in both cases distrained on goods which were the joint partnership property of the bankrupts, had exceeded their rights, and that they could not distrain on goods in which the tenant and another person had an undivided interest. *Parke, Ex parte, Potter, In re*, 43 L. J., Bk. 139; L. R. 18 Eq. 381; 30 L. T. 618; 22 W. R. 768.

**Attornment—Effect of.**]—An attornment in a mortgage deed by the mortgagor as tenant to the mortgagee, at a rent reserved, creates a tenancy and rent with all its incident remedies, so that the mortgagee can in such a case distrain upon the goods of a third person, who has no notice of the mortgage, which may be on the mortgaged premises at the time of default in payment of rent by the mortgagor. *Kearsley* v. *Philips*, 52 L. J., Q. B. 581; 11 Q. B. D. 621; 49 L. T. 435; 31 W. R. 909—C. A.

A mortgage by mortgagors in possession, of premises used for the purposes of trade, contained a provision that the mortgage should continue for five years if the interest should be regularly paid, and the mortgagors should not become bankrupt, or take proceedings for liquidation or composition, and also an attornment clause whereby the mortgagors attorned tenants to the mortgagee at a rent far exceeding the interest on the mortgage or the annual value of the property. The mortgagors having gone into liquidation, the mortgagee claimed under the attornment to distrain for a year's rent:—Held, that the attornment clause was a mere device for making the chattel subject to the mortgage without a bill of sale, and, being a fraud upon the bankruptcy laws, an injunction must be granted to restrain him from proceeding with his distress. *Thompson, In re, Williams, Ex parte*, 47 L. J., Bk. 26; 7 Ch. D. 138; 37 L. T. 764; 26 W. R. 274—C. A.



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A. mortgaged to B. the lease of a house and two policies of assurance to secure 250*l.*, with interest at 10*l.* per cent., and after covenanting to pay the interest, 25*l.*, the rent reserved by the lease. 115*l.*, and the premiums on the policies, 32*l.* 12*s.* 6*d.*, he attorned tenant from year to year to B., the mortgagee, at the yearly rent of 175*l.*, which sum exceeded the amount of the interest, the landlord's rent, and the premiums by 2*l.* 7*s.* 6*d.* A. having become bankrupt, the mortgagee distrained under the attornment clause for 175*l.*, as for a year's rent due, notwithstanding that the interest, the landlord's rent, and the premiums had all been duly paid, and seized goods upon the premises belonging to a third party:—Held, that, notwithstanding the difference in the amounts, the attornment clause was intended to secure the interest, the landlord's rent, and the premiums, and nothing more, and that these having all been duly paid, the distress was unlawful. Secus, if the object of the attornment clause had been expressed to be for enabling the recovery of the principal as well. *Hampson* v. *Fellows*, 37 L. J., Ch. 694; L. R. 6 Eq. 575; 19 L. T. 6.

By a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that, if default should be made in payment of the mortgage-money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers, or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt:—Held, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgaged premises. *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547; 5 Jur. (N.S.) 689; 7 W. R. 532.

Held, secondly, that the express power of distress was not a power in gross, but one annexed to the tenancy, and that the distress was valid. *Ib.*

The deed could not operate as a grant of a rent-charge, as the mortgagor had no estate in him to create such a right. *Ib.*

B., being mortgagor in possession, executed a mortgage on the 12th of September, 1866, of the premises to his bankers to secure the repayment with interest of certain advances to be made by them. The mortgage was by indenture between B. and his bankers, but was never executed by them: the deed recited the previous mortgage (which was in fee), and by it B. conveyed all the premises comprised in the recited mortgage to his bankers, in fee, upon trust that they should, either immediately or at any time, sell them, "and, as a further security for the principal and interest for the time being due from B. to them, B. did thereby attorn and become tenant to them, their heirs and assigns, as and from the date thereof, of such of the premises thereby conveyed as were in his occupation, for and during the term of ten years, if that security should so long continue, at the yearly rent of 800*l.*, to be paid on the 1st of October, the first yearly rent to be payable on the 1st of October then next. Provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the bankers, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale, to enter upon the mortgaged premises, or any part thereof, and to eject B. or any person claiming through him, and to determine the term of ten years, notwithstanding any lease that might have been granted by B." The bankers made the stipulated advances, and B. continued in occupation of the premises; and on the 15th of October, 1866, they distrained for the first year's rent:—Held, first, that the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, and not a term of ten years; that, a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the bankers had not executed the deed was immaterial. *Morton* v. *Woods*, 18 L. T. 791. Affirmed, 9 B. & S. 632; 38 L. J., Q. B. 81; L. R. 4 Q. B. 293; 17 W. R. 414—Ex. Ch.

Held, secondly, that, the parties having agreed that the relation of landlord and tenant should be established between them, the mortgagor was estopped from setting up that the mortgagees had no legal reversion; and that it made no difference that the fact of the mortgagor having only the equity of redemption appeared on the face of the deed; and that the distress was therefore lawful. *Ib.*

A mortgage deed contained an attornment clause whereby A. (the mortgagor) attorned and became tenant from year to year to B. (the mortgagee) for and in respect of the mortgaged premises, at the yearly rent of 800*l.*, to be paid by equal quarterly payments. And it was thereby agreed that it should be lawful for B., at any time after three months from the date of the mortgage, without giving previous notice of his intention so to do, to enter upon and take possession of the premises whereof A. had attorned tenant, and to determine the tenancy created by the aforesaid attornment. A. filed a liquidation petition, and on the same day a receiver was appointed, who entered into possession of A.'s estate and effects. Notice of the petition and of the appointment of a receiver was sent to B., who two days later, by virtue of the attornment clause, distrained upon the goods and chattels on the mortgaged premises for a half-year's rent then due:—Held, that a tenancy from year to year and not a tenancy at will was created by the attornment clause, and that B. was entitled, under the act of 1869, s. 34, to distrain for the rent due to him from A. at the time of filing the liquidation petition. *Morton* v. *Woods* (L. R. 4 Q. B. 293) explained. *Queen's Benefit Building Society, Ex parte*, or *Blakey, Ex parte, Threlfall, In re*, 50 L. J., Ch. 318; 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128—C. A.

A limited company gave, in 1875, a mortgage to its bankers for its account current, by covenant to surrender its copyhold works, and by the mortgage deed the company became tenant to the bankers at the rent of 5,000*l.* No surrender of the copyholds was made. On the 16th July, 1877, the bankers sent an auctioneer to distrain for 10,000*l.*, being two years' rent. The auctioneer, on the same day, saw the managing director of the company, gave him formal notice of distraint,

and by arrangement with him employed two workmen of the company to keep possession of the chattels distrained. On the 18th July, the company requested the bankers not to proceed to an immediate sale, to which the bankers assented, and the two men remained in possession. On the 19th July a petition was presented for winding up the company; and on the 28th July a winding-up order was made. By arrangement with the liquidator, the men went out of possession in October, and in November the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, and realised less than 5,000*l.*:—Held, that the attornment clause created the relation of landlord and tenant; that, there being no ground for saying that the rent of 5,000*l.* was so unreasonable as to be fraudulent, the mortgagees had the same rights of distress as any other landlord; and that, as the value of the chattels sold was less than one year's rent, on the mortgagees abandoning all claim to the chattels remaining unsold, the proceeds of sale must go to them. *Stockton Iron Furnace Co., In re*, 48 L. J., Ch. 417; 10 Ch. D. 335; 40 L. T. 19; 27 W. R. 433.

Held, also, that the doctrine of reputed ownership had no application, as a distress does not make the landlord the owner of the goods distrained. *Ib.*

And see *Jackson, Ex parte, Bowes, In re*, 14 Ch. D. 725; 43 L. T. 272; 28 W. R. 523—C. A.

—— **Death of Mortgagor—Payment of Interest by Heir—Inference of Tenancy.**]—Where a mortgage of a freehold farm and chattels contained an attornment clause by the mortgagor, and the mortgagor died, the court refused to infer an agreement for a new tenancy at will by the mortgagor's son—entitling the mortgagee to distrain—from the fact of the son having entered as heir-at-law and for six years paid the interest on the mortgage, he (the son) having paid it as interest and in ignorance of the attornment clause. *Scobie* v. *Collins*, 64 L. J., Q. B. 10; [1895] 1 Q. B. 375; 15 R. 6; 71 L. T. 775.

—— **To Second Mortgagee.**]—An attornment by a mortgagor to a second mortgagee is valid, notwithstanding the fact that the mortgagor has already attorned tenant to the first mortgagee of the same property. And, if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, so that there is no fraud on the bankruptcy law, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. *Morton* v. *Woods* (L. R. 4 Q. B. 293), explained and followed. *Punnett, Ex parte, Kitchin, In re*, 50 L. J., Ch. 212; 16 Ch. D. 226; 44 L. T. 226; 29 W. R. 129.

—— **Bills of Sale Act.**]—Sect. 6 of the Bills of Sale Act, 1878 (enacting that every attorney whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any debt or advance shall be deemed to be a bill of sale, within the meaning of the act, of any personal chattels which may be seized or taken under such power of distress), and s. 9 of the Bills of Sale Act, 1882 (by which a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule), do not render void the ordinary attornment clause contained in mortgages of real property so as to destroy the relation of landlord and tenant created by it between the mortgagee and mortgagor. *Mumford* v. *Collier*, 59 L. J., Q. B. 552; 25 Q. B. D. 279; 38 W. R. 716.

**Account.**]—In taking the account in a foreclosure action between first mortgagee and second mortgagee and mortgagor, an attornment clause in his mortgage deed will not render the first mortgagee liable to account on the footing of mortgagee in possession in respect of the rent reserved by the attornment clause. *Stanley* v. *Grundy*, 52 L. J., Ch. 248; 22 Ch. D. 478; 48 L. T. 606; 31 W. R. 315.

### 5. Ejectment.

**Generally.**]—Court refused to interfere by injunction to prevent a mortgagee from pursuing his legal remedy to get possession of the mortgaged premises. *Davies* v. *Williams*, 7 Jur. 663.

**With Foreclosure.**]—Mortgagee is not precluded from bringing an ejectment at law at the same time he has bill of foreclosure depending here. *Booth* v. *Booth*, 2 Atk. 343.

Mortgagee may bring ejectment and bill to foreclose. *Garforth* v. *Bradley*, 2 Ves. 678.

**7 Geo. 2, c. 20.**]—A mortgagor, in order to entitle himself to the benefit, in a court of law, of the 7 Geo. 2, c. 20, s. 1, must become a defendant in the action of ejectment. Where he is not such defendant the court will not interfere. *Doe* d. *Hurst* v. *Clifton*, 4 A. & E. 814; 2 H. & W. 285; 6 L. J., K. B. 274.

**Condition of Staying.**]—In ejectment by a mortgagee, the court, or a judge, can include, as a condition of an order for a stay of proceedings, the payment of the costs of an abortive attempt at the sale under a power. *Dowle* v. *Neale*, 10 W. R. 627.

**After Receiver and Decree for Sale.**]—A second incumbrancer having obtained the appointment of a receiver, and a decree for a sale, without making the first incumbrancer a party, a petition by the latter for a reference to ascertain priorities, and for the receiver to keep down the interest, refused, on the ground that the petitioner had commenced a suit for the same purpose, and had delayed it; but leave was given to bring an ejectment. *Brooks* v. *Greathed*, 1 J. & W. 176.

**Waiver of Default—Restraint of Ejectment.**]—Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion, within two years, interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, a waiver of the default, and injunction granted to restrain an ejectment brought within the two years. *Langridge* v. *Payne*, 2 J. & H. 423; 7 L. T. 23; 10 W. R. 726.

**Statute of Limitations.**]—A legal mortgage of freehold land in 1856; no possession by the

mortgagee, and no payment of principal or interest to him nor any acknowledgment of his title. In 1870 a bill by the mortgagee for redemption or foreclosure; in 1874 a decree nisi for redemption or foreclosure; and in 1877 an order absolute for foreclosure. In 1878 an action by the mortgagee to recover possession of the land:—Held, that, although brought more than twenty years after the date of the mortgage deed, the action was not barred by the Statutes of Limitations (3 & 4 Will. 4, c. 27 & 1 Vict. c. 28). *Pugh* v. *Heath*, 51 L. J., Q. B. 367; 7 App. Cas. 235; 46 L. T. 321; 30 W. R. 553—H. L. (E.)

Semble, per Earl Cairns, that the action being brought by one who had become absolute owner of the land under the foreclosure decree was an action as to which the right to bring it must be taken to have accrued within s. 2 of 3 & 4 Will. 4, c. 27, at the date of that decree; and that s. 3 of that act, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive, or otherwise inconsistent with this view. *Ib.*

—— **Evidence.**]—In an ejectment by a mortgagee against a mortgagor, to recover a house, he gave in evidence the mortgage deed (which included the house and some other property), and judgment in ejectment for the mortgaged property obtained in 1847; and shewed that a paper (suggested to have been the declaration in ejectment) was, in that year, served on the mortgagor, and that from 1847 the mortgagor, who had till then been in possession of all the property, only held the house:—Held, that there was no evidence of possession by the mortgagee, or of the creation of a new tenancy under him in 1847, so as to prevent the operation of the Statute of Limitations. *Thorp* v. *Facey*, 1 H. & R. 678; 35 L. J., C. P. 349; 12 Jur. (N.S.) 741.

**Practice—Ord. III. r. 6—Ord. XIV.**]—A mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default having been made, the mortgagee commenced an action for the recovery of the premises, and applied for judgment under Ord. XIV.:—Held, that the mortgagor was a tenant whose term had expired, or had been duly determined by notice to quit, within the meaning of Ord. III. r. 6 (F.), and the plaintiff was entitled to judgment. *Daubuz* v. *Lavington* (13 Q. B. D. 347), approved and followed. *Hall* v. *Comfort*, 56 L. J., Q. B. 185; 18 Q. B. D. 11; 55 L. T. 550; 35 W. R. 48. S. P., *Daubuz* v. *Lavington*, 53 L. J., Q. B. 283; 13 Q. B. D. 347; 51 L. T. 206; 32 W. R. 772.

## N. FORECLOSURE.

1. *Right to*, 1708.
2. *Who Bound by*, 1714.
3. *Against Crown*, 1715.
4. *Against Infants*, 1716.
5. *Against Lunatics*, 1720.
6. *Against Married Women*, 1721.
7. *Tenant for Life and Remainderman*, 1721.
8. *Trustee in Bankruptcy*, 1723.
9. *Under 7 Geo. 2, c. 20*, 1723.
10. *Time*, 1725.
11. *Attendance for Payment*, 1732.
12. *Opening*, 1733.
13. *Staying*, 1737.
14. *Proceedings for*, 1738.
15. *Costs and Expenses*—*See* post, S. 5, col. 1851.

### 1. RIGHT TO.

**One of Several Mortgagees.**] — One of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs. *Luke* v. *South Kensington Hotel Co.*, 48 L. J., Ch. 361; 11 Ch. D. 121; 40 L. T. 638; 27 W. R. 514—C. A. *See also cases*, post, **R**, 1, *b.*, col. 1817.

**Conveyance on Trust, with Power of Sale.**]—Conveyance of real estate upon trust to secure the payment of advances made upon the security thereof, with a power of sale, held not to entitle the mortgagee to a decree for foreclosure. *Sampson* v. *Pattison*, 1 Hare, 533.

**Purchaser.**]—A. mortgaged three houses (23, 26 and 27) to B., and afterwards contracted to sell 23 (one of the houses) to C.; C. paid the purchase-money to A. under the contract, but without obtaining a conveyance, and with constructive notice of the prior mortgage to B.; C. afterwards paid off what was due to B. upon his mortgage, and, having taken a transfer of the mortgage, filed a bill against the devisee of A. and several mortgagees under subsequent mortgages made by A., which included the houses 26 and 27 and other property, and obtained a decree for the specific performance by the devisees of A. of the contract of sale as to the house 23, and for successive foreclosure of all subsequent mortgagees and the devisees of A., in default of the redemption of the houses 26 and 27. *Sober* v. *Kemp*, 6 Hare, 155, 160.

**Equitable Mortgagee.**]—An equitable mortgagee, as of right, is entitled to a foreclosure, and not to a sale. *Cox* v. *Toole*, 20 Beav. 145.

An equitable mortgagee is entitled to a conveyance and foreclosure, unless the mortgagor requires a sale, and will make the proper deposit. *Underwood* v. *Joyce*, 7 Jur. (N.S.) 566.

**Mortgagee by Deposit.**]—The proper remedy for an equitable mortgagee with a deposit of title deeds is by a decree for foreclosure, and not a sale. *James* v. *James*, 42 L. J., Ch. 386; L. R. 16 Eq. 153; 21 W. R. 522.

—— **Without Memorandum.**]—The right of an equitable mortgagee by deposit without memorandum is foreclosure, not sale. *Semble* v. *Wilson*, 5 N. R. 395.

—— **With or without Memorandum.**]—The relief to which an equitable mortgagee by deposit of title deeds with or without a memorandum of deposit is entitled is foreclosure. *Backhouse* v. *Charlton*, 8 Ch. D. 444; 26 W. R. 504.

—— **With Memorandum to execute Legal Mortgage.**]—Where there is a mortgage by deposit of deeds, and the memorandum states an agreement to execute a legal mortgage, a decree

on a bill to enforce the security will not direct a sale, but foreclosure; but if there is no memorandum a sale will be directed. *London Monetary Advance, &c. Co.* v. *Brown*, 12 L. T. 199; 13 W. R. 490.

When a bill is filed for foreclosure or sale by an equitable mortgagee by deposit, accompanied by a memorandum of agreement to execute a legal mortgage, the court will not decree a legal sale, but will order the execution of a legal mortgage, with due provision for the foreclosure of such legal mortgage when executed. *Yeatman* v. *Reed*, 36 L. J., Ch. 136; 15 L. T. 349; 15 W. R. 168.

Where a deposit of title deeds was accompanied by a memorandum containing an express stipulation that the depositor would, if required, execute a mortgage, upon a claim to obtain the benefit of the security, the depositee was held entitled to a decree for foreclosure. *Moore* v. *Perry*, 1 Jur. (N.S.) 126.

—— **Suit by, against Bankrupt's Trustee.**]—An equitable mortgagee, by deposit of title deeds, having commenced an action for foreclosure against the trustee of a bankrupt's estate, the Court of Appeal declined to interfere under the Bankruptcy Act, 1869, s. 72. *Pannell*, or *Pennell*, *Ex parte*, *England*, *In re*, 47 L. J., Bk. 21; 6 Ch. D. 335; 37 L. T. 450; 26 W. R. 194.

**Person standing in Shoes of Equitable Mortgagee.**]—Two promissory notes being given, accompanied by a memorandum and deposit of title deeds, to remain as a security for both sums, judgments are entered up against the drawer; the acceptor of the notes and depositee of the debts transfers his interest by a mortgage on the premises comprised in the deeds, in which the drawer confirms and the acceptor releases. Upon a foreclosure claim by the transferee, and the question whether the transfer was not a separate transaction, and therefore came after the judgment debts:—Held, that the plaintiff was entitled to foreclosure, and stood in the shoes of the first equitable mortgagee. *Neve* v. *Hodges*, 2 W. R. 315.

**Pledgee of Personal Chattels.**]—The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure does not extend to a pledgee of personal chattels. *Carter* v. *Wake*, 46 L. J., Ch. 841; 4 Ch. D. 605.

**Personal Obligation with Deposit.**]—When a personal obligation is given to pay a sum of money advanced to a party, accompanied by a deposit of copies of court rolls, a foreclosure will be decreed, and not a sale. *Price* v. *Curtis*, 1 Jur. 233.

**Judgment Creditor.**—The relief to which a judgment creditor is entitled under the 1 & 2 Vict. c. 110, is a foreclosure, and not a sale. *Jones* v. *Bailey*, 17 Beav. 582.

A judgment creditor, ranking after a first mortgagee, but prior in date to a further charge and to other judgments, held entitled to a foreclosure, although all the other parties insisted on a sale. *Messer* v. *Boyle*, 21 Beav. 559.

**Part Owner.**]—A person entitled to part only of a sum of money due on mortgage cannot file a bill for a foreclosure of the same part of the mortgaged estate. *Palmer* v. *Carlisle* (*Earl*), 1 Sim. & S. 423.

**Two Mortgages, One Mortgagee.**]—A mortgagee, having separate mortgages created by the same mortgagor on two different estates, has not the right to foreclose both estates on nonpayment of the aggregate amount of the mortgage debts, but can only foreclose each estate separately on nonpayment of what is secured upon it. *Holmes* v. *Turner*, 7 Hare, 367, n. S. P., *Smeathman* v. *Bray*, 15 Jur. 1051.

—— **Where prior Mortgages.**]—A mortgagee of two different estates, each of which was subject to a prior mortgage to distinct mortgagees, was held entitled, as against the mortgagor, to redeem or foreclose either or both of such estates. *Pelly* v. *Wathen*, 7 Hare, 351; 18 L. J., Ch. 281; 14 Jur. 9.

**Copyhold.**]—Before admittance, mortgagee of copyholds may bring bill of foreclosure, and after decree an ejectment for possession of the premises. *Sutton* v. *Stone*, 2 Atk. 101.

**Annuity out of Lands.**]—An annuity is granted out of lands, and made redeemable on payment of a sum of money. The grantor cannot be foreclosed of the land, though he may of the redemption of the annuity. *Carnesew* v. *Arscott*, 1 Vern. 209.

**Policy of Assurance—Without Power of Sale.**]—Where a policy of assurance on the life of the mortgagor was, upon a further advance being made, assigned as a collateral security, with a declaration of trust that the mortgagee should stand possessed of the moneys to be received under the policy upon trust to pay his debt, &c., and without any power of sale; the court held this declaration to be a ground for excluding the right of sale which the mortgagee would otherwise have had, but allowed the mortgagee to foreclose, retaining the policy; the court observing that it would have power to interfere if the policy was used for the purpose of obtaining more than the value of the debt. *Dyson* v. *Morris*, 1 Hare, 413; 11 L. J., Ch. 241; 6 Jur. 297.

**Reversionary Interest in Stock.**]—The mortgagee of a reversionary interest in stock in the public funds, with a power of sale, may bring his bill for foreclosure; and is entitled to a decree in the common form for an account, and, in default of payment, for foreclosure. *Slade* v. *Rigg*, 3 Hare, 35.

**Share in Colliery Partnership.**]—The mortgagee of a share in a colliery partnership is entitled to a decree for foreclosure, but he is not entitled to any account of the property paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery, but he is entitled to say that no extra burden shall be thrown on his shares which is not in accordance with some contract or agreement in force at the date of the mortgage. *Redmayne* v. *Foster*, 35 Beav. 529.

**Sub-demise of Leasehold.**]—A mortgage by sub-demise of leasehold property contained an absolute declaration of trust by the mortgagor of

his reversion. The mortgagor having refused to convey, the court decreed judgment for foreclosure of the equity of redemption in the premises, and of the reversionary term; but the court refused to make a vesting order as to the reversion until the decree absolute. *British Empire Mutual Life Assurance Co.* v. *Sugden*, 47 L. J., Ch. 691; 26 W. R. 631.

**After Part Payment on Covenant or Bond.**—Where a debt is secured by mortgage, covenant, and bond, if the mortgagee obtain, on the covenant or bond, part payment only, he may go on with his foreclosure suit and foreclose for the remainder. *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J., Ch. 347; 10 Jur. 532.

**On Covenant.**]—Although by the mortgage deed no day was fixed for repayment, yet, there being a covenant by the borrower to pay when required to do so, and a covenant by the lender to reconvey upon being repaid, it was held that a bill for foreclosure was maintainable. *Balfe* v. *Lord*, 1 Con. & L. 519; 2 Dr. & War. 480; 4 Ir. Eq. R. 648.

**Presumption of Equity.**]—A court of equity will presume an instrument of this nature, intended as a security for money advanced, to be an ordinary mortgage, and the lender entitled to the usual remedies of a mortgagor, unless the terms of the instrument exclude such a construction. *Ib.*

**Effect of Covenant in Prior Mortgage.**]—The plaintiff was transferee of a mortgage on the defendant's property, the original mortgage deed containing a personal covenant by the mortgagee not to proceed for the recovery of the mortgage money until the expiration of a notice. After the transfer the plaintiff made a further advance to the defendant, on the security of a deed further charging the same property, the defendant agreeing that it should not be redeemable until the payment of the whole amount due to the plaintiff. On a bill by the plaintiff, who had not given the notice, praying for an account of what was due on his securities, and for payment or foreclosure:—Held, that, assuming the covenant as to notice to affect the right to foreclose the original mortgage, it did not affect the plaintiff's rights under the subsequent mortgage; and that, as the defendant had precluded himself by his agreement from being admitted to redeem the subsequent without also redeeming the prior mortgage, the plaintiff was entitled to the relief which he asked for. *Haywood* v. *Gregg*, 24 W. R. 157.

**After Default of Interest.**]—In a mortgage of leaseholds there was a proviso for redemption in case the principal should be paid at the expiration of five years, with interest half-yearly in the meantime, at 5*l.* per cent. Default having been made in payment of the interest, a bill of foreclosure was filed, although the period for payment of the principal had not arrived:—Held, that, the condition having been broken, the mortgagee was entitled to a decree of foreclosure, notwithstanding he had taken possession of the property, and had realised, by sale of a portion of it, more than enough to cover the interest due. *Edwards* v. *Martin*, 25 L. J., Ch. 284; 4 W. R. 219.

**Equity of Redemption Purchased by first Mortgagee.**]—A mortgagee having instituted an action for foreclosure of a mortgage against the mortgagor, making a second mortgagee party, during the pendency of an action purchased the equity of redemption:—Held, that, the intention being apparent upon the deeds not to let in the second mortgagee as first mortgagee, such second mortgagee could only foreclose on terms of paying off the amount secured by the first mortgage. *Adams* v. *Angell*, 25 W. R. 139. Affirmed, 46 L. J., Ch. 352; 5 Ch. D. 634; 36 L. T. 334—C. A.

**Mortgage for Term and Trust for Sale of Fee.**]—Where money is secured by mortgage for a term, and by trust for sale of the fee, the mortgagee, if he files a bill praying for a sale only, is not entitled to foreclose the fee, nor, unless he amends his bill, to foreclose the term. *Kerrick* v. *Saffery*, 7 Sim. 371; 4 L. J., Ch. 162.

**Notwithstanding Notice to Pay off, or Decree for Redemption.**]—Until the mortgagee is actually paid off by his own consent, or by a decree of the court, he retains the character of mortgagee with all the rights incident to it, and may file a bill for foreclosure notwithstanding a notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption. *Grugeon* v. *Gerrard*, 4 Y. & C. 119.

**Under Assignment.**]—A. mortgaged to B., who filed a bill of foreclosure, and B., pending the suit, assigned to C., who mortgaged to D., and became insolvent. D. filed a supplemental bill, to have the benefit of the suit for foreclosure:—Held, that he was entitled to such relief. *Coles* v. *Forrest*, 10 Beav. 552.

**Right to Stand in place of Assignor.**]—After decree in a suit by a second mortgagee to redeem the first and foreclose the subsequent mortgagees, one of the latter assigned his interest in the premises to A., who filed a bill against all the parties in the first suit, praying to have the benefit of that suit, and also, to redeem the mortgages prior to his own and foreclose the others. This bill was dismissed with costs against all the defendants except the assignor, in whose place A. was declared to be entitled to stand in the further prosecution of the first suit. *Booth* v. *Creswicke*, 8 Sim. 352.

**Between Heir and Executor.**]—The heir of the mortgagee forecloses the mortgagor, the executor being no party. Upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land was decreed to the executor: but, if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage money and interest. *Clerkson* v. *Bowyer*, 2 Vern. 67.

**Further Advance on Mortgaged Realty, Covenant and Assignment of Policy.**]—The mortgagee of a real estate made a further advance, and took, as security for the same, a further charge upon the mortgaged premises, the covenant of the mortgagor for payment, and an assignment of a policy of assurance on the life of the mortgagor, upon trust to receive the moneys to become payable on the policy, and thereout first to pay the expenses of the trust, then to apply the residue towards payment of the mortgage debt, or so

much thereof as should remain due, and subject thereto upon trust for the mortgagor. Upon the bill of the mortgagee praying a sale of the policy, and payment by the mortgagor of so much of the debt as the proceeds of the sale should be insufficient to pay, or in default that the mortgagor might be foreclosed :—Held, that the mortgagee was entitled only to the usual decree for payment or foreclosure of the real estate, and not to a decree for the sale of the policy ; but that he was entitled to retain the policy upon the terms of the trust, notwithstanding the foreclosure of the real estate. *Dyson* v. *Morris*, 1 Hare, 413 ; 11 L. J., Ch. 241 ; 6 Jur. 297.

**Cancelling Mortgage.**]—Letters, which purported to cancel a mortgage, operating neither by way of gift nor as valid declarations of trust, the plaintiffs, mortgagee's executors, were entitled to the usual decree of foreclosure. *Scales* v. *Maude*, 1 Jur. (N.S.) 533 ; 3 W. R. 527.

**Trusts of Will.**]—A testator, by his will, gave to trustees a term of 500 years in real estate, upon trust to levy and raise 2,400*l.*, and when so raised upon trust to place out the same at interest upon government or real security, and call in and place out the same from time to time as they should think proper. In 1828 the trustees mortgaged the term for 2,400*l.*, and signed a receipt for the money. In 1845 the executors of the original mortgagee transferred the mortgage to C. and D., who in 1848 filed a bill for foreclosure. One of the defendants, who under the will was entitled to a portion of the 2,400*l.*, raised a question as to the trustees having ever received the sum, which it was alleged had been paid to other parties, and contended that the term was consequently not properly charged :—Held, that under the trusts of the will the trustees had an implied power to give a receipt for the money, and that the plaintiffs were entitled to a decree for foreclosure. *Locke* v. *Lomas*, 5 De G. & Sm. 326 ; 21 L. J., Ch. 503 ; 16 Jur. 813.

In this case, if the mortgagee had paid the money to the trustees, he would not have been bound to see to the application of it ; and, if his mortgage deed was regular on the face of it, the transferees would not have been affected by any breach of trust in which the trustees and the mortgagee might have been implicated. *Ib.*

**Bills Dishonoured, after Receipt given and Deeds handed over.**]—Where there was a mortgage payable in 1844, with interest only in the meantime, and in 1839 the mortgagor paid the principal by cheque and gave two bills, accepted by himself, but drawn by a third party, for the arrears of interest, and thereupon the following receipt was executed by the mortgagee : "London, 23rd December, 1839. Received the sum of 7,000*l.* in cash, and two bills of exchange as under for 3,120*l.*, drawn by C. & Co. of M., upon and accepted by the said C. the mortgagor, and which cheque for 7,000*l.* and bills for 3,120*l.*, making together 10,120*l.*, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for 10,000*l.*, and I do hereby undertake, whenever required, to execute a conveyance of the said property. (Signed) T." The deeds were delivered up to the mortgagor together with this memorandum, but the estate was not reconveyed. The cheque was paid, but the bills were dishonoured :—Held, that the mortgagee was entitled against the assignees of the bankrupt mortgagor to have the deeds redelivered up, and to have a foreclosure of the estate. *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31 ; 6 Jur. 987.

**For Costs only.**]—Where the debt in the nature of a mortgage debt is paid off, the mortgagee, entitled to a balance consisting of costs only, cannot have a decree of foreclosure in default of payment of such a demand for costs only, with costs. *Drought* v. *Redford*, 1 Moll. 572.

**Practice—Equitable Defence—Opening Signed Accounts.**]—Upon a proper case for opening signed accounts made by a mortgagor by his answer and evidence in a foreclosure suit in issue before the 2nd November, 1875, the court has power under the Judicature Act, 1873, s. 24, sub-ss. 2 and 3, to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counter-claim had been filed for the purpose. *Eyre* v. *Hughes*, 45 L. J., Ch. 395 ; 2 Ch. D. 148 ; 34 L. T. 211 ; 24 W. R. 597.

### 2. Who Bound by.

**Puisne Mortgagee not a Party.**] — Puisne mortgagee not bound by an account taken in a foreclosure cause, to which he was not a party. *Dick* v. *Butler*, 1 Moll. 42.

Subsequent mortgagees of equity of redemption are bound by decree of foreclosure, though not parties. *Winchester (Bishop)* v. *Paine*, 11 Ves. 194 ; 8 R. R. 131.

**Mortgagor Tenant for Life of Moneys secured by Second Mortgage.**]—A mortgagor being a defendant to a claim for foreclosure, in that character, and who, in such character, has a right given to him to redeem, is bound by the foreclosure, in respect of an interest which he may have as tenant for life under a settlement made of moneys secured by a second mortgage of the same estate, although such latter interest be not stated on the claim. *Bromitt* v. *Moor*, 9 Hare (App.) xxxix. n.

**Judgment after Foreclosure.**]—Judgment confessed after bill of foreclosure is ineffectual against plaintiff. *Metcalfe* v. *Pulvertoft*, 2 V. & B. 207 ; 13 R. R. 63.

**Issue.**]—Where settlement, on marriage, is made of an estate subject to a mortgage, if the mortgagee forecloses the husband and wife, it will bind, though issue is afterwards born. *Platt* v. *Sprigg*, 2 Vern. 304.

**Administrator Pendente Lite.**] — Decree of foreclosure against an administrator pendente lite, plaintiff knowing limited character in which administrator represented mortgagor, and that there were persons claiming the beneficial title to estate, not parties to suit, merely forecloses administrator pendente lite. Sale directed by decree of foreclosure to be made in a month, on the consent of administrator pendente lite ; not binding on persons beneficially entitled to the estate, not parties in the suit. *Ellis* v. *Deane*, Beat. 5.

**Purchaser under Second Mortgage made pending Suit.**]—Plaintiff in redemption suit became insolvent after decree, but before default in payment. The bill was dismissed after default, without bringing the assignee before the court:—Held, that the foreclosure was good against a purchaser under a second mortgage made before the insolvency, but pending the suit, of which the purchaser and his vendor had notice, though they were not parties thereto. *Wood* v. *Surr*, 2 W. R. 683.

**Creditors.**]—Creditors of mortgagor obtaining judgments between first and second mortgages, who did not come in to take the benefit of the decree of foreclosure, are bound by the decree, and cannot follow the estate in the hands of a purchaser taking his title under the decree. *Steele* v. *Philips*, Beat. 188.

**Subsequent Judgment — Creditors.**]—M., in 1846, mortgaged some property to the plaintiffs for securing a debt. In 1857 the plaintiffs assigned to trustees, for their creditors, this and another debt due from M., and all securities for the same (except the mortgage of 1846, and the premises thereby assigned, and the benefit and advantage to arise therefrom). The surplus was to be paid to the plaintiffs, and there was a proviso that they were to have the property comprised in the mortgage for their own benefit:—Held, that, as against a subsequent judgment creditor of M., the plaintiffs could maintain a bill to foreclose the mortgage. *Morley* v. *Morley*, 25 Beav. 253.

**Beneficiaries.**]—The mortgagor of a mortgaged estate devised it to trustees upon trust to sell, with a power to give receipts to purchasers. A bill of foreclosure being filed by the mortgagee against the trustees only:—Held, that a decree in this suit would not bind the cestui que trusts under the will of the mortgagor. *Chamberlain* v. *Thacker*, 18 L. J., Ch. 489; 13 Jur. 785; 14 *Id.* 190.

**Mortgagee of Term by Executor—Right of Beneficiaries.**]—A. having a term in a business for twenty-one years, by will directs that 2,000*l.* shall be raised out of the profits for his daughter and her children, and made B. executor. B. mortgages the term:—Decreed, the daughter and her children should redeem or be foreclosed; but this decree was reversed by the House of Lords. *Humble* v. *Bill*, 2 Vern. 444.

**Person Disclaiming Interest.**]—The court will decree a foreclosure against defendants who disclaim any interest, instead of simply dismissing the bill as against them. *Johnson* v. *Clarke*, 3 W. R. 193. S. P., *Perkin* v. *Stafford*, 10 Sim. 562.

### 3. Against Crown.

**Part of Mortgagor's Interest vested in Crown.**]—Where part of the mortgagor's interest is vested in the Crown, the court will not decree foreclosure in respect thereof, but will give the plaintiff liberty to apply in chambers for a sale. *Bartlett* v. *Rees*, 40 L. J., Ch. 599; L. R. 12 Eq. 395, 459; 24 L. T. 779; 25 *Id.* 373; 19 W. R. 1046.

**Intestacy — Illegitimacy — Bare Trustee.**]—Where the fee-simple of estates mortgaged by an intestate, illegitimate, was not worth the mortgage money:—Held, that the mortgagor could not on that account as against the Crown, entitled to the equity of redemption, be deemed a bare trustee for the mortgagee within 4 & 5 Will. 4, c. 23, s. 2; the estate ordered to be sold in the administration of assets, the mortgagee to become a purchaser, with liberty to apply to the Crown for a grant of the fee. *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.

**Death without Heirs.**]—The mortgagor having died entitled to an equitable inheritance only, and without heirs, a sale ordered, and the attorney-general dismissed. *Prescott* v. *Tyler*, 2 Jur. 870.

Mortgagee by deposit may sell against the Crown, when the mortgagor has died without heirs. *S. C.*, 1 Jur. 470.

**Where Mortgagor Attainted.**]—Where mortgagor was attainted, the court would not decree a foreclosure against the Crown, but directed the mortgagee should hold and enjoy till the Crown thought proper to redeem the estate. *Powell* v. *Knowles*, 2 Atk. 224.

**Conviction of Felony — Jurisdiction.**]—The title deeds of a leasehold estate were deposited with bankers, by way of equitable mortgage, for securing the balance of a running account. The party making the deposit was subsequently convicted of felony. A bill was filed by the bankers, claiming to be equitable mortgagees by virtue of the deposit, against the attorney-general for a sale of the property:—Held, that the court had no jurisdiction, the legal estate being in the Crown, to decree a sale of the estate, nor any power to compel a conveyance by the Crown of the legal estate, but only to declare the plaintiffs as equitable mortgagees, entitled to hold possession of the property until the Crown should think fit to redeem. *Hodge* v. *Att.-Gen.*, 3 Y. & C. 342; 8 L. J., Ex. Eq. 28.

—— **Equitable Mortgage of Leasehold.**]—In a foreclosure suit by an equitable mortgagee of leaseholds, where the mortgagor has been convicted of felony, the court will order a sale, but has no jurisdiction to direct the Crown to convey. *Hancock* v. *Att.-Gen.*, 33 L. J., Ch. 661; 10 Jur. (N.S.) 557; 10 L. T. 222; 12 W. R. 569.

—— **Sale with Condition.**]—The mortgagor having been convicted of felony, the mortgaged premises were set up to be sold under the decree, subject to the condition that conveyance not to be executed by the attorney-general, nor the record of conviction to be made up. *Anon.*, 4 Ir. Eq. R. 701.

### 4. Against Infants.

*a.* In General, 1716.
*b.* Decree Absolute, or Day to shew Cause, 1718.
*c.* Sale when Ordered, 1720.

#### a. In General.

**Error.**]—An infant may be foreclosed subject only to error. *Winchester* (*Bishop*) v. *Beavor*, 3 Ves. 316. *See* 8 R. R. 132, n.

In a foreclosure against an infant, though the

infant has six months after he comes of age to shew cause, &c., yet he cannot ravel into the account, nor even redeem, but only shew an error in the decree. *Mallack* v. *Galton*, 3 P. Wms. 352.

**Second Mortgagee.**]—A. has a first mortgage, and B. a second, and, subject to these mortgages, the estate is settled on C. for life, remainder on D., an infant. A. brings a bill to foreclose, though B. has not the like remedy over against D., who because of his infancy cannot be foreclosed; yet B. must redeem A. in six months, or be foreclosed. *Draper* v. *Clarendon* (*Earl*), 2 Vern. 518.

**Property Insufficient to pay Debt.**]—When, in a foreclosure suit against an infant heiress-at-law of the mortgagor, the property was insufficient to satisfy the mortgage debt, the court, at the instance of the plaintiff, and upon his offering to pay the defendant's costs, made an immediate and absolute foreclosure decree. *Bennett* v. *Harfoot*, 24 L. T. 86; 19 W. R. 428.

**Equitable Mortgage — Death before Legal Estate Conveyed.**]—Where a person creates an equitable mortgage, and dies intestate before he has conveyed the legal estate, leaving an infant heir, the equitable mortgagee can obtain only a modified decree against this infant. *Oldaker* v. *Petford*, 2 L. J. (o.s.) Ch. 47.

**Interest on Interest.**]—Bill to foreclose an infant. By decree it is sent to a master to see what due. Master reports what is due for principal, interest and costs. Whether upon a subsequent order to carry on interest, the former interest, during the infancy, shall carry interest. *Benet* v. *Edwards*, 2 Vern. 392.

**Reference when Ordered.**]—A reference, on motion, to ascertain what is due to the plaintiff in a foreclosure suit, will not be ordered, unless on the application of all the defendants having a right to redeem, nor if any of the defendants are, through infancy or otherwise, incompetent to admit the right and title of the plaintiff. *Lushington* v. *Price*, 9 Sim. 651; 8 L. J., Ch. 254.

**Decree only with Consent of Mortgagee.**]—Upon a bill of foreclosure against an infant entitled to the equity of redemption, no sale will be ordered, nor any other decree than the common decree of foreclosure made, unless by the consent of the mortgagee. *Adkins* v. *Graves*, 3 L. J. (o.s.) Ch. 62.

**Defence—Statute of Limitations.**]—In a foreclosure suit the defendants (some of whom were minors) by their answer relied on the Statute of Limitations, as disentitling the plaintiff to more than six years' interest. In the progress of the cause an order was made on consent, in pursuance of which a payment was made to the plaintiff on account of his demand:—Held, that, although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between adults, yet as the interests of minors were concerned the payment ought to be considered as made without prejudice to the rights and subject to the equities of the parties in the cause, and ought not therefore to be permitted to defeat the defence relied upon by the answer. *Thwaites* v. *M'Donough*, 2 Ir. Eq. R. 97.

**Practice—Answer on Coming of Age.**]—Where a decree has been made against an infant defendant, who put in the common answer by his guardian, the general rule is that such defendant, on coming of age, has the privilege of putting in a new answer stating a different case, and of going into evidence in support of that case. The privilege does not extend to foreclosure suits. *Kelsall* v. *Kelsall*, 2 Myl. & K. 409.

**Rehearing.**]—An order had been obtained on an ordinary claim for foreclosure. It afterwards appeared that two of the defendants were still infants. The court declined to allow the claim to be set down for rehearing against the infants, but directed a supplemental claim to be filed against them. *Scawen* v. *Nicholson*, 22 L. J. Ch. 632; 17 Jur. 369.

### b. Decree Absolute, or Day to shew Cause.

**Right of Infant.**]—An infant defendant in an action to foreclose a legal mortgage is still entitled to have a day given him on which to shew cause against the judgment for foreclosure. *Gray* v. *Bell*, 46 L. T. 521; 30 W. R. 606.

An infant cannot be foreclosed without a day to shew cause. But the proper way is to decree a sale, and that binds the infant. *Booth* v. *Rich*, 1 Vern. 295.

Lands were mortgaged in fee, subject to which the equity of redemption was settled in strict settlement. The first tenant in tail was a minor:—Held, that in a decree for a foreclosure and sale, at the suit of the mortgagee, a day to shew cause ought not to be given to the minor. *Hutton* v. *Mayne*, 3 Jo. & Lat. 584; 9 Ir. Eq. R. 343.

Where the decree is for an immediate sale, and no conveyance of the legal estate is required from a minor defendant, the decree ought not to give him a day to shew cause. *Ib.*

In a decree for a sale in mortgage cause an infant owner of the equity of redemption is not entitled to a day to shew cause. *Hutton* v. *Mayne*, 9 Ir. Eq. R. 343; 3 Jo. & Lat. 586.

Nor is the infant heir or devisee of the mortgagor. *Clinton* v. *Bernard*, Dr. 287; 6 Ir. Eq. R. 355.

—— **Order for Conveyance by Infant.**]—The court will make an order, under the statute 1 Will. 4, c. 47, s. 11, that the infant shall execute the conveyance to the purchaser. *Ib.*

**Right on Attaining Twenty-one.**] — Infant devisee of equity of redemption of copyhold, decreed to join in sale at twenty-one, had liberty to shew cause against it when he attained twenty-one. *Adams* v. *Gould*. Dick. 443.

A decree of foreclosure and sale against the mortgagor and against an infant, who is entitled under a settlement of the equity of redemption, must give the infant a day to shew cause after he shall have attained his age. *Clibborn* v. *Forstall*, 5 Ir. Eq. R. 531.

—— **Order for Conveyance by Infant.**]—If a decree against an infant give him a day to shew cause, the court will not, before the day given, order him to execute a conveyance to the purchaser under the decree. *Ib.*

**On Coming of Age.**]—An infant defendant entitled to a portion of the equity of redemption of lands decreed to be sold in a foreclosure suit was ordered to execute the conveyance to the purchaser. The decree did not give him a day to

shew cause on coming of age. *Jones* v. *Ham*, 3 Ir. Eq. R. 65.

A decree of foreclosure against an infant must give the infant a day to shew cause against the decree, after he attains twenty-one, notwithstanding the provisions of the act 11 Geo. 4 & 1 Will. 4, c. 47, ss. 10, 11. *Price* v. *Carrer*, 3 Myl. & Cr. 157. Overruling *Powys* v. *Mansfield*, 6 Sim. 637; 5 L. J., Ch. 297.

In a decree for foreclosure against the infant heir of an estate subject to an equitable mortgage, the infant ought to be allowed a day to shew cause against the decree on coming of age. *Scholefield* v. *Heafield*, 7 Sim. 669. *S. C.*, 8 Sim. 470; 7 L. J., Ch. 4.

In an action by an equitable mortgagee, without any memorandum of deposit of title deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure:—Held, on motion for judgment, the defendants not having appeared, that the infant heir must be ordered to convey the estate when he attained the age of twenty-one years, and that he must have a day to shew cause in the usual way. *Price* v. *Carrer* (3 Myl. & Cr. 157) followed. *Mellor* v. *Porter*, 53 L. J., Ch. 178; 25 Ch. D. 158; 50 L. T. 49; 32 W. R. 271.

**Benefit of Infant.**]—Judgment for foreclosure was made absolute against an infant without giving time to shew cause, the mortgagee offering to pay the infant's costs as between solicitor and client, and the guardian of the infant being of opinion that it was for the benefit of the infant that the order should be made, and there being evidence that the mortgage debt greatly exceeded the value of the property. *Younge* v. *Cocker*, 32 W. R. 359.

**Form.**]—Foreclosure against an infant, the decree absolute should repeat the clause nisi, as in the original decree, giving six months after age to shew cause. *Williamson* v. *Gordon*, 19 Ves. 114; 12 R. R. 149.

**Costs.**]—Judgment for an immediate foreclosure absolute against an infant granted, the plaintiffs offering to pay the defendant's costs of the action as between solicitor and client, and the defendant's counsel not asking for liberty to redeem, or that an account should be taken of what was due to the plaintiffs, upon the court being satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mortgage, together with interest and the costs of the action, and that it would be for the benefit of the infant to give judgment in that form. *Wolverhampton and Staffordshire Banking Co.* v. *George*, 24 Ch. D. 707.

Where, at the hearing of a foreclosure suit against an infant heir of the mortgagor, it appeared that the property was not worth the money due on the mortgage, and the plaintiff offered to pay the costs of the infant, the court made an order at once for foreclosure absolute against him. *Croxon* v. *Lerer*, 12 W. R. 237. S. P., *Bennett* v. *Harfoot*, 24 L. T. 86; 19 W. R. 428.

**Service of Subpœna.**]—An infant, having a day to shew cause against a decree of foreclosure after he attained twenty-one, attained that age, and left the kingdom before he was served, to avoid his creditors; application to serve his clerk in court with the subpœna: Lord Thurlow thought it must be personal service, but, it being again moved upon strong affidavit, it was granted. *Elcock* v. *Glegg*, Dick. 764.

### c. Sale, when Ordered.

**Benefit of Infant.**]—Direction for sale of an infant's estate in a foreclosure suit (under circumstances shewing it to be clearly for the benefit of the infant) without giving time to redeem. *Mears* v. *Best*, 10 Hare (App.) li.

Where the heir of a mortgagor is an infant, the mortgagee is not entitled to a sale of the estate, unless it appears, upon reference to the master, to be for the benefit of the infant; otherwise the mortgagee is entitled to a foreclosure only. *Davis* v. *Dowding*, 2 Keen, 245; 7 L. J., Ch. 169.

—— **Without Reference.**]—Where, from the facts, the court is able to see that it will be for the benefit of the infant that a sale should take place, it will order a sale without a previous reference to the master. *Ib.*

—— **Inquiry.**]—Inquiry directed in case the mortgagees consent to a sale, whether it will be for the benefit of the infant heir of the mortgagor. *Mondey* v. *Mondey*, 1 V. & B. 223.

**Adversely.**]—On a bill for foreclosure, the court refused to direct a sale adversely on application on behalf of infants partially interested in equity of redemption. *Farrow* v. *Rees*, 4 Beav. 18; 4 Jur. 1028.

### 5. Against Lunatics.

**Issue directed—As to Validity of Mortgage.**]—Where a common foreclosure clause was supported by affidavits of the attesting witnesses to the mortgage deed, and the defendant, who was the heir-at-law of the alleged mortgagor, did not cross-examine the witnesses, but set up by affidavit the insanity of the alleged mortgagor at the time of the alleged mortgage:—Held, that, without instituting a suit of his own to set aside the mortgage, he might have its validity tried by an issue or an ejectment. *Jacobs* v. *Richards*, 18 Beav. 300; 5 De G. M. & G. 55; 23 L. J., Ch. 557; 18 Jur. 527; 2 Eq. R. 299.

—— **As to Sanity.**]—After a bill to foreclose, the mortgagor was found lunatic by inquisition, at a date overreaching the mortgage deed. At the hearing, an issue was directed as to his sanity at the date of the mortgage. *Snook* v. *Watts*, 11 Beav. 105; 12 Jur. 444.

**Knowledge of Mortgagee.**]—A mortgagee held entitled to a foreclosure decree in a suit against the real and personal representative of a mortgagor, who was a lunatic at the time of the mortgage, there being no evidence to shew that the mortgagee knew or took advantage of the lunacy. *Campbell* v. *Hooper*, 3 Sm. & G. 153; 24 L. J., Ch. 644; 1 Jur. (N.S.) 670; 3 Eq. R. 727; 3 W. R. 528.

The cases of *Snook* v. *Watts* (11 Beav. 105; 12 Jur. 444) and *Jacobs* v. *Richards* (18 Beav. 300) observed upon. *Ib.*

**Practice.**]—A charge in the bill, that A. was of a weak and feeble understanding approaching almost to idiotcy, was an allegation sufficiently

precise (no demurrer being taken) to put in issue that A. was of insane memory; it being proved that A. was incapable of managing himself or his affairs, he was held to be within the saving of the statute 7 Geo. 2, c. 14, (Ir.,) c. 8. But this allegation would not have been sufficiently precise on a plea, nor on a bill, if demurred to. The heir of the mortgagor may take advantage of the saving in s. 8 of the statute. *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

6. Against Married Women.

**No Time to shew Cause.**]—The equity of redemption of a mortgage comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to shew cause after the death of her husband. *Mallack* v. *Galton*, 3 P. Wms. 352.

**Reversionary Interest.**]—Assignment by a husband of reversionary interest of his wife, and of a policy of insurance on his own life, to secure a running account to a banking company. The security contained no power of sale, or proviso for redemption. The limitation of the property was upon trust to pay the costs of the assignment and of keeping on foot the policy, and to retain and pay all and every such sum and sums of money as should from time to time be due and owing to the company; and, as to the residue, upon trust to retain and pay the same unto the husband and his wife according to their respective interests therein. On a bill for foreclosure and sale:—Held, that the company was not entitled to either a decree of foreclosure or for sale in respect of the reversionary interest of the wife. *Stamford, Spalding and Boston Banking Co.* v. *Ball*, 31 L. J., Ch. 143; 8 Jur. (N.S.) 420; 5 L. T. 594; 10 W. R. 196.

The whole assignment was limited by the trusts and by the direction to "retain"; the trust could only operate, therefore, on the reversionary interest when it fell into possession. *Ib.*

A mortgage of a wife's reversionary property in court was executed by A. and B. after their marriage, and after the mortgagee had knowledge of the marriage, the agreement having been entered into, and a small part of the mortgage-money paid to B. before her marriage, the court made a decree of foreclosure against the husband and wife. *Lewis* v. *Poole*, 3 Giff. 636; 8 Jur. (N.S.) 536; 6 L. T. 709.

**Form.**]—Decree for foreclosure of the estate of a married woman should be in the ordinary form, and ought not to be made absolute at once, even by consent. *Harrison* v. *Kennedy*, 10 Hare (App.) xlv., li.

7. Tenant for Life and Remainderman.

**Tenant in Tail abroad.**]—Decree of foreclosure against a tenant for life, the tenant in tail being abroad. *Fishwick* v. *Lowe*, 1 Cox, 411.

**Remainderman's Title vesting long after Decree.**]—Where a decree of foreclosure has been made against a tenant for life of an equity of redemption, who afterwards executed the conveyance to a purchaser under the decree, a remainderman whose title did not, until many years after, vest in possession, filing a bill immediately on the death of the tenant for life, not bound by the decree or sale. *Blake* v. *Foster*, 2 Ball & B. 574.

**Setting aside Title after Twenty Years.**]—A remote remainderman of an equity of redemption, filing a bill to redeem immediately after his title vested in possession:—Held, not too late to set aside a title founded on a decree made upwards of twenty years, which was fraudulent and void as against him, and the other persons claiming remainders under the will, and length of time no bar. *Eyre* v. *Dolphin*, 2 Ball & B. 387; 12 R. R. 94.

**Release of Equity of Redemption by Tenant in Tail.**]—Bill of foreclosure against tenant for life and the first remainder in tail. The usual decree made and the time for redemption being elapsed, tenant in tail released the equity of redemption, so that the decree was never made absolute:—Held, binding on those in remainder. *Reynoldson* v. *Perkins*, Amb. 564; Dick. 427.

**Distribution of Surplus Proceeds of Sale.**]—The bill was to redeem or foreclose; it was objected that the defendant was only tenant for life of the equity of redemption, and the remaindermen over were not made parties; court directed a bill to be brought, the defendant to have a sale made, the mortgage debt paid, and the surplus distributed amongst the tenants for life and the remaindermen in proportion according to their respective interests. *Thynn* v. *Ducall*, 2 Vern. 117.

**Death of Tenant for Life before Hearing.**]—Where a mortgagee of a tenant for life of an equity of redemption filed a bill for redemption and foreclosure against the mortgagees in fee and the remaindermen, and the tenant for life died before the hearing of the cause, the bill was dismissed with costs. *Riley* v. *Croydon*, 10 Jur. (N.S.) 1251; 13 W. R. 223.

**Mortgage by Tenant for Life and Exercise of Power to raise Portions.**]—A tenant for life of real estates, with a power to charge 20,000*l.* for the portions of younger children, mortgaged his life estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power for the benefit of his children, and created a term of 1,000 years to secure payment of the 20,000*l.*, and upon the marriage of one of his daughters he appointed 5,000*l.* to her for a portion. The trustees, and also the appointees, had notice of the mortgages and of the covenant entered into by the tenant for life. A common decree of foreclosure was made. *Hurst* v. *Hurst*, 16 Beav. 372; 22 L. J., Ch. 538; 1 W. R. 105.

**Against Tenant in Tail.**]—In 1810 a testator devised his real estates to E. R. in fee, subject to the payment of his debts and legacies, and died in the same year. A legacy of 800*l.* was never paid off. The property consisted of four estates, T., F., P. and C. In 1818, E. R. mortgaged estates T. and C. to W. In 1822, E. R., on his marriage, settled estates T., P. and C., on himself for life, remainder in strict settlement upon the first and other sons, &c., of the marriage; and he covenanted therein against incumbrances. In 1836, E. R. mortgaged F. to L. In 1843, the plaintiff H. registered a

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judgment against E. R. In 1844, E. R. became insolvent, and C. was appointed his assignee. H., the judgment creditor, filed her bill against all the above incumbrancers, against C., and the first tenant in tail under the settlement, praying to be permitted to redeem prior incumbrances, &c., and that C. should redeem her or be foreclosed:—Held, that both as to pleading and on the merits it was altogether erroneous to foreclose the tenant in tail. *Hughes* v. *Williams*, *Chappell* v. *Rees*, 3 Mac. & G. 683; 1 De G. M. & G. 393; 16 Jur. 415.

**Account.**]—Though the general rule of the court is, that where, in a foreclosure suit, the tenant for life is a party, and the accounts directed are fairly taken, such accounts are binding on those in remainder, and they can only be permitted to surcharge and falsify them, yet as, in this case, the decrees were all upon sequestration, and the accounts taken in the absence of every person interested in their being taken fairly, and as some doubts were thrown upon the case, as to the existence of any debt, the remainderman was entitled to have a general account directed. *Wrixon* v. *Vize*, 2 Con. & L. 138; 3 Dr. & War. 104; 5 Ir. Eq. R. 173.

*See also* **R,** 1, g., post, col. 1822.

8. TRUSTEE IN BANKRUPTCY.

**Trustee of Mortgagee against Trustee of Mortgagor.**]—The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the court of bankruptcy. *Waddell* v. *Toleman*, 9 Ch. D. 212; 38 L. T. 910; 26 W. R. 802.

**Ground of dismissing Bill.**]—A bill of foreclosure against the assignees of a bankrupt mortgagor, before the execution of the bargain and sale by the commissioners, will not be dismissed on the ground that the assignees have not any interest that can be the subject of a foreclosure. *Bainbridge* v. *Pinhorn*, Buck, 135.

**Bankruptcy Act, 1869, s. 72.**]—An equitable mortgagee, by deposit of title deeds, having commenced an action for foreclosure against the trustees of a bankrupt's estate, the Court of Appeal declined to interfere under the Bankruptcy Act, 1869, s. 72. *Pannell* or *Pennell*, *Ex parte*, *England*, *In re*, 47 L. J., Bk. 21; 6 Ch. D. 335; 37 L. T. 450; 26 W. R. 194.

9. UNDER 7 GEO. 2, C. 20.

**Effect of Act.**]—The statute 7 Geo. 2, c. 20, as to foreclosure, gives no new power to courts of equity. *Praed* v. *Hull*, 1 Sim. & S. 331.

**Application of Act—Submission of Defendant.**]—The statute 7 Geo. 2, c. 20, applies only to simple cases of foreclosure, and not where the bill prays a sale; but, if the defendant submits to such a decree as the plaintiff claims to be entitled to, the court, in the exercise of its general jurisdiction, will make the order upon motion, upon the terms of the defendant paying the costs. *Aberdeen* v. *Chitty*, 3 Y. & C. 382; 8 L. J., Ex. Eq. 30.

**Subject Matter of Bill.**]—No order, under 7 Geo. 2, c. 20, s. 2, the bill not being confined to mere foreclosure, but including also another subject. *Bastard* v. *Clarke*, 7 Ves. 489.

**No Decree unless Title admitted.**]—The court will not, under statute 7 Geo. 2, c. 20, make a decree of foreclosure upon motion, where any of the defendants do not admit, though they may not absolutely deny, the plaintiff's title. *Roe* v. *Wardle*, 3 Y. & C. 70; 2 Jur. 640.

**Infant Defendant.**]—Whether the court will not make such a decree against an infant, unless he do more than merely submit his rights and interests to the court, quære. *Ib.*

A decretal order on foreclosure, under 7 Geo. 2, c. 20, s. 2, requiring the concurrence of all the defendants who are interested in the equity of redemption, cannot be made where one of them is an infant. *Lushington* v. *Price*, 9 Sim. 65; 8 L. J., Ch. 254.

A., seised in fee, mortgaged for a term of years, and afterwards devised the mortgaged premises, and died. The mortgagee brought his bill against the devisees, some of whom were infants, for foreclosure:—Held, that the defendants, during the infancy of the devisees, were not entitled to a decretal order on motion, under the statute 7 Geo. 2, c. 20, s. 2. *Taylor* v. *Coates*, 3 Hare, 263.

**Infants Interested.**]—Where the equity of redemption of a term was vested in A. as the administrator of his father, although his children, who had an interest in it, were infants, and could not admit the title of the mortgagee in a proceeding under 7 Geo. 2, c. 20, the court held that, independently of that statute, A. being administrator and responsible for any undue admission, an order might be made in a foreclosure suit, on motion made by A. admitting the balance due, to the same effect as a decree. *Grane* v. *Mitchell*, 10 Sim. 484; 9 L. J., Ch. 171.

**Execution—Relief.**]—No relief to a mortgagor under the statute 7 Geo. 2, c. 20, the mortgagee being entitled to execution. *Amis* v. *Lloyd*, 3 V. & B. 15.

**Assignees of Bankrupt.**]—Where mortgagor becomes bankrupt, and a bill is filed against him and his assignees, the court will not, on application of assignees alone, make an immediate decree under 7 Geo. 2, c. 20, s. 2. *Garth* v. *Thomas*, 2 Sim. & S. 188; 3 L. J. (o.s.) Ch. 94.

**Mortgagor in Contempt.**]—Mortgagor, defendant to a bill of foreclosure, being in contempt, cannot obtain the reference on motion, under the statute 7 Geo. 2, c. 20. *Hewitt* v. *M'Cartney*, 13 Ves. 560.

**Reference.**]—A reference under the statute 7 Geo. 2, c. 20, must proceed upon admission of the principal and interest due upon the mortgage, and the master cannot admit evidence. *Huson* v. *Hewson*, 4 Ves. 105.

On motion for reference under 7 Geo. 2, c. 20, the court refused to direct master to take into account costs incurred at law, no mention of proceedings at law having been made in the bill; but leave was given to amend bill in that respect, and motion directed to stand over till bill amended. *Millard* v. *Major*, 3 Madd. 433.

Defendant to a bill for an account cannot, upon motion immediately after answer, have a

reference to the master by analogy to the case of a mortgage by statute 7 Geo. 2, c. 20, and the case of specific performance according to the practice settled, though the reason of it is questionable. *Eldridge* v. *Porter*, 14 Ves. 139.

**Order without Answer—Discovery on Affidavit.**]—On a motion by a defendant for an immediate decree, in a foreclosure suit, under the statute 7 Geo. 2, c. 20, or under the jurisdiction of the court, independent of the statute, the order may be made without answer; and, if the bill suggests that the defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to the fact upon affidavit. *Piggin* v. *Cheetham*, 2 Hare, 80; 6 Jur. 819.

**Ground of resisting Motion.**]—A motion by defendant in a foreclosure suit for the ordinary decree under 7 Geo. 2, c. 20, s. 2, cannot be resisted by the plaintiff on the ground that he has, pending the action, parted with the legal estate; nor (if the action has been entered for trial) on the ground that he desires to stay proceedings, in order to take advantage of a transfer and right of consolidation arising since the entry for trial. *Matthews* v. *Antrobus*, 49 L. J., Ch. 80.

**Plaintiff's Right to dismiss Action.**]—Rule of court, Ord. XXIII. r. 1 (Jud. Act), does not entitle a plaintiff to dismiss his action after it has been entered for trial. *Ib.*

**Staying Proceedings.**]—On bill of foreclosure, defendant submitting to same decree as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at any time stay all further proceedings in the cause, under 7 Geo. 2, c. 20. *Praed* v. *Hull*, 1 Sim. & S. 331.

**Discharging Decree.**]—A decree on motion under 7 Geo. 2, c. 20, cannot be discharged on motion. *Cadle* v. *Fowle*, 1 Bro. C. C. 515.

10. Time.

*a.* Computation, 1725.
*b.* Enlargement, 1725.
*c.* Equitable Mortgages, 1729.
*d.* Where several Defendants, 1730.

### a. Computation.

**Calendar not Lunar.**]—The time granted on a decree of foreclosure shall be computed by the calendar and not by the lunar month. *Anon.*, Barnard. 324.

### b. Enlargement.

**Rules of Court.**]—The rules of court allow mortgagor in foreclosure suit so much time as may be occupied in procuring report of principal, and interest, and costs, and three months from date of that report. *Ellis* v. *Deane*, 1 Beat. 16.

**Not of course.**]—In a foreclosure suit, the order to enlarge the time for payment of the mortgage-money is by no means of course, but may be refused where no excuse for the default is stated, and the security does not appear to be ample. *Eyre* v. *Hanson*, 2 Beav. 478; 9 L. J., Ch. 302.

**Condition of.**]—The usual condition on which it is granted is on payment of interest and costs before the time appointed by the master for payment of the whole; in this case, however, it was ordered that, upon payment of the interest and costs within a month, the time should be enlarged for five months. *Ib.*

**Discretionary.**]—Motion to enlarge time for foreclosure is not of course, although interest and costs be paid; and where there is no opposition it is discretionary in court. *Quarles* v. *Knight*, 8 Price, 630.

**Ground for.**]—The slightest ground will induce a court of equity to extend the time of sale in a foreclosure cause. *Jessop* v. *King*, 2 Ball & B. 97.

The defendant in a foreclosure suit may obtain an enlargement of the time limited for absolute foreclosure upon slight evidence of the probability of his being able to pay off the mortgage; but the order will only be made upon the terms of his paying a large part of the interest due to the plaintiff within a short specified time, and paying interest upon the aggregate sum found to be due to the plaintiff for principal, interest and costs from the date of the certificate, and the costs of the application, and that, if he fail to pay the specified sum to the plaintiff for interest at the time appointed, he shall be absolutely foreclosed. *Holford* v. *Yates*, 1 K. & J. 677.

Where mortgaged premises afford an ample security for the mortgage debt and interest, the court will, when there is a reasonable prospect of the mortgagor being able to discharge the debt, enlarge the time fixed for foreclosure absolute upon immediate payment by the mortgagor to the mortgagee of a substantial portion of the interest accrued due and costs. *Forrest* v. *Shore*, 32 W. R. 356.

**Infants.**]—Even in the case of infants, the court will, in a suit for foreclosure, only extend the time for payment of the mortgage-money upon the terms of immediate payment of the interest and costs. *Coombe* v. *Stewart*, 13 Beav. 111.

**On Death of one joint Mortgagee.**]—A foreclosure was decreed, in default of payment, to three mortgagees, who were entitled "on a joint account." Before the day appointed for payment arrived, one of the mortgagees died:—Held, that the foreclosure could not be made absolute, and the court appointed a new day for payment to the survivors. *Cockburn* v. *Caine*, 22 Beav. 614.

**Negotiations between Parties.**]—Where, in a suit of foreclosure, pending exceptions to the master's report, which are afterwards disallowed, and after the time fixed by the report for the payment of the money, the plaintiff negotiates with the defendants, with respect to the payment of his debt, he cannot apply to have them foreclosed from the day originally given them. *Grove* v. *Cooper*, 1 L. J. (o.s.) Ch. 197.

**Under 15 & 16 Vict. c. 86.**]—In February, 1851, a decree for foreclosure was made, and in January, 1853, after report made, it was ordered, by consent, that the plaintiff, the first mortgagee, should be at liberty to continue in posses-

sion until the 25th June, 1854, and that, upon payment within one week after that date of the amount which should be found due, the plaintiff should convey, &c.; but, in default of payment within that time, the defendants were to be foreclosed without any further order, and without any further extension of time. Motion by second mortgagee, under statute 15 & 16 Vict. c. 86, s. 48, that the time for foreclosure might be enlarged to the second day of Michaelmas term, and that the property might be in the meantime sold by and under the direction of the court, refused, with costs. *Campbell* v. *Moxhay*, 18 Jur. 641.

**Under 5 Geo. 2, c. 25.**]—Time enlarged for appearance to a bill of foreclosure under statute 5 Geo. 2, c. 25, notice in the parish church having been prevented while under repair. *Knowles* v. *Broome*, 1 V. & B. 305.

**Under 7 Geo. 2, c. 20.**]—Under statute 7 Geo. 2, c. 20, s. 2, the time for payment of money on mortgage may be enlarged on usual terms. *Wakerell* v. *Delight*, 9 Ves. 36.

**After Six Years.**]—Equity will not enlarge time to redeem mortgage after six years' acquiescence, under forfeiture by mortgagor's own consent, specially if there have been any improvements on the estate. *Lant* v. *Crispe*, 5 Bro. P. C. 200.

**Fourth Order for.**]—Under circumstances, a fourth order made for enlargement of time for payment of mortgage-money. *Edwards* v. *Cunliffe*, 1 Madd. 287.

On a decree of foreclosure, six months were given to the mortgagor in the usual way; then six more months were granted, which time was enlarged for six months longer, on his undertaking not to ask for more time. Yet the court, on motion, allowed him another six months, to be peremptory, because the estate was of greater value than the incumbrance upon it. *Anon.*, Barnard. 221.

**Till Exceptions disposed of.**]—Where, in foreclosure suit, exceptions are taken to the master's report, and the time appointed for payment of the mortgage-money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of. *Renvoize* v. *Cooper*, 1 Sim. & S. 364.

**Pending Appeal.**]—The time appointed for redemption enlarged, on terms, pending an appeal to the House of Lords. *Finch* v. *Shaw*, *Colyer* v. *Finch*, 20 Beav. 555.

**After Decree.**]—When a decree is to foreclose, the court, in cases of necessity, will enlarge the time for the performance in paying the money, though the decree be signed and enrolled. *Cocker* v. *Bevis*, 1 Ch. Ca. 61.

The inrolment of an order absolute of foreclosure does not, any more than an inrolment of the decree of foreclosure, preclude the court from again enlarging the time in a proper case, and upon the usual terms. *Ford* v. *Wastell*, 2 Ph. 591; 17 L. J., Ch. 368; 12 Jur. 404.

The time fixed, by the decree in a foreclosure suit, for payment of principal, interest, and costs, enlarged by vice-chancellor, notwithstanding the decree had been made absolute, and the order absolute had been signed and enrolled. *Thornhill* v. *Manning*, 1 Sim. (N.S.) 451; 20 L. J., Ch. 604.

In a foreclosure suit, the court will not refrain from pronouncing the usual decree for a sale, at the motion of the defendant, suggesting the appointment of a receiver, unless upon consent; but it will, after decree, enlarge the time for redemption, on a proper case being made. *Anon.*, 10 Ir. Eq. R. 174.

**Reference.**]—The defendant in a foreclosure suit made default in the payment of the mortgage debt at the time and place appointed, whereupon the order for foreclosure was made absolute. He then moved for a reference to the master to compute subsequent interest, and tax subsequent costs, and appoint a further time for payment, upon affidavits, shewing that the default had been owing to accidental and unusual circumstances. Motion granted. *Jones* v. *Creswicke*, 9 Sim. 304; 9 L. J., Ch. 113; 4 Jur. 216. S. P., *Nanfan* v. *Perkins*, *Crompton* v. *Effingham (Earl)*. *Joachim* v. *M'Douall*, *Lee* v. *Heath*, *Abney* v. *Wordsworth*, *Ismoord* v. *Claypool*, and *Clay* v. ——, stated in the notes, 9 Sim. 306, et seq.

**Interest—Neglect to Pay.**]—On bill of foreclosure, an order being obtained for enlarging time for payment of principal money on condition of interest being paid; the defendant neglecting to pay the interest, plaintiff obtained the usual decree absolute on motion, as of course. A petition to discharge this decree as obtained by surprise was dismissed with costs. *Jones* v. *Roberts*, M'Cle. & Y. 567.

—— **Computation of.**]—Where the time fixed by the decree in a foreclosure suit for payment of principal and interest and costs is enlarged, the court will direct subsequent interest to be computed on the aggregate sum found due for principal, interest and costs. *Bruere* v. *Wharton*, 7 Sim. 483.

Where the time for payment of principal, interest and costs, under a foreclosure decree, is enlarged, and no terms are imposed as to payment of subsequent interest, such subsequent interest is to be calculated upon the principal due and the unpaid costs, and not upon the aggregate of principal, interest and costs. *Whitfield* v. *Roberts*, 7 Jur. (N.S.) 1268; 9 W. R. 844.

**Application refused.**]—A first application by a mortgagor to change the time for the payment of mortgage-money, refused. *Nanny* v. *Edwards*, 4 Russ. 124; 6 L. J. (O.S.) Ch. 20; 28 R. R. 24.

**Where Mortgagor prevented from receiving Rents.**]—Where, after the second report and day of payment fixed, in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment of the mortgagor, within one month, of the interest and costs found due by the report, notwithstanding there was a doubt whether the value of the security was ample. *Geldard* v. *Hornby*, 1 Hare, 251; 6 Jur. 78.

**Mortgagor not Appearing — Mortgagee in Receipt of Rents.**]—Upon a motion by mortgagees for judgment for foreclosure absolute, and possession of the property, to which the mortgagor did not appear, and the mortgagees

had received rents since the date of the certificate, the court enlarged the time for redemption by one month, and directed the plaintiffs to file and deliver to the registrar an affidavit shewing what would be the balance due to them up to that date for principal, interest and costs; and ordered that, if the amount should not be paid, the defendant should be absolutely foreclosed, and the plaintiffs should have possession of the property. *Lacon* v. *Tyrrell*, 56 L. T. 483.

**Mortgagor not Insisting on Redemption.**]—On motion by mortgagor for further time to redeem, and that mortgage should stand as security only for what was bonâ fide advanced, but forfeited as to what was won at play:—Held, that, as mortgagor in a former cause, where he might have done it, did not insist on a redemption, the foreclosures could not regularly be kept open, but on the whole circumstance three months were allowed. *Fleetwood* v. *Jansen*, 2 Atk. 467.

**Scire facias.**]—Upon scire facias taken out on a judgment, defendant shall insist only on what he might have done at the hearing of the original cause. The rule in equity is the same, with this difference only, that if anything new have happened since the hearing, defendant may avail himself of it. *Id.* 468.

**Before Puisne Mortgagee Foreclosed.**]—In an action by executors of a mortgagee against the mortgagor and a puisne mortgagee an order nisi for foreclosure was made, giving successive periods of redemption. After the time fixed for redemption, and before final judgment was obtained against the puisne mortgagee, and before the expiration of the time allowed to the mortgagor, the plaintiffs received a sum of money for rent. A further account had been taken against the mortgagor, and a further day fixed for redemption by him:—Held, that it was irregular to fix a further time for the mortgagor to redeem until the puisne mortgagee had been finally foreclosed. The order was to foreclose the puisne mortgagee absolutely, and to take a further account against the mortgagor. *Webster* v. *Patteson*, 53 L. J., Ch. 621; 25 Ch. D. 626; 50 L. T. 252; 32 W. R. 581.

### c. Equitable Mortgages.

**Six Months before Sale.**]—In a suit by an equitable mortgagee, the decree will give the mortgagor six months to redeem before a sale of the estate. *Thorpe* v. *Gartside*, 2 Y. & Coll. 730; 7 L. J., Ex. Eq. 30.

**Deposit of Deeds.**]—In the decree upon a bill by an equitable mortgagee, the equitable mortgagor will be allowed six months to redeem the deposited deeds. *Parker* v. *Housefield*, 2 Myl. & K. 419; 4 L. J., Ch. 57.

Equitable mortgagees by deposit of deed; the court refused to suspend the execution of a decree obtained by a mortgagee until six months after hearing an appeal, but gave six months on bringing the money into court, consenting to a receiver, and paying interest and costs, on plaintiff undertaking to repay if the decree should be reversed. *Monkhouse* v. *Bedford Corporation*, 17 Ves. 380.

—— **Of Lease.**]—Where a deposit of a lease was made to secure a debt, and from the nature of the transaction no interest was to be paid on the principal sum secured, the equitable mortgagor, on a bill filed by the equitable mortgagee to have the lease sold, is entitled to the usual time to redeem. *Meller* v. *Woods*, 1 Keen, 16; 5 L. J., Ch. 109.

### d. Where Several Defendants.

**General Rule.**]—As a general but not invariable rule, when there are several defendants to a foreclosure action, one period for redemption should be allowed to all the defendants. *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 51 L. T. 284; 32 W. R. 792.

Where there were two defendants to a foreclosure action—the mortgagor and a second mortgagee who had joined in the plaintiff's security to postpone his previously prior right, and as surety for the plaintiff:—Held, that only one period of six months should be allowed for redemption by both defendants. *Bartlett* v. *Rees* (L. R. 12 Eq. 395) and *General Credit and Discount Co.* v. *Glegg* (22 Ch. D. 549) followed. *Smith* v. *Olding*, 54 L. J., Ch. 250; 25 Ch. D. 462; 50 L. T. 357; 32 W. R. 386. Contra, *Sweet* v. *Combley*, 25 Ch. D. 463, n.

—— **Questions of Priority.**]—In a foreclosure suit, when questions as to priorities not affecting the plaintiff are raised between co-defendants, the court will fix a day certain for all to redeem or be foreclosed, without prejudice to the rights of the several defendants inter se. *Bartlett* v. *Rees*, 40 L. J., Ch. 599; L. R. 12 Eq. 395; 25 L. T. 373; 19 W. R. 1046.

**Several Puisne Mortgagees.**] — Foreclosure ordered with one term of redemption for all the puisne mortgagees. *Bartlett* v. *Rees* (L. R. 12 Eq. 395) followed. *General Credit and Discount Co.* v. *Glegg*, 52 L. J., Ch. 297; 22 Ch. D. 549; 48 L. T. 182; 31 W. R. 421.

A suit having been instituted by a first mortgagee to redeem or foreclose several subsequent incumbrances, the court made a special decree fixing a day for any of the subsequent incumbrancers to redeem or to be foreclosed. *Edwards* v. *Martin*, 28 L. J., Ch. 49; 4 Jur. (N.S.) 1044; 7 W. R. 30.

A., a first mortgagee, brought an action for foreclosure against the mortgagor, his trustee in bankruptcy, and two subsequent incumbrancers, C. and R. The defendants all appeared, and both C. and R. delivered defences. C.'s defence alleged that his mortgage was registered in Middlesex without notice, and therefore had priority over R. R.'s defence made no answer to this allegation:—Held, that the mere fact that R.'s defence did not deny the allegation of priority in C.'s defence could not be taken as an admission by R. of the priority of C.'s mortgage; that, therefore, the priorities were in dispute, and the plaintiff was entitled to have only one period of redemption, as in *Bartlett* v. *Rees* (L. R. 12 Eq. 395). *Tufnell* v. *Nicholls*, 56 L. T. 152.

A first mortgage is primâ facie entitled to a judgment in a foreclosure action limiting only one period for redemption, both as against subsequent incumbrancers and the mortgagor, and, where there are conflicting claims as to priority between co-defendants, the practice, as settled by *Bartlett* v. *Rees* (L. R. 12 Eq. 395), is to grant only one period for redemption. Where, however, the defendants have put in a defence or appeared at the bar and have proved or offered to prove their incumbrances, and there is no



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question of priority between them, the court will at the request of the puisne incumbrancers, but not at the request of the mortgagor, limit successive periods for redemption. A mortgagor has no right in himself to more than one period of six months to redeem. *Platt* v. *Mendel*, 54 L. J., Ch. 1145; 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918.

The settled practice of the court in a foreclosure action, where there are incumbrances subsequent to that of the plaintiff, to grant successive periods of redemption to the subsequent incumbrancers and the mortgagor, will only be departed from where special reason for so doing is shewn. *Lewis* v. *Aberdare and Plymouth Co.*, 53 L. J., Ch. 741; 50 L. T. 451.

The fact that there is a contest as to priorities between the subsequent incumbrancers may be a reason for departing from the ordinary practice. *Ib.*

Where such a contest was raised upon the pleadings, and the nature of the property and other special circumstances were such as to render any delay peculiarly disadvantageous to the plaintiffs, the court fixed one period of nine months for redemption by the mortgagors (a company in liquidation) and two sets of incumbrancers subsequent to the plaintiffs. *Ib.*

Semble, even in a case in which the priorities are not in dispute, the court will not now give successive periods for redemption. *Tufnell* v. *Nicholls*, 56 L. T. 152.

—— **Non-appearance.**]—In a foreclosure action by the transferee of the first mortgagee, the statement of claim alleged that the defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the plaintiff's charge. None of the defendants, including the mortgagor, put in a defence or appeared at the bar:—Held, that the plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the defendants. *Platt* v. *Mendel*, 54 L. J., Ch. 1145; 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918.

In a foreclosure judgment against the mortgagor and subsequent incumbrancers, only one period for redemption will be fixed where none of the defendants appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled," or only that they "claim to be entitled" to charges upon the mortgage premises. *Doble* v. *Manley*, 54 L. J., Ch. 636; 28 Ch. D. 664; 52 L. T. 246; 33 W. R. 409.

—— **And Mortgagor's Trustee in Liquidation.**]—In an action by second mortgagees against subsequent incumbrancers and the mortgagor's trustee in liquidation, there being evidence that the sale of the property would leave a very small margin for the subsequent incumbrancers, only one of whom appeared, one time certain was fixed for all the defendants to redeem or be foreclosed. *Cripps* v. *Wood*, 51 L. J., Ch. 584.

—— **And Judgment Creditors.**]—Upon a foreclosure claim by a mortgagee against the mortgagor, and subsequent mortgagees and judgment creditors:—Held, that the judgment creditors ought not to stand exactly in the position of mortgagees; and the court made a decree fixing one period for redemption by all the judgment creditors, as if their judgments formed one incumbrance only. *Stead* v. *Banks*, 5 De G. & Sm. 560; 22 L. J., Ch. 208; 16 Jur. 945.

—— **And Jointress.**]—In a foreclosure action the plaintiffs were first mortgagees, and also third mortgagees. The defendants were the second incumbrancer, who was a jointress, and several subsequent incumbrancers, whose priorities had not been ascertained. An order was made, on the hearing of the action, giving the jointress a period of six months within which to redeem; in case she did not redeem, the subsequent incumbrancers were to have one period of three months within which to redeem; but, in case the jointress did redeem, the plaintiffs, as third mortgagees, were to have a period of three months within which to redeem subject to the jointure; and a further period of three months was given to the subsequent incumbrancers within which to redeem. *Smithett* v. *Hesketh*, 59 L. J., Ch. 567; 44 Ch. D. 161; 62 L. T. 802; 38 W. R. 698.

### 11. Attendance for Payment.

**Time of.**]—Notice for payment of a mortgage at three o'clock is not forfeited, where there is an attendance before four o'clock. *Knox* v. *Simmons*, 4 Bro. C. C. 443.

Foreclosure may be made absolute, although the mortgagee does not attend the first moment of the time appointed for payment of the mortgage money. *Anon.*, 1 Coll. C. C. 273.

The court will make an order for foreclosure absolute, although the mortgagee has not attended at the spot named for payment of the mortgage money until after the time fixed by the parties. *Bernard* v. *Norton*, 10 L. T. 183.

Under a foreclosure decree, the solicitor of the mortgagee attended at the time and place appointed by the chief clerk for the payment of the redemption money (but without any power of attorney to receive the money). The mortgagee did not attend until after the commencement of the time fixed, but both remained until the time had expired. The mortgagor did not attend, and the money remained unpaid. A decree absolute was made. *Lechmere* v. *Clamp*, 31 Beav. 578; 32 L. J., Ch. 276; 9 Jur. (N.S.) 482; 7 L. T. 411; 11 W. R. 83.

Under the common decree in a foreclosure suit, the chief clerk's certificate having fixed a time and place for the repayment by the mortgagor of what was due for principal and interest, the plaintiff's solicitor attended at the time and place appointed, but without any power of attorney from the plaintiffs to receive the mortgage moneys; the mortgagor made default. Upon a motion for the order absolute to foreclose:—Held, it is the mortgagor's right to have every formality strictly observed. *Gurney* v. *Jackson*, 1 Sm. & G. (App.) xxvi.

**Through Agent.**]—In a foreclosure suit the plaintiff's agent attended during the prescribed time for payment, but without a power of attorney to receive the money. No one attended to pay. On an ex parte application the foreclosure was made absolute. *Macrae* v. *Evans*, 24 W. R. 55.

In a foreclosure suit the money was to be paid between twelve and one. The agent of the mortgagee attended during the whole of the appointed time, but without any power of attorney to receive the money. The mortgagee himself did not attend. No one appeared on behalf of the mortgagor:—Held, that the foreclosure ought to

be made absolute. *Cox* v. *Watson*, 47 L. J., Ch. 263; 7 Ch. D. 196.

**Authority to give Receipt.**]—On a motion to make a foreclosure decree absolute, it is not necessary that the person attending at the Rolls Chapel should have authority to give a receipt where no one appears to pay. *London Monetary Advance and Assurance Society* v. *Brown*, 18 L. T. 52; 16 W. R. 782.

—— **Affidavit of Agent's Authority.**]—After judgment for foreclosure, an agent of the mortgagee attended at the place appointed for the payment of the money, but the mortgagor failed to attend:—Held, that the mortgagee, upon production of an affidavit stating that his agent had received the power of attorney, enabling him to receive the money, was entitled to have foreclosure made absolute. *Hart* v. *Hawthorne*, 42 L. T. 79.

**Mistake.**]—In a suit to redeem, the mortgagee having, by mistake, omitted to attend at the time and place fixed by the master for payment of the sum computed to be due to him for principal, interest and costs, the court, upon motion, with notice, appointed a new time and place for the payment of the money ten days after the date of the order. In such a case the defendant is not entitled to subsequent interest. *Hughes* v. *Williams*, 1 Kay (App.) iv.

12. OPENING.

*a.* In General, 1733.
*b.* Subsequent Receipt of Rents and Profits, 1736.

### a. In General.

**When.**]—A decree for foreclosure is never really absolute, but is always liable to be reopened upon proper cause within reasonable time. *Campbell* v. *Holyland*, 26 W. R. 160. *S. C.*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128.

**What is—Bringing Action for Balance.**]—If after foreclosure and sale mortgagee brings an action for the balance, this, it has been held, opens the foreclosure. *Dashwood* v. *Blythway*, 1 Eq. Abr. 317.

After foreclosure and sale, action by the mortgagee for the balance opens the foreclosure; therefore the mortgagee should have time to get back the estate, and tender a reconveyance, and the mortgagor to redeem. But the mortgagee having taken possession a considerable time ago, and the balance being inconsiderable, a perpetual injunction was decreed. *Perry* v. *Barker*, 13 Ves. 198; 9 R. R. 171.

—— **Unfair Conduct.**]—Foreclosure will be opened if there is unfair conduct on part of mortgagee. *Soley* v. *Salisbury*, 9 Mod. 153.

—— **By Suing on Collateral Security.**]—Where a debt is secured on mortgage, covenant and bond, if the mortgagee forecloses first and, the value of the estate proving insufficient to satisfy the debt, sues on the bond or covenant for the deficiency, he thereby opens the foreclosure, and the mortgagor may thereupon redeem. *Lockhart* v. *Hardy*, 9 Beav. 349; 15 L. J., Ch. 347; 10 Jur. 532.

—— **By Devise.**]—After a decree of foreclosure had been made absolute, and the mortgagee for many years in possession, he made his will, and thereby disposed of the mortgage debt in these words: "And if M. S.'s debt be well paid, as I doubt not but it will, I order my executor to pay the sum of 4,800*l.*" (which was the exact amount of the debt) "amongst the children of my nephew":—Held, that this devise did not open the foreclosure, and that the testator's calling it a debt did not alter the nature of his estate in the premises. *Tooke* v. *Ely*, 5 Bro. P. C. 181.

—— **By Receipt of Rent.**]—In an action by executors of a mortgagee against the mortgagor and a puisne mortgagee:—Held, that the receipt of moneys for rent after the time fixed for the puisne mortgagee to redeem, and before final judgment obtained against him, did not open the foreclosure against him. *Webster* v. *Patteson*, 53 L. J., Ch. 621; 25 Ch. D. 626; 50 L. T. 252; 32 W. R. 581.

—— **By Sale to a Defendant.**]—After a decree for foreclosure absolute had been made, one of the defendants in the action purchased the lands from the executors and trustees of the mortgagees, who had died subsequent to the decree, the purchase-money being equivalent to the amount due on foot of the mortgage and costs of the foreclosure, payment of the principal being deferred for five years, and interest in the meantime payable at a lower rate than that secured by the mortgage:—Held, that the foreclosure decree was not thereby opened, and that the defendant so purchasing could confer a good title on a sale by her. *Power and Carton, In re*, 25 L. R., Ir. 459.

—— **By Receiver's Mistake.**]—Some months after the usual order for foreclosure absolute had been made in favour of first mortgagees against the mortgagor and second mortgagees, and after the first mortgagees acting upon that order had actually sold portions of the mortgaged property, the mortgagor discovered that the receiver had omitted from his accounts certain rents which he had received. The mortgagor accordingly moved that the foreclosure might be reopened; and that the first mortgagees might be restrained from parting with the legal estate of the mortgaged property:—Held, that there was no evidence that the first mortgagees had received any of the rents for which the receiver had not accounted, and there was no reason why the foreclosure should be reopened merely because the receiver, who was not the agent of the first mortgagees for all purposes, but was an officer of the court, had made a mistake which the mortgagor had not discovered before it was too late. *Jenner-Fust* v. *Needham* (32 Ch. D. 582) distinguished. *Ingham* v. *Sutherland*, 63 L. T. 614.

**Admitting Part of Decree.**]—A foreclosure decree cannot be opened at the suit of a plaintiff who admits part of the decree and impeaches the rest. *Patch* v. *Ward*, 4 Giff. 96; 9 Jur. (N.S.) 373; 7 L. T. 413; 11 W. R. 135.

Four mortgagees obtained in 1848, in a suit against P., a decree of foreclosure. In 1861 P. filed a bill against one of the mortgagees to open the decree against him only, alleging fraudulent conduct, and that the other mortgagees were not cognisant of the acts complained of:—Demurrer allowed with costs. *Ib.*

**By Judgment Creditors giving Notice.**]—A. mortgaged his land, and then confessed several

judgments; some of the judgment creditors gave the mortgagee notice, and he afterwards obtained a decree to foreclose the mortgagor. Those who gave notice may redeem as creditors for a valuable consideration, but those who gave no previous notice of their judgments are barred of all redemption. *Smith* v. *Valence*, 1 Ch. Rep. 170. And see *Weldon* v. *Rallison*, 1 Ch. Rep. 171.

**Recent Foreclosure.**]—Bill by a conusee of a statute of the mortgagor, to redeem, after a decree of foreclosure, defendant pleaded the decree, and that the statute was acknowledged pendente lite, without notice to him. Per cur., this is a recent foreclosure, and plaintiff shall redeem, paying what is due, with costs. *Crisp* v. *Heath*, 7 Vin. Abr. 52, pl. 2.

**After Years.**]—After a decree of foreclosure made absolute, and an acquiescence of eleven years in mortgagee's possession under it, no parol evidence of his promising to account and reconvey on payment of his money, can be admitted. *Wichalse* v. *Short*, 3 Bro. P. C. 558.

A decree of foreclosure was opened in this case after sixteen years, the mortgagee being interested, and the equity of redemption being worth more than was due on the account. *Burgh* v. *Lanton*, 15 Vin. Abr. 476, pl. 2; 5 Bro. P. C. 213.

—— **Errors of Form.**] — A decree of foreclosure, after an acquiescence of twenty years, shall not be set aside upon a bill of review for errors in form only, and not of substance, and therefore a demurrer to such a bill is good. *Jones* v. *Kenrick*, 5 Bro. P. C. 244.

**Notwithstanding Mortgagee has Sold.**]—In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute, and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to redeem lies in the discretion of the court, and depends on the circumstances of each particular case. *Campbell* v. *Holyland*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128. *S. C.*, 26 W. R. 160.

**Surprise.**]—On bill for foreclosure, and order being obtained enlarging payment of principal money due on condition of interest being paid, the defendant neglecting to pay the interest, plaintiff obtained the usual decree absolute, on motion of course. Petition to discharge decree as obtained by surprise was dismissed with costs. *Jones* v. *Roberts*, M'Cle. & Y. 567.

**Fraud.**]—After a foreclosure decree absolute a mortgagor will not be allowed to redeem, although he alleges that the decree was obtained by fraud. He must seek to have it set aside. *Patch* v. *Ward*, 7 L. T. 413; 11 W. R. 135.

**Setting Aside.**]—W., as solicitor of V., a second mortgagee, received the rents of the mortgaged property. The first mortgagees obtained a decree for foreclosure, and a first report was made finding what was due to them. W. paid them off with his own money, in V.'s name, and also paid off V. The proceedings went on without W.'s interest being disclosed, and shortly afterwards a second report was made finding what was due to V. in respect of his own security, and of what he had paid to the first mortgagees, after allowing for the rents received by him. P., the mortgagor, not paying this, an order absolute for foreclosure was made, V. making the usual affidavit that he had received nothing towards payment of the sum found due. Between the second report and the making this affidavit W. had gone on receiving rents. He was entitled to an undisputed third mortgage, given him by P., on the same property. P., twelve years afterwards, filed a bill to impeach the order for foreclosure absolute as having been obtained by fraud:—Held, that it was not the duty of W., when he became owner of the mortgages, to disclose his interest, and make himself a party to the proceedings; and that, although the affidavit made by V. was in the circumstances irregular, the irregularity did not prove any fraudulent design on the part of W., as it was a doubtful question whether he was not entitled to retain the rents towards satisfaction of this third mortgage, which he claimed to do; and if he was so entitled V.'s affidavit was substantially correct: and that, therefore, the decree for foreclosure absolute could not be set aside. *Patch* v. *Ward*, L. R. 3 Ch. 203; 18 L. T. 134; 16 W. R. 441.

—— **Against alleged Heir of Mortgagor.**]—Judgment was given in a foreclosure action against the son and supposed heir-at-law of C. A contract for sale of the property was entered into, but the chief clerk declined to sanction it, there being no proper evidence that the defendant was heir-at-law. On an application to amend the writ and pleadings by adding the name of any person claiming to be the true heir-at-law, or to set aside the judgment, the judgment was set aside and the action dismissed without costs. *Lancaster Banking Co.* v. *Cooper*, 9 Ch. D. 594; 27 W. R. 164.

**First Mortgagee Foreclosing Second and Devising to Mortgagor.**]—A. mortgages land to B., and afterwards mortgages the same land to C. B., the first mortgagee, forecloses C., and afterwards devises the premises to the mortgagor. Whether C. may now in equity set aside the first mortgage, quære. *Cook* v. *Sadler*, 2 Vern. 235.

**Plea in Bar.**]—Bill to redeem mortgagee being overpaid:—Defence of foreclosure, signed and inrolled, is good plea in bar. *Mallock* v. *Galton*, Dick. 65.

**Resisting—Costs.**]— Mortgagee resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, decreed to pay so much of the costs as was occasioned by his resistance. *Harvey* v. *Tebbutt*, 1 J. & W. 197; 21 R. R. 145.

**b. Subsequent Receipt of Rents and Profits.**

**After Default of Payment.**]—When a mortgagee receives rents after default is made in payment of the principal and interest on the day fixed by the chief clerk's certificate, but before the affidavit of such default is made, an order for final foreclosure will be granted without further account. *Constable* v. *Howick*, 5 Jur. (N.S.) 331; 7 W. R. 160. S. P., *National Building Society* v. *Raper*, 61 L. J., Ch. 73; [1892] 1 Ch. 54; 65 L. T. 668; 40 W. R. 73.

**After Account taken.**]—A foreclosure is not complete until the final order has been made, and the final order cannot be obtained if rents have been received by the mortgagee since the account was taken. *Prees* v. *Coke*, L. R. 6 Ch. 645.

**Opening Account.**]—A mortgagee in possession, who receives a sum by way of rent from the mortgaged property in the interval between the filing of the chief clerk's certificate and the day fixed for payment, thereby opens the account and cannot get a final order without getting another certificate fixing another day for redemption. *Allen* v. *Edwards*, 42 L. J., Ch. 455 ; 21 W. R. 471.

**After Report.**]—A mortgagee received rents between the master's report and the day fixed for the payment ; default being made :—Held, that the mortgagee was not then entitled to an order absolute. *Garlick* v. *Jackson*, 4 Beav. 154.

—— **Further Reference.**]—If a mortgagee receives rents after the master's report and before the day appointed for payment, there must be a further reference and account and a new day appointed for payment. *Alden* v. *Foster*, 5 Beav. 592. S. P., *Ellis* v. *Griffiths*, 7 Beav. 83.

—— **Costs.**]—Where a mortgagee receives rents between the report and the day of payment, it is not the practice, on directing the accounts to be continued, and the time to be extended, to order the mortgagor forthwith to pay the arrears of interest and costs. *Buchanan* v. *Greenway*, 12 Beav. 355.

13. STAYING.

**On Payment into Court.**]—In a suit for foreclosure, on motion by a subsequent mortgagee, the bill was ordered to be dismissed on the mover paying into court a fixed sum on or before a day specified, to answer the plaintiff's claim, and the costs of the plaintiff and other defendants. *Challie* v. *Gwynne*, 1 Kay (App.) xlvi.

In a foreclosure suit by a subsequent mortgagee (to which the prior mortgagees were parties), an order was made on the motion of the mortgagor to stay proceedings, and that the plaintiff should reconvey the estates subject to the prior mortgages, on payment into court of a sum sufficient to satisfy the amount due to him for principal, interest and costs (as between solicitor and client) of him and all the other mortgagees, defendants in the suit. *Lastett* v. *Cliffe*, 9 L. J., Ch. 393. Affirmed, 5 Jur. 493.

**Terms of.**]—In a foreclosure suit the court will not stay proceedings on the application of a defendant, except upon the terms of his paying down, or having previously paid or tendered to the plaintiff his principal and interest, and all the costs of the suit. *Paynter* v. *Carew*, 1 Kay (App.) xxxvi. ; 23 L. J., Ch. 596 ; 18 Jur. 417 ; 2 Eq. R. 496 ; 2 W. R. 345.

**Resisting.**]—Other incumbrancers, who are parties to the suit, have not such an interest in it as to enable them successfully to oppose a motion to stay proceedings, because the plaintiff might at any time dismiss the bill against them upon payment of their costs. *Ib.*

**On Payment on future Day.**]—The court will not make an order to stay proceedings upon payment of principal, interest, and costs on a future specified day, however near, because the right of a mortgagee is to pursue any or all of his remedies without hindrance, until he actually obtains payment of his demand. *Ib.*

**By Plaintiff in his own Suit.**]—A decree was made in a suit for the administration of a mortgagor's estate. The mortgagee afterwards filed a foreclosure bill, but subsequently obtained full payment in the administration suit :—Held, that he was entitled to stay proceedings in his own suit, and to have the costs of it. *Brooksbank* v. *Higginbottom*, *Bent* v. *Buckley*, 31 Beav. 35.

**Two Suits.**]—When an action was commenced by an equitable mortgagee, whose claim was disputed, to establish his charge, and also seeking general administration, and the usual administration decree as to personalty was subsequently made under an administration summons taken out by another creditor, the court stayed all proceedings in the first action, added an inquiry as to incumbrances to the decree, and gave the conduct of the decree to the plaintiff in the first action. *Matthews* v. *Matthews*, *Willyams* v. *Matthews*, 45 L. J., Ch. 711 ; 34 L. T. 718.

Bill by a mortgagee for an account, and for foreclosure, and a sale after a decree in a creditor's suit, under which the plaintiff in a second suit had gone in before the master and proved his charge before he filed his bill, application to stay the proceedings in the second cause, as involving the same accounts, refused ; the plaintiff having more speedy and effectual relief, is entitled to go on ; as, where there are litigated points beyond that of the amount of his demand, he is required to go on, in his separate suit, up to such point, as all ulterior relief can be equally had in the suit first instituted : and, as to staying the proceedings in the first suit, while properly conducted, the court, however anxious to guard against unnecessary expense, has no authority. *Uniacke* v. *Rochford*, 1 Moll. 216.

**Evidence.**]—On a motion by a defendant in a foreclosure suit to stay proceedings on payment of principal, interest and costs, the defendant need not produce an affidavit to shew that he is the only person entitled to redeem. *Piggin* v. *Cheetham* (2 Hare, 80) disapproved of. *Reeves* v. *Glastonbury Canal Co.*, 14 Sim. 351.

**Palatine Court.**]—The court will not stay proceedings in an action for foreclosure or sale commenced in the palatine court of Lancaster, where the property is beyond the limit of the jurisdiction of the palatine court but both mortgagees and mortgagors are within such jurisdiction. *Longdendale Cotton Spinning Co., In re*, 8 Ch. D. 150 ; 38 L. T. 776 ; 26 W. R. 491.

14. PROCEEDINGS FOR.

*a.* Form of, 1739.
*b.* Disclaimer, 1742.
*c.* Defendant out of Jurisdiction, 1743.
*d.* Non-appearance of Defendant, 1744.
*e.* Proof of Mortgage, 1745.
*f.* Form of Decree, 1747.
*g.* Dismissal of Bill to Redeem—*See* REDEMPTION, PROCEEDINGS FOR, IN GENERAL, ante, L. 5 a, col. 1686.

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*h.* Reference for Inquiry, 1752.
*i.* Accounts, 1754.
*j.* Revivor, 1757.

### a. Form of.

**What Relief to be asked.**]—The fact that a bill does not pray for foreclosure is not a sufficient reason for refusing the assistance of the court. *Hutton* v. *Sealy*, 27 L. J., Ch. 263; 4 Jur. (N.S.) 450; 6 W. R. 350.

**General Creditor's Suit.**]—Where a plaintiff, claiming as mortgagee, frames his bill also as a general creditor's suit, the course is, that he should go in under the general decree for an account; and, if not satisfied under that, then go for the unsatisfied balance against his particular security. *Stone* v. *Van Heythuysen*, 18 Jur. 344.

**Summons.**]—There is no jurisdiction to give judgment for foreclosure upon summons, although the facts are not in dispute. *Lloyd* v. *David Lloyd & Co.*, 26 W. R. 572.

**Pending Winding-up.**]—Liberty to a mortgagee, pending a winding-up, to institute a suit for foreclosure refused, there being no special difficulty, and it being competent to him to obtain the proper order in chambers without the necessity of a suit. *St. Cuthbert Lead Smelting Co., In re*, 35 Beav. 384.

**Short Cause.**]—Bill of foreclosure cannot be set down as a short cause, except by consent. *Rashleigh* v. *Dayman*, 2 Madd. 147.

It is contrary to the practice to advance a foreclosure suit to be heard as a short cause, unless with the consent of the defendant; but see the 4th general order, 9th May, 1839. *Lewin* v. *Moline*, 1 Beav. 99; 8 L. J., Ch. 96.

**Writ specially Endorsed under Ord. III. r. 6.**]—Where the writ in an action for foreclosure was also specially indorsed under Ord. III. r. 6, with a claim for the amount due on the covenant to pay in the mortgage deed, an application to enter judgment against the mortgagor under Ord. XIV. r. 1, for the amount claimed, before the action was heard, was refused. *Hill* v. *Sidebottom*, 47 L. T. 224.

**Suit for Recovery of Money.**]—The Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40) may be pleaded to a bill of foreclosure; a foreclosure suit being in fact a suit for the recovery of the money secured by the mortgage. *Dearman* v. *Wyche*, 9 Sim. 570; 9 L. J., Ch. 76.

**Action for Recovery of Land.**]—A foreclosure action is not an action for the recovery of land within the meaning of rules of court, 1875, Ord. XVII. r. 2. *Tawell* v. *Slate Co.*, 3 Ch. D. 629.

Although a foreclosure action is an action for the recovery of land, a foreclosure judgment absolute is not a judgment for the recovery of the possession of land within the meaning of the Judicature Act, Ord. XLII. r. 3, and consequently cannot be enforced by writ of possession. *Wood* v. *Wheater*, 52 L. J., Ch. 144; 22 Ch. D. 281; 47 L. T. 440; 31 W. R. 117.

**Delivery of Possession—Ex parte Application.**]—Where a summons for foreclosure does not ask for delivery of possession, the subsequent order for foreclosure absolute and delivery of possession will not be made ex parte. *Le Bas* v. *Grant*, 64 L. J., Ch. 368.

Where an order nisi for foreclosure and possession had been made, the order absolute was made ex parte. *Withall* v. *Nixon*, 54 L. J., Ch. 616; 28 Ch. D. 413; 33 W. R. 565.

In a foreclosure action the plaintiff did not ask for possession in his originating summons. An order for foreclosure absolute having been made, the plaintiff applied ex parte for delivery of possession. The defendant had not appeared:—Held, that after foreclosure absolute the court could make such order. *Jenkins* v. *Ridgley*, 3 R. 628; 68 L. T. 671; 41 W. R. 585.

**Setting out Lunacy.**]—A mortgage was executed by S., who was afterwards found lunatic by inquisition as from a date prior to the mortgage. The mortgagee filed his claim for foreclosure against the mortgagor and his committee, but did not set out the date from which the mortgagor had been found lunatic. The deed was proved by the surviving attesting witness, who was not cross-examined by the defendants, but they went into evidence to shew that the mortgagor was lunatic both prior to and at the time of the mortgage being executed:—Held, that the suit was properly by claim, and was not defective in not setting out the prior lunacy of the mortgagor. *Jacobs* v. *Richards*, 5 De G. M. & G. 55; 23 L. J., Ch. 557; 18 Jur. 527; 2 Eq. R. 299.

**Impeaching Mortgage by Cross Suit.**]—Semble, that in a foreclosure suit, it is not competent for the defendant to impeach the mortgage on the ground of fraud without instituting a cross suit. *Eddleston* v. *Collins*, 3 De G. M. & G. 1; 22 L. J., Ch. 480; 17 Jur. 331; 1 W. R. 169.

**Demurrer.**]—Mortgagee filed a bill of foreclosure against his mortgagor and others whom he considered subsequent mortgagees. B., one of the defendants, demurs to the bill for want of equity, upon the ground that A. shews by his bill that he is only entitled to redeem him, and therefore can have no equity for relief so inconsistent with his right:—Held, that the demurrer could not hold, plaintiff having, by the admission of the defendant, shewn upon his bill a title to some relief, though inconsistent with the prayer of his bill, and that the hearing was the proper time to decide upon the precise relief for the plaintiff. *Medley* v. *Horton*, 5 Jur. 1031.

**Issue Directed and Abandoned.**]—Upon the hearing of a foreclosure claim the court directed an issue, in which the defendant was to be the plaintiff. The defendant having abandoned the issue:—Held, that the plaintiff's proper course was to move that the issue might be taken pro confesso against the defendant; upon which the court could dispense with the issue, and the claim would stand in the same situation as if the issue had been tried and found for the plaintiff. *Hartland* v. *Dancocks*, 5 De G. & Sm. 561; 21 L. J., Ch. 449.

**Evidence of Nonpayment.**]—A mortgagee had obtained a foreclosure judgment nisi, and now moved the court to grant him foreclosure absolute.

He had made no affidavit of nonpayment of moneys due to him, but the solicitor's clerk, who attended on his behalf to receive the money due on the security, had made an affidavit of nonpayment. The defendant had not appeared in the action since its commencement :—Held, that, on a motion by a mortgagee for foreclosure absolute, the plaintiff's personal affidavit of nonpayment might be dispensed with, in spite of the contrary practice laid down in Seton on Decrees, 4th edit. p. 1091. *Frith* v. *Cooke*, 52 L. T. 798 ; 33 W. R. 688.

Upon an application for an order for foreclosure absolute, where an affidavit of nonpayment had been made by the person attending on behalf of the plaintiff to receive the mortgage-moneys, the court declined to dispense with an affidavit by the plaintiff stating that he had not received the mortgage-moneys between the date of attendance and the date of the application. *Barrow* v. *Smith*, 52 L. T. 798 ; 33 W. R. 743.

Where one of six mortgagees had made an affidavit for himself positively, and for the other mortgagees to the best of his knowledge and belief, that the debt had not been paid, and one of the remaining five mortgagees was out of the jurisdiction, and the others in the jurisdiction ; on motion, ex parte, on behalf of the plaintiffs for an order absolute for foreclosure :—Held, that the affidavit in support of the motion was not sufficient, and that an affidavit must be made by all the mortgagees in the jurisdiction, and the matter mentioned again to the court. *Kinnaird* v. *Yorke*, 60 L. T. 380.

Upon a motion made on 20th March, for a final order of foreclosure, an affidavit made on 20th Feb. by J. D., one of two joint mortgagees, and by James S., was tendered in evidence. John S., the other mortgagee, had in 1874 gone to reside in New Zealand, and had granted James S. a power of attorney to act for him in the matter of the mortgage. Under the authority of this power, and under a power of attorney granted by J. D., James S. had attended on 31st Jan. previous, to receive payment of the mortgage-moneys. The affidavit stated that John S. was still in New Zealand ; that default had been made in payment of the mortgage-moneys, and that the whole of this sum remained due to the mortgagees :—Held, that the affidavit was not sufficient, and that more recent evidence must be adduced. At the subsequent hearing of the motion on 25th March, an affidavit made by James S. alone on 21st March was produced. In this James S. stated that John S. was still residing in New Zealand, that J. D. was away from his home in Derbyshire, and that his whereabouts was unknown, and that to the best of his knowledge the mortgage-moneys remained unpaid :—Held, that an affidavit made by James S. alone was insufficient. *Docksey* v. *Else*, 64 L. T. 256.

**Multifariousness.**]—Two separate portions charged on real estates were assigned by way of mortgage to a person who also became the mortgagee in fee of the entirety of the same estates, subject to the portions. The mortgagee in one foreclosure suit sought to foreclose the mortgagors of the two portions and the mortgagor of the entirety. On an objection taken by the mortgagor of the entirety at the hearing :—Held, that the suit was not multifarious. *Pearce* v. *Watkins*, 5 De G. & Sm. 315 ; 16 Jur. 832.

### b. Disclaimer.

**In Ignorance.**]—Where a defendant in a foreclosure suit had filed an answer and disclaimer, in ignorance of her rights to the equity of redemption, applied after a decree to account for liberty to withdraw the disclaimer and amend the answer, or to file a supplemental answer stating her claims to the equity of redemption ; the court refused the order, without prejudice to any application which the defendant might make after satisfaction of the plaintiff's demand under the decree. *Glenny* v. *Murdock*, Fl. & K. 277.

**By some Defendants.**]—If some of the defendants in a foreclosure suit disclaim, the court will decree them to be foreclosed, and not simply dismiss the bill as against them. *Perkin* v. *Stafford*, 10 Sim. 562. S. P., *Johnson* v. *Clarke*, 3 W. R. 193.

**Party till.**] — A second incumbrancer not having disclaimed interest by answer must remain a party. *M'Nab* v. *Mensal*, Tam. 375.

**Effect of—By Bankrupt.**]—A defendant (bankrupt mortgagor) to a suit by his mortgagee, praying for a declaration of priority and for accounts, cannot by means of an answer and disclaimer avoid answering fully, for, though he may disclaim his interest in the subject-matter of the suit, he cannot disclaim his liability to account. *Dobree* v. *Nicholson*, 22 L. T. 774 ; 18 W. R. 965.

—— **By Trustee of Bankrupt.**]—In a foreclosure action brought against a bankrupt mortgagor and his trustee in bankrutpcy where the trustee has disclaimed and neither defendant has appeared, the mortgagee is entitled at the hearing to a foreclosure absolute against the trustee, but against the mortgagor he is only entitled to an ordinary foreclosure decree. *English* v. *Barlow*, 48 L. T. 188.

—— **By Assignees of Bankrupt.**]—The disclaimer by the assignees of a bankrupt, of the equity of redemption of a term of years vested in the bankrupt by the devise to him of the fee simple of the same estate, renders the bankrupt a necessary party to the bill of foreclosure. Semble. *Singleton* v. *Cox*, 4 Hare, 326.

An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit of foreclosure. *Collins* v. *Shirley*, 1 Russ. & M. 638.

**When may be Pleaded.**]—A disclaimer in a foreclosure suit can be pleaded as an answer to any further suit for redemption, but not in any other way. *Burrell, In re, Burrell* v. *Smith*, 38 L. J., Ch. 382 ; L. R. 7 Eq. 399 ; 17 W. R. 516.

**Duration of.**] — Therefore, when A., being lessee of a house for a term of years, made an underlease to B., by way of mortgage, and on a bill filed by B. for a foreclosure of the mortgage, A.'s representatives disclaimed :—Held, that the effect of the disclaimer upon the mortgaged property was confined to the period comprised in the underlease. *Ib.*

*See also* S. 10, post, col. 1864.

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### c. Defendant out of Jurisdiction.

**Principle.**]—It is a principle not to foreclose an absent mortgagee; aliter, semble, as to a decree for sale. *Leahy* v. *Dancer*, 3 Moll. 109. S. P., *Gowan* v. *Tyghe*, 3 Moll. 113.

A decree for foreclosure or sale cannot be made in the absence, abroad, of a party entitled to one-third of the equity of redemption. The objection is not removed by the 15 & 16 Vict. c. 86. *Caddick* v. *Cook*, 32 Beav. 70.

**Decree—Against some of several.**]—A mortgagor devised a mortgaged estate, in trust for sale, and to divide the produce amongst his nine children; two of the children were living out of the jurisdiction, and on a bill for foreclosure a decree was made against the other seven only. *Runcorn* v. *Nicholson*, 5 L. J., Ch. 203.

—— **Against Defendant Absconded.**]—In a foreclosure suit where, the defendant having absconded, the plaintiff had, by leave, entered an appearance for him, and advertised the replication and subpœna to hear judgment, the court, on proof of the facts in the bill, made a decree in the terms of the prayer. *Lechmere* v. *Clamp*, 30 L. J., Ch. 651; 9 W. R. 860.

**Vesting Order.**]—The court also made a prospective order under the 13 & 14 Vict. c. 60, ss. 34, 43, vesting the mortgage property in the plaintiff. *Ib.*

On making an order of foreclosure absolute, the court refused to add a declaration under the Trustee Act, 1850, that the mortgagor being out of the jurisdiction is a trustee, in order to found upon it a subsequent application for a vesting order. Such a declaration can be obtained only on a separate application. *Smith* v. *Boucher*, 1 Sm. & G. 72; 16 Jur. 1154.

**Service—Dispensing with.**]—In a foreclosure suit, when the bill had been ordered to be taken pro confesso against a trustee, out of the jurisdiction, and he had been served with the order without the notice specifying the time within which he must appear and object, as required by r. 11 of the Cons. Ord. XXII., the court, after the lapse of three years from the decree, upon being satisfied that service of the order upon him was unnecessary altogether, dispensed with such service, and made the order absolute. *Thurgood* v. *Cane*, 11 W. R. 297.

—— **By Advertisement.**] — In a foreclosure suit, by a mortgagee who had been in possession twelve years, against several defendants, trustees and beneficiaries under the will of the original mortgagor—some of whom were out of the jurisdiction in America—the bill having been ordered to be taken pro confesso against the defendants out of the jurisdiction, and at the hearing none of the defendants appearing, service of copy of the decree upon the defendants out of the jurisdiction was permitted to be made by advertisements in two London, and one American, newspapers. *Hyde* v. *Large*, L. R. 19 Eq. 48; 23 W. R. 22.

—— **Proceeding after.**] — The plaintiff was allowed to proceed under the decree at the expiration of three months from the date of the advertisements. *Ib.*

**Form.**] — A defendant in a foreclosure suit having made default, and it being impossible to find him, a motion was made to take the bill pro confesso, and make the decree absolute. In drawing up the order the registrar considered that he could only make the order absolute:—Held, that there must be an order similar to that in *Lechmere* v. *Clamp* (31 Beav. 578). *London Monetary Advance Co.* v. *Bean*, 18 L. T. 349.

### d. Non-Appearance of Defendant.

**Decree—Ordinary.**] — Immediate foreclosure, in case the mortgagor did not appear, was claimed by the pleading. The mortgagor made default in appearance, and the court made only an ordinary foreclosure decree. *Patey* v. *Flint*, 48 L. J., Ch. 696; 40 L. T. 651; 27 W. R. 595.

The bill in a foreclosure suit was taken pro confesso against two defendants, who at the hearing did not appear:—Held, that the plaintiff was entitled only to the ordinary decree, and not to a decree of foreclosure absolute. *Brierly* v. *Ward*, 20 L. J., Ch. 46; 15 Jur. 277.

—— **Nisi.**]—Defendant not appearing to bill to redeem or foreclose, decree nisi pronounced. *Kettle* v. *Corbin*, Dick. 314.

**Under Mortgage Act.**]—The court felt itself bound, even in a case of hardship, to refuse to give any effect to a proceeding, under the Mortgage Act, against an absent mortgagor; but Lord Chancellor intimated that, on a bill filed, an application might be so framed as to protect the rents which should accrue during the four terms required by the act to make such suit effectual, from being paid out, being received in a cause instituted by a puisne incumbrancer to the prejudice of the petitioner. *Wolfe* v. *Jackson*, 1 Moll. 250.

**Account—Ordering.**]—When at the trial of a foreclosure action the plaintiff asks for a sale of the property, and the mortgagor does not appear, the court will order an account of what is due to the plaintiff to be first taken, and then that so much of the property be sold as will be sufficient to satisfy what is found due to the plaintiff. *Wade* v. *Wilson*, 52 L. J., Ch. 399; 22 Ch. D. 235; 47 L. T. 696; 31 W. R. 237.

—— **Dispensing with.**]—Where, at a trial of a foreclosure action, the plaintiff asks for a sale of the property, and the mortgagor does not appear, the court will dispense with an account of what is due, if it appear by the pleadings that the security is insufficient. *Williams* v. *Owen*, 48 L. T. 388.

**7 Geo. 2, c. 2.**]—A decree of foreclosure had on sequestration in 1777, in pursuance of 7 Geo. 2, c. 2 (Irish), against an absent mortgagor, known by the plaintiff to be incompetent from mental imbecility to conduct his affairs, and advantage having been taken in the account of the state of the defendant, and of his absence, and of his having nobody to manage his defence: and a sale had in 1780, in pursuance of such decree, to the person conducting the suit, set aside as fraudulent; and an inquiry directed into the circumstances upon the ground of which the decree and former proceedings were

impeached: on original bill filed in 1785 by the heir of the mortgagor. *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

—— **Application of.**]—The statute 7 Geo. 2, c. 14 (Irish), enabling plaintiffs to proceed where defendants refuse to appear, does not apply to defendants labouring under incompetency, as idiotcy, &c. *Id.* 292.

**Conveyancing Act, 1881, s. 25, sub-s. 2.**]—Upon motion for judgment in an action where foreclosure alone is claimed by the mortgagee, and the mortgagor does not appear, the court will not exercise its discretion under s. 25, sub-s. 2 of the Conveyancing and Law of Property Act, 1881, unless the mortgagor has had notice of the mortgagee's intention to ask for a sale, instead of foreclosure, of the mortgaged premises. *South-Western District Bank* v. *Turner*, 47 L. T. 433; 31 W. R. 113.

**Judgment under Ord. XIII. r. 3—Ord. XV.**]—A writ was indorsed with a claim for an account of principal, interest and costs on a mortgage security, and for foreclosure or sale, and also with a claim for a specific sum for principal and interest due under a covenant in the mortgage deed. The defendant did not appear, and no statement of claim was delivered. The plaintiff moved, under Ord. XIII. r. 3, for liberty to forthwith sign final judgment for the amount indorsed on the writ, and, under Ord. XV., for the usual foreclosure judgment nisi:—Held, that, under Ord. XIII. r. 3, the plaintiff was entitled to sign judgment for the liquidated demand, notwithstanding that the writ was also indorsed with a claim for an account and foreclosure, but that he was not entitled under Ord. XV. to a foreclosure judgment. Observations on *Blake* v. *Harvey* (29 Ch. D. 827). *Bissett* v. *Jones*, 55 L. J., Ch. 648; 32 Ch. D. 635; 54 L. T. 603; 34 W. R. 591.

### e. Proof of Mortgage.

**Need not prove Consideration.**]—On a bill by a mortgagee, where the payment to the mortgagor of the money secured by the mortgage deed is not put in issue by the answer, the mortgagee need only prove her mortgage deed, and is not obliged to prove also the payment of the consideration. *Minot* v. *Eaton*, 4 L. J. (o.s.) Ch. 134.

Third mortgagee buys in the first, and brings his bill to foreclose the second; he need not prove the money actually lent on the third mortgage, the producing an acquittance being sufficient. *Holt* v. *Mill*, 2 Vern. 279.

**Proof of Second Mortgage by First Mortgagee.**]—On a bill to foreclose by first mortgagee against mortgagor and second mortgagee, the plaintiff should prove the second mortgage, otherwise he can only take an inquiry at the first hearing. *Guardner* v. *Boucher*, 13 Beav. 68.

**By Proof of Handwriting of Witness.**]—Mortgage bequeathed to wife of sole subscribing witness of mortgage; proof of his handwriting sufficient proof of execution of mortgage between mortgagor and mortgagee. *Inman* v. *Parsons*, 4 Madd. 271.

**Deed primâ facie valid.**]—A mortgage was executed by S., who was afterwards found lunatic by inquisition as from a date prior to the mortgage. The mortgagee pleaded his claim for foreclosure against the mortgagor and his committee, but did not set out the date from which the mortgagor had been found lunatic. The deed was proved by the surviving attesting witness, who was not cross-examined by the defendants, but they went into evidence to shew that the mortgagor was lunatic both prior to and at the time of the mortgage being executed:—Held, that, the deed being a good one primâ facie, the defendants could not be permitted to shew its invalidity in the present suit (except, semble, by cross-examination of the attesting witness), and that the court would act upon it until it was set aside by a court of law. The usual foreclosure decree was made, with a direction for it not to be drawn up for six months, the defendants to be at liberty in the meantime to take proceedings to set aside the deed. Upon appeal to the Lords Justices, the claim was ordered to be retained for a year, with a direction to the plaintiff to bring an action of ejectment. *Jacobs* v. *Richards*, 5 De G. M. & G. 55; 23 L. J., Ch. 557; 18 Jur. 527; 2 Eq. R. 299.

**Judgment, primâ facie Evidence.**]—In 1818, A. and B. agreed to build a mill at their joint expense, A. undertaking to advance the whole sum. B. gave him a mortgage for 400*l.* as his moiety of the cost. The mill was afterwards sold. In 1831 A. brought an action against B., on the mortgage deed, and obtained a judgment, but took no further steps. In 1837 A. filed a bill of foreclosure, admitting that 240*l.*, part of the mortgage-money, was paid in 1824. B., by his answer, insisted that the whole was satisfied by the mill transaction, and gave in evidence general admissions by the plaintiff to third persons, made before the action at law, to that effect:—Held, that the judgment was primâ facie evidence of the strongest nature that a debt was due at the time, and that it could not be impeached in equity by evidence of conversations and general admissions on the part of the plaintiff, which might have been used as a defence to the action at law. *Caldecott* v. *Williams*, 10 L. J., Ex. Eq. 26.

**Affidavit, by whom to be made.**]—A common foreclosure decree was made; but the registrar objected to draw up the decree, on the ground that the affidavit was made by an officer of a public company:—Held, that the affidavit was properly made, and the objection of the registrar was overruled. *Consolidated Investment and Insurance Society* v. *Dodd*, 9 W. R. 12.

**Copy of Deed and Re-conveyance.**]—A mortgage deed could not be produced, and a copy purporting to have been furnished by the solicitor who held the deed was produced on behalf of the plaintiff as evidence of the deed; the plaintiff also deposed to the existence of the mortgage. The defendants had in their answers not expressly challenged the mortgage deed, and had admitted that there had been a reconveyance of part of the property comprised in the mortgage:—Held, that as against them the mortgage deed was sufficiently proved. *Heath* v. *Crealock*, 44 L. J., Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650; 23 W. R. 95.

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**Drafts good secondary Evidence.**]—Drafts produced from the proper custody, and bearing indorsement in the handwriting of a solicitor shewing that the deeds were engrossed from them and were duly executed and stamped, and the diary of a deceased clerk containing entries in his handwriting made in the regular course of his business, and shewing that he had drawn the drafts and had attended the execution and stamping of the deeds, were good secondary evidence of the mortgages. *Waldy* v. *Gray*, 44 L. J., Ch. 394; L. R. 20 Eq. 238; 32 L. T. 531; 23 W. R. 676.

**Interrogating Defendant.**]—In every bill for redemption and foreclosure it is relevant for the plaintiff to interrogate the defendant as to the dates of his securities, the amount of money which he has actually advanced, and the rates of interest reserved. *Beavan* v. *Cook*, 20 L. T. 689; 17 W. R. 872.

### f. Form of Decree.

**Common Decree, what.**]—The common decree in foreclosure does not direct the delivery up of the title deeds by the mortgagor to the mortgagee in case of foreclosure, but merely that the mortgagor shall be absolutely barred and foreclosed of all right and equity of redemption; and it is only where there is a covenant to deliver them in case of default in payment of the principal money and interest that the court makes such a decree. *Wiseman* v. *Westland*, 1 Y. & J. 117; 30 R. R. 765.

**In Action by second Mortgagee.**]—In an action by a second mortgagee to redeem the first mortgagee, and to foreclose the mortgagor, the proper form of judgment is that in default of the plaintiff redeeming the action is to stand dismissed with costs. *Hallett* v. *Furze*, 55 L. J., Ch. 226; 31 Ch. D. 312; 54 L. T. 12; 34 W. R. 225.

**Where Debt payable by Instalments.**]—Form of foreclosure judgment when mortgage debt is payable by instalments. *Greenhough* v. *Littler*, 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

**Personal Payment combined with Foreclosure.**]—In a foreclosure action, since the Judicature Acts, where both forms of relief are expressly claimed, an order for personal payment may be combined with an order for foreclosure. *Gibbon* v. *Walker*, 38 L. T. 217.

Since the Judicature Acts, it is the practice in foreclosure actions to make a personal order for payment of the sum found due for principal and interest. *Poulett* v. *Hill*, 62 L. J. Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503—C. A.

A mortgagee, being now entitled to combine in one action his right to judgment on the mortgage covenant against the mortgagor personally with his right to foreclosure, is entitled:—(a) If the amount of debt and interest is proved, admitted, or agreed to at the trial, to judgment for immediate payment of the whole amount; (b) If the amount is not so proved, admitted, or agreed to, to an account of what is due to him for principal and interest in respect thereof, and to judgment for payment of the whole amount immediately the same is certified—unless in either case the judge in his discretion gives time. Semble, the allowance of one month for payment from the date of the certificate is a reasonable exercise of such discretion. *Farrer* v. *Lacy*, 55 L. J., Ch. 149; 31 Ch. D. 42; 53 L. T. 515; 34 W. R. 22—C. A.

**Where Personal Judgment against Mortgagor.**]—Form of judgment in a foreclosure action, when a personal judgment is taken against the mortgagor on his covenant for payment of principal and interest. The form in *Grundy* v. *Grice*, Seton on Decrees, 4th ed. vol. ii., p. 1036 (Form No. 2) modified. *Hunter* v. *Myatt*, 54 L. J., Ch. 615; 28 Ch. D. 181; 52 L. T. 509; 33 W. R. 411.

**Where Widow claims Dower.**]—Form of a decree of foreclosure, where a widow claimed dower out of the mortgaged premises, paramount, to some extent, to the mortgage. *Jones* v. *Griffith*, 2 Coll. C. C. 207.

**On equitable Mortgage.**] — By a foreclosure decree on an equitable mortgage, the mortgagor was declared a trustee, and an order was made vesting the estate in the mortgagee. *Lechmere* v. *Clamp*, 30 Beav. 218.

A decree for foreclosure in the case of an equitable mortgage ought not to omit the word "foreclose," but ought to contain directions that upon default the mortgagor will be foreclosed, that the hereditaments will be discharged from all equity of redemption, and that a conveyance must be executed. *Lees* v. *Fisher*, 22 Ch. D. 283; 31 W. R. 94.

A foreclosure decree upon an equitable mortgage should contain the word "foreclose" in addition to the words used in Seton on Decrees, p. 1126, Form 4. *Ib.*

—— **Against Infants.**]—Form of equitable mortgagees' decree, some of the defendants, devisees of the mortgagor, being infants. *Lewis* v. *John*, C. P. Cooper, 8; 9 Sim. 366; 7 L. J., Ch. 242.

In a foreclosure action, where the estate of the mortgagor was devised in trust for sale and had become vested in an infant, who was also one of the persons beneficially interested:—Held, that the decree should contain a direction that, in case the mortgagees were not redeemed within six months, the infant should be a trustee for them within the meaning of the Trustee Act, and the executrix of the mortgagor be ordered to convey the estate to the mortgagees on his behalf. *Foster* v. *Parker*, 8 Ch. D. 147.

**Where Equity divided.**]—Form of decree where equity of redemption is divided. *Thorneycroft* v. *Crocket*, 7 Jur. 712.

**One Decree in Two Causes.**]—Where the mortgagor met a foreclosure suit by a bill for an account (the mortgagee being also a trustee), it was held that the court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to, or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case. *Dodd* v. *Lydall*, 1 Hare, 333.

**Where Mortgagee has two Mortgages.**]—Form of decree of foreclosure where the mortgagee had two mortgages, by one of which property,

belonging partly to A. and partly to B., was conveyed to secure money advanced to A. and B. in different proportions, with a proviso for redemption on payment of the money by them, or either of them; and, by the other, property belonging to A., and partly comprised in the first mortgage, was covenanted to be conveyed to secure the debt of A. *Higgins* v. *Frankis*, 15 L. J., Ch. 329; 10 Jur. 328.

—— **Both legal and equitable.**]—Form of decree for foreclosure where the mortgagee has a legal mortgage for the whole of his debt on one of the mortgagor's estates, and an equitable mortgage for part of his debt on another of the mortgagor's estates. *Holmes* v. *Turner*, 7 Hare, 367.

—— **Mortgages of both Mortgagor's and Surety's Estates.**]—Form of decree in a foreclosure suit, where A., whose estate was already mortgaged to the plaintiff, joined B. as his surety, in a mortgage to the plaintiff of both their estates, for a further sum. *Aldworth* v. *Robinson*, 2 Beav. 287.

**Separate Orders against Mortgagor and puisne Mortgagee.**]—Under a decree of foreclosure against puisne mortgagees and the mortgagor, the mortgagor is not to be foreclosed before the foreclosure has been made absolute against the second mortgagee, and the foreclosure is not to be made absolute against the second mortgagee and the mortgagor by one and the same order. *Whitbread* v. *Lyall*, 3 Sm. & G. 314. *S. C.*, 8 De G. M. & G. 383; 25 L. J., Ch. 791; 2 Jur. (N.S.) 671.

**Against Official Receiver and puisne Incumbrancers.**]—A mortgagor was adjudicated bankrupt, and his estate became vested in the official receiver in bankruptcy for the county of Lancaster. The mortgagee assessed the value of his mortgage security in accordance with the rules contained in the second schedule to the Bankruptcy Act, 1883. The mortgage debt amounted to 4,566*l.* 10*s.* 1*d.*, and the assessed valuation of the mortgage security was 3,500*l.* The mortgagee commenced a foreclosure action against the official receiver and subsequent incumbrancers. Upon motion for judgment in default of pleading:—Held, that the judgment for foreclosure ought to shew on the face of it that the official receiver was entitled to redeem the mortgaged property at a sum less than that at which the subsequent incumbrancers were entitled to redeem the mortgaged property. *Knowles* v. *Dibbs*, 60 L. T. 291; 37 W. R. 378.

**Decree for Partition, how far incident to Foreclosure or Redemption.**]—A decree for partition is not properly incident to a foreclosure or redemption suit in such a way that the owners of the equity of redemption can be allowed to insist on it against the will of the mortgagee, who has no interest in the question. *Watkins* v. *Williams*, 3 Mac. & G. 622; 21 L. J., Ch. 601; 16 Jur. 181.

**Non-Admission, subsequent Admission, of Debt.**]—Where a mortgagor in his defence to a foreclosure action did not admit the mortgage debt, but afterwards admitted it at the trial, the court, in giving judgment for personal payment under the covenant and for foreclosure, declined to grant a month's time for payment. *Instone* v. *Elmslie*, 54 L. T. 730; 34 W. R. 592.

**Puisne Incumbrancer having Priority.**]—Where, in a foreclosure suit, a subsequent incumbrancer is held to have priority by reason of the possession of deeds, in case the first mortgagee elects not to redeem him, the bill will be dismissed against him only, and, as against the subsequent incumbrancers, there will be the usual foreclosure decree. *Layard* v. *Maud*, 16 L. T. 738.

**Where Rents received by Receiver after Certificate—Liberty to apply.**]—When in a foreclosure action the plaintiff, in order to avoid opening the foreclosure by claiming payment of rents come to the hands of the receiver in the action between the date of the certificate and the day fixed for the redemption, submits to be charged in account with a sum certain in the hands of the receiver in respect of such rents, the judgment should reserve liberty to either party to apply for payment of any money come to the hands of the receiver. *Lusk* v. *Sebright*, 71 L. T. 59.

**After Receiver appointed—Liberty to apply.**]—Where, after the commencement of a foreclosure action concerning certain property subject to a mortgage which included the goodwill of a business, a receiver and manager had been appointed, the court directed a proviso to be inserted in the order for foreclosure, that any person redeeming, or in the event of foreclosure the plaintiff, should be at liberty to apply to the judge in chambers for payment of any money in court, or in the hands of the receiver. *Smith* v. *Pearman*, 58 L. T. 720; 36 W. R. 681.

—— **Special Circumstances.**]—On motion for judgment for default of appearance in a foreclosure action, in which a receiver had been appointed, an order in the form made in *Coleman* v. *Llewellin* (34 Ch. D. 143) was refused, there being no special circumstances to justify the insertion of the provision therein contained. *Cheston* v. *Wells*, 62 L. J., Ch. 468; [1893] 2 Ch. 151; 3 R. 367; 68 L. T. 197; 41 W. R. 374.

**Mortgage of Land in Colonies.**]—A foreclosure decree being a decree in personam depriving the mortgagor of his personal right to redeem, the court has jurisdiction to make such a decree in respect of a mortgage between an English mortgagor and mortgagee of land in one of the colonies. *Paget* v. *Ede*, 43 L. J., Ch. 571; L. R. 18 Eq. 118; 30 L. T. 228; 22 W. R. 625.

**Difference between Causes in England and Ireland.**]—The course of proceedings in foreclosure causes in Ireland and in England is materially different: in England, it is merely a suit between mortgagor and mortgagee, to bar the equity of redemption of the former; but no sale is directed, and no provision made for creditors, as under similar decrees in this court. *Steele* v. *Phillips*, Beat. 192.

**For Delivery of Possession.**]—A summons for foreclosure asked for delivery of possession in the event of foreclosure. The usual foreclosure order was made without any direction as to the delivery of possession. Default in payment having been made, the order for foreclosure

was made absolute. The plaintiff then moved in the action for an order on the defendant to deliver up possession of the mortgaged property:—Held, that such an order ought to be made, and that the plaintiff ought not to be obliged to bring a new action for the purpose of recovering possession. *Keith* v. *Day*, 58 L. J., Ch. 118; 39 Ch. D. 452; 60 L. T. 126; 37 W. R. 242—C. A.

After an order absolute for foreclosure made on an originating summons, the court will grant an order for possession, although possession was not asked for by the summons; and will also, on motion, grant an injunction to restrain removal of chattels comprised in the security, and an order for restitution of chattels wrongfully removed. *Manchester Banking Co.* v. *Parkinson*, 60 L. T. 258.

An order for foreclosure absolute in a foreclosure action commenced by summons may, as against the defendant mortgagor in possession (he having been served and not appearing), include an order for delivery of possession by him to the plaintiff, even though the summons did not ask for delivery of possession. *Best* v. *Applegate* 57 L. J. Ch. 506; 37 Ch. D. 42; 57 L. T. 599; 36 W. R. 397.

Under Ord. XVIII. r. 2, of the rules of the supreme court, Dec. 1885, the court has jurisdiction in a foreclosure action to order delivery of possession where possession is asked, not against a third party, but against the mortgagor, notwithstanding that the plaintiff has not asked for possession either in the writ or statement of claim. *Salt* v. *Edgar*, 54 L. T. 374.

The minutes of the order in a mortgagee's action, where possession of the mortgaged premises is (inter alia) claimed, should contain a direction that, in default of the defendant redeeming, he should deliver up possession of the mortgaged premises to the plaintiff, inasmuch as the order for possession is a conditional order like a foreclosure order, and requires to be made absolute like a foreclosure order. *Williamson* v. *Burrage*, 56 L. T. 702.

Where an order nisi for foreclosure and possession had been made, the order absolute also provided for possession and was made ex parte. *Withall* v. *Nixon*, 54 L. J., Ch. 616; 28 Ch. D. 413; 33 W. R. 565.

An order for the delivery of possession of mortgaged property (forming part of an order for foreclosure absolute) should contain the description of the property contained in the mortgage deed, so that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property. *Thynne* v. *Sarl*, 60 L. J., Ch. 590; [1891] 2 Ch. 79; 64 L. T. 781.

**By Consent, without Account.**]—Form of order for foreclosure taken by consent without account. *Boydell* v. *Manby*, 9 Hare (App.) liii.

**When new Accounts and several Defendants.**]—In a foreclosure action when new accounts and directions are necessary, and there are several defendants, the form of order will follow that suggested by Lord Selborne in *Jennings* v. *Jordan* (6 App. Cas. 698), rather than that in Seton on Judgments and Orders, 5th edit., p. 1628. *Biddulph* v. *Billiter Street Offices Co.*, 13 R. 572; 72 L. T. 834.

**Liberty to apply for Sale.**]—The court, in making a foreclosure decree, gave liberty to any party to apply in chambers for a sale. *Burmester* v. *Moxon*, 35 Beav. 310.

### g. Dismissal of Bill to Redeem.

*See* REDEMPTION, PROCEEDINGS FOR, IN GENERAL, ante, col. 1686.

### h. Reference for Inquiry.

**Between Defendants.**]—An inquiry directed between two defendants. *Ede* v. *Knowles*, 2 Y. & C. C. C. 172.

—— **As to Priority.**]—Upon a bill of foreclosure by first mortgagee, there was a contest between the defendants, the puisne mortgagees, as to their respective priorities. The court held that it must, in the first instance, direct an inquiry. *Duberly* v. *Day*, 14 Beav. 9.

—— **Decree without Inquiry.**]—Decree for foreclosure against divers sub-mortgagees and parties having derivative interest under the mortgagor, subsequent to the plaintiff, without any inquiry as to their respective priorities. *Long* v. *Storie*, 9 Hare, 551; 21 L. J., Ch. 521; 16 Jur. 349.

**As to Notice of Plaintiff's Title.**]—A defendant claiming as a mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill nor proved, an inquiry for the purpose of affecting him with notice was refused, first, upon a petition to vary the minutes, and, again, upon a rehearing. *Hardy* v. *Reeves*, 5 Ves. 426.

**As to Sum advanced.**]—An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Ib.*

**As to Repairs and Improvements.**]—Reference for an inquiry as to substantial repairs and lasting improvements will not be ordered at the hearing on further directions, merely on the statement of counsel for an incumbrancer that such repairs, &c., have been made, unless all parties interested consent; a petition is necessary. *Pelly* v. *Wathen*, 5 Hare, 351; 18 L. J., Ch. 281; 14 Jur. 9.

**Surplus Fund in Court.**]—Where there was a clear surplus fund in court, which had been produced by a sale under a decree in a foreclosure cause, the court, on motion of the plaintiff, who was also a creditor, by judgment subsequent to his mortgage, granted a reference to the remembrancer, to inquire and report who was entitled to the surplus, and whether the applicant had any, and what lien upon it; and, if so, whether there were any, and what, prior liens thereon. *Mackay* v. *Martins*, 1 Ir. Eq. R. 331.

**Benefit of Infant.**]—In a suit for realising a mortgage security where the devisee or heir of the mortgagor is an infant, the court usually directs a reference to the master to inquire whether a sale of the mortgaged premises will be for the benefit of the infant; but, where it is clear that such sale will be for the infant's benefit, the court will direct a sale in the first instance. *Davis* v. *Dowding*, 2 Keen, 245; 7 L. J., Ch. 169.

**Under 5th Order of May, 1839.**]—The court will not direct preliminary inquiries to be made under the 5th order of May, 1839, unless it is plain that they would be directed at the hearing, and would be binding on the parties to the suit. *Meinhertzhagen* v. *Davis*, 10 Sim. 289 ; 3 Jur. 1025.

The court will not, under the 5th order of the 9th of May 1839, direct an inquiry in a suit for foreclosure, of who was the heir-at-law of a party who was entitled to the equity of redemption of mortgaged premises. *Warner* v. *Moore*, 10 L. J., Ch. 371 ; 5 Jur. 910.

**Adding Accounts and Inquires after Judgment.**]—When some time after a judgment of foreclosure directing accounts against the plaintiffs as mortgagees in possession, but containing no inquiry or direction as to improper working, a probable case was made out that the mortgaged property had been seriously damaged by the improper working of the mortgagees in possession, or persons acting under their authority :—Held, that the mortgagors should not be absolutely foreclosed and left to the remedy of proceeding against the plaintiffs, either as mortgagees or as lessees in respect of their breach of the covenants of the lease, but were entitled to an inquiry with reference to the injury caused, and to a declaration charging the plaintiffs with the amount of the loss or damage caused thereby. Such an inquiry should be obtained either by means of a supplemental judgment, or by an addition to the existing judgment. *Taylor* v. *Mostyn*, 55 L. J., Ch. 893 ; 33 Ch. D. 226 ; 55 L. T. 651—C. A.

**Exception to Report.**]—Leave given, under the circumstances, to except to a report, although the party had not carried in objections to it. *Wood* v. *Lambirth*, 9 Sim. 195.

**Jurisdiction under.**]—To a foreclosure bill, filed by a mortgagee, stating subsequent incumbrances, and that some specified defendants claimed an interest in the mortgaged property, one of these defendants put in an answer claiming to be entitled under a security which was void for usury. By the decree the usual reference was directed as to incumbrances and their priorities. The defendant claimed as an incumbrancer under this decree, and the master disallowed his claim :—Held, that the master had jurisdiction so to decide, although the security was not impeached by the pleadings. *Mansfield* (*Earl*) v. *Ogle*, 7 De G. M. & G. 181 ; 24 L. J., Ch. 450 ; 2 Jur. (N.S.) 603 ; 3 W. R. 557.

**Form.**]—Form of inquiry in a bill of foreclosure, where the defendant suggests by his answer that the plaintiff has been in possession and paid himself interest. *Dobson* v. *Lee*, 1 Y. & C. C. C. 714.

**Practice on.**]—Where the plaintiff in a foreclosure suit asks to be redeemed by, or to foreclose, a defendant whose security, stated upon the pleadings, is questionable but not questioned by the plaintiff, he can only proceed against the defendant as being a person entitled to redeem, or as having no right to redeem ; and, therefore, where, on an inquiry before the master as to what incumbrances affected the estates, a controversy arose as to the validity of a security which was not questioned in the pleadings, it was held, allowing the exception, that it is not in accordance with the practice of the court to contest questions in the master's office not raised by the pleadings. *Baker* v. *Bradley*, 1 Jur. (N.S.) 415.

—— **Staying Proceedings.**]—On a reference in a foreclosure suit to ascertain what is due to the plaintiff for principal, interest and costs, the plaintiff must ascertain his rights, and have his costs taxed, or the defendant may apply to have the proceedings in the cause stayed. *Creed* v. *Byrne*, 1 Hog. 108.

*See also next subdivision.*

### i. Accounts.

**Form of.**]—Form of inquiry and accounts in a bill of foreclosure, where the defendant suggests in his answer that the plaintiff has been in possession and paid himself interest. *Dobson* v. *Lee*, 1 Y. & C. C. C. 714.

**Account of Costs.**]—The plaintiff in a foreclosure action is, as a general rule, entitled to an account of only principal and interest due to him on his mortgage, and of the costs of the action. To entitle him to an account of any other costs he must make out a special case. But, where the plaintiff was the transferee of a mortgage, on which interest was overdue at the date of the transfer, and the mortgagor was a bankrupt : —Held, that the plaintiff was entitled to an account of costs generally. *Bolingbroke* v. *Hinde*, 53 L. J., Ch. 704 ; 25 Ch. D. 795 ; 32 W. R. 427.

**Puisne Mortgagee not a Party.**]—Puisne mortgagee not bound by an account taken in a foreclosure cause, to which he was not a party. *Dick* v. *Butler*, 1 Moll. 42.

**Surcharge.**]—A mortgagee having notice of a judgment before his foreclosure and purchase of the equity of redemption, the judgment creditor may go before the master and surcharge and falsify the mortgagee's account, but the mortgagee is not to account for the profits since the decree of foreclosure. *Bird* v. *Gandy*, 7 Vin. Abr. 45, pl. 20.

**Bill of Review.**]—It having been referred to a master to take an account between mortgagor and mortgagee, under a foreclosure, and the report being confirmed in 1736, Lord Hardwicke dismissed defendant's petition for a bill of review, as it appeared that his attorney, solicitor and agent had then attended the settling of the account before the master, by which defendant should be bound. *Gould* v. *Tancred*, 2 Atk. 533.

**Working out successive Foreclosures.**]—In working out a decree for successive foreclosures, an order absolute to foreclose the person having the first right to redeem must be obtained, before the chief clerk can proceed to take an account of subsequent interest and costs, and to appoint a time for redemption by the person next entitled to redeem. *Whitbread* v. *Lyall*, 8 De G. M. & G. 383 ; 25 L. J., Ch. 791 ; 2 Jur. (N.S.) 671. *S. C.*, 3 Sm. & G. 314.

—— **Interest, computing.**]—When a judgment for foreclosure, obtained by a first mortgagee against subsequent mortgagees, and the mortgagor directs successive redemptions, and fore-

closure in default of redemption, and a puisne mortgagee fails to pay the amount found due from him to the prior mortgagee for principal, interest and costs, and is accordingly foreclosed, in taking the account against the person next entitled to redeem, subsequent interest ought to be computed on the whole sum found due from the person who has failed to redeem, i.e. upon the interest found due from him, as well as upon the principal and costs. *Elton* v. *Curteis*, 51 L. J., Ch. 60; 19 Ch. D. 49; 45 L. T. 435; 30 W. R. 316.

**Interest — Form of Order.**]—A mortgagee claimed payment, or, in default, sale or foreclosure. Judgment was given for immediate payment of principal and interest proved to be due, and, in default, for foreclosure, the account being directed with interest at the rate provided by the mortgage, the plaintiff bringing into account what, if anything, should be received under the judgment. *Lee* v. *Dunsford*, 54 L. J., Ch. 108; 51 L. T. 590.

**Rents and Profits in Receiver's Hands—Form of Order.**]—In taking the usual account of what is due on the security in a foreclosure action where a receiver has been appointed, the mortgagees must be charged with the whole of the rents and profits in the receiver's hands at the date of the chief clerk's certificate, and not merely with such a sum, if any, as they submit to be charged with in respect thereof. Form of order in *Barber* v. *Jeckells* (Seton, p. 2142) corrected accordingly. *Simmons* v. *Blandy*, 66 L. J., Ch. 83; [1897] 1 Ch. 19; 75 L. T. 646; 45 W. R. 296.

**Irregularity of Certificate.**]—To facilitate the computation of interest in a foreclosure suit, the chief clerk's certificate was dated the 15th July, 1874, but was not signed by the chief clerk till the 31st July, 1874:—Held, that the certificate was irregular. *Buckeridge* v. *Whalley*, 23 W. R. 224.

—— **Waiver.**]—The defendant attended several appointments to settle the certificate between the 15th and 31st July:—Held, that, as he must have known that the 15th July was fixed as the date of the certificate, he had by his conduct waived the irregularity. *Ib.*

**Abstaining from bringing in—Order insisted on.**]—Mortgagees abstained from bringing in the accounts directed by a foreclosure judgment on the ground that needless expense would be occasioned thereby, the security being alleged to be already insufficient:—Held, that, there being no evidence before the court that the taking of the accounts would be a reckless proceeding, the mortgagors were entitled to an order on the mortgagees to bring in the accounts, but that the order must be prefaced with a statement that it was insisted on by the mortgagors, and be without prejudice to an application by the mortgagees to stay proceedings in case they should be able to prove the proceedings to be reckless. *Taylor* v. *Mostyn*, 53 L. J., Ch. 89; 25 Ch. D. 48; 49 L. T. 483; 32 W. R. 256.

—— **Costs.**]—Whether this statement would give the court jurisdiction as to the costs if it turned out that the accounts had been asked for vexatiously and unreasonably, and whether the court would not on a substantive application by the plaintiffs stay the taking the accounts if it was satisfactorily shewn that taking them would be useless, quære. *Ib.*

**Practice—Special Circumstances, when to be mentioned.**] — Any special circumstances affecting the taking of an account under a foreclosure judgment should be brought to the attention of the court at the trial. *Sanguinetti* v. *Stuckey's Bank*, 65 L. J., Ch. 340; [1896] 1 Ch. 502; 74 L. T. 269; 44 W. R. 308.

The trustee in bankruptcy of a mortgagor having, after a foreclosure judgment directing the usual accounts and inquiries, claimed to be entitled to have the accounts taken on the footing that he was entitled to redeem on payment of the amount at which the mortgagee had valued his security in the bankruptcy:—Held, that the trustee should have asked at the hearing for a special declaration, and that in the absence of any such declaration the question could not be raised during the mechanical operation of taking an ordinary account. *Ib.*

**General Order, 22nd June, 1842.**]—The general order of 22nd June, 1842, is not to have the effect of involving plaintiffs in the account of the sums due on incumbrances puisne to their demands. *Davis* v. *Rowan*, 2 Con. & L. 154; 3 Dr. & War. 478.

**Rules of Court, 1875.**]—When an order for preliminary accounts is obtained under rules of court, 1875, Ord. XV. r. 1, after issuing the writ of summons in a foreclosure action, and after simple appearance to the writ by the defendant, the order should not prejudice the trial of any issues which might be raised by the pleading subsequently delivered by inserting as of common form the words "and the judge not requiring any trial of this action other than this application." *Gatti* v. *Webster*, 48 L. J., Ch. 763; 12 Ch. D. 771; 41 L. T. 18; 27 W. R. 935. See also *Greenough* v. *Littler*, 15 Ch. D. 93; 42 L. T. 144; 28 W. R. 318.

The plaintiff, after issuing the writ in a redemption action, took out a summons for an account under (Jud. Act) Ord. XV. r. 1:—Held, that the order under the summons must be limited to preliminary accounts, and that the usual terms of a final judgment for redemption ought not to be added without the plaintiff's consent. *Clover* v. *Wilts and Western Benefit Building Society*, 53 L. J., Ch. 622; 50 L. T. 382; 32 W. R. 895.

**Rules of Court, 1883.**]—In foreclosure actions, where there is no preliminary question to be tried, the plaintiff may obtain, under rules of supreme court, 1883, Ord. XV., an order for an account with all necessary inquiries, and the usual directions as in a common foreclosure judgment nisi. *Smith* v. *Davies* or *Davies* v. *Smith*, 54 L. J., Ch. 278; 28 Ch. D. 650; 52 L. T. 19; 33 W. R. 211.

**Summons in Chambers—Costs.**]—Such order should be applied for by summons in chambers, and not by motion in court, and only the costs of a summons in chambers attended by counsel will be allowed. *Ib.*

### j. Revivor.

**Upon Death of Plaintiff.**]—The heir-at-law of a mortgagee of real estate, of which there was no devise, applied for a common order to revive under 15 & 16 Vict. c. 85, s. 52, a foreclosure suit abated by the death of the sole plaintiff:—Held, that the order ought to be made. *Ward* v. *Shakeshaft*, 1 Dr. & Sm. 607; 7 Jur. (N.S.) 1229; 5 L. T. 342; 10 W. R. 6.

**Upon Transfer.**]—When a decree has been made in a foreclosure suit, and the plaintiff has subsequently transferred his interest, the transferee may obtain an order of revivor under 15 & 16 Vict. c. 86, s. 52, whether the transfer took place before or after the chief clerk had made his certificate. *Bibby* v. *Naylor*, 43 L. J., Ch. 405; L. R. 17 Eq. 14; 22 W. R. 52.

## O. SALE BY COURT.

1. *When Ordered*, 1757.
2. *Leave to Bid, and Reserve*, 1766.
3. *Conveyance*, 1768.
4. *Other Matters*, 1768.

### 1. When Ordered.

*a.* In General, 1757.
*b.* Equitable Mortgages, 1765.

### a. In General.

**Generally.**]—Sale of plantation decreed for money charged on it. *Gascoigne* v. *Douglas*, Dick. 431.

Tenant for life subject to mortgage is not entitled to pray sale; though mortgagee may, if security be scanty. *Kinnoul (Earl)* v. *Money*, 3 Swanst. 208, n.

Mortgagee may pray a sale of the mortgaged premises in the first instance, where the heir and personal representative are the same person, and the personal estate is clearly deficient. *Tweddell* v. *Tweddell*, 2 Bro. C. C. 155. S. P., *Daniel* v. *Skipwith*, *Ib.*

**Charge on Drilling-hall.**]—The court will give effect, by sale, to a charge on a building used as a drilling-hall for a volunteer corps. *Grissell* v. *Money*, 38 L. J., Ch. 312.

**In Foreclosure Suit.**]—Immediate sale directed on a foreclosure suit, instead of the common foreclosure decree. *Anning* v. *Lavers*, 1 W. R. 19.

Application by the mortgagor for sale, instead of foreclosure. *Boydell* v. *Manby*, 9 Hare (App.) liii.

**Conveyance on Trust.**]—A conveyance of an estate to A., in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon nonpayment, after notice, does not entitle him to a decree of foreclosure, but only for a sale. *Sampson* v. *Pattison*, 1 Hare, 533.

**Mortgage for Term and Trust of Fee.**]—Where money is secured by mortgage for a term, and by trust for sale of the fee, the mortgagee, if he files a bill praying for a sale only, is not entitled to foreclose the fee, nor, unless he amends his bill, to foreclose the term. *Kerrick* v. *Saffery*, 7 Sim. 317; 4 L. J., Ch. 162.

**Assignment on Trust to sell.**]—Certain tenements were, upon a loan of 200*l.*, assigned by the owner to the lender for a long term of years, upon trust to sell, and out of the proceeds, first, to pay the costs of sale; secondly, to pay the 200*l.* and interest; and thirdly, to pay the surplus to the owner. The deed contained a covenant by the owner to pay to the lender the 200*l.* and interest at the end of six months, and also absolute covenants by the owner for title, as upon a mortgage, and for quiet enjoyment by the lender after default. Upon a bill to foreclose the equity of redemption in the form No. 6, of schedule A. to the orders of April, 1850:—Held, that the case was one for a sale, and not for a foreclosure. *Jenkin* v. *Row*, 5 De G. & Sm. 107.

**Where Agreement for Payment out of Rents of other Lands.**]—Where the agreement of the parties to a loan is that the money shall be repaid by the creditor retaining the rents of certain lands of which he was tenant to the debtor, a sale of the lands will not be decreed. *Maguire* v. *O'Reilly*, 9 Ir. Eq. R. 335; 3 Jo. & Lat. 224.

**In Exoneration of mortgaged Estate.**]—By a family settlement it was agreed that the K. estate should exonerate the L. estate from a charge of 60,000*l.* which affected them both, and the trustees were empowered, from time to time, as occasion should require, to sell the whole or part of the K. estate to indemnify the L. estate. The L. estate was afterwards mortgaged, with the benefit of the provision from exoneration, and this mortgage came by assignment to the mortgagees of the 60,000*l.* A second mortgage of the L. estate was made to the plaintiff, subject to the former mortgage thereof. The plaintiff filed his bill to have the K. estate sold for relieving the L. estate from the 60,000*l.* The interest on this sum not being in arrear, and no demand having been made for payment of the principal, and the defendant, who was beneficially entitled, undertaking to keep down the interest, and to give notice to the plaintiff of any application for payment of the principal, the Court of Appeal held, that no occasion for the sale had arisen; but retained the bill on the file, the plaintiff paying all costs up to the hearing. *Rooke* v. *Kensington (Lord)*, 25 L. J., Ch. 567; 4 W. R. 582—L. JJ.

**Notwithstanding Limitation of Right to sell.**]—The common order for sale made on a mortgage, with power of sale, notwithstanding a proviso that it should not be exercised for five years, and the mortgagor had become bankrupt within the five years. *Bignold, Ex parte, Theobald, In re*, 3 Mont. & Ayr. 477; 3 Deac. 151; 7 L. J., Bk. 35.

**Where Covenant not to redeem.**]—A mortgage contained a covenant by the mortgagor not to redeem for eight years, and, five years being yet unexpired, the mortgagor presented a petition for sale in the usual form:—Held, that the covenant was cause against making an absolute order for sale. *Hone's Estate, In re*, Ir. R. 8 Eq. 65.

**On doubtful Title and Lapse of Time.**]—Bill by mortgagee for a sale under trust for that purpose in the mortgage deed, dismissed upon

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doubtful evidence of title, and possession for twenty years without payment of interest, demand, or acknowledgment. *Christophers* v. *Sparke*, 2 J. & W. 223.

**Right—On Construction of Deed.**]—By a deed, property was conveyed to the sons of the settlor upon certain trusts for the benefit of the children and grandchildren of the settlor. The trustees had power to sell, and extensive powers of management, and provisions were made that any trustee advancing money to the settlor, or paying off any part of a certain mortgage debt, should be entitled to a charge by way of mortgage on the estate. One of the trustees advanced considerable sums to the settlor, and paid off part of the mortgage debt:—Held, on the construction of the deed, that the trustee was not entitled to have such a mortgage on the estate as would empower him to foreclosure, and was entitled only to a sale. *Tennant* v. *Trenchard*, 38 L. J., Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856.

**Where Infants interested.**]—Although there are infants interested in the equity of redemption of property (devised to trustees subject to mortgages), the court will direct an immediate sale where it appears to be for the benefit of the infants. *Cockburn* v. *Ankett*, 3 W. R. 641.

**In Bankruptcy.**]—The court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognizance, or for payment of any other security except a mortgage. *Usher*, *Ex parte*, 1 Ball & B. 197.

**Resale after Purchase by Bankrupt's Assignee.**]—An assignee who was also a mortgagee of the bankrupt's freehold property having purchased it for himself when it was put up for sale, the estate was ordered to be resold, subject to any claim of the assignee by virtue of his mortgage. *Turvill*, *Ex parte*, 3 Deac. & C. 346.

**In Prejudice of Creditors.**]—Where mortgagee is a creditor of trustee under will of estate to pay debts, and advances further moneys to trustee for payment of them, and takes mortgage of estate knowing of trust, he cannot have a sale of estate in prejudice of other creditors of testator. *Turner*, *Ex parte*, 9 Mod. 418.

**For Benefit of Bankrupt's Estate.**]—Where there have been several mortgages of different estates by a bankrupt for distinct debts to one and the same mortgagee, and the latter petitions to have a consolidated account taken of what is due on all the securities, and the amount realised by sale of all or any of the mortgaged estates, and the circumstances of the case shew that such a course would be beneficial to the bankrupt's estate, the court would adopt it. *Berridge*, *Ex parte*, 3 Mont. D. & D. 464; 7 Jur. 1141.

**Against Executors.**]—Semble, the mortgagee may maintain a suit against the executors of the mortgagor for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator. *King* v. *Smith*, 2 Hare, 239; 7 Jur. 694.

**Against Widow and Devisees in Trust.**]—R., by indenture, in 1851 conveyed freehold lands and tenements unto and to the use of B. and M., their heirs and assigns, to secure repayment of 3,000*l.* and interest, but subject to redemption. The indenture contained a power to the mortgagees, after six months' notice, to sell the premises, and to hold the moneys arising thereby upon the trusts therein mentioned, for better securing the repayment of the mortgage-moneys. The mortgagor died in 1856, having by his will devised and bequeathed all his real and personal property for the benefit, as to the real estate, of his wife for life; and after her decease, upon trust, as to both the real and personal estates, for the benefit of his twelve nephews and nieces. B. and M. afterwards, in conformity with the terms of the power, gave notice of their intention to exercise the power of sale at the expiration of six months, if their debt was not previously paid; but in 1857 they, instead of selling under the power, pursuant to their notice, filed a bill against the widow of the mortgagor and his devisees in trust, praying for an account of the mortgage debt, that the premises might be sold under the direction of the court, and that the sum found due to the plaintiffs in respect of the debt might be paid out of the proceeds of sale, together with all the costs of the suit:—Held, that the plaintiffs were entitled to a decree in the terms of the prayer. *Hutton* v. *Sealy*, 27 L. J., Ch. 263; 4 Jur. (N.S.) 450.

**At Request of Second Mortgagee—Settled Property.**]—At the request of a second mortgagee, the court ordered a sale of some settled property that had been mortgaged, and for foreclosure in case a sale were not effected. *Saul* v. *Pattinson*, 55 L. J., Ch. 831; 54 L. T. 670; 34 W. R. 561.

**Mortgage by Beneficiary — Mortgage by Trustee.**]—A bishop's lease was assigned to a trustee, in trust for the husband for life, then to secure a jointure to the wife, and, after her decease, in trust for the husband absolutely; and the husband covenanted to procure the lease to be renewed. The husband subsequently mortgaged his interest in the lease; and, having neglected to procure the lease to be renewed, the trustee mortgaged the legal estate under the lease, for the purpose of obtaining money wherewith to procure a renewal. A renewal was afterwards executed to the mortgagee of the trustee:—Held, that, although the mortgagee of the husband was entitled to redeem the mortgagee of the trustee, he was not entitled to have the legal estate in the lease sold for payment of his demands. *Tremble* v. *Simpson*, 6 Ir. Eq. R. 98.

**Property unproductive—Discretion of Court.**]—When a mortgagee of leasehold property which was unlet and could not be let, and was consequently unproductive, asked in a suit for foreclosure or sale, for an immediate sale, under 15 & 16 Vict. c. 86, s. 48, and the court below decreed accordingly, the Court of Appeal declined to interfere with what the court below had done. *Foster* v. *Harvey*, 4 De G. J. & S. 59; 9 L. T. 404; 12 W. R. 92; 3 N. R. 98.

**Property unlikely to Sell.**]—In an action for foreclosure by first mortgagees of a residential estate and plots of freehold and leasehold lands in different places, the second mortgagees and an alleged incumbrancer asked for a sale. The first

mortgagees and the owner of the equity of redemption asked for foreclosure, the latter anticipating that the property might increase in value, and allow of redemption. The court was not satisfied as to the sufficiency or insufficiency of the security; but, considering that the property was in various places, and not likely to sell, except as a speculation, in one lot, declined to exercise its discretion by ordering a sale. *Provident Clerks' Association* v. *Lewis*, 62 L. J., Ch. 89; 67 L. T. 644.

**Rents insufficient to keep down Interest.**]—Where leaseholds were subject to a first mortgage, an annuity and subsequent incumbrances, and the rents were insufficient to keep down the interest on the first mortgage:—Held, that it was a proper case for an immediate sale at the first mortgagee's instance. *Phillips* v. *Gutteridge*, 4 De G. & J. 531.

**Notwithstanding Third Mortgagee claiming Foreclosure and Redemption.**]—Decree for sale ordered, at the request of the first and second mortgagees and the mortgagor, notwithstanding the third incumbrancer insisted on a decree for foreclosure and redemption, the value of the property not being proved. *Wickham* v. *Nicholson*, 19 Beav. 38.

**Defendant not appearing at Hearing.**]—In a foreclosure claim, the defendants appeared to the claim, but, though duly summoned, did not appear at the hearing. The plaintiff asked for an immediate sale. The court declined to direct an immediate sale, but ordered that an account should be taken, and that, in default of payment within a short period, the property should be sold. *Smith* v. *Robinson*, 1 Sm. & G. 140; 22 L. J., Ch. 482; 1 W. R. 123.

**By Consent in Foreclosure Decree.**]—On pronouncing a final decree in a foreclosure suit, the court will not order an immediate sale, however desirable it may appear, except upon consent. *Betham* v. *Mitchell*, 5 Ir. Eq. R. 218.

**After Decree for Foreclosure.**]—After a decree for foreclosure, but before it was drawn up, a sale was directed on the application of one of the defendants, a puisne mortgagee, with the consent of the prior mortgagees, in the absence of the mortgagor, against whom the bill had been taken pro confesso. *Woodford* v. *Brooking*, L. R. 17 Eq. 425; 22 W. R. 683.

Under the 15 & 16 Vict. c. 86, s. 48, the court has power after decree for foreclosure to direct a sale. On the petition of an insolvent mortgagor and two of his creditors, with the concurrence of the plaintiff (the first incumbrancer), the court, after a decree in a foreclosure suit, and upon payment into court of a sum sufficient to indemnify a puisne incumbrancer, made an order for a sale. *Laslett* v. *Cliffe*, 2 Sm. & G. 278; 2 W. R. 536.

**Under 15 & 16 Vict. c. 86.**]—Principles on which the court acts in directing a sale of a mortgaged estate, under the 15 & 16 Vict. c. 86. *Hurst* v. *Hurst*, 16 Beav. 372; 22 L. J., Ch. 538; 1 W. R. 105.

Under the 15 & 16 Vict. c. 86, s. 48, the court has a discretion, and will not direct the sale of an incumbered estate, unless it is manifestly for the benefit of all parties. *Ib.*

Under the 15 & 16 Vict. c. 86, s. 48, the court requires a case to be made for a sale instead of a foreclosure. *Robert* v. *Price*, 1 W. R. 303.

A sale will not in general be ordered under the 15 & 16 Vict. c. 86, s. 48, instead of foreclosure, unless there is such complication that the common decree cannot be conveniently worked. *Hiorns* v. *Holtom*, 16 Beav. 259; 16 Jur. 1077.

The court refused, on the application of the mortgagee, after a decree of foreclosure had been made, to vary the decree by directing a sale, under the 48th section of the 15 & 16 Vict. c. 86. *Girdlestone* v. *Lavender*, 9 Hare (App.) liii.; 16 Jur. 1081.

—— **Consent of Mortgagor.**]—Under statute 15 & 16 Vict. c. 86, s. 48, the court will not make a decree for sale instead of foreclosure without the consent of the mortgagor, except under special circumstances. *Probert* v. *Price*, 1 Eq. Rep. 51.

The court has power, in a foreclosure suit, under s. 48 of the 15 & 16 Vict. c. 86, to make an immediate order for sale, if it thinks fit, without the consent of the mortgagor. Under the circumstances the court directed a sale within three months. *Newman* v. *Selfe*, 33 Beav. 522; 33 L. J., Ch. 527; 10 L. T. 152; 12 W. R. 564.

—— **Where Mortgagee in Possession.**]—Mortgaged premises were a distillery, at which no business was carried on, and held under a lease, of which about twenty-five years were to run, and on which several subsequent mortgagees disputed their respective priorities. The mortgagee was in possession, and liable to the rents and covenants in the lease. No income was derived from the property:—Held, that the mortgagee was entitled to a decree for immediate sale under the 15 & 16 Vict. c. 86, s. 48, instead of one for foreclosure. *Foster* v. *Harvey*, 4 De G. J. & S. 59; 9 L. T. 404; 12 W. R. 92.

—— **Where Infants interested.**]—In a foreclosure suit under 15 & 16 Vict. c. 86, s. 48, an immediate sale will be ordered, notwithstanding that infants are interested in the equity of redemption, without inquiring whether such sale is for their benefit. *Wigham* v. *Measor*, 5 W. R. 394.

—— **At instance of Subsequent Incumbrancer—Deposit to cover Expense.**]—In a foreclosure suit a sale was directed, under the 15 & 16 Vict. c. 86, s. 48, at the instance of a subsequent incumbrancer, upon deposit of 200*l.*, sufficient to cover the expenses of an abortive sale, and upon a bidding being reserved sufficient to cover the amount found due to the plaintiff. *Whitbread* v. *Roberts*, 28 L. J., Ch. 431; 5 Jur. (N.S.) 113; 7 W. R. 216.

—— **Terms.**]—Whatever other terms may be imposed by the court in its discretion, upon a mortgagor asking a sale instead of a foreclosure under the 15 & 16 Vict. c. 86, s. 48, a deposit to cover the expense of a sale must be made. Observations as to the terms, and amount of deposit. *Bellamy* v. *Cockle*, 23 L. J., Ch. 456; 18 Jur. 465; 2 Eq. R. 435; 2 W. R. 326.

**On Interlocutory Application.**]—The court has no power to order a sale under s. 48 of the Chancery Improvement Act, on interlocutory



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application, but only where, before the act, foreclosure might have been decreed. *Wayn* v. *Lewis*, 1 Drew. 487; 22 L. J., Ch. 1051; 1 W. R. 344.

Sect. 55 of the stat. 15 & 16 Vict. c. 86, is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the court for a sale, and it was not intended to enable parties, in a contested suit, to obtain, upon an interlocutory application before the hearing, a decision upon the questions in contest. *Prince* v. *Cooper*, 16 Beav. 546; 23 L. J., Ch. 343.

The 55th section of the Chancery Procedure Act, 1852, does not authorise the court in an ordinary foreclosure action to direct a sale on an interlocutory application. *London and County Banking Co.* v. *Dover*, 48 L. J., Ch. 336; 11 Ch. D. 204; 27 W. R. 749.

**Jurisdiction — Sale any Time before Foreclosure absolute — Conveyancing Act, 1881, s. 25.**]—A decree for successive redemptions and foreclosures having been obtained in an action by a second mortgagee against the first mortgagee and several successive incumbrancers, the second mortgagee redeemed the first, and then applied for a sale of the mortgaged property:—Held, that under the Conveyancing and Law of Property Act, 1881, s. 25, the court has jurisdiction to order a sale of mortgaged property in a foreclosure or redemption action at any time before the suit is concluded by foreclosure absolute, and a sale was ordered. *Union Bank of London* v. *Ingram*, 51 L. J., Ch. 508; 20 Ch. D. 463; 46 L. T. 507; 30 W. R. 375—C. A.

**At Request of Second Mortgagee—Conveyancing Act, 1881.**]—In an action for foreclosure by first mortgagees of a building estate at Manchester, the second mortgagees and mortgagor requested a sale, and offered to pay into court a sum sufficient to meet the costs of sale. The value of the estate was insufficient to cover what was due on the first mortgage; but the applicants produced evidence stating that since the date of the action such value had, in consequence of the subsequent passing of the Manchester Ship Canal Act, increased, and was likely to continuously increase:—Held, that the court had no power to grant the application, notwithstanding the discretion conferred by the Conveyancing Act, 1881, s. 25, sub-s. 2. *Merchant Banking Co.* v. *London and Hanseatic Bank*, 55 L. J., Ch. 479.

**Under Conveyancing Act, 1881.**]—Under s. 25 of the Conveyancing and Law of Property Act, 1881, the court has power in a redemption action to order a sale of the mortgaged property on an interlocutory application made before the trial of the action by a person interested in the equity of redemption. In an action by the owner of the equity of redemption of property, subject to several mortgages, for the redemption of the mortgages, the plaintiff, soon after the issue of the writ, applied by summons for an order giving him liberty to sell the mortgaged property, and asking that he might have the conduct of the sale. The first and second mortgagees opposed the application, the other supported it:—Held, that an order for sale ought to be made, but that a reserved price must be fixed large enough to cover what was due on the first and second mortgages, and that the plaintiff must give security for the costs of the sale. The conduct of the sale was given to the plaintiff, on the ground that he was more interested than the first or second mortgagees in obtaining as large a price as possible for the property. And it was ordered that the sale should take place out of court, and that the proceeds of sale should be paid into court. *Woolley* v. *Colman*, 51 L. J., Ch. 854; 21 Ch. D. 169; 46 L. T. 737; 30 W. R. 769.

Where one tenant in common has mortgaged his interest in the property to another tenant in common, the mortgagor cannot enforce a sale of the property against the will of the mortgagee, except on the terms of paying off the mortgage, and this rule is unaffected by sub-s. 2 of s. 25 of the Conveyancing and Law of Property Act, 1881. *Gibbs* v. *Haydon*, 47 L. T. 184; 30 W. R. 726.

Upon motion for judgment in an action where foreclosure alone is claimed by the mortgagee, and the mortgagor does not appear, the court will not exercise its discretion under s. 25, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, unless the mortgagor has had notice of the mortgagee's intention to ask for a sale instead of foreclosure of the mortgaged premises. *South-Western District Bank* v. *Turner*, 47 L. T. 433; 31 W. R. 113.

**Setting Aside Order for Sale.**]—A bill to foreclose having been filed in this case, the court made a decree and ordered the mortgaged lands to be sold; afterwards a third person, who had paid off the mortgage and taken an assignment thereof and of the decree of foreclosure, applied to the court to set aside their order for sale, which the court refusing, he appealed to the lords, by whom the order of refusal was affirmed with costs. *Crowe* v. *Halliday*, 2 Ridgw. P. C. 50.

**Extension of Decree.**]—On bill by first mortgagee to foreclose and sell a competent part, the decree could not be extended, except by consent of the mortgagor, to sell a further part sufficient to cover the demands of subsequent charges made by defendants: it is limited to provide for the plaintiff and prior incumbrancers; but such subsequent incumbrancers brought before the court, if they do not redeem, are entitled to costs. *Ellis* v. *Molloy*, 1 Moll. 536.

**Practice—Form.**]—An order for sale made on a claim for foreclosure, at the request of the mortgagee, such sale to be "one month after the judge's clerk shall have made his certificate of the amount of the principal, interest and costs due to the mortgagee, if such amount shall not be paid." *Staines* v. *Rudlin*, 9 Hare (App.) liii. n.; 16 Jur. 965.

—— **Accounts.**]—A sale of mortgaged property, consisting of freehold and leasehold premises, and a policy of life insurance, ordered in a foreclosure suit, at the request of the mortgagee. The mortgagors were bankrupt, and the suit was against their assignees and against incumbrancers subsequent to the plaintiff. The decree directed the accounts of what was due to the several incumbrancers, and directed the proceeds of the different property to be distinguished. *Cator* v. *Reeves*, 9 Hare (App.) liii. n.; 16 Jur. 1004.

**In Adminstration Suits.**]—*See* EXECUTOR AND ADMINISTRATOR.

**b. Equitable Mortgages.**

i. In General, 1765.
ii. By Deposit, 1765.

i. *In General.*

**Extent of Saleable Interest.**]—An equitable mortgagee, from vendee who has not paid purchase-money, can sell bankrupt's interest only, unless vendor consents, and the court will not act till he is served. *Wright, Ex parte, Watts, In re,* 3 Mont. & Ayr. 49.

**If Mortgagor Dead.**]—An equitable mortgagee, if the mortgagor is dead, is entitled to have the estate sold, and the proceeds applied in payment of his debt, and to stand as a creditor, for the balance (if any) on the general assets of the mortgagor. *Brocklehurst* v. *Jessop,* 7 Sim. 438.

**Benefit of Infant.**]—On a bill filed by an equitable mortgagee praying a sale, the court will order an immediate sale, although the heir of the mortgagor is an infant, if it appears that such a sale will be for the benefit of the infant. *Redshaw* v. *Newbold,* 12 Jur. 833.

**Sale under Agreement for Equitable Mortgage.**]—The agreement for an equitable mortgage must be free from all taint and suspicion; otherwise, the court will not make the usual order for the sale of it. *Nunn, Ex parte,* 1 Deac. 393.

**Where Contest as to Priority.**]—Where a contest existed between equitable mortgagees as to priority, and a question arose whether the one who had the title deeds would be bound to give them up, the difficulty was removed by ordering a sale, and all parties to concur therein, reserving the rights of the parties as against the purchase-money. *Langstaff* v. *Nicholson,* 25 Beav. 160.

**Where Sale rejected by Assignees.**]—A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption:—Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if rejected by the assignees. *Tuffnell, Ex parte, Watts, In re,* 1 Mont. & Ayr. 620; 4 Deac. & C. 29.

ii. *By Deposit.*

**Right.**]—Where an equitable security is given by the deposit of deeds, the plaintiff, on a bill brought to give effect to his security, is entitled to a decree for a sale. *Pain* v. *Smith,* 2 Myl. & K. 417.

**Running Balance.**]—On a claim by an equitable mortgagee under a deposit of title deeds, with a memorandum for securing a running balance, limited to a certain amount, the court will direct a sale. *Lloyd* v. *Whittey,* 22 L. J., Ch. 1038; 17 Jur. 754.

**Pledgee of Personal Chattels.**]—The doctrine, that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels. *Carter* v. *Wake,* 46 L. J., Ch. 841; 4 Ch. D. 605.

A. deposited with B. certain Canada railway bonds as security for a debt. On bill filed by B. for foreclosure or sale:—Held, that B. was entitled to an order for sale only. *Ib.*

**As against Prior Voluntary Conveyance.**]—An equitable mortgage by deposit of title deeds, with an agreement in writing by the party making the deposit to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgagee a purchaser for good consideration within the statute 27 Eliz. c. 4, in respect of such balance; and, it being a term of the agreement that the mortgage to be executed should contain a power of sale, the court, on a bill to set aside a prior voluntary conveyance by the mortgagor as fraudulent and void under the statute 27 Eliz. c. 4, decreed that on default of payment the mortgaged property should be sold. *Lister* v. *Turner,* 5 Hare, 281; 15 L. J., Ch. 336; 10 Jur. 751.

**Agreement with Deposit—Effect of.**]—An agreement in writing, accompanying a deposit of deeds, to charge lands with a sum of money, is nothing more than an equitable charge enforceable in equity by having the money raised by sale or mortgage, and gives no right to foreclose, nor to ask for a legal mortgage. *Matthews* v. *Goodday,* 31 L. J., Ch. 282; 8 Jur. (N.S.) 90; 5 L. T. 572; 10 W. R. 148.

A contract to charge land, and also, if required, to give a legal mortgage, accompanied by a deposit of deeds, gives a right to a sale, but does not compel the mortgagee to take a legal mortgage. *Ib.*

**Under Conveyancing Act, 1881, s. 25.**]—An equitable mortgagee by deposit of deeds is entitled under s. 25, sub-s. 2, of the Conveyancing Act, 1881, for an order for sale instead of foreclosure, although there is no memorandum of the charge and no agreement by the mortgagor to execute a legal mortgage. *Oldham* v. *Stringer,* 51 L. T. 895; 33 W. R. 251.

Where an equitable mortgagee by deposit of deeds applied, under s. 25, sub-s. 2, of the Conveyancing Act, 1881, for an order for sale instead of foreclosure, there being a memorandum of the charge, and an agreement by the mortgagor to execute a legal mortgage, the court made an order for sale of the property, such sale not to take place until three months after the chief clerk's certificate, as to the amount due to the plaintiff, should be filed; but refused to order an immediate sale after such certificate. *Green* v. *Biggs,* 52 L. T. 680.

2. Leave to Bid, and Reserve.

**Generally.**]—Mortgagee of premises to be sold under the general order, permitted to bid at the sale. *Duncane, Ex parte,* Buck. 18.

Leave to the plaintiff to bid at the sale without taking from him the carriage of the decree, where he was the first incumbrancer, and the property clearly insufficient to pay his demand. *Steele* v. *Devonport,* 11 Ir. Eq. R. 339.

**Trustee, Beneficiaries objecting.**]—If any of the cestuis que trustent object, a trustee of an estate, though also a mortgagee, will not be allowed to bid at a sale of the estate directed by the court; but, semble, if the estate is not sold



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at the sale, the trustee may be allowed to become the purchaser under proposals to the court. *Tennant* v. *Trenchard*, 38 L. J., Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856.

**Incumbrancers.**] — Incumbrancers will be allowed to bid at the sale of the premises charged; but the sale must not be under their direction. *Slack, Ex parte*, 1 L. J. (o.s.) Ch. 70.

**Bankruptcy.**]—Mortgagee of bankrupt's estate allowed to bid on sale of it. *Marsh, Ex parte*, 1 Madd. 148.

**Creditors.**] — A mortgagee who was sole assignee and principal creditor, there being only one other creditor to a small amount, permitted to bid for the estates subject, &c. *Anon.*, Buck, 245.

**Assignees.**]—A reserved bidding allowed to assignees on the sale of an estate which had been mortgaged by the bankrupt. *Ellis, Ex parte*, 3 Deac. & C. 297.

Under what circumstances a reserved bidding refused to assignees, on the sale of property under an equitable mortgage. *Bernard, Ex parte*, 3 Deac. & C. 291; 1 Mont. & Ayr. 81.

**Equitable Mortgagee.**]—Where an equitable mortgagee is allowed to conduct the sale, and wishes to bid and become the purchaser of the premises comprised in his mortgage, the court will, before giving leave, ascertain the value of the premises and fix a reserved bidding. *Commercial Bank of London, Ex parte, Hills, In re*, 9 L. T. 782.

—— **Must pay Deposit.**] — Equitable mortgagee is not entitled to be excused from paying deposit on sale. *Stephens, Ex parte* and *In re*, 2 Mont. & Ayr. 31.

—— **Costs.**]—Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the practice is for him to pay the costs of the application. *Robinson, Ex parte*, Mont. & M'Ar. 261.

**Condition of.**]—Before a mortgagee with a power of sale can apply for leave to bid, he must waive his power of sale, and come before the court in the simple character of mortgagee. *Davis, Ex parte, Hagley, In re*, 3 Deac. & C. 504; 1 Mont. & Ayr. 89.

**Deposit.**]—The court will not exempt a mortgagee who bids from paying a deposit. *Tatham, Ex parte, Sheppard, In re*, 1 Mont. & Ayr. 335; 4 Deac. & C. 640.

**Purchase without Leave.**] — A mortgagee having bid at the sale of the mortgage property, and become the purchaser without having previously obtained an order for him to bid, the court granted him an order, nunc pro tunc. *Pedder, Ex parte, Hadwen, In re*, 3 Deac. & C. 622; 1 Mont. & Ayr. 327.

Although it is the usual and the prudent practice for a mortgagee to apply to the court for leave to bid, the court will not rescind the sale where the mortgagee has purchased the property without such leave if the purchase has been made by him bonâ fide. *Ashley, Ex parte, Bell, In re*, 3 Deac. & C. 510; 1 Mont. & Ayr. 82; 3 L. J., Bky. 9.

### 3. Conveyance.

**Parties to — Incumbrancers.**] — An incumbrancer paid off by the proceeds of the sale under a decree is not obliged to assign his security to the purchaser. He is only bound to join, if required, in conveyance to the purchaser. *Anon.*, 2 Moll. 505.

—— **Covenantees.**] — A colliery company covenanted to appropriate 6*d*. per ton to secure money lent, and gave to the lenders power to appoint receivers and powers of distress over all their property:—Held, that on a sale in liquidation of a colliery the covenantees were not necessary parties to the conveyance. *Sankey Brook Coal Co., In re*, 41 L. J., Ch. 119.

**In Bankruptcy — Compelling Second Mortgagee to join in Sale.**]—The lord chancellor has no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting upon his security, to join in a sale obtained by a prior mortgagee under the general order, 8th March, 1794, not producing enough for both mortgagees. *Jackson, Ex parte*, 5 Ves. 357.

### 4. Other Matters.

**Sale, whether Subject to, or Discharged from, Lease.**]—To a bill to raise a charge secured by a term, a subsequent mortgagee of the inheritance, and a lessee who claimed under a lease made by the inheritor after he had executed the mortgage, were made parties. The bill prayed that, if necessary, the lands should be sold discharged of the lease. There was a consent to sell the inheritance instead of the term. The mortgagee insisted by his answer that the lease had been made at a gross under-value, and that the lands should be sold, discharged of it. The lessee insisted that the lease was made at the full value, and that the lands should be sold subject to it. The plaintiff amended his bill, but did not put in issue the case made by the mortgagee:—Held, that in this suit the mortgagee was not entitled to have the lands sold discharged of the lease; and the lands were directed to be sold subject to the lease, without prejudice to the mortgagee filing a bill to have them sold discharged of it. *Colthurst* v. *Colthurst*, 2 Jones, 262.

**Sale Under Extent—Right of Crown.**]—If estate subject to mortgage be sold absolutely, under extent, and purchase-money paid into court, crown will not be allowed on motion to satisfy mortgagee, but court will order reference to deputy remembrancer to ascertain what is due on mortgage. *Rex* v. *Coombes*, 1 Price, 207.

—— **Notice.**]—Notice of motion for order of sale of crown debtor's mortgaged lands under extent should be given to mortgagee before motion. *Ib.*

**Equitable Mortgagee.**]—Equitable mortgagee is not entitled to costs of defending extent in aid, or to be excused from paying deposit on sale. *Stephens, Ex parte* and *In re*, 2 Mont. & Ayr. 31.

**Infant Coming of Age—Right to Show Cause.**] —On a decree for sale, in case of an equitable

mortgage, the infant heir ought not to be allowed the six months to show cause against the decree on coming of age. *Schalefield* v. *Heafield*, 7 Sim. 667. *S. C.*, 8 Sim. 470; 7 L. J., Ch. 4.

**Benefit of Infant—Right to Proceeds.**]—An estate was mortgaged to A. for a term of five hundred years. A. filed a bill of foreclosure against the persons entitled to the equity of redemption and the reversion, some of whom were infants. By consent it was ordered that the master should inquire whether a sale in fee would be for the benefit of the infant, and, if he should so find, that the property should be so sold. The property was sold under the decree, but realised less than the mortgage debt:—Held, that the defendants were entitled to the difference in value between the term and the fee. *Foster* v. *Eddy*, 18 L. J., Ch. 151; 13 Jur. 761.

**Price.**]—Sale by order of the court. Incumbrancer's suit. Contract by first mortgagor before the suit, for 460*l.*, went off. Offer by a person to purchase at that price accepted by the court, on affidavit of surveyor that the estate would probably fetch less by auction, on consent of the other incumbrancers, the estate being deficient. *Anon.*, 1 Jur. 525.

**Sale of Unnecessarily Large Portion—Balance of Purchase-Money, whether Realty or Personalty.**]—In a mortgagee's suit for foreclosure and sale, a decree was made that, in default of payment within the usual time, the mortgaged lands, or a sufficient part, should be sold, and that after payment of the incumbrances the remainder should be paid to the mortgagor, and that if any part of the lands remained unsold they also should be reconveyed to the mortgagor. A larger part of the estate was sold than was sufficient to satisfy all the incumbrancers. The mortgagor made two applications to the court as to the investment of this surplus fund, on the second of which it was invested in government stock. No further proceedings had ever been taken as to the fund till the present action:—Held, that the capital of the fund was to be deemed a portion of the mortgagor's real estate, and descended to his heir-at-law. *Scott* v. *Scott*, 9 L. R., Ir. 367.

**Inquiry.**]—A mortgagor of property continued to retain control of the same, which was seized by the landlord for arrears of rent due from the mortgagor. An inquiry had been directed in the suit as to what part of the mortgaged property had been sold by the mortgagee, and a direction that the property sold by him should be set off against his mortgage debt. The chief clerk found that the part of the property in question had not been sold by the mortgagee. His finding was upheld by the court. *Aylward* v. *Shrimpton*, 14 W. R. 628.

**Specific Performance.**]—Specific performance of sale under Lord Loughborough's Order decreed by this court, although the following objections were urged, viz.—1st. That particulars of sale did not state that sale took place under order of court, it appearing that purchaser must have known the fact that it was so. 2nd. That a third mortgagee of equity of redemption, and an assignee on prior insolvency of bankrupt, were not parties. 3rd. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency, especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. Quære, whether this court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this court, or of commissioners. *Sidebotham, Ex parte*, 2 Mont. & Ayr. 146; 4 L. J., Bk. 27. *See* 4 Deac. & C. 461.

**Setting Aside—On Application of Assignee.**]—A bill to foreclose having been filed in this case, the court made a decree and ordered the mortgaged lands to be sold; afterwards a third person, who had paid off the mortgage and taken an assignment thereof, and of the decree of foreclosure, applied to the court to set aside the order for a sale, which the court refusing, he appealed to the lords, by whom the order of refusal was affirmed with costs. *Crowe* v. *Halliday*, 2 Ridgw. P. C. 50.

—— **Fraud.**]—Decree of foreclosure; the proceedings and sale under it set aside as fraudulent, the res gestæ of the parties concerned affording conclusive evidence of a contrivance to use the process of the court to effect fraudulent sale, to obtain the estate under colour of pursuing the legitimate right to recover a debt. *Ellis* v. *Deane*, Beat. 5.

**Laches.**]—A man, though no party to decree, may preclude himself from aid of a court of equity, if he knowingly allowed parties to proceed under it, and used unreasonable delay in bringing forward his complaint, but every case of this kind depends on its own circumstances. *Id.* 21.

**Diligence.**]—It is the settled course that an incumbrancer, using reasonable diligence in clearing the title, has a right to have it sold such as it is, being set up subject to the incumbrances reported. *Galway* v. *Butler*, 2 Moll. 504.

**Sale of Property Out of Court—Reserved Biddings and Remuneration of Auctioneer to be Fixed by Judge—Form of Order.**]—In a foreclosure action, where an order is made for the sale of the mortgaged property by the plaintiffs out of court, but the reserved biddings and the remuneration of the auctioneer are to be fixed by the judge, and the proceeds of sale are to be paid into court by the plaintiffs—such order must be prefaced with the declaration (required when the proceedings are altogether out of court) that the judge is satisfied by the evidence that all persons interested in the estate to be sold are before the court. *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.* 61 L. J., Ch. 335; [1892] 1 Ch. 92; 66 L. T. 103.

## P. SALE UNDER POWER.

1. *Existence of Power*, 1771.
2. *Validity of*, 1774.
3. *Right to Proceeds*, 1784.
4. *Purchase by Mortgagee*, 1790.
5. *Purchase by Mortgagor*, 1792.
6. *Pre-emption, Right to*, 1792.

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7. *Injunction Against*, 1793.
8. *Setting Aside*, 1794.
9. *Specific Performance*, 1796.

1. Existence of Power.

**Nature of.**]—A power of sale in a mortgage deed is to be regarded as limiting the exercise of the rights of legal ownership of the mortgaged property, and at the same time as enabling the mortgagee to realise his security; and, as the mortgagee is the sole judge of what is necessary to enable him to realise, his motives in exercising the power will not be regarded by the court, and so long as he does all that he fairly can do to obtain a fair price, as a prudent owner intending to sell for his own advantage and to the best of his judgment, he will come under no liability to the mortgagor or puisne incumbrancer. *Colson* v. *Williams*, 58 L. J., Ch. 539; 61 L. T. 71.

**Creation of — Under 23 & 24 Vict. c. 145, ss. 11-24.**]—A power to raise money by sale or mortgage authorises a mortgage with a power of sale. *Bridges* v. *Longman*, 24 Beav. 27.

**Where Mortgagee sub-mortgages.**]—Where a mortgagee sub-mortgages, it is doubtful whether his power of sale is not gone. *Cruse* v. *Nowell*, 25 L. J., Ch. 709; 2 Jur. (N.S.) 536; 4 W. R. 619.

**Mortgage by Underlease—23 & 24 Vict. c. 145.**]—The 23 & 24 Vict. c. 145, s. 15, gives power to a mortgagee of leaseholds by underlease to sell the whole of the original term. *Hiatt* v. *Hillman*, 25 L. T. 55; 19 W. R. 694.

**After Transfer.**]—In 1825 D. mortgaged an estate to I. in fee. The mortgage deed contained a power of sale. In 1830, I. having called for payment, a deed of transfer was executed:—Held, that the power of sale in the mortgage of 1825 was still subsisting, and capable of being exercised. *Boyd* v. *Petrie*, 41 L. J., Ch. 378; L. R. 7 Ch. 385; 26 L. T. 460; 20 W. R. 513.

**—— And Change of Covenant.**]—A mortgage contained a power of sale. The mortgage was transferred, with the benefit of the provisoes, &c., contained therein. The mortgagor concurred and covenanted to pay a different sum on a different day:—Held, that the power of sale still existed, and that a good title could be made upon a sale under the power. *Young* v. *Roberts*, 15 Beav. 558.

**On Demise by Mortgagor and Mortgagee upon Trust.**]—A mortgagor and a mortgagee with a power of sale joined in demising the mortgaged hereditaments upon trust, at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor after the satisfaction of the mortgage, to grant leases of the premises in such manner as the person making such request should appoint, and to permit the mortgagor to receive the rents until default was made in payment of the mortgage money or interest, and upon trust after default to receive the rents and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage:—Held, that they were so in effect, and that the trustee was bound, without the concurrence of the mortgagor, to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale. *King* v. *Heenan*, 3 De G. M. & G. 890.

**Under Royal Charter and Deed of Settlement.**]—An institution was incorporated by royal charter and deed of settlement, authorising the council or managing body to hold lands, tenements or hereditaments, and to sell, grant, demise, exchange and dispose of the same; but no sale, mortgage, incumbrance or other disposition of any such lands, tenements or hereditaments to be made, except with the approbation and concurrence of a general meeting of the proprietors of the corporation. At a general meeting of the proprietors the council were authorised to mortgage the property of the corporation for 25,000*l.*:—Held, that the council had no power to grant a mortgage with a power of sale. *Clarke* v. *Royal Panopticon*, 4 Drew. 26; 27 L. J., Ch. 207; 3 Jur. (N.S.) 178; 5 W. R. 332.

Secus as to trustees of chattels. *Ib.*

**Agreement not to Sell.**]—By a deed, the amount due to the first mortgagee was confirmed to him by the subsequent incumbrancers, and he thereby agreed not to execute his power of sale for a limited time:—Held, that a party, who by his bill contested the amount so admitted to be due to the first mortgagee, could not take advantage of the stipulation in the deed, not to sell within the time, and an injunction to restrain such sale was refused. *Cockell* v. *Bacon*, 16 Beav. 158.

**After Tender.**]—Semble, that, where the costs are unascertained, and the security ample, a mortgagee after a tender of principal and interest is not entitled to proceed with the sale. *Jenkins* v. *Jones*, 2 Giff. 99; 29 L. J., Ch. 493; 6 Jur. (N.S.) 391; 8 W. R. 270.

**Joint Mortgagees—Right of Survivor.**]—A power of sale, and to give receipts in a mortgage given to the two mortgagees, their heirs and assigns, it being declared that the mortgage money was advanced by them out of moneys in their possession on a joint account:—Held, to be exercisable by the survivor. *Hind* v. *Poole*, 1 K. & J. 383; 1 Jur. (N.S.) 371; 3 Eq. R. 449; 3 W. R. 331.

A fortiori where the proceeds of the sale were to be applied to reimburse "themselves and himself," all expenses which "he or they" should be put to in making the sale, &c., and then to reimburse "themselves and himself," the mortgage money and interest, and it was declared that the receipts of the "survivor" of them should be good discharges for the mortgage debt and interest. *Ib.*

**Administrator of "Assign."**]—The administrator of an assign of a mortgagee, who has obtained a conveyance from the heir of such assign to a trustee for himself, can exercise a power of sale given by the mortgage deed to the original mortgagee, his heirs, executors, administrators and assigns, with a direction that the receipts of the same persons should be good discharges; for the legal representatives of an "assign" must be considered to be assigns within the meaning of such a power. *Cooke* v. *Crawford* (13 Sim. 91) distinguished. *Saloway* v. *Strawbridge*, 1 K. & J. 371. Affirmed, 7 De G. M. & G. 594; 25 L. J., Ch. 121; 1 Jur. (N.S.) 1194; 4 W. R. 34.

**Under Conveyancing Act, 1881.**]—The power of sale incident to the estate of the mortgagee under s. 19 of the Conveyancing Act, 1881, which enables him to sell the "mortgaged property or any part thereof," does not authorise him to sell the trade machinery apart from the freehold. *Yates, In re, Batcheldor* or *Batchelor* v. *Yates*, 57 L. J., Ch. 697; 38 Ch. D. 112; 59 L. T. 47; 36 W. R. 563—C. A.

**Equitable Mortgage by Deed — Lord Cranworth's Act.**]—An equitable mortgagee in fee, by deed made before 1882, by a mortgagor who has the legal estate, can, under Lord Cranworth's Act, ss. 11, 15, sell and convey the legal estate; and that, notwithstanding s. 71 of the Conveyancing and Law of Property Act, 1881. *Solomon to Meagher, In re*, 58 L. J., Ch. 339; 40 Ch. D. 508; 60 L. T. 487; 37 W. R. 331.

**Registration—Sale by Mortgagee under Statutory Power.**]—A mortgagor registered with an indefeasible title made three successive mortgages, all of which were entered on the register of incumbrances; the first mortgagee sold under his power of sale, and conveyed the estate to a purchaser:—Held, that the purchaser was entitled to be registered with an indefeasible title, although the second and third mortgagees remained on the register of incumbrances. *Richardson, In re*, 40 L. J., Ch. 616; L. R. 12 Eq. 398; 25 L. T. 12; 19 W. R. 1048.

The former order made in *Richardson, In re*, supra, varied. *Richardson, In re*, 41 L. J., Ch. 221; L. R. 13 Eq. 142; 20 W. R. 163.

**Removal of Incumbrances.**]—When the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, under the Transfer of Land Act (25 & 26 Vict. c. 53), subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto, removed from the register without the consent of the mortgagor. *Winter, In re*, 42 L. J., Ch. 318; L. R. 15 Eq. 156; 27 L. T. 842; 21 W. R. 320.

**Staying Adverse Proceedings.**]—When a petition for sale of lands was presented by an owner, for the purpose of defeating an incumbrancer's power of sale, the proceedings were stayed to enable the incumbrancer to sell. *Redington's Estate, In re*, 23 L. R., Ir. 503.

**Where Authorised by Power to Mortgage.**]—*See* POWERS.

**In Case of Executors.**]—*See* EXECUTOR AND ADMINISTRATOR.

**Duty of Solicitor to Insert Power of Sale in Mortgages from Client.**]—*See* FRAUD.

## 2. VALIDITY OF.

*a.* In General, 1774.
*b.* Notice to Mortgagor, 1778.
*c.* Auction or Private Contract, 1780.
*d.* Price, 1780.
*e.* Management and Conduct, 1782.
*f.* Conditions, 1783.
*g.* Severance of Minerals, 1783.
*h.* Deposit, 1784.

### a. In General.

**Generally.**]—If a mortgagee selling under a power of sale acts in good faith and in compliance with the terms of the power, the sale cannot be impeached. *Kennedy* v. *De Trafford*, 66 L. J., Ch. 413; [1897] A. C. 180; 76 L. T. 427; 45 W. R. 671—H. L. (E.)

**Two Mortgagees receiving each a Portion of Purchase-Money.**]—The first and second mortgagees of an estate had power of sale and of giving good receipts. They joined together in selling, and each received his portion of the purchase-money, for which they gave a receipt to the purchaser:—Held, that a title depending on this sale was perfectly good. *M'Carogher* v. *Whieldon*, 34 Beav. 107.

**Buying with Knowledge of Invalidity.**]—A purchaser who buys with knowledge of circumstances sufficient as against a mortgagee to invalidate the sale becomes a party to the transaction, and is not protected by the proviso that the purchaser needs make no inquiry. *Jenkins* v. *Jones*, 2 Giff. 99; 29 L. J., Ch. 493; 6 Jur. (N.S.) 391; 8 W. R. 270.

—— **Purchaser's Protection Clause.**]—A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived:—Quære (per Bowen, L.J.), whether the same rule would apply where the irregularity was one which might have been waived. *Parkinson* v. *Hanbury* (L. R. 2 H. L. 1) followed. *Selwyn* v. *Garfit*, 57 L. J., Ch. 609; 38 Ch. D. 273; 59 L. T. 233; 36 W. R. 513—C. A.

**Bonâ fide Purchaser without Notice.**]—A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that, upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favour of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would show that the security was satisfied at the time of the sale:—Held, that the sale having been made to a bonâ fide purchaser without notice, was valid, even if the security should prove to have been satisfied. *Dicker* v. *Angerstein*, 45 L. J., Ch. 754; 3 Ch. D. 600; 24 W. R. 844.

**Equitable Mortgage by Deposit, with Memorandum — Subsequent Legal Mortgage.**]—In May, 1849, W. deposited title deeds as a security for 200*l.* to be advanced to him, and signed a memorandum engaging to execute a mortgage deed, when called upon to do so. In June, 1849,

and before any mortgage was executed, W. sold the premises comprised in the title deeds, and, treating the intended mortgage as in existence, conveyed the property to the purchasers, "subject to a certain mortgage to, &c., for securing 200*l.* and interest, but with the benefit of the provisions for redemption, contained in the mortgage deed." The purchasers made no inquiry of the intended mortgagees respecting the contents of the supposed mortgage, and shortly after the purchase the 200*l.* was advanced; and in July, 1849, W. executed a mortgage, with a power of sale, under which the mortgagees sold the premises to the plaintiff. Upon a bill by the plaintiff against the purchasers from W.:—Held, that the power of sale was validly created as against the latter, and they were declared to be trustees of the legal estate for the plaintiff, and ordered to convey the same accordingly. *Leigh* v. *Lloyd*, 35 Beav. 455; 34 L. J., Ch. 646; 12 L. T. 813; 13 W. R. 1054.

**Purchase-Money to Remain on Mortgage.**]—The lessee of premises mortgaged them to the defendant, the mortgage deed containing a power of sale in the event of the nonpayment of the mortgage money. Upon default of payment the defendant contracted to sell the premises to B., but in carrying out the arrangement it was agreed that the greater part of the purchase-money should remain on mortgage:—Held, in the absence of any proof that the contract of sale to B. was not bonâ fide, that the defendant had duly executed his power of sale, and that he was not bound to have disposed of the premises for ready money only. *Thurlow* v. *Mackeson*, 38 L. J., Q. B. 57; L. R. 4 Q. B. 97; 19 L. T. 448; 17 W. R. 280.

A mortgagee, who has bonâ fide contracted to sell according to the power of sale in his mortgage deed, may allow part of the purchase-money to remain outstanding on a mortgage of the property, though the power of sale makes no mention of any such privilege. *Ib.*

—— **Agreement for.**]—Lands were mortgaged in fee, with power of sale, by auction or private contract, in case of default in payment of the mortgage money. The mortgagee sold part of the property by private contract, containing an agreement that more than half of the purchase-money might remain on mortgage of the land sold for four years, if interest should be regularly paid, and that, if a stated sum were laid out on the land in the erection of houses within a specified time, the mortgage money might remain for a longer period. On a bill filed by the owner of the equity of redemption to redeem and set aside the sale:—Held, that there being no fraud nor inadequacy of price, the transaction could not be impeached; and the bill was dismissed with costs. *Davey* v. *Durrant*, 26 L. J., Ch. 830.

**Sale to Institution.**]—The same mortgagee, being in possession, offered to give a portion of the land as a site for a building in the nature of a hospital, but, being apprised by the proposed grantees that his title did not enable him to do this, he agreed to sell the site to the institution at a valuation, and to give the price to the charity. The land was conveyed in pursuance of the contract:—Held, that this was not a valid sale within the terms of the power. *S. C.*, 1 De G. & J. 535.

The mortgagors had approved of a general building plan, with which the edifice built for the charity was not at variance:—Held, that the transaction could not be set aside on reimbursing to the grantees the whole sum laid out by them upon the land. *Ib.*

**Demise of Term Less One Day.**]—A mortgagee contracted to sell two properties, leasehold and freehold, to the equity of redemption in which the mortgagors were entitled in different shares. The leaseholds had been mortgaged to him by underlease. The purchaser refused to complete, and the vendor filed a bill for specific performance. At the date of filing the bill the mortgagors were willing to concur; but, before the decree was made, some of them died, leaving infants interested in the equity of redemption:—Held, that the 23 & 24 Vict. c. 145, s. 15, empowered the vendor to sell the whole of the term of the leaseholds, though they were only demised to him for the residue of the term less one day. *Hiatt* v. *Hillman*, 25 L. T. 55; 19 W. R. 694.

**Benefit of Infants.**]—Held, also, that the infants interested in the equity of redemption must be bound by the sale, as it was for their advantage that the two properties should be sold together; and that the vendor could make a good title. *Ib.*

**Tenants in Common—Purchase by one Co-tenant.**]—If after notice by the mortgagee to both of two co-owners that he is prepared to sell for the amount of principal, interest and costs, no objection is taken, he may so sell though the purchaser be one of the co-owners, and such co-owner is entitled to buy without liability to the other. *Kennedy* v. *De Trafford*, 66 L. J., Ch. 413; [1897] A. C. 180; 76 L. T. 427; 45 W. R. 671—H. L. (E.)

**Assignment to Second Mortgagee, on Trust to Sell.**]—Property subject to two mortgages was assigned to the second mortgagee upon trust to sell, and out of the proceeds to pay off the first mortgage, then the second mortgage, and pay the surplus to the mortgagor:—Held, that this did not bind the trustee not to sell unless he could so pay off the first mortgage, and that a sale subject to the first mortgage was valid. *Manser* v. *Dix*, 3 Jur. (N.S.) 252—L.JJ.

**Conveyance on Trust—Appointment of New Trustee.**]—Where a conveyance by way of mortgage is made to a trustee for the mortgagee in trust to sell, and the trustee becomes bankrupt, the mortgagor should join in the application for the appointment of another trustee. *Orgill, Ex parte*, 2 Deac. & C. 413.

**Mortgagee in Possession having Rents in Hand.**]—Whether a mortgagee in possession, having a balance of rents in hand more than sufficient for payment of the interest and all expenses he has incurred, can be heard to say that interest is in arrear so as to justify a sale because no account has been rendered and no appropriation made, quære. *Cockburn* v. *Edwards*, 51 L. J., Ch. 46; 18 Ch. D. 449; 45 L. T. 500; 30 W. R. 446—C. A.

**Without foreclosing Equity of Redemption.**]—Exchequer annuities were assigned by way of mortgage for securing 5,000*l.* and interest. The money not being paid, the mortgagee (after repeated notice to the executor of the mortgagor,

and demand of his money) sold the annuities on exchange at the market price:—Held, that this was a good sale, and that there was no necessity of previously foreclosing the equity of redemption. *Wilson* v. *Tooker*, 5 Bro. P. C. 193; 1 P. Wms. 261.

**Mortgage by Client to Solicitor—Unusual Provisions.**]—In a mortgage to a solicitor by his client there was a power of sale without qualification. It was not explained to the mortgagor that it was usual to insert a proviso that the power should not be exercised unless interest was in arrear for three months or notice to pay off had been given:—Held, that the power could not be properly exercised as against the mortgagor, though three months' interest was in arrear. *Craddock* v. *Rogers*, 53 L. J., Ch. 968; 51 L. T. 191.

In April, 1879, P. owed 450*l.* to his solicitor K., who was pressing for payment. On the 11th of April, 1879, he gave K. his promissory note for 466*l.* 17*s.* 10*d.*, payable three months after date, and on the 31st of May signed an agreement to mortgage to K. his interest in a railway for the 466*l.* 17*s.* 10*d.* The agreement contained a provision that, if that sum was not paid on the 11th of July, K. should be at liberty to sell the property without notice. The agreement was drawn by K., and P. had no independent advice. Default having been made, K. sold without giving such notice as is required in the common form of power of sale:—Held, that as this was not an ordinary mortgage transaction, but an arrangement for giving the client time for payment of a debt presently payable, the doctrine of *Cockburn* v. *Edwards* (18 Ch. D. 449) did not apply: that it was not incumbent on K. to explain to P. the unusual form of the power of sale; and that the sale could not be impeached on the ground that it was not authorised by the common form of power. *Pooley's Trustee* v. *Whetham*, 55 L. J., Ch. 899; 33 Ch. D. 111; 55 L. T. 333; 34 W. R. 689—C. A.

A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exerciseable at any time without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shown that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interests of both mortgages. He then sold the property without notice:—Held, in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shown that some interest was three months in arrear; and, whether the absence of explanation did not make it improper even if there was interest in arrear, quære. *Cockburn* v. *Edwards*, 51 L. J., Ch. 46; 18 Ch. D. 449; 45 L. T. 500; 30 W. R. 446—C. A.

Held, that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest would not by itself prove that there was no interest in arrear if no appropriation was shown to have been made. The dictum in *Brocklehurst* v. *Jessop* (7 Sim. 442) overruled. *Ib.*

But held, that, as in an account sent by the mortgagee to the mortgagor the interest was treated as satisfied up to a certain day out of the rents, there was evidence of an arrangement that the rents should be applied in discharge of interest, and that, as the final account showed that if the rents were thus appropriated there would be no interest in arrear at the time of sale, the sale was improper. *Ib.*

Held, also, that the difference between party and party costs and solicitor and client costs of the present action could not be given to the plaintiff by way of damages. *Ib.*

**Conveyancing Act, 1881—Power to convey Legal Estate.**]—An equitable mortgagee by deed who sells in exercise of the power of sale conferred by the Conveyancing Act, 1881, cannot convey the legal estate vested in the mortgagor. *Hodson and Howes' Contract, In re*, 56 L. J., Ch. 755; 35 Ch. D. 668; 56 L. T. 837; 35 W. R. 553—C. A.

—— **Improper Exercise of Power—Action for Damages.**]—The remedy in damages, which, under sub-s. 2 of s. 21 of the Conveyancing and Law of Property Act, 1881, "any person damnified by an unauthorised, or improper, or irregular exercise of the power" of sale conferred by the act has "against the person exercising the power," may be obtained by means of a common law action brought in the county court, under s. 56 of the County Courts Act, 1888, where the amount claimed is within the county court jurisdiction. *Ames* v. *Higdon*, 69 L. T. 292.

**Whether Exerciseable by Assign.**]—See *Rumney* v. *Smith*, 66 L. J., Ch. 641; [1897] 2 Ch. 351; 76 L. T. 800; 45 W. R. 678—C. A.

### b. Notice to Mortgagor.

**Sufficiency of Service of.**]—S. took a conveyance of an estate from W., his father, and then mortgaged the estate, with a power of sale in default of payment of the mortgage money and interest within three months after notice in writing given to S., his heirs, executors, administrators, or assigns, or left at his or their usual or last known place of abode. The conveyance to S. from W. was afterwards declared void as against the creditors of W. Some years afterwards, the mortgagee caused the notice demanding payment to be affixed to the door of the house which was the last known place of abode of S., and the mortgagee, a short time before the expiration of the three months, entered into a contract for the sale of the property:—Held, that, as the right of the mortgagee under the power of sale was paramount to that of the creditors of W., the notice to S. was sufficient; that such notice was well served by being fixed on the door of S.'s last known place of abode; that the contract for sale of the property, although made before the expiration of the notice, was not therefore invalid. *Major* v. *Ward*, 5 Hare, 598.

—— **Lapse of Years After.**]—The power of sale in a mortgage provided that, upon default of payment of the principal and interest as therein mentioned, and if the mortgagee, his heirs, executors, administrators, or assigns, should give to the mortgagor, his heirs, or assigns, "six calendar months' previous notice in writing of his or their intention to proceed to a sale, unless the principal and interest should be paid at the

expiration of such notice," it should be lawful for the mortgagee, his heirs, executors, administrators or assigns, "immediately or at any other time after the expiration of the notice," so long as the principal and interest should remain unpaid, without the consent of the mortgagor, his heirs, or assigns, to sell the mortgaged property. Default having been made in payment of the mortgage money, the devisee of the mortgagee, on the 4th of August, 1853, caused a notice in writing, dated the 15th July, 1853, to be served on the mortgagor, requiring payment of the mortgage money "at the expiration of six calendar months from the date thereof." On the 25th of May, 1857, the mortgage money being still unpaid, the devisee of the mortgagee, without any further notice to the mortgagor and without his consent, sold the mortgaged property. Upon a bill by the mortgagor against the purchaser and the devisee of the mortgagee to set aside the sale, on the ground of its having been made without due notice to the mortgagor:—Held, that the notice was good, and the bill was dismissed with costs. *Metters* v. *Brown*, 33 L. J., Ch. 97; 9 Jur. (N.S.) 958; 8 L. T. 567; 11 W. R. 744.

**Revival of.**]—Mortgage of the equity of redemption of premises as security for payment of a sum of money, with the condition that, if default should be made for seven days after notice requiring payment, the mortgagee might sell. The mortgagee subsequently gave due notice, and on the sixth day after took a bill of exchange at three months for the amount from the mortgagor, who died the following day. The bill was dishonoured, and thereupon the mortgagee, without giving any further notice, sold the premises to the plaintiff, who brought ejectment against the defendant, the mortgagor's widow:—Held, that, the power of sale having been well exercised, the defendant was not entitled to redeem, but must give up possession to the plaintiff. That the giving of the bill operated as a suspension of the remedy by sale, and of the running of the notice, and that both revived when the bill was dishonoured; and no further notice was therefore necessary. *Wood* v. *Murton*, 47 L. J., Q. B. 191; 37 L. T. 788.

**Infant Heir.**]—In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs, or assigns. The mortgagor died, leaving an infant heir:—Held, that notice to the infant heir and her guardian was good notice. *Tracy* v. *Lawrence*, 2 Drew. 403; 18 Jur. 590; 2 W. R. 610.

**Equitable Mortgage by Deposit—Notice to, and Concurrence of, Assignees in Bankruptcy.**]—Where, at time of deposit, by way of equitable mortgage, power of sale has by agreement been given to mortgagee, on notice being given to repay the money secured, mortgagee cannot make a valid assignment of premises, in event of bankruptcy of party pledging without notice to and concurrence of assignees of bankrupt in the conveyance. *Hawkins* v. *Ramsbottom*, 1 Price, 138.

**Notice to Second Mortgagee.**]—A mortgage contained a power of sale, with a proviso that the mortgagee was not to execute the power without giving notice to the mortgagor or his assigns. The mortgagor assigned his equity of redemption by way of mortgage to a second mortgagee:—Held, that such second mortgagee was entitled to receive notice of the first mortgagee's intention to exercise his power of sale, and was entitled to damages from him for default in giving such notice. *Hoole* v. *Smith*, 50 L. J., Ch. 576; 17 Ch. D. 434; 45 L. T. 38; 29 W. R. 601.

**Purchase before Notice Elapsed.**]—Under the usual power of sale contained in a mortgage, a contract was entered into by the defendant to purchase the property of the mortgagees before the three months' notice required by the mortgage deed to be given to the mortgagor had elapsed. The defendant refused to complete the purchase in consequence of the non-concurrence of the mortgagor; and, on a bill filed for the specific performance of the contract, the court declined to decide as to the necessity of such concurrence, as the time for making a valid contract had not, when it was entered into, arrived; and the only order made was that the title should be investigated. *Ford* v. *Heely*, 3 Jur. (N.S.) 1116; 5 W. R. 516.

**Purchasing with Knowledge that no Notice had been given.**]—Where a first mortgagee, under his power of sale, sold the mortgaged premises by private contract to the second mortgagees, who were mortgagees in possession, and also trustees for sale for the mortgagor, and the mortgage deed required that, before any sale should be made, three months' notice should be given to the mortgagor, and contained a clause, that a purchaser should not be required to ascertain that previous notice had been given, or to inquire into the necessity or expediency of the sale, and that the mortgagee's receipt should be a sufficient discharge. The second mortgagees, at the time they purchased, knew that the three months' notice had not been given to the mortgagor, he having died some time before, and on administration having been taken out to his estate, upon a suit for redemption by the mortgagor's administratrix:—Held, that she was entitled to redeem, and that the clause, discharging a purchaser from ascertaining whether proper notice had been given, did not protect a purchaser who purchases with actual knowledge that such notice had not been given. *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; 8 W. R. 575.

### c. Auction or Private Contract.

**Purchase-Money to remain on Mortgage.**]—A mortgagee with a power of sale, either by public auction or private contract, and a proviso that all arrangements, sales, conveyances, acts, matters, and things made and done by him, should be as valid without as if made with the concurrence of the mortgagor, sold by private contract, and agreed that a part of the purchase-money might remain on a mortgage of the property sold:—Held, that the sale was not invalidated by the want of a previous attempt to sell by auction, or by the stipulation as to the purchase-money remaining on mortgage, but was good as regarded both the purchaser and the mortgagee. *Darey* v. *Durrant*, 1 De G. & J. 535; 26 L. J., Ch. 830.

### d. Price.

**Duty to get Best.**]—It is the duty of a mortgagee, with a power of sale, to use every exertion

to sell the property at the best price. A person who has acted as the agent of the mortgagee, being the medium through which the money is advanced, surveying the security and receiving the interest regularly for the mortgagee, is not a competent purchaser from the mortgagee under a power of sale. *Orme* v. *Wright*, 3 Jur. 19.

—— **Action.**]—B., in consideration of a sum of money lent to him by parties who carried on business under the name of "The City Investment and Advance Co.," assigned by deed certain goods of his to the company, to hold as their own proper goods; nevertheless, by way of mortgage, for securing the repayment of the loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the loan and costs of sale, and to pay the residue, if any, to B.:—Held, that the property in the goods passed by such deed to the mortgagees, and that a party, who claimed the same goods under a subsequent assignment to him from B., could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them. *Maughan* v. *Sharpe*, 17 C. B. (N.S.) 443; 34 L. J., C. P. 19; 10 Jur. (N.S.) 989; 10 L. T. 870; 12 W. R. 1057.

**Liability to make good Deficiency in.**]—A mortgagee in possession, by not taking proper means to ascertain the right value of the mortgaged property, sold it at a loss:—Held, that he was liable to make good the difference between the price at which the property was sold and that which it would have produced had it been sold, at a reserved price, under a decree of the court. *Wolff* v. *Vanderzee*, 20 L. T. 353; 17 W. R. 547.

**Want of Diligence.**]—A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an undervalue. *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889—P. C.

**Where Bona Fides.**]—If a mortgagee exercises his power of sale bonâ fide for the purpose of realizing his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. *Warner* v. *Jacob*, 51 L. J., Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.

**Misdescription causing Diminution in — Measure of Liability for.**]—A mortgagee who, in the exercise of his power of sale, personally or by his agent commits a mistake, such as a misdescription of the property, whereby a material diminution is caused in the price realised, is liable to the parties interested in the equity of redemption for the loss so occasioned; but the amount of that diminution is not necessarily the measure of the compensation payable by the mortgagee. *Tomlin* v. *Luce*, 59 L. J., Ch. 164; 43 Ch. D. 191; 62 L. T. 18; 38 W. R. 323; 54 J. P. 486—C. A.

Where, therefore, mortgaged property was sold for 20,800*l.*, and, in consequence of a misstatement in the particulars by the auctioneer employed by the mortgagee, a compromise was come to between the purchaser and mortgagee, which the court held to be a reasonable one, whereby 895*l.* was allowed to the purchaser out of the purchase-money:—Held, that that sum was not necessarily to be taken as the measure of compensation to be allowed as between the mortgagee and the owners of the equity of redemption, and an inquiry was directed whether the property would have sold for any, and (if any) what sum in excess of 19,905*l.* (the original purchase-money less the sum allowed to the purchaser), in case the property had been sold without the misstatement in the particulars. *Ib.*

### e. Management and Conduct.

**By Mortgagee.**]—Biddings opened on an advance of 365*l.* on 7,300*l.*, but as the mortgagee applied he was not allowed to conduct the resale. *Domville* v. *Berrington*, 2 Y. & C. 723; 7 L. J., Ex. Eq. 58.

**Best Advantage.**]—Where a mortgagee enters into possession of the mortgaged property with a view to a sale of it, he is bound to act with the same care and prudence, and to use every effort which a prudent man would use to have the sale conducted in a manner to obtain the greatest advantage. *Marriott* v. *Anchor Reversionary Co.*, 30 L. J., Ch. 571; 7 Jur. (N.S.) 713; 4 L. T. 590; 9 W. R. 726—L.JJ. Affirming, 2 Giff. 457.

A mortgagee with power of sale is not bound to wait till a more advantageous sale can be effected, neither is he bound to advertise before proceeding to a sale. *Davey* v. *Durrant*, 1 De G. & J. 535; 26 L. J., Ch. 830.

**In Redemption Action—Security for Costs.**]—First mortgagees of real estate on the 19th of Nov., 1891, gave notice to the mortgagors to pay off the mortgage debt within three months, and that if it was not so paid they would proceed to sell under their power of sale. On the 17th of Feb., 1892, the mortgagors commenced a redemption action, and moved under s. 25 of the Conveyancing Act, 1881, that the property should be sold out of court and the conduct of the sale given to the mortgagors. The first mortgagees opposed this application, but certain second mortgagees of the property consented to it:—Held, that there was jurisdiction to allow a sale by the mortgagors out of court, and that they should be given liberty to sell within three months, subject to a reserve price being fixed, sufficient to cover the mortgage debt, interest, and costs, and to payment into court by the mortgagors of 100*l.* as security for the costs of the mortgagees. *Brewer* v. *Square*, 61 L. J., Ch. 516; [1892] 2 Ch. 111; 66 L. T. 486; 40 W. R. 378.

**Under 15 & 16 Vict. c. 86.**]—A second mortgagee is entitled under the 15 & 16 Vict. c. 86, to apply in a foreclosure suit for the conduct of the sale of the estate; but the court will exercise a discretion, and will refuse such application, upon being satisfied that expense will be saved by giving the conduct of the sale to the first mortgagee. *Hewitt* v. *Nanson*, 28 L. J., Ch. 49; 7 W. R. 5.

**Foreclosure Suit Pending.**]—Although a foreclosure suit is pending the court will allow the property to which it relates to be sold without the control of the court, provided all parties interested are sui juris and consent; but the purchase-money will be ordered to be paid into court, at least if there is any question as to

priority of incumbrances. *Relph* v. *Horton*, 19 W. R. 220.

**In Foreclosure Suit—Security for Costs.**]—An action having been brought to foreclose an equitable mortgage, the plaintiff at the hearing asked for a sale. The defendants did not oppose this, but they wished to have the conduct of the sale. The parties left it to the judge to decide who should have the conduct:—Held, that the defendants ought to have the conduct, because it was most to their interest to obtain the best possible price for the property:—Held, also, that, inasmuch as the defendants alone would be liable for the costs of the sale, there was no reason for requiring them to give security for the costs. *Woolley* v. *Coleman* (21 Ch. D. 169) not followed as to such security. Ordered, that the sale should take place out of court, and that the proceeds of sale should be paid into court. *Davies* v. *Wright*, 32 Ch. D. 220.

**After Order for Sale.**]—A first mortgagee applied for leave to sell out of court, under a power of sale in the mortgage, notwithstanding the absolute order of sale:—Held, that such leave should not be given in the absence of evidence that the mortgagee would be damnified by retaining the matter in court, or that a profit would be made by an immediate sale. *Claire's Estate, In re*, 23 L. R., Ir. 281.

**Equitable Mortgage—Delay of Assignee.**]—After an order for sale obtained by an equitable mortgagee, if the assignees delay the sale, semble, that the course is not to present a fresh petition for a sale, but to prosecute the former order. *Robinson, Ex parte*, 3 Deac. & C. 103.

**Equitable Mortgagee also Assignee.**]—Where an equitable mortgagee is also an assignee, a solicitor will be appointed to take the account and conduct the sale. *Lees, Ex parte*, 2 Deac. & C. 360.

### f. Conditions.

**Depreciatory.**]—A condition of sale, on a sale by a mortgagee under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce, and therefore binding on the mortgagor. *Falkner* or *Faulkner* v. *Equitable Reversionary Society*, 4 Drew. 352; 28 L. J., Ch. 132; 4 Jur. (N.S.) 1214; 7 W. R. 73.

**Notice in.**]—When a purchaser from mortgagees under a power of sale has notice in the conditions of sale of an agreement between the mortgagor and the tenant in possession that a certain sum shall be allowed for buildings, he is bound by such agreement and by all the equities which bind the tenant thereunder. *Thomas* v. *Davies*, 9 W. R. 831.

### g. Severance of Minerals.

**Mortgage excepting Minerals.**]—Mortgagees of real property, except the minerals, were allowed upon petition to exercise their power of sale by selling apart from the minerals, although a bill for foreclosure had been filed by them, and subsequent incumbrancers and persons interested in the equity of redemption opposed the petition. *Wilkinson's Mortgaged Estates, In re*, 41 L. J., Ch. 392; L. R. 13 Eq. 634.

**Under 25 & 26 Vict. c. 108.**]—A mortgagee of freeholds, with power of sale, may, under 25 & 26 Vict. c. 108, sell the minerals separately from the land, though there are subsequent mortgagees who have not consented. *Beaumont's Mortgage, In re*, 40 L. J., Ch. 400; L. R. 12 Eq. 86; 19 W. R. 767.

**Service of Petition.**]—It is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the petition on any subsequent incumbrancers. *Ib.*

A petition by a mortgagee of land, under s. 2 of the Act 25 & 26 Vict. c. 108, for the sanction of the court to his selling the surface of the mortgaged property, with a reservation of the mines and minerals thereunder, must be served on the mortgagor. Dictum in *Wilkinson's Mortgaged Estates, In re* (L. R. 13 Eq. 634), dissented from. *Hirst's Mortgage, In re*, 60 L. J., Ch. 48; 45 Ch. D. 263; 63 L. T. 444; 38 W. R. 685.

### h. Deposit.

**Taking Payment of, how.**]—On a sale by auction on behalf of a mortgagee, in exercise of the power of sale contained in his mortgage deed, the acceptance by the auctioneer, on behalf of the vendor and with his concurrence, of a cheque (which was dishonoured on presentation) in lieu of cash for the deposit, is not, having regard to the common practice at sales by auction, unreasonable, and is not such an act of negligence on the part of the mortgagee as to deprive him of his right to the costs of the abortive sale. *Farrer* v. *Lacy*, 55 L. J., Ch. 149; 31 Ch. D. 42; 53 L. T. 515; 34 W. R. 22—C. A.

**Whether Mortgagee need Require.**]—When a mortgagee sells under his power of sale, he is not bound to require a purchaser to pay a deposit of ten per cent. *S. C.*, 53 L. J., Ch. 569; 25 Ch. D. 636; 50 L. T. 121; 32 W. R. 196.

**Accountability for.**]—A first mortgagee joining in a sale by a subsequent mortgagee executing conveyances and signing receipts for the purchase-money of lands in mortgage:—Held, not accountable either to the mortgagor or to the subsequent mortgagee in respect of deposits which, pursuant to the conditions of sale, the purchasers had paid to the solicitor, and with which the solicitor had absconded. *Barrow* v. *White*, 2 J. & H. 580.

### 3. Right to Proceeds.

*a.* In General, 1784.
*b.* Between Mortgagor and Mortgagee, 1786.
*c.* Of Puisne Incumbrancer, 1788.
*d.* Whether Real or Personal Estate—*See* Conversion.

### a. In General.

**Duty and Liability of Vendor.**]—Where a mortgagee sells under his power of sale and, after he has paid himself his debts and costs out of the purchase-money, a surplus remains in his hands, it is his duty, if he cannot ascertain who

are the persons entitled to the surplus, to set it apart so as to be fruitful for their benefit, and if he fails to do so he will be charged with interest at four per cent. from the time of the completion of the sale. *Charles* v. *Jones*, 56 L. J., Ch. 745; 35 Ch. D. 544; 56 L. T. 848; 35 W. R. 645.

—— **Threatened Misapplication — Appointment of Receiver.**]—A mortgagee of chattels in possession, and proceeding under the power in his deed of assignment to sell the mortgage property, is, after satisfying the amount of his mortgage security and the expenses of the sale, a trustee of the surplus proceeds; and where the mortgagee, by his answer to the bill of an execution creditor, declared his intention to pay such proceeds to certain claimants, in respect of an execution and an assignment, both subsequent to the delivery to the sheriff of the writ of execution obtained by the plaintiff, the surplus proceeds of the property already sold were ordered to be paid into court, and a receiver appointed of the moneys to arise by the future sales. *Gouthwaite* v. *Rippon*, 8 L. J., Ch. 139.

**Apportionment between Judgment Creditor and Appointee.**]—D., being entitled to three estates, the first unincumbered, the second mortgaged for 1,400*l.*, and the third for 3,000*l.*, settled them to the use of himself for life, remainder to such uses as he and his wife should jointly appoint, with an ulterior limitation as to one moiety to himself in fee, and as to the other moiety as his wife should appoint. Subsequently, D. and his wife appointed the first and second estates to A., by way of mortgage, to secure 1,000*l.* borrowed by D. Subsequently A. entered into possession of the first and second estates, kept down the interest, and paid off part of the principal out of the rents. D. and his wife died, and, upon A. selling under a power contained in his mortgage deed, there remained a net surplus in his hands after satisfying the 1,400*l.* and his own debt:—Held, by Romilly, M.R., first, that, as between a judgment creditor of D. and the appointees of his wife, the principal debt of 1,400*l.* must be borne equally by the respective moieties of the husband and wife of the proceeds of sale, so as to restore to the husband's estate the rents and profits applied by A. in satisfaction of principal; and, secondly, that no counter equity existed on the part of the appointees of the wife to have the surplus rents and profits applied in discharging the interest of the 3,000*l.* which had been suffered by D. to fall into arrear. Upon appeal, the decision upon the first point was affirmed; but, as to the second, held, that the judgment creditor was, as between himself and the appointees of the wife, subject to the same equity arising from the obligation to keep down the interest as the tenant for life himself would have been subject to, and, consequently, that, if any loss had accrued to the appointees by reason of the tenant for life having failed to keep down the arrears of interest, they would have a right of set-off to the extent of this loss against the judgment creditor. *Scholefield* v. *Lockwood*, 33 L. J., Ch. 106; 9 Jur. (N.S.) 738; 8 L. T. 409; 11 W. R. 555.

—— **Rectification.**]—In the settlement referred to, the mortgage on the second estate was erroneously stated to be for 1,200*l.* (instead of 1,400*l.*), but in subsequent deeds executed by the parties and proved, the mortgage was recognised as being for 1,400*l.*:—Held, by Romilly, M.R., that the court might treat the settlement as having, in fact, been made subject to a mortgage for 1,400*l.* without any suit to rectify it. *Ib.*

**Mortgagee's Right to retain more than Six Years' Arrears of Interest.**]—Sect. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not affect the right of a mortgagee who has sold under his power of sale to retain out of the proceeds more than six years' arrears of interest. *Marshfield, In re, Marshfield* v. *Hutchings*, 56 L. J., Ch. 599; 34 Ch. D. 721; 56 L. T. 694; 35 W. R. 491.

After the judgment for the administration of the estate of a second mortgagee of real estate, the first mortgagees sold the mortgaged property under their power of sale and received the proceeds. A summons in the action was then taken out by the plaintiff, a beneficiary under the will of the second mortgagee, to determine the question whether the first mortgagees were entitled to retain more than six years' arrears of interest. The first mortgagees were not parties to the action, but consented to appear on the summons to argue the question. The second mortgage absorbed all the possible surplus of the proceeds of sale:—Held, that the first mortgagees were entitled to retain more than six years' arrears of interest. *Edmunds* v. *Waugh* (L. R. 1 Eq. 418) approved of. *Ib.*

**Surplus Proceeds—Money in Hands of First Mortgagee—Interest.**]—Where upon the realisation of mortgaged property the first mortgagee receives and retains more money than is sufficient to satisfy his claim under his mortgage, the court will order him to pay to the second mortgagee simple interest upon the surplus moneys so retained by him, unless there are circumstances in the particular case before the court which render such an order unjust. The fact, that the second mortgagee has wilfully abstained for four years from taking proceedings to enforce his claim to the surplus moneys retained by the first mortgagee, is not a circumstance upon which the court will deprive him of interest. *Eley* v. *Read*, 76 L. T. 39—C. A.

### b. Between Mortgagor and Mortgagee.

**Mortgagee Trustee for Mortgagor.**]—A mortgagee in exercising his power of sale is not (except as to the balance of the purchase-money after a sale) a trustee for the mortgagor, even if the mortgage is in the form of a trust for sale. *Downes* v. *Grazebrook* (3 Mer. 200) and *Robertson* v. *Morris* (1 Giff. 421) observed upon. *Warner* v. *Jacob*, 51 L. J., Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.

**Application of Surplus to pay simple contract Debt.**]—When a mortgagor dies insolvent, and the mortgagee then realises his security and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor, and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate; the mortgagee being merely in the position of a trustee of the surplus for the estate. *Talbot* v. *Frere*, 9 Ch. D. 568; 27 W. R. 148.

—— **Where Mortgagee Executor.**]—If the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member. *Ib.*

**Retaining Balance in Reduction of Principal.**]—If a mortgagee, even when his interest is in arrear, enters into possession and sells part of the estate under a power of sale in his mortgage, and after payment of his costs and interest then due retains a balance of the proceeds in his hands, that balance will be considered as applied in reduction of the principal debt, and future interest can be charged only on the amount of the debt so reduced. *Thompson* v. *Hudson*, 40 L. J., Ch. 28; L. R. 10 Eq. 497; 23 L. T. 278; 18 W. R. 1081.

**Several Mortgages in one Mortgagee.**]—Semble, that, if two distinct mortgages by the same mortgagor, each containing a trust to apply the proceeds of a sale under the power, first in payment of costs of sale, then of the interest, and then of the principal due upon it, come into the hands of the same person as mortgagee, he may sell the lands subject to one mortgage, and apply the proceeds in payment of arrears of interest on the other mortgage before reducing the principal of the first one. *Ib.*

If there be several mortgages for distinct debts to one mortgagee, who applies to commissioner in usual manner for sale, the proceeds of each must be applied to the particular debt; and surplus of one cannot be applied to deficiency of another. *Bignold, Ex parte, Newton, In re*, 3 Mont. & Ayr. 9; 2 Deac. 66; 6 L. J., Bk. 65.

**Compromise—Sale twelve years later.**]—Preparatory to a contemplated sale under a trust for sale in a mortgage deed, an ejectment was brought by the first and second mortgagees against the heir of the mortgagor, and compromised upon the terms that he should give up possession on the 29th day of September following, and, if required, release to the mortgagees all his right, claim and interest, if any, in the premises. The sale did not take place, the heir was not required to execute any release, and he did not give up possession of the premises. Twelve years afterwards, the mortgaged property was sold under the trust for sale for considerably more than enough to pay principal, interest and costs:—Held, that the mortgagees were not entitled under the compromise to retain the surplus purchase-moneys for their own use. *Rushbrook* v. *Lawrence*, 39 L. J., Ch. 93; L. R. 5 Ch. 3; 21 L. T. 477; 18 W. R. 101.

**Lien for Purchase-money of mortgaged Property.**]—G. A. bequeathed all his furniture, plate, pictures and books (subject to his debts) to his wife S. A. for life, remainder to his son H. A., and appointed them his executrix and executor. With the sanction of the court of chancery, which had made a decree for sale, and directed the purchase-money to be paid into court, H. A. agreed to purchase and became the purchaser of the books and paintings at a valuation of 2,050*l.* 15*s.*, and, for the purpose of paying the amount and to supply the other wants of H. A., he and his mother, S. A., by deed, assigned to M. by way of mortgage, the furniture, plate, pictures and books for 2,800*l.*, and both jointly covenanted for payment. H. A. afterwards became the purchaser of the plate and furniture, with the sanction of the court of chancery, at a valuation of 706*l.* 8*s.*; and to enable him to make the purchase M. advanced him 600*l.*, secured by deed of H. A., executed after the death of his mother, S. A., whereby he covenanted that the furniture, plate, pictures and books assigned by the first deed should stand charged with and be a security to M. for payment of the 600*l.*, and should not be redeemable until payment of that sum, as well as of the 2,800*l.* The 600*l.* was paid into the hands of H. A.'s solicitor, but the purchase-money for the plate and furniture was never paid into court, M. having sold the plate, furniture, pictures and books under a power of sale contained in the first deed:—Held, in an action by him against the executor of S. A. on her covenant for payment, that, although M. as against S. A.'s representatives could not, by force of the second deed, in equity, deduct the 600*l.* out of the moneys so raised, yet he was entitled to deduct the unpaid purchase-money of 706*l.* 8*s.*, as he could not sell the whole of the mortgaged property without satisfying the lien of the court to that extent. *Marcon* v. *Bloxam*, 11 Ex. 586; 25 L. J., Ex. 193.

**Payment into Court and Investment—Depreciation.**]—In a foreclosure suit the mortgaged estate was, by the consent of all parties, sold, and the purchase-money invested in consols, which were subsequently sold at a lower price, and the produce paid to the mortgagee. At the time of investment, the purchase-money was sufficient to satisfy the debt, but the produce of the consols was not sufficient. The mortgagee claimed to be entitled to the difference out of the assets in an administration suit:—Held, that the mortgagee was still a creditor, and entitled to the balance of his principal, interest and costs, including the costs of the application. *Tompsett* v. *Wickens*, 2 Jur. (N.S.) 10; 4 W. R. 136.

**Repayment for Permanent Improvements.**]—If a mortgagee in possession, or a mortgagee selling under his power of sale, has reasonably expended money in permanent works on the property, he is entitled on primâ facie evidence to that effect to an inquiry whether the outlay has increased the value of the property, and, if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure. Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it. *Scudon* v. *Hooper* (6 Beav. 246; 14 L. J., Ch. 120) commented on. *Shepard* v. *Jones*, 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308—C. A.

### c. Of Puisne Incumbrancer.

**Payment into Court—Petition.**]—A first mortgagee sold under a power, and, after deducting his debt, paid the balance into court. On a petition by a puisne mortgagee to have his debt, interest and costs paid to him out of the fund,

the order was made, without an account being directed. *Bingham* v. *King*, 14 W. R. 414.

—— **Where Question of Priority.**—Although a foreclosure suit is pending, the court will allow the property to which it relates to be sold without the control of the court, provided all parties interested are sui juris and consent; but the purchase-money will be ordered to be paid into court, at least if there is any question as to priority of incumbrances. *Relph* v. *Horton*, 19 W. R. 220.

**Compulsion of subsequent Incumbrancer to redeem out of Proceeds.**]—Semble, where a subsequent incumbrancer has an independent right to sell the premises for payment of his own incumbrance, the court of exchequer will not compel him to redeem a prior mortgage, otherwise than out of the sale of the mortgaged premises, unless the mortgagee insists that the premises are an insufficient security to pay him, and that he ought to be redeemed in the first instance: aliter, where the subsequent incumbrancer has no such independent right to sell. *Crofts* v. *Poe*, 1 Jones, 540.

**Purchaser liable for allowing irregular Application.**]—Prior judgment creditor who neglected to come in and prove before final decree for a sale, directed to obtain a report, and then apply to extend the sale to cover his demand, a motion to amend the minutes being refused. Purchaser under the decree, after such a motion, could not plead want of notice; and, although he had the legal estate, would, it appears, be liable, if, having notice of such prior judgment creditor, he allowed the purchase-money to be applied to subsequent incumbrances contrary to the order of priority of charge. *Leake* v. *Moore*, 2 Moll. 127.

**Contribution.**]—A. borrowed money on a mortgage of his estates D. and S., to which B., a prior incumbrancer on D., and C., a prior incumbrancer on S., were parties, and consented to give the mortgage priority over their respective charges. The lands were subsequently sold, and the mortgage paid out of the joint produce. The residue of the fund produced by sale of the S. estate was not sufficient to pay C.'s incumbrance:—Held, that C. was not entitled to contribution against B., there not having been any common liability to pay a common demand. *Keily, In re*, 9 Ir. Ch. R. 87.

**Balance handed to Mortgagor—Liability of first to second Mortgagee.**]—A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor. In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—Held, that the first mortgagees were liable to make good to the plaintiffs the amount of their security to the extent of the balance of the purchase-money. The doctrine in *Peacock* v. *Burt* (4 L. J., Ch. 33) will not be extended. Dictum of Wood, V.-C., in *Bates* v. *Johnson* (Johns. 304, 313), as to the right of a first mortgagee to transfer to a third mortgagee in preference to the second, questioned. *West London Commercial Bank* v. *Reliance Permanent Building Society*, 54 L. J., Ch. 1081; 29 Ch. D. 954; 53 L. T. 442; 33 W. R. 916—C. A.

**Balance paid into Bank—Right to Interest.**]—A first mortgagee, having sold the mortgaged property under a power of sale, gave notice to the subsequent mortgagees that he was ready to pay over the balance, after satisfying his own mortgage. The second mortgagee required that the money should not be parted with until disputes between the incumbrancers should have been settled. The money was thereupon paid by the first mortgagee into his bankers, and was allowed to remain unproductive for several years:—Held, that the first mortgagee could not, under the circumstances, be charged with interest upon the money. *Mathison* v. *Clark*, 25 L. J., Ch. 29; 4 W. R. 30.

**Under Garnishee Order.**]—M. mortgaged a leasehold to W. and then to B. A judgment creditor of B. obtained a garnishee order against M. After this W. sold the property under a power of sale, and an action was brought to distribute the surplus proceeds:—Held, that the judgment creditor had no claim against the surplus proceeds of sale, for that a garnishee order has not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, and that to treat the garnishee order as affecting the land before execution would conflict with the provisions of 27 & 28 Vict. c. 112. *Chatterton* v. *Watney*, 50 L. J., Ch. 535; 17 Ch. D. 259; 44 L. T. 391; 29 W. R. 573—C. A.

**Sale in Creditor's Suit—Right of Equitable Mortgagee by Deposit.**]—The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt:—Held, that the equitable mortgagee was entitled to the whole of the purchase-money, whether arising from the value of the goodwill, or from the value of the lease, independently of the goodwill. *Chissum* v. *Dewes*, 5 Russ. 29; 29 R. R. 10.

**Injunction against parting with Proceeds.**]—A mortgage with a power of sale having been made, judgment was entered up by a creditor against the mortgagor, who was subsequently imprisoned, and discharged under the Insolvent Debtors Acts. The mortgagees, whilst the mortgagor was in prison, sold under their power, and the purchase-money was invested in the names of the mortgagor and the assignees. At the suit of the judgment creditor, they were restrained from parting with a part of the purchase-money. *Robinson* v. *Hedger*, 13 Jur. 846. *And see* 19 L. J., Ch. 463; 14 Jur. 784.

On a bill by a judgment creditor of a mortgagor, the court granted an injunction to restrain mortgagees who were about to sell under their power from paying the surplus to the mortgagor. *Thornton* v. *Finch*, 4 Giff. 515; 34 L. J., Ch. 466.

4. PURCHASE BY MORTGAGEE.

**Generally.**]—A mortgagee purchased part of the mortgaged estate. His principal and interest, calculated up to the 24th of March, exceeded the purchase-money. He was let into possession from the preceding Christmas. *Bates* v. *Bonnor*, 7 Sim. 427.

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**Right of puisne, on Sale by prior Mortgagee.**]—There is no rule in equity which precludes a puisne mortgagee from purchasing the mortgaged property on the occasion of the exercise by a prior mortgagee of his power of sale, and a puisne mortgagee so purchasing acquires as against the mortgagor an absolute irredeemable title. *Shaw* v. *Bunny*, 2 De G. J. & S. 468; 34 L. J., Ch. 257; 11 Jur. (N.S.) 99; 11 L. T. 645; 13 W. R. 374.

—— **Setting aside.**]—A purchase by the mortgagees of the mortgaged property from a prior mortgagee selling under a power of sale will be set aside, as a purchase by a trustee of trust property. *Parkinson* v. *Hanbury*, 2 De G. J. & S. 450; 11 L. T. 755; 13 W. R. 331.

Property being put up for sale by a first mortgagee was bought by a second incumbrancer, to whom the equity of redemption had been conveyed on trust for sale on default in payment of his debt. This sale having been set aside at the suit of the representative of the mortgagor (see 1 Dr. & Sm. 143; 8 W. R. 575):—Held, that the possession of the purchaser was to be referred to the character of trustee, and the account of the rents received by him was not as of course to be on the footing of wilful neglect and default. The second incumbrancer, being not an ordinary mortgagee, but a trustee for sale, was incapacitated from purchasing. *Ib.*

—— **Rule of Equity.**]—There is no rule in equity that a second mortgagee shall not purchase from a first mortgagee selling under his power of sale. *S. C.*, 1 Dr. & Sm. 143; 8 W. R. 575.

—— **Whether second Mortgage being Trust for Sale makes Difference.**]—A second mortgagee may purchase from the first mortgagee selling under his power of sale; and with respect to the question of undervalue he is in the same position as a stranger. The circumstance that the second mortgage is in form of a trust for sale makes no difference; nor is it material that the second mortgagee is in possession at the time of sale. *Kirkwood* v. *Thompson*, 2 De G. J. & S. 613; 12 L. T. 811; 13 W. R. 1052. Affirming, 2 H. & M. 392; 34 L. J., Ch. 305; 11 Jur. (N.S.) 385.

**Trust to Sell.**]—A., having contracted for the purchase of an estate, agrees, by deed, to convey it to two partners to whom he was indebted, upon trust to sell, and, after paying prior charges, to retain their own debt; and it was provided that the power of sale might be exercised, by the partners, before any conveyance should be made to them. No conveyance was ever made or required to be made to the partners, nor did they attempt to exercise the power of sale, and, one of them having died, the survivor agrees with an agent of A. to purchase the estate:—Held, that he was not a trustee, but stood in the situation of a creditor, with a security for his debt, and therefore was not disqualified from purchasing the estate. *Chambers* v. *Walters*, 3 Sim. 42. *S. C.*, on appeal, Coop. t. Brough. 91. Affirmed, *S. C.*, nom. *Waters* v. *Groom*, 11 Cl. & F. 684.

**Sale by Mortgagee to himself — Validity—Subsequent Sale to Third Person.**]—Where a mortgagee whose interest is in arrear puts the mortgaged property up to auction, and goes through a form of sale with one who is in reality acting on his behalf, the transaction, although not necessarily a fraud or evidence of fraud, is inoperative. A subsequent sale by the mortgagee to an innocent third party is, therefore, good. *Henderson* v. *Astwood*, [1894] A. C. 150; 6 R. 450—P. C.

**Purchase by Company of which Mortgagee a Member.**]—The mortgagors of a quarry brought an action to set aside a sale of the mortgaged property made by the mortgagees under the power of sale in the mortgage to a limited company who were defendants to the action. The sale was impeached on the ground that F., one of the mortgagees, was personally interested in the purchase, being at the time of the sale the holder of shares in the company to the amount of one-tenth of the subscribed capital of the company and also being the solicitor to the company:—Held, that, although a mortgagee could not sell to himself, nor could two mortgagees sell either to one of themselves, or to one of themselves and another, the reason being that there could not be any real independent bargaining as between opposite parties, yet, where mortgagees sold to a corporation such as a public company, there were primâ facie two independent contracting parties and a valid contract, and, if the bargaining was real and honest, and conducted independently by the mortgagees on the one hand and by the directors on the other, and it was satisfactorily shown that in the concluding terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees had some interest as a shareholder in the company, there was no sufficient reason for setting aside the sale; that in the present case the material terms of the bargain were honestly and independently settled, and were not in any degree affected by the fact that F. subsequently agreed to become a member of and to act as solicitor for the company, and that the sale ought not to be set aside merely because he was a member of and acting as solicitor for the company at the time when the formal contract was signed. *Farrar* v. *Farrars*, 58 L. J., Ch. 185; 40 Ch. D. 395; 60 L. T. 121; 37 W. R. 196—C. A.

### 5. Purchase by Mortgagor.

**Charge for Deficiency.**]—A mortgagor having made two successive mortgages of his estate to different persons purchased the estate from the first mortgagee under a power of sale contained in his mortgage, and subsequently granted further incumbrances to other persons who had notice of the second mortgage. The purchase-money not being sufficient to pay off the first and second mortgages:—Held, that the second mortgagee was entitled to a charge upon the estate for the deficiency, and that he might obtain a decree of foreclosure against the mortgagor and the subsequent mortgagees. *Otter* v. *Vaux* (*Lord*), 2 K. & J. 650. Affirmed, 6 De G. M. & G. 638; 26 L. J., Ch. 128; 3 Jur. (N.S.) 169; 5 W. R. 188.

Quære, whether this would be the case if the estate had been sold under the power to a stranger, and subsequently purchased from such stranger by the mortgagor. *Ib.*

### 6. Pre-emption, Right to.

**Enforcing after Sale.**]—Equity will not, after a sale, enforce a covenant of pre-emption against mortgagor, in favour of mortgagee. *Orby* v. *Trigg*, 9 Mod. 2.

7. INJUNCTION AGAINST.

**General Rule.**]—The general rule is that a sale by a mortgagee will be restrained only on payment into court by the mortgagor of the amount which the mortgagee swears to be due to him, but this does not apply where the court can see on the terms of the deed that this amount cannot be due on the security. *Hill* v. *Kirkwood* (28 W. R. 358) considered. *Hickson* v. *Darlow*, 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417—C. A.

In 1830 W. conveyed certain real estates to R. and T. and their heirs, by way of mortgage, for securing 400*l.*, with a power of sale in case of default. W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons, A., B. and C., as tenants in common in fee. In 1839, after W.'s death, B. conveyed all his one-third share, under his father's will, to R., H. and N. by way of mortgage, with power of sale in case of default. R., the surviving mortgagee of the deed of 1830, threatened to sell under the power in that deed unless A., the acting executor of W., would redeem both mortgages. Upon a bill by A. to redeem and for an injunction, the court, upon motion, on payment into court by A. of the money due upon the first mortgage, restrained R. from selling under the power contained in the deed of 1830, and from conveying the legal estate in the one-third share of B. comprised in the mortgage of 1839. *Whitworth* v. *Rhodes*, 20 L. J., Ch. 105.

—— **Where Mortgagee is Solicitor of Mortgagor.**]—The ordinary rule, that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest and costs, does not apply to a case where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case, and will make such order as will save the mortgagor from oppression without injuring the security of the mortgagee. *Macleod* v. *Jones*, 53 L. J., Ch. 145; 24 Ch. D. 289; 49 L. T. 321; 32 W. R. 43—C. A.

**Trustee for Sale proceeding Precipitately.**]—Injunction not granted to restrain mortgagee from selling under power in mortgage deed; otherwise, where there is a trustee for sale, and he proceeds precipitately and without notice to both parties. *Anon.*, 6 Madd. 10.

**Selling after Offer by Puisne to pay off First Mortgagee.**]—A puisne incumbrancer offered to pay off the first mortgagee, which being declined he filed a bill to compel a transfer. The first mortgagee, having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title deeds. *Rhodes* v. *Buckland*, 16 Beav. 212.

**In Arbitration.**]—Injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator, refused, although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority. *Harcourt* v. *Ramsbottom*, 1 J. & W. 505.

**Sale without Notice.**]—Where a covenant in a mortgage deed not to exercise the power of sale except after three months' notice was followed by a proviso that the purchaser should not be affected by the absence of such notice, and that the remedy of the mortgagor should be by an action for damages:—Held, that the court had no jurisdiction to restrain the mortgagee from selling without giving the required notice. *Prichard* v. *Wilson*, 10 Jur. (N.S.) 330; 11 L. T. 437; 3 N. R. 350.

—— **Deed of Arrangement indorsed on Mortgage.**]—By a deed of arrangement, indorsed upon a mortgage deed, which contained the usual power of sale upon notice, the mortgagee was appointed receiver of the mortgaged premises, without prejudice to his rights and powers under the mortgage deed; and it provided that, upon the mortgagee giving three months' notice to the mortgagor to put an end to the trusts, he should be at liberty to exercise the power of sale and other powers contained in the mortgage deed. Upon motion, the mortgagee was restrained from exercising his power of sale, he not having given notice to determine the trusts of the deed of arrangement. *Gill* v. *Newton*, 12 Jur. (N.S.) 220; 14 L. T. 240; 14 W. R. 490.

**Stringency of Conditions.**]—Where a mortgagee had a power, on default of payment, on notice, to sell the premises, together or in lots, by private contract or by public auction, subject to such special or other conditions of sale as he might think fit, and he proceeded to a sale after ample notice, but under very special conditions of sale, directed against certain defects of title which the mortgagor himself had, since executing the mortgage, insisted upon, the court refused to interfere to prevent the sale under such stringent provisions. *Kershaw* v. *Kalow*, 1 Jur. (N.S.) 974.

**Surprise and Undervalue.**]—Motion by mortgagor for injunction to restrain completion of sale of mortgaged premises by mortgagee under power of sale, on the ground of surprise and undervalue, refused, mortgagor having acted unfairly, and in some degree sanctioned the transactions relating to the sale. *Ferrand* v. *Clay*, 1 Jur. 265.

**Practice—Alleged Breach of Trust—Answer.**]—On a bill by a mortgagor to restrain a mortgagee from enforcing his power of sale under the mortgage deed, and where no answer had been put in, but it was alleged by the bill that a breach of trust had been committed by the mortgagee, the court, on motion, granted an injunction until the filing of the answer or further order. *Merest* v. *Murray*, 14 L. T. 321.

8. SETTING ASIDE.

**Generally.**]—An alleged sale under a power of sale in a mortgage was set aside as against persons claiming the equity of redemption. *Kelly* v. *Hutton*, 37 L. J., Ch. 917; L. R. 3 Ch. 703; 19 L. T. 228; 16 W. R. 1182.

**Neither Fraud nor Under-value.**]—A few weeks after death of mortgagor and before probate of his will, mortgagee proceeded to exercise power of sale of reversionary interest. Communications were taking place at the time between solicitor of mortgagee and solicitor acting for family of mortgagor, the latter protesting against sale as unnecessary and oppressive, and

offering to pay all principal money, interest and costs so soon as assignment could be prepared. No fraud or undervalue. Bill, by executrix of mortgagor, to set aside sale was dismissed with costs. *Matthie* v. *Edwards*, 16 L. J., Ch. 405; 11 Jur. 761—L. C. Reversing 2 Coll. C. C. 465; 10 Jur. 347.

**Sale after Tender.**]—Where a mortgagee, after tender of his principal and interest (the costs being unascertained), sold under the power in his deed, the court set aside the sale against him, and a person who had bought with knowledge of the tender. *Jenkins* v. *Jones*, 2 Giff. 99; 29 L. J., Ch. 493; 6 Jur. (N.S.) 391; 8 W. R. 270.

**Suppression of Information.**]—First mortgagee with power of sale had entered into arrangements, but not a binding contract for the advantageous sale of part of the mortgaged property. After this, he bought up, at a reduced price, the interest of the second mortgagee, without informing him of the arrangements for sale:—Held, that he was not bound to inform the second mortgagee of the opportunity he had of selling, and a bill to set aside the sale, on the ground of suppression of information, was dismissed, with costs. *Dolman* v. *Nokes*, 22 Beav. 402.

**Irregularity in Notice.**]—Semble, that, even where there has been a serious irregularity in the notice to sell by a mortgagee under a power of sale, if the purchaser has entered and expended money on the property, the court will not, in the absence of fraud, interfere to set aside the purchase. *Metters* v. *Brown*, 33 L. J., Ch. 97; 9 Jur. (N.S.) 958; 8 L. T. 567; 11 W. R. 744.

**Undervalue.**]—A sale, not completed, by a solicitor-mortgagee, at a price which appeared to be below the value, was set aside. *Jones* v. *Linton*, 44 L. T. 601.

—— **Fraud — Leaving Purchase-Money on Mortgage — Mistake.**]—B. being entitled to a sum of 2,916*l.* stock in reversion expectant on the death of an old lady aged eighty-two, obtained, through the defendant E. who acted as solicitor for both parties, a loan of 1,650*l.* upon mortgage. The mortgage contained a power of sale upon three months' notice, or on interest being one month in arrear. The interest being in arrear, the stock was sold, under the power, for 1,950*l.*, as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health, and died within three months. It was afterwards found that only 7*l.* was payable for succession duty. None of the purchase-money was paid except the deposit, the rest being left upon mortgage of the stock. There was evidence that, having regard to the age and health of the tenant for life, from 100*l.* to 200*l.* might have been obtained for the reversion:—Held, that the sale could not be set aside, either on the ground of undervalue, as there was no fraud; nor the leaving of the purchase-money on mortgage; nor the mistake as to succession duty, that being merely a matter for compensation. *Bettyes* v. *Maynard*, 49 L. T. 389; 31 W. R. 461—C. A.

**Sale Instigated by Solicitor.**]—Bill by mortgagor against mortgagee and his solicitors, praying to have a sale under the mortgage deed set aside for fraud and oppression, dismissed as against the solicitors, the main charges in the bill against them not having been made out, but without costs, on the ground that they were the substantial movers and authors of the sale, which, as between the mortgagor and the mortgagee, was proved not to be sustainable in a court of equity. *Matthie* v. *Edwards*, 2 Coll. C. C. 465; 10 Jur. 347. See *S. C.* reversed, supra.

### 9. Specific Performance.

**Generally.**]—The owner of a plot of land granted a lease of it for ninety-six years to P., who mortgaged to the lessor (through a trustee), to secure 2,100*l.* and future advances, the mortgage deed containing a power of sale, and, default being made, the property was contracted to be sold to G. under the power. The contract stipulated for the completion of a house on the land by a fixed day, the lessor to deliver an abstract and title commencing with the lease, and paying 250*l.* and interest at 5*l.* per cent., performing the covenants, paying the costs of the agreement—not to inquire into the right of the lessor to exercise the power of sale, or whether anything was due on the mortgage. The lessor did not deliver an abstract, but G. took possession, finished and let the house, and paid interest, until he heard that judgments were outstanding against the mortgagee. The lessor died, and P. paid off the mortgage, took a reassignment, and brought two actions; one of ejectment, and the other for the interest against G. On a bill by G. to restrain the actions, and for specific performance of the contract:—Decree made with costs against P., except the costs of the action as to interest, and the costs of the executors of the lessor. *Gutteridge* v. *Fletcher*, 12 L. T. 226; 13 W. R. 540.

**Mortgagor not Joining.**]—Specific performance against a purchaser under a power of sale in a mortgage deed, without the mortgagor, though under a covenant to the mortgagee to join in a sale: without costs, the only authority produced being MS. *Corder* v. *Morgan*, 18 Ves. 344.

—— **Delivery of Possession.**]—A mortgagee, having a power to sell, contracted for sale without the concurrence of mortgagor, who, as the purchaser insisted, was a necessary party to the conveyance, though the vendor offered to deliver possession:—Held, that there should be a reference as to vendor's ability so to do, and, if able, then there should be a specific performance, with costs. *Allen* v. *Martin*, 5 Jur. 239.

**Concurrence of Mortgagor.**]—A mortgagee contracted to sell together two properties mortgaged to him by different persons; and on the purchaser objecting to the title, the mortgagors, some of whom were married women, verbally promised to concur. The purchaser, however, refused to complete, and, before a final order for specific performance could be obtained, some of the mortgagors died leaving infants interested in the equity of redemption:—Held, that the willingness of the mortgagors to concur covered the defect in the title. *Hiatt* v. *Hillman*, 25 L. T. 55; 19 W. R. 694.

**Joint Mortgagors—Benefit.**]—The mortgagors had so mortgaged the property that the distinct powers of sale could not be exercised separately without selling undivided shares:—Held, that under the circumstances they would be benefited

by a joint exercise of the powers, and must be bound by it. *Ib.*

**Concurrence of Parties—Variation in Title.**]—Mortgagees sold under their power, without formal notice to the second mortgagees or to the trustee in bankruptcy of the mortgagor, subject to conditions which stated that the vendors were mortgagees selling under a power of sale, and that the assignment was to be accepted from them under such power, without the concurrence of other persons. The purchaser repudiated the contract on the ground of the absence of the three months' notice required by s. 20 of the Conveyancing Act, 1881. Subsequently the vendors offered to procure the concurrence of the second mortgagees and the trustee in bankruptcy of the mortgagor:—Held, that the concurrence of the other parties did not prevent the title from being a title under a mortgagee's power of sale; and that the purchaser was bound to complete notwithstanding the variation in the title offered. *Thompson and Holt's Contract, In re*, 59 L. J., Ch. 651; 44 Ch. D. 492; 62 L. T. 651; 38 W. R. 524.

**Defence to Enforcement of Conveyance.**]—A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee, with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and, on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, shewing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure by conveying under the power:—Held, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power. *Watson* v. *Marston*, 4 De G. M. & G. 230.

## Q. RECEIVER.

1. *Appointment*, 1797.
2. *Rights, Duties, and Liabilities*, 1810.
3. *Receipt of Moneys by, in Foreclosure*, 1814.

### 1. APPOINTMENT.

*a.* In General, 1797.
*b.* Against Mortgagee, 1801.
*c.* At Suit of Mortgagee, 1802.
*d.* Under Judicature Act, 1873, 1807.
*e.* Under Irish Mortgage Act, 1808.

#### a. In General.

**For whose Benefit.**]—The appointment of receiver is for benefit of incumbrancers only so far as expressed to their benefit, and they choose to avail themselves of it. *Gresley* v. *Adderley*, 1 Swanst. 579; 18 R. R. 146.

**Mortgagee to be before the Court.**]—A receiver cannot be appointed without mortgagee's being before the court, if a mortgage appears upon the face of pleadings. *Price* v. *Williams*, G. Cooper, 31.

**Not Complete till Security Given.**]—An order was made at the suit of an equitable mortgagee "that C. E. M., upon his giving security, be appointed receiver" of certain chattels comprised in the security. After this order, but before security had been given, an execution creditor of the mortgagor took the chattels in execution:—Held, that the receiver was not constituted receiver till he had given security, and that the taking the chattels in execution was not a contempt of court. *Edwards* v. *Edwards*, 45 L. J., Ch. 391; 1 Ch. D. 291; 34 L. T. 472; 24 W. R. 713.

**By Mortgagor and Mortgagee Jointly—Whose Possession.**]—A mortgagor having only a life interest in the mortgaged premises, and a mortgagee having a charge both on the life interest and on the interest in remainder, by a joint deed, appoint a receiver, who is directed to pay certain debts, expenses, and the charge on the life interest, and to keep down the interest on the residue. The mortgagee dies, and afterwards the mortgagor; the receiver continues in receipt of the rents and profits after the death of the mortgagor, and pays some part of the rents to the representative of the mortgagee:—Held, that, upon the construction of the deed, the possession of the receiver was not the possession of the mortgagee, but there was ground for an inquiry whether the representative of the mortgagee had by any acts constituted the receiver her agent exclusively. *Jones* v. *Smith*, 1 Hare, 43. Affirmed, 1 Ph. 245; 12 L. J., Ch. 381; 7 Jur. 431.

**Receiving Rents after Discharge.**]—A receiver was appointed by the court of an estate which had been mortgaged to A. By a decree dated in December, 1827, the receiver was ordered to be discharged, and pay the balance in his hands to A. The receiver continued to receive the rents until 1830, but paid them over to A., and, after that time, the rents were paid by the tenants to A.:—Held, that the possession of the receiver after December, 1827, was the possession of A., and that, therefore, A. had been in possession from that time. *Horlock* v. *Smith*, 11 L. J., Ch. 157; 6 Jur. 478.

**A Suit of Annuitant.**]—A., having charged his estates by mortgages and other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates, with verbal directions to pay the interest to the mortgagees, and to pay over the surplus of the rents to himself. On the making a fifth mortgage, A., by deed, appointed B. receiver of the estates comprised in that mortgage, in trust to keep down the interest of that mortgage, and to pay over the residue of the rents to himself; A. afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee for securing the said annuities in manner therein mentioned, and subject thereto to permit A. to receive the surplus for his benefit. At the time of granting these annuities A. represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A. and B. (without making any of the prior incumbrancers parties), the court will restrain B. from paying over any part of the rents to A., and will appoint a receiver, without prejudice to the prior mortgagees taking possession. *Dalmer* v. *Dashwood*, 2 Cox, 378.

**Charge on Hotel—Whether Business comprised in Security.**]—The defendant, being about to erect an hotel under a building agreement,

charged "the said building agreement, and all the premises comprised therein, and the hotel and buildings to be hereafter erected as aforesaid," with the repayment of an advance, and contracted with the lender to execute, as soon as the lease was granted, a mortgage which should be in such form, and contain such powers, covenants and provisions, as the solicitor or counsel of the mortgagee should advise or require. The hotel was built, and the mortgagor carried on business there as an hotel-keeper:—Held, in an action by the mortgagee for sale or foreclosure, that the goodwill or business of the hotel was not included in the security, and the court could not appoint a manager. *Whitley* v. *Challis*, 61 L. J., Ch. 307; [1892] 1 Ch. 64; 65 L. T. 838; 40 W. R. 291—C. A.

**Lease of Collieries.**]—The court has jurisdiction, at the instance of mortgagees of collieries held under leases containing working covenants, to appoint a receiver and manager of the property and business, notwithstanding that the latter is not specifically referred to in the mortgage security. *Campbell* v. *Lloyd's Bank*, 58 L. J., Ch. 424.

**Mortgage of Newspaper.**]—On motion by a mortgagee of a newspaper a receiver and manager of the mortgaged property were appointed until the hearing of the cause. *Chaplin* v. *Young*, 6 L. T. 97—L. C. And see *Kelly* v. *Hutton*, infra.

—— **Sale—Co-owner's Application for Receiver.**] — K. obtained a decree that he was entitled to a moiety of a newspaper, subject to a lien thereon in favour of his co-owner H., and the decree directed certain accounts to be taken. H. had mortgaged his interest (including his lien on K.'s share) to M. K. had no interest in the premises where the business of printing and publishing the newspaper was carried on, nor in the plant used in the business. The books of account were in the possession of H. Great delay took place in taking the accounts, both H. and M. placing every obstacle they could in the way. Ultimately M. purported, as mortgagee, to sell the whole interest in the newspaper to J. Thereupon K. filed another bill against M. and H. and J., praying that the sale to J. might be declared void as against K., and that the newspaper might be sold by the court, and that till sale a receiver and manager might be appointed, and that, if necessary, the suit might be treated as supplemental to the first suit:—Held, that a receiver and manager ought to be appointed. *Kelly* v. *Hutton*, 20 L. T. 201; 17 W. R. 425.

**Practice—Amending Notice of Motion—Two Suits.**]—The notice of motion for a receiver and manager having been entitled only in the second suit, the vice-chancellor amended it by entitling it also in the first suit, and made the order in both suits:—Held, that it was competent to the vice-chancellor to make the order in both suits. *Ib.*

**Mortgagee Appointed.**]—A defendant, a mortgagee, in the absence of any direct authority to be found in the books, was appointed the consignee, manager and receiver of the mortgaged estates. *Davis* v. *Barrett*, 13 L. J., Ch. 304.

**On Bill to enforce Agreement for Mortgage.**]—On advance of money defendant agreed to execute mortgage, but failed. Arrears of interest of advance due. On bill for specific performance, receiver granted. *Shakel* v. *Marlborough* (*Duke*), 4 Madd. 463.

**On Equitable Charge and Judgment.**]—Receiver granted in default of payment into court, on an equitable charge and a judgment, but execution prevented by the circumstances of the title. The right not affected by a subsequent variation of circumstances, and established over the whole estate, though of great value compared with the debt, as a reasonable part may be tendered as security, or the debt may be paid into court. *Curling* v. *Townshend*, 19 Ves. 628.

**Mortgagor out of Jurisdiction.**]—The conditional order for a receiver in a mortgage matter cannot be enforced against a mortgagor who resides and has been served out of the jurisdiction. *Wolfe* v. *Jackson*, 2 Hog. 199.

**Action Pending.**]—A legal mortgagee, being in possession of the mortgaged property, applied to the court for the appointment of a receiver:—Held, that, although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the court, it was more desirable, where an action was pending, that the appointment should be made by the court under the Judicature Act, 1873. *Tillett* v. *Nixon*, 53 L. J., Ch. 199; 25 Ch. D. 238; 49 L. T. 598; 32 W. R. 226.

**Pending Bill to Foreclose.**]—The court will appoint a receiver of the rents of lands in mortgage, pending a bill to foreclose. *Crowe* v. *Halliday*, 2 Ridgw. P. C. 58.

**Practice—Appointment ex parte.**]—A receiver and manager had been appointed on an ex parte application by the plaintiff in a foreclosure action under a mortgage of brewery premises. The mortgagor, the defendant, afterwards became bankrupt on his own petition. The official receiver opposed a motion by the plaintiff for the continuance of the original receiver and manager, contending that he ought to be substituted:—Held, that an order must be made confirming the previous appointment, and continuing the person then appointed as receiver of the rents and profits of the premises comprised in the mortgage, and as manager of the business, he to be at liberty to use any of the vats, fixed motive machinery, and other property comprised in the mortgage, but nothing else. *Deacon* v. *Arden*, 50 L. T. 584.

—— **Bill by Equitable Mortgagees—Disappearance of Defendant.**]—When a defendant had disappeared after failing to arrange with his creditors in bankruptcy, and a bill was filed by the plaintiffs as equitable mortgagees, service of which could not be effected, the court appointed a receiver of the mortgaged property on an ex parte motion. *London and South Western Bank* v. *Facey*, 24 L. T. 126; 19 W. R. 676.

**Form.**]—Form of order appointing a receiver and manager with an injunction. *Truman* v. *Redgrave*, 50 L. J., Ch. 830; 18 Ch. D. 547; 45 L. T. 605; 30 W. R. 421.

### b. Against Mortgagee.

**When Mortgagee not in Possession.**]—When the first mortgagee is not in possession, a receiver may be appointed at the suit of a subsequent incumbrancer, without prejudice to the first mortgagee's taking possession. *Berney* v. *Sewell*, 1 J. & W. 637; 21 R. R. 265.

**When Mortgagee in Possession.**]—When a first mortgagee is in possession, a receiver will not be appointed against him, except on his confession that he has been paid off, or his refusal to accept what is due to him. *Ib.*

**On Application of Creditors.**]—When a mortgagee is not in possession, the court will, upon application of creditors, appoint a receiver of the mortgaged premises, but without prejudice to the right of the mortgagee to obtain possession. *Bryan* v. *Cormick*, 1 Cox, 422. And see *Berney* v. *Sewell*, 1 J. & W. 637; 21 R. R. 265.

**On Behalf of Judgment Creditors.**]—Where judgment creditors had duly taken out writs of elegit, but possession could not be given by the sheriff in consequence of the existence of prior outstanding mortgages, the mortgagees being alleged not to be in possession, and to refuse to take possession, the court appointed a receiver of the mortgaged premises, without prejudice to the rights of the mortgagees, the prior incumbrancers. *Rhodes* v. *Mostyn* (*Lord*), 17 Jur. 1007; 1 W. R. 366.

**On Application of Specialty Creditors—Mortgage of Equitable Interest.**]—The court refused, upon motion by specialty creditors of a testator, to appoint a receiver of the rents of real estate, where the persons in possession and in receipt of the rents were mortgagees of a devisee for life of an equitable interest. *Caldwell* v. *Ellison*, 9 L. T. 751; 12 W. R. 299.

**Mismanagement—Partnership.**]—Motion for receiver against mortgagee of mines, who had become also partner, on ground of mismanagement, and excluded mortgagor from interference, refused; the parties having regulated their rights by subsequent agreement, and mortgagee denying his mortgage was satisfied. The rights, &c., of person in the joint situation are not to be governed solely by principles applicable to one holding as mortgagee or partner; and, to deprive him of possession on ground of mismanagement, it must be of a clear and specified nature. *Rowe* v. *Wood*, 2 J. & W. 553; 22 R. R. 208.

**Practice—Affidavit Evidence.**]—On motion for receiver against mortgagee insisting by answer he is not fully paid, court will not try that fact on affidavit. *Ib.*

**Ground for Motion, before Answer.**]—The management of the estates, and misapplication of the rents, and collusion with the mortgagor, are not grounds for a motion, before answer, to take possession from him. *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265.

**After Decree.**]—Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant. *Hiles* v. *Moore*, 15 Beav. 175.

**Mortgagee not shewing Debt.**]—A. B., the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years, and received a considerable sum, a receiver was appointed against him, on the application of the second mortgagee, the affidavit of A. B. not satisfactorily shewing that anything remained due on the first mortgage. *Ib.*

**Where Debt not Ascertained.**]—Receiver upon a mortgagee in possession, who cannot ascertain the debt due to him. *Codrington* v. *Parker*, 16 Ves. 469.

### c. At Suit of Mortgagee.

i. Legal Mortgagee, 1802.
ii. Equitable Mortgagee, 1802.
iii. Subsequent Mortgagee, 1803.
iv. Other Cases, 1804.

#### i. *Legal Mortgagee.*

**Generally.**]—A mortgagee who has the legal estate cannot have a receiver. *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265.

A mortgagee having the legal estate is not entitled to have a receiver appointed by the court, although the tenants may be numerous, and the rents difficult to collect. *Sturch* v. *Young*, 5 Beav. 557; 12 L. J., Ch. 56.

**In Possession.**]—A legal mortgagee who has once gone into possession of the mortgaged property is not entitled, as of right, to have a receiver appointed. *Mason* v. *Westoby* (32 Ch. D. 206), discussed. *Prytherch, In re, Prytherch* v. *Williams*, 59 L. J., Ch. 79; 42 Ch. D. 590; 61 L. T. 799; 38 W. R. 61.

The rule laid down in *Prytherch, In re, Prytherch* v. *Williams* (42 Ch. D. 590), that the court will not by appointing a receiver assist a legal mortgagee to retire from possession, is not an absolute rule of law, but is subject to the discretion of the court. A receiver appointed, in the exercise of that discretion, at the instance of a mortgagee in possession. *County of Gloucester Bank* v. *Rudry Merthyr Steam, &c. Co.*, 64 L. J., Ch. 451; [1895] 1 Ch. 629; 12 R. 183; 72 L. T. 375; 43 W. R. 486; 2 Manson, 223—C. A.

**Interlocutory Application.**]—A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain, upon an interlocutory application, an order for the appointment of a receiver and manager, and an injunction restraining the mortgagor from interfering with the management of the business and the possession of the premises. *Truman* v. *Redgrave*, 50 L. J., Ch. 830; 18 Ch. D. 547; 45 L. T. 605; 30 W. R. 421.

#### ii. *Equitable Mortgagee.*

##### a. In General.

**Generally.**]—Upon a bill by equitable mortgagees, a receiver was directed to be appointed, with liberty to the parties to propose themselves. *Meaden* v. *Sealey*, 6 Hare, 620; 18 L. J., Ch. 168.

**Against subsequent Mortgagee—Mortgagor out of Jurisdiction.**]—A bill being filed by an

equitable mortgagee against a subsequent equitable mortgagee and the mortgagor, who was out of the jurisdiction, and had not appeared, but was sworn to be, by his agent, in receipt of the profits of the mortgaged premises:—Held, by the vice-chancellor, that the court will not appoint a receiver. —— v. *Chadwick*, 4 L. J. (o.s.) Ch. 67.

b. By Deposit.

**Before Answer.**]—Receiver of rents of mortgaged premises appointed before answer upon bill by equitable mortgagee by deposit of title deeds, the court thinking, from the circumstances, that it was a case of danger to the plaintiff, unless the court interfered. *Aberdeen* v. *Chitty*, 3 Y. & C. 379; 8 L. J., Ex. Eq. 30.

**Practice—Assumption in favour of Depositor.**]—In a suit to establish an equitable mortgage by deposit of deeds, if the court is satisfied as to the deposit, it will for the purpose of a motion for a receiver assume the probability that such deposit was made for an advance of money, and that the plaintiff may be entitled to some relief at the hearing and make an order for a receiver. *Bodger* v. *Bodger*, 11 W. R. 160.

**Against Judgment Creditors.**] — W. & Co., bankers, being equitable mortgagees by deposit under agreement in writing with C., the owner of certain freehold estates, filed their bill against B. and D., judgment creditors of C., who had by legal process under writs of elegit, and for the purpose of satisfying their debts, entered into possession of those estates. The bill stated a strong case of fraud and collusion against B. and D., also against C., and charged that the actions brought by B. and D. respectively against C. (in which the judgments were obtained and the elegits afterwards sued out) were brought with the view and for the purpose of defrauding the plaintiffs, and defeating their equitable lien on C.'s estate, and that the elegits were therefore void as against the plaintiffs. The bill prayed a declaration that the plaintiffs were entitled to a priority over the elegit creditors respectively, and that the judgments and elegits might be declared fraudulent and void as against the plaintiffs, and that a receiver might be appointed:—Held, on motion for an injunction and receiver, that, the charges of fraud and collusion having been positively denied by the affidavits, and the plaintiffs not having insisted on a right of priority of their security over the defendants, independently of the fraud and collusion charged by the plaintiffs, the court would not interfere in favour of the plaintiffs with the defendants' title. *Whitworth* v. *Gaugain*, Cr. & Ph. 325; 10 L. J., Ch. 317; 5 Jur. 523.

iii. *Subsequent Mortgagee.*

**Generally.**]—Where the first mortgagee is not in possession, a receiver may be appointed at the suit of a subsequent incumbrancer without prejudice to the first mortgagee's taking possession. *Berney* v. *Sewell*, 1 J. & W. 647; 21 R. R. 265.

**Consent of First Mortgagee.**]—Second mortgagee, the mortgagor living, cannot have receiver without consent of first mortgagee. *Phipps* v. *Bath and Wells (Bishop)*, Dick. 608.

**Against Tenant and Mortgagee combined in One Person.**]—A second mortgagee (the plaintiff) applied for receiver; this was opposed by a defendant who had purchased from plaintiff part of mortgage and was in possession as tenant of a part of estate of which the rent was equal to the interest of his share of the mortgage. The court held the two characters of tenant and mortgagee could not be united, and, therefore, granted the receiver. *Archdeacon* v. *Bowes*, 3 Anst. 752; 4 R. R. 855.

**Death of Receiver.**]—A mortgagee had power by his mortgage deed of appointing a receiver in certain events. He did so, and the receiver had recently died. On a suit by a second mortgagee to redeem:—Held, that the court would appoint a receiver: the first mortgagee to have a right to nominate, subject to any proper objection. *Bord* v. *Tollemache*, 1 N. R. 177; 7 L. T. 526.

iv. *Other Cases.*

**Two separate Estates, one primarily liable.**]—A brother and sister conveyed their separate estates to a mortgagee, and the deed contained a proviso that recourse should not be had to the sister's estate so long as the brother's estate was sufficient to pay the money lent. The brother's estate, owing to prior mortgages, was insufficient, but no formal administration of his estate had been made upon a bill to foreclose the sister's estate:—Held, that the plaintiff, like a subsequent mortgagee, was entitled to a receiver. *Acland* v. *Gravener*, 31 Beav. 482; 32 L. J., Ch. 474. See *S. C.*, 1 N. R. 350.

**Mortgage of undivided Share.**]—In a suit for foreclosure and partition by mortgagees of an undivided share in property, the court allowed a receiver to be appointed of the undivided share which belonged to the plaintiffs' mortgagor. *Fall* v. *Elkins*, 9 W. R. 861.

A receiver may be appointed over the whole of a property at the instance of a mortgagee of an undivided share. *Samsion* v. *Crutwell*, 31 W. R. 399.

**Equitable Mortgagee of equal Moieties.**]—Where two parties, entitled in equal moieties in the premises, concurred in an equitable mortgage, and one being out of the jurisdiction, the rents were received by the other:—Held, a fit case for a receiver being appointed of the whole rents. *Holmes* v. *Bell*, 2 Beav. 298; 9 L. J., Ch. 217.

**Mortgage of Leaseholds—Ejectment by Landlord.**]—If a mortgagor of leasehold premises allows an arrear of rent to fall due, and an ejectment to be brought by the landlord, the mortgagee may pay the arrear and costs, and apply for a receiver. *Kelly* v. *Staunton*, 1 Hog. 393.

Where the head landlord threatened to evict mortgaged premises for nonpayment of rent; the court, on bill filed for a foreclosure, and before answer or process, granted a conditional order for a receiver. *Barrett* v. *Mitchell*, 5 Ir. Eq. R. 501.

W. L. O. mortgaged certain leasehold premises to the plaintiff; the deed contained a clause of redemption on payment of the principal and interest on the 1st of May, 1842. By a deed of the same date, reciting an agreement, on the treaty for the mortgage, that the principal sum should not be called in until after the death of

W. L. O., and that, by mistake, it was stated in the mortgage deed that it might be called in after the 1st of May, 1842, the plaintiff covenanted that the principal sum should not be called in until after the decease of W. L. O.; W. L. O. became insolvent, and the interest of the mortgage fell in arrear. The plaintiff paid an arrear of head rent in order to save the premises from eviction by the head landlord:—Held, that the plaintiff was not entitled to foreclose the mortgage during the life of W. L. O., but was entitled to a receiver to keep down the interest on the mortgage and his advances. *Burrowes* v. *Molloy*, 8 Ir. Eq. R. 482; 2 Jo. & Lat. 521.

**On Sale and Purchase—Vendor re-entering for Forfeiture.**]—An agreement was entered into by A., for the sale of an estate to B., to be completed, and the purchase-money paid, on or before the expiration of five years, and, in the meantime, interest on the purchase-money was to be paid half-yearly by the purchaser; the vendor reserved a right of avoiding the contract, in case the interest should be in arrear for twenty-one days. To enable B. to pay the interest then in arrear, C. advanced a sum of money on mortgage of B.'s interest in the property, and the vendor afterwards verbally agreed with C. to extend the term of payment of the half-yearly interest. The interest became afterwards in arrear in such a way that A., by the original agreement, had a right to annul the contract; but he had no such right, under the varied agreement; A. re-entered as for a forfeiture. The court, on the application of C., appointed a receiver over the property. *Dawson* v. *Yates*, 1 Beav. 301; 2 Jur. 960.

**Mortgage of Rates.**]—The commissioners appointed under a local act were empowered to raise money upon the security of the rates for the purposes of local improvements. Of the money so borrowed the sum of 100*l.* at the least in every year was to be repaid to such of the mortgagees as should be selected by ballot. The interest upon the mortgage was duly paid, and annual instalments were paid in the prescribed manner, though not with complete regularity. The mortgagees gave notice to the commissioners, requiring them to pay off their mortgage (800*l.*) in six months. The commissioners refused to do so, whereupon the mortgagees filed a bill to establish their right to be paid off, and for a receiver of the rates:—Held, that they had no right to have their mortgage debt paid off, except under the provisions of the act, and that the court had no jurisdiction to appoint a receiver of the rates. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 760; L. R. 7 Ch. 655; 27 L. T. 87; 20 W. R. 875.

**Mortgage of Tolls.**]—A canal company, under the authority of various acts of parliament, raised money on mortgage of the undertaking. The instrument of mortgage assigned the navigation and the rates and tolls to the lender, his executors, administrators and assigns, to hold till principal and interest were paid and satisfied; and the acts provided that all the mortgages should be satisfied pari passu. A mortgagee gave the company six months' notice requiring to be paid off, and the company refused to do so:—Held, that he was entitled to have a receiver of the rates and tolls appointed by the court. *Hopkins* v. *Worcester and Birmingham Canal Navigation Co.*, 37 L. J., Ch. 729; L. R. 6 Eq. 437.

A mortgagee of turnpike tolls and toll-houses which are leased and are subject also to other mortgages, may apply to have a receiver appointed, instead of taking steps to obtain possession at law. *Crewe* (*Lord*) v. *Edleston*, 1 De G. & J. 93; 3 Jur. (N.S.) 1061; L. R. 6 Eq. 437.

Where several mortgages were made, under the authority of an act of parliament, of a canal navigation and undertaking, and the works, lands, hereditaments and capital subscription calls, debts, sums of money, property, estate and effects belonging, due or owing, or thereafter to belong, or be due, or owing thereto, and all tolls, rates and duties arising by virtue of the acts under which the company was formed, the mortgagees being equally entitled, one with the other, to their proportions of the tolls and premises, the court, at the suit of one of the mortgagees, whose interest had been a long time unpaid, appointed a receiver of the tolls, rates and duties, and of the estate of the company. *Fripp* v. *Chard Ry.*, 11 Hare, 241.

A receiver was appointed by the court of the rates, tolls, duties and other property of a canal and railway company, incorporated by act of parliament, notwithstanding that the act of incorporation provided that a committee of proprietors should be elected at every annual general meeting to manage the affairs of the company. *Ib.*

A receiver of the rates, tolls, duties and other property of the company, appointed by the court at the suit of a mortgagee whose interest was long in arrear, notwithstanding the act of incorporation gave the mortgagee in such a case the specific remedy of applying to and obtaining the appointment by two justices of the peace of a receiver of such rates, tolls and duties, until the interest in arrear and the costs and charges should be satisfied, accompanied by a provision that the act should be without prejudice to any remedies which such mortgagee might have either in law or equity. *Ib.*

**Over Property of Company.**]—It is no objection to the appointment of a receiver over the property of a company, whose business is in the nature of a trade, that the application is made by one of several mortgagees who, according to the terms of their mortgages, have the legal estate in the property, nor is it any objection that the company has duties to perform, the neglect of which might subject them to indictment, for the order of the court always gives the parties liberty to apply, whereby any such consequence may be averted. *Ib.*

A receiver appointed at the suit of a mortgagee, having a charge forming about a ninth of the entire mortgage debt of the company, although the other eight-ninths of mortgagees did not concur in the application. *Ib.*

Consideration on the selection of a receiver and manager of the property and business of a company, so as to avoid the appointment of any person whose individual pecuniary interest might conflict with the duties of his office, in respect to those for whose benefit the appointment is made. *Ib.*

**On Debtor's Admission.**]—A receiver will be appointed on the admission of the debtor, that an arrear of interest is due to the plaintiff on a

mortgage, although a creditor in possession of the mortgaged premises does not make any admission on the subject. *Page* v. *Wellesley* (*Marquis*), 1 Hog. 179.

**After Decree.**]—The defendant in a foreclosure suit, not having complied with the order in the decree to bring in the title deeds, the court, on motion, referred it to the master to appoint a receiver, although the decree was merely for a sale, and did not direct a receiver to be appointed. *Harris* v. *Shee*, 6 Ir. Eq. R. 543 ; 1 Jo. & Lat. 91.

**After Foreclosure absolute.**]—After judgment for foreclosure absolute, the action being at an end, the plaintiff cannot obtain an order for the appointment of a receiver of the mortgaged property, even though the conveyance of the property to the plaintiff remains to be settled. *Wills* v. *Luff*, 57 L. J., Ch. 563 ; 38 Ch. D. 197 ; 36 W. R. 571. Affirmed, W. N. 1888, p. 191—C. A.

**Evidence.**]—When upon a decree pro confesso, in a foreclosure suit, the plaintiff moves for a receiver, he must shew, by affidavit, the sum due for principal, interest and costs, after all just allowances, and that defendant is in possession ; the statement in the bill as to the sum due, is not enough. *Rogers* v. *Newton*, 2 Ir. Eq. R. 40.

**Interlocutory Application for Possession.**]—In an action brought by brewers for foreclosure of a mortgage of a public-house of which the mortgagor was in possession, a receiver and manager had been appointed by order on interlocutory motion in the form given in *Truman* v. *Redgrave* (18 Ch. D. 547). The mortgagor continued in occupation of a part of the premises, and was alleged to have acted in a manner which interfered with the proper conduct of the business by the receiver. The plaintiff now moved for an order directing the mortgagor to give up possession to the receiver, and restraining him from remaining in occupation of any part of the premises :—Held, that the mortgagee was not entitled to such an order before judgment. *Taylor* v. *Soper*, 62 L. T. 828.

**Practice — Suit for Redemption.**]—At the hearing of a suit for redemption, the court will not, on the application of the defendant, grant a receiver against the plaintiff, the mortgagor in possession, none being prayed by the bill. Whether it can be done by petition, quære. *Barlow* v. *Gains*, 8 Beav. 329.

### d. Under Judicature Act, 1873.

**Action pending—Conveyancing Act, 1881.**]—A legal mortgagee being in possession of the mortgaged property, applied to the court for the appointment of a receiver :—Held, that, although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the court, it was more desirable, where an action was pending, that the appointment should be made by the court under the Judicature Act, 1873. *Tillett* v. *Nixon*, 53 L. J., Ch. 199 ; 25 Ch. D. 238 ; 49 L. T. 598 ; 32 W. R. 226.

**Right of Mortgagee in Possession.**]—Under s. 25, sub-s. 8, of the Judicature Act, 1873, a mortgagee in possession is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession, and that he has surplus rents in his hands. *Mason* v. *Westoby*, 55 L. J., Ch. 507 ; 32 Ch. D. 206 ; 54 L. T. 526 ; 34 W. R. 498—V.-C. B.

**Extension of Order.**]—Under the power given by the Judicature Act, 1873, s. 25 (8), to appoint a receiver in all cases in which it shall appear just and convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in the plaintiff's security, as to part of which he was legal and as to part equitable mortgagee. *Pease* v. *Fletcher*, 45 L. J., Ch. 265 ; 1 Ch. D. 273 ; 33 L. T. 644 ; 24 W. R. 158.

**On behalf of Sub-mortgagee.**]—The plaintiff in an ejectment action which was set down for trial, but had been stayed until another action affecting the same property, and brought by the defendant in ejectment against the plaintiff and others, should be ready for trial, moved for a receiver and for attornment to him. The defendant in ejectment set up a defence that in equity the plaintiff was only a sub-mortgagee. The evidence in support of the motion shewed that the property was wasting, and that, even if the plaintiff was only sub-mortgagee, it was insufficient for the original mortgage upon it ; and this evidence was not met to the satisfaction of the court :—Held, that under the circumstances it was just and convenient within the Judicature Act, 1873, s. 25, sub-s. 8, now to appoint a receiver ; and an order was made accordingly, unless the defendant elected within four days to pay an occupation rent into court, the amount to be settled in chambers. *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 706.

**In Ireland.**]—The 3rd section of 19 & 20 Vict. c. 77, has been repealed by the 28th section of the Judicature (Ireland) Act, sub-s. 8, and, therefore, the court may appoint a receiver on foot of any judgment mortgage, notwithstanding that the rental of the estate is less than 100*l.* per annum. The court will, under special circumstances, appoint a receiver where less than one year's interest is due. *Martin's Estate, In re*, 13 L. R., Ir. 43.

### e. Under Irish Mortgage Act.

**Application of Act.**]—Mortgage Act contemplates rents only ; and, therefore, a receiver of the produce of mines, on the petition of a mortgagee to whom a large arrear of interest was due upon his mortgage, was refused. *Darcy* v. *Blake*, 1 Moll. 249.

The 11 & 12 Geo. 2, c. 10, does not authorise the appointment of a receiver over mines in the respondent's possession. The court is not in the habit of ordering any lands to be let under a mortgage petition, which were not producing rent at the time when the receiver was appointed. *Frere* v. *Hibernian Mining Co.*, 2 Hog. 30.

**Jurisdiction after 19 & 20 Vict. c. 77.**]—Where the receiver in a matter under the Mortgage Act pending at the passing of the 19 & 20 Vict. c. 77, dies, the court has power to appoint a new receiver, notwithstanding the repeal of the former by the 5th section of the latter act. *Harstone* v. *Tottenham*, 6 Ir. Ch. R. 144.

**Where Mortgage impeached.**]—A petition by a mortgagee for a receiver, under the Mortgage Act (12 Geo. 3, c. 10, Ir.), will be dismissed, if it appears that the mortgage is impeached. *Leahy* v. *Arthur*, 1 Hog. 92.

The court will not appoint a receiver under the 11 & 12 Geo. 3, c. 10, where the mortgage is impeached upon probable grounds, but the mere impeachment of the mortgage is not a sufficient cause against the appointment of a receiver under that statute. *Cosgrave* v. *Gannon*, Fl. & K. 228; 3 Ir. Eq. R. 433.

Where a petition is presented under the Mortgage Act, the mere impeachment of the mortgage, by affidavit, without shewing probable grounds for such impeachment, is not sufficient to prevent the court from appointing a receiver. But, semble, if a bill were filed to impeach the mortgage, the court would not distribute the fund received by the receiver till the suit was disposed of. The case of *Cosgrave* v. *Gannon* (3 Ir. Eq. R. 433) approved of. *Whaley* v. *Whaley*, 11 Ir. Eq. R. 276.

If the validity of the security is impeached upon probable grounds, or from length of time, or other circumstances, it should be presumed to be paid off. A receiver will not be appointed in a summary way under the Mortgage Act; but where the subsistence of the mortgage was doubtfully denied, and the affidavit was positive, a receiver was appointed. *Shepherd* v. *Murdock*, 2 Moll. 531.

Receiver under the Mortgage Act only where the mortgage is not questioned. But where it was impeached, but the objection appeared groundless and frivolous, no costs were given, although it could not be resisted, for no inquiry can be entered into. *Darcy* v. *Blake*, 1 Moll. 247.

**Opposition of prior Incumbrancer.**]—Application for receiver under Mortgage Act granted, although opposed by prior incumbrancer, who is not in possession. *Rundell* v. *Wellesley* (*Marquis*), 3 Moll. 116.

**Setting aside.**]—A mortgagee having obtained a conditional order for a receiver under the Mortgage Act, payments were made on account of interest, and a receiver was appointed by a judgment creditor. A petition being presented by the mortgagee, the conditional order was made absolute, and the receiver extended on the mortgage, in chambers. On an affidavit stating the intermediate payments, the order was set aside. *Goldsmidt* v. *Glengall* (*Lord*), 11 Ir. Eq. R. 608.

**Service of Order.**]—Service of the conditional order, under the Mortgage Act, not substituted, the act only contemplating the case of mortgagor within the jurisdiction. *Barlow* v. *Harvey*, 1 Moll. 246.

Service of the conditional order for a receiver under the Mortgage Act, 11 & 12 Geo. 3, c. 10 (Irish), upon the mortgagor abroad, not effectual, not by analogy to service of original process, which is altogether different; personal service out of the jurisdiction of such conditional order qua notice being good, but failing of its effect on the ground that the act did not contemplate the case of an absent mortgagor, which is inferred from that case having been provided for otherwise. *Johnson* v. *Nagle*, 1 Moll. 240.

**Practice—Shewing Cause.**]—When a petition for a receiver has been presented under the Mortgage Act, the defendant cannot shew cause without filing a petition; and, if the petition has not been filed, the court has no jurisdiction even to give costs, against the respondent, of a motion to shew cause. *Pakenham* v. *Darcy*, 7 Ir. Eq. R. 476.

2. Rights, Duties and Liabilities.

*a.* In General, 1810.
*b.* Under Irish Mortgage Act, 1814.

### a. In General.

#### i. *Of Receiver.*

**Rights—To bring Ejectment.**]—A receiver in a mortgage cause will not be permitted to bring an ejectment on the title, against a lessee of the mortgagor, after mortgage executed, where the lessee has been in possession for twenty years, where the consideration of the mortgage security has been impeached by a cross bill, and the mortgagee has not proceeded for eighteen years to foreclose his mortgage after it was so impeached, and no account has been taken between the parties. *Martin* v. *Walker*, Sau. & Sc. 139.

—— **To Repayment of Expenses.**]—By a deed made by K., the plaintiffs and the defendant, by which K. mortgaged to the plaintiffs the Kingston rectory estate, consisting of a number of small holdings and tithes, many of which were taken in kind, it was agreed that the defendant, an attorney practising in London, should be appointed receiver with the usual powers. The deed provided for the application of the rents, &c., as follows, viz.: that the defendant should, "in the first place, pay all the costs, charges and expenses which he should bear, sustain, incur, or be liable to in or about the collecting, receiving and compelling payment of the rents, &c., including therein all expenses of suit, action, process, distress and all other charges of management whatsoever." It provided that the interest upon the mortgages should be paid, and that the defendant should pay over to K. the residue of the rents, &c., after answering the purposes aforesaid, and deducting and detaining out of such residue for his own use so much and such sums of money as he should reasonably deserve, as a compensation for his care and pains, and trouble and expense in collecting, receiving and paying the rents, &c., for the time being received or collected:—Held, that the receiver was entitled to repay himself such sums as were reasonably expended by him in the collection of the rents (including a salary or percentage paid to a collector), before applying the rents, &c., to the satisfaction of arrears of interest due upon the mortgages. *Gilbert* v. *Dyneley*, 3 Scott (N.R.) 364; 3 Man. & G. 12; 5 Jur. 843.

—— **To sue for Rent in Name of Mortgagor's Heir-at-law.**]—A mortgagor died, having devised the mortgaged lands to two trustees upon certain trusts. One of the trustees predeceased him, and the other disclaimed. The principal money and interest for over two months being due, the mortgagee appointed a receiver, under the Conveyancing and Law of Property Act, 1881:—Held, that, under s. 24, sub-s. 3, of the act, the receiver was entitled to sue for rent in the name of the heir-at-law of the mortgagor, upon giving him

a sufficient indemnity. *Fairholme* v. *Kennedy*, 24 L. R., Ir. 498.

—— **To Distrain.**]—A receiver of an estate was appointed by a mortgagor and mortgagee. They gave him power of distress and entry, and the mortgagor attorned as tenant to the receiver at a certain rent. The deed provided that nothing therein should abridge the rights of the mortgagee. The mortgagor afterwards became bankrupt, and the receiver distrained for the rent:—Held, that the validity of the distress depended upon the existence of a tenancy to the receiver; that such a tenancy was created, pursuant to the intention of all parties, by the attornment of the mortgagor to him, with the consent of the mortgagee; and that the express power of distress was not a power in gross, but annexed to the tenancy, and that the distress was valid, entitling the mortgagee to the produce of it. *Jolly* v. *Arbuthnot*, 28 L. J., Ch. 547; 5 Jur. (N.S.) 689; 7 W. R. 532.

—— **To move for Reference.**]—A motion by a receiver for a reference to inquire and report whether any and what sum was due on foot of a mortgage, and whether it would be for the advantage of the parties that the receiver should make certain payments on account of any sum reported due, will be refused with costs, as the receiver ought not thus to interfere with the rights of the parties in the cause. *O'Connor* v. *Malone*, 1 Ir. Eq. R. 20.

**Duties—Infant's Estate.**] — Court will not order receiver of infant's estate to keep down interest of mortgage debt, unless master reports it due. *Anon.*, 6 Madd. 9.

ii. *Persons Interested.*

**Money in hand of Receiver — To whom belonging.**]—A prior mortgagee instituted a foreclosure suit in chancery, and obtained a decree for a sale. A puisne mortgagee instituted a similar suit in the exchequer, in which the prior mortgagee was not a party, and obtained a receiver. The receiver having brought a sum of money, being by-gone rents of the mortgaged premises:—Held, that the puisne mortgagee was not entitled to this sum as against the prior mortgagee, who had filed a bill in the exchequer to attach it. *Lismore* v. *Chamley*, Hayes, 329.

**Back Rents come into Receiver's hands before Mortgagee takes Possession.**]—Money in the hands of a receiver is not in custodia legis in the same way as it is when in the hands of a sequestrator. A mortgagor of shares in a company paid interest on the loan till 1888, and died in 1889. In a creditor's action for the administration of his estate a receiver was appointed, to whom the company issued debenture bonds representing dividends accrued due on the mortgaged shares during the mortgagor's life. The mortgagee subsequently took possession by being registered as transferee of the shares:—Held, that the receiver stood in the place of the executors so far as the receipt of assets was concerned, and that the mortgagee was not entitled to the bonds. *Delany* v. *Mansfield* (1 Hogan, 234) questioned. *Hoare, In re, Hoare* v. *Owen*, 61 L. J., Ch. 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R. 105.

**Receivership of Tolls—Judgment Creditor proceeding to Attach—Injunction.**]—In a suit by mortgagees of a dock against the trustees and a judgment creditor, the chairman was appointed receiver of the tolls, with direction to pay into court the balance, after paying the expenses of carrying on the concern, and the interest on the mortgages. A judgment creditor having afterwards proceeded to attach the tolls under the Common Law Procedure Act, 1854, was restrained by injunction. It was insisted that the possession of the receiver was either that of the dock company or of the mortgagees, and that in the former case the judgment creditor ought not to be restrained in the exercise of his legal remedies against the company, and, in the second, that the mortgagees had no power, under the acts of parliament, to carry on the concern; but this argument was held unavailing. *Ames* v. *Birkenhead Docks*, 20 Beav. 332; 24 L. J., Ch. 540; 1 Jur. (N.S.) 529; 3 W. R. 381.

**Increase of Interest in favour of First, as against Second, Mortgagee.**]—A first mortgage was made to secure the principal with interest at 5*l.* per cent., and was accompanied by a receivership deed in the common form. A subsequent mortgage was made to M., containing a stipulation that, if the interest should be in arrear forty days, the receiver under the former deed should act, and should stand possessed of the rents, after payment of interest on the first mortgage, in trust to pay the interest on M.'s mortgage, and pay the ultimate surplus to the mortgagor. The first mortgagees and the receiver had notice of this deed. By a subsequent deed the property was charged, in favour of the first mortgagees, with an extra 1*l.* per cent. interest in the sum secured by the first mortgage. The receiver at times took possession at the instance of the first mortgagees, and from the date of the last-mentioned deed interest at the increased rate was uniformly paid to the first mortgagees, sometimes by the mortgagor, and at other times by the receiver with his consent, no notice ever having been given to the receiver to pay interest to M., or that his interest was in arrear. A foreclosure suit having been instituted by the first mortgagees, a decree was made directing the usual account of what was due on the first mortgage. The chief clerk certified the whole principal to be due, but the vice-chancellor directed him to review his certificate, and to charge the first mortgagees with everything they had received from the receiver in excess of 5*l.* per cent.:—Held, that this decision could not be maintained, for that, whether the extra 1*l.* per cent. was rightfully received or not, it was neither paid nor received in respect of the principal moneys and interest secured by the first mortgage, and could not be attributed to it, nor taken into account in ascertaining what was due on the first mortgage, and that M.'s claim (if any) in respect of such extra payments must be enforced by some independent proceeding. *Law* v. *Glenn*, L. R. 2 Ch. 634.

**Right to Payment of Principal.**]—Where it is shewn to be for the benefit of an owner or puisne incumbrancer that the principal as well as interest of a first charge should be paid off by a receiver out of the rents and profits, the court will make an order to that effect. *Henkell's Estate, In re*, 23 L. R., Ir. 540.

But in the absence of special circumstances

the court will not order payment by a receiver of the principal money due upon an incumbrance. *Kearney's Estate, In re*, 25 L. R., Ir. 89.

**Reference.**]—A. demised to B. two acres of the lands of M.; B., on the next day, re-demised to A. the two acres of M., together with six acres of the lands of S., at a gross rent. A. then mortgaged the land of M. A receiver was appointed over the lands of M. in a suit to foreclose the mortgage. An arrear of the rent reserved on the lease from B. to A. having accrued, the receiver was ordered to pay to B. the sum in his hands, the produce of the two acres of the lands of M.; and it was referred to the remembrancer to ascertain the sum so in the receiver's hands, and the rent properly payable out of the two acres of M., having regard to the value of the whole of the lands comprised in the lease from B. to A., and the part included and not included in the mortgage, with liberty of B. to proceed at law, as he might be advised, in regard to any balance that might remain due to him after payment by the receiver as aforesaid. *Peard* v. *Foulke*, 5 Ir. Eq. R. 589.

—— **Restraining Receiver from making Payments.**]—The priorities of incumbrancers upon an estate were declared, and a receiver appointed, with direction to keep down the incumbrances in a suit to which the first incumbrancer was not a party. The first incumbrancer filed a bill against the receiver and the several parties to the former suit to establish his priority, and praying "that, if necessary, the second bill might be taken as supplemental to the first." The plaintiff in the second suit moved for an injunction to restrain the receiver from making any further payments to the other incumbrancers:—Held, irregular, and that he ought to have applied in the first suit for leave to enforce his legal remedies:—Held, also, that the court would not, on this occasion, determine whether this was to be taken as a supplemental bill. *Smith* v. *Effingham* (*Earl*), 2 Beav. 232.

—— **Account.**]—Where a person and his incumbrancers. B., C. and D., joined in the appointment of a receiver who covenanted to keep down the incumbrances, according to their priorities, and pay the surplus to A.:—Held, that a subsequent mortgagee from A. could not sustain a bill against the receiver and A. for an account of the rents, and an injunction against paying the surplus to A. in the absence of B., C. and D. *Ford* v. *Rackham*, 17 Beav. 485; 23 L. J., Ch. 481; 2 W. R. 9.

**Discharge.**]—Cestuis que trustent under a will instituted a suit to have the trusts carried into effect, and to set aside a mortgage of a part of the trust estate made by the trustees. By the terms of the mortgage the mortgagees were not entitled to take possession except upon a prescribed notice. Before this notice had been given the plaintiff had obtained an order for a receiver, and also an order to take proceedings with respect to a claim adverse to the interests of all parties to the suit. Afterwards a decree was made establishing the validity of the mortgage and directing a sale, in which all parties were ordered to join. The mortgagees neither consented to, nor opposed, the orders being made, nor did they at the hearing ask for a dismissal of the bill as against themselves, or oppose the insertion of the direction for a sale. They afterwards applied to have the receiver discharged and to be let into possession, and gave the notice prescribed by the mortgage. On their application being refused, they appealed from the refusal, and at the same time from so much of the decree as rendered it obligatory on them to concur in the sale:—Held, that they had not adopted the proceedings in the suit, but were entitled to priority over the costs of it and of the action, and also to have the receiver discharged and the decree varied so far as it bound them to join in the sale. *Langton* v. *Langton*, 7 De G. M. & G. 30; 24 L. J., Ch. 625; 1 Jur. (N.S.) 1078; 3 Eq. R. 394; 3 W. R. 222.

Held, also (the testator's estate in the subject of the security being equitable), that the court might direct possession to be delivered to the mortgagees. *Ib.*

### b. Under Irish Mortgage Act.

**Rights.**]—A receiver under the Mortgage Act, 11 & 12 Geo. 3, c. 10, will be permitted to pay over money to a third person, upon the consent of all parties. *Kelly* v. *O'Brien*, Hay. & J. 377.

**Liability.**]—In a petition matter under the Mortgage Act, the court will not decide equities between owners of different parts of the mortgaged premises; and, therefore, where a receiver had received all the rents out of the portion of A., who had a right to be indemnified out of the portion of B., who had been required to pay nothing to the receiver for some years, the court refused to charge the receiver as for default at the instance of A., the mortgagee having been paid all his interest. *Lane* v. *Lynch*, 9 Ir. Eq. R. 501.

**Extension—To whom received Rents belong.**]—A puisne mortgagee having obtained a receiver under the Mortgage Act, a prior mortgagee, in a year after, extended the receiver, no rents having in the meantime been collected by him:—Held, that the prior mortgagee was entitled to all the rents due before the extension by him, but not collected till afterwards. *Boyd* v. *Burke*, 8 Ir. Eq. R. 660.

A receiver was appointed in an annuity cause, and was afterwards extended to the matter of a petition presented by a prior mortgagee under the Mortgage Act:—Held, that rents received by the receiver before the conditional order for extending the receiver to the matter was made, and which were still in court, belonged to the annuitant. *Davoren* v. *Collins*, 2 Jones, 806.

### 3. Receipt of Moneys by, in Foreclosure.

**Generally.**]—Money in the hands of a receiver in a foreclosure suit is, in the first instance, to be treated as the plaintiff's fund. *Paynter* v. *Carew*, 23 L. J., Ch. 596; 18 Jur. 417; 1 Kay, (App.) xxxvi; 3 Eq. R. 496; 2 W. R. 345.

**Appointment after Foreclosure—Balance in Receiver's hands.**]—Where a receiver was appointed after a judgment for foreclosure, and there was a balance in his hands representing the corpus of the mortgaged property, the plaintiff was held to be entitled to have the foreclosure judgment made absolute. *Welch* v.

*National Cycle Works Co.*, 55 L. T. 673; 35 W. R. 137.

**Before, and after, day fixed for Redemption.**]—The receiver, appointed before judgment in a foreclosure action, received rents both before and after the day fixed for payment of the mortgage money:—Held, that a further account must be taken, and a further period of one month from the date of the new certificate given to the mortgagor to redeem. *Peat* v. *Nicholson*, 54 L. T. 569; 34 W. R. 451.

The receiver and manager, appointed before judgment in a foreclosure action, received moneys that represented the gross takings in the business of the mortgaged property, which was a leasehold public-house. The moneys were received from day to day, partly before and partly after the date fixed for redemption. The court made a final order for foreclosure, and directed that the receiver and manager should pass forthwith his final account, and be discharged, his recognisance and bond to be vacated. The court also directed that the balance of the moneys on the receiver's account should be paid into court, and gave liberty to any of the parties to apply in chambers as to such balance, and also as to the costs of the present application, such costs being reserved. *Holt* v. *Beagle*, 55 L. T. 592.

**Since Certificate.**]—At the date limited for redemption in a foreclosure action, money was in court and in the hands of a receiver paid under a mining lease since the issue of the chief clerk's certificate. The foreclosure judgment gave liberty to any person redeeming, or, in the event of foreclosure, to the plaintiffs, to apply for payment to themselves of funds in court or in the hands of the receiver:—Held, that the plaintiffs were entitled to an immediate order for foreclosure absolute, and for payment of the money in court and in the hands of the receiver without any further account. *Jenner-Fust* v. *Needham* (32 Ch. D. 582) distinguished. *Coleman* v. *Llewellin*, 56 L. J., Ch. 1; 34 Ch. D. 143; 55 L. T. 647; 35 W. R. 82—C. A.

—— **No Bar to Foreclosure.**]—In a foreclosure action the fact, that a receiver appointed by the court has received rents since the certificate under the order nisi, is no bar to an immediate order of foreclosure absolute on default of payment pursuant to the certificate. *Hoare* v. *Stephens*, 55 L. J., Ch. 511; 32 Ch. D. 194; 54 L. T. 230; 34 W. R. 410.

**Between Certificate and day fixed for Redemption—To whom belonging.**]—Where a receiver has received rents of mortgaged property between the date of the certificate under a foreclosure judgment and the day fixed for redemption, the mortgagee is not entitled to the rents so received, except on the terms of bringing them into account as between mortgagee and mortgagor, and a fresh date must be fixed for redemption. *Jenner-Fust* v. *Needham*, 55 L. J., Ch. 629; 32 Ch. D. 582; 55 L. T. 37; 34 W. R. 709—C. A.

**Practice.**]—The court to save the expense and delay of a further reference to chambers allowed mortgagees to file an affidavit shewing the exact amount which would be due to them for principal, interest and costs, after allowing for everything received, brought down to the day for which notice of motion was given to fix another day for redemption. *Ib.*

R. PARTIES.

1. *Suits for Foreclosure, Sale, or Redemption*, 1816.
2. *Suits for Account*, 1830.

1. SUITS FOR FORECLOSURE, SALE, OR REDEMPTION.

*a.* General Principles, 1816.
*b.* Joint Owners, 1816.
*c.* Judgment Creditor, 1817.
*d.* Mortgagee or his Heir, 1819.
*e.* Mortgagor or his Heir, 1820.
*f.* Personal Representative, 1821.
*g.* Tenant for Life or Remainderman, 1822.
*h.* Trustee, 1823.
*i.* Cestui que Trust, 1825.
*j.* After Assignment, 1828.
*k.* Transferee after Decree, 1828.
*l.* Other Cases, 1829.

**a. General Principles.**

**All Persons Interested.**]—Generally all persons interested are necessary parties to bill of foreclosure. *Culverley* v. *Phelp*, 6 Madd. 229.

**Parties entitled to whole Mortgage-money.**]—There can be no redemption or foreclosure unless parties entitled to the whole of mortgage-money are before the court. *Palmer* v. *Carlisle* (*Earl*), 1 Sim. & S. 423.

**Parties to Deed.**]—In a foreclosure suit, the parties to the mortgage deed, and those claiming under them, ought alone to be made parties. *Audsley* v. *Horn*, 26 Beav. 195.

**Allegation of Deposit—Depositee, whether a necessary Party.**]—An allegation in the answer that the defendant had deposited a deed, the subject of the suit for redemption, with R., by way of security for an advance, and that the deed was in the possession of R.'s solicitors, they being also the defendant's solicitors, does not make R. a necessary party. *Waters* v. *Mynn*, 14 Jur. 341.

**Practice—Same Person both Plaintiff and Defendant—Striking out.**]—In a foreclosure action by a first mortgagee against the second, third and fourth mortgagees, and the executors and trustees of the will of the mortgagor, the plaintiff was also joined as a defendant, as one of the second mortgagees:—Held, that a man could not be both plaintiff and defendant in an action, and that the writ and pleadings must be amended by striking out the name of the plaintiff as a co-defendant. *Wavell* v. *Mitchell*, 64 L. T. 560.

—— **Adding, after Decree.**]—A decree for foreclosure being always liable to be reopened upon proper cause within reasonable time, the action may be regarded as continuing, and new parties added under Judicature Act, Ord. L., r. 4, after a decree for absolute foreclosure has been made. *Campbell* v. *Holyland*, 26 W. R. 160. *S. C.*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128.

**b. Joint Owners.**

**Person Partially Interested.**]—A bill for redemption cannot be sustained by a party having a partial interest in the equity of redemp-

tion, in the absence of the other parties interested in it. *Henley* v. *Stone*, 3 Beav. 355.

A person having a partial interest in a real estate filed a bill for relief in respect of fraud, and for a redemption :—Held, that all the persons interested in the equity of redemption were necessary parties to the suit. *Ib.*

**One of Several Mortgagees.**]—One mortgagee, out of several interested, cannot sustain a bill of foreclosure for his proportion alone, without making the others parties. *Lowe* v. *Morgan*, 1 Bro. C. C. 368. But see *Montgomerie* v. *Bath* (*Marquis*), 3 Ves. 560. *But see* 1 Bro. C. C. 365, n.

A. mortgages to B. in fee ; B. dies, having devised the mortgaged estate to C. and D. D. subsequently advances money to A. on the same security :—Held, that C. was alone entitled to file a bill for foreclosure, and that D. was properly made a party defendant. *Remer* v. *Stokes*, 4 W. R. 730.

A trustee laid out the money of different persons on a mortgage ; foreclosure by one cestui que trust as to his share allowed. *Montgomerie* v. *Bath* (*Marquis*), 3 Ves. 560. But see *Lowe* v. *Morgan*, 1 Bro. C. C. 368.

Where a mortgage is made to two for a sum of money, of which each had lent a portion, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant ; and the plaintiff in such a suit is entitled to the usual decree of foreclosure on default of payment of the whole mortgage debt, in the proportions due to the plaintiff and defendant respectively together with their respective costs. *Davenport* v. *James*, 7 Hare, 249 ; 12 Jur. 827.

—— **Personal Representative of Deceased.**]—Where a mortgage is made to several persons jointly, they are, in equity, tenants in common of the mortgage-money, and the representatives of such of them as may be dead are necessary parties with the survivor to a bill for foreclosure or redemption. *Vickers* v. *Cowell*, 1 Beav. 529 ; 8 L. J., Ch. 371 ; 3 Jur. 864.

**Mortgage of Interests of Tenants in Common.**]—Parties necessary to a redemption action by mortgagees of the interests of tenants in common, whether of an undivided share or of the entirety, stated. *Bolton* v. *Salmon*, [1891] 2 Ch. 48 ; 64 L. T. 222 ; 39 W. R. 589.

### c. Judgment Creditor.

**Generally.**]—The court ordered a bill of foreclosure to stand over to make a judgment creditor, the only incumbrancer not before the court, a party, but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Winchester* (*Bishop*) v. *Beavor*, 3 Ves. 314. *See* 8 R. R. 132, n.

**Subsequent to Mortgage.**]—Judgment creditors, whose judgments have been entered up subsequently to the plaintiff's security, must be made parties to a bill of foreclosure ; it is not sufficient that they should be served with copies of the bill under the twenty-third of the Orders of August, 1841. Semble, however, that this rule may be relaxed in cases where the judgment creditors are inconveniently numerous. *Adams* v. *Paynter*, 1 Coll. C. C. 530 ; 14 L. J., Ch. 53 ; 8 Jur. 1063.

In a suit by a first mortgagee, sale was directed. Subsequent judgment creditors of the mortgagor were not parties. On objection by a purchaser under the decree :—Held, that the judgment creditors were not bound by the proceedings, and liberty was given to bring them before the court. *Knight* v. *Pocock*, 24 Beav. 436 ; 27 L. J., Ch. 297 ; 4 Jur. (N.S.) 197.

Held, also, that in their absence a good title cannot be made to a purchaser. *Ib.*

The mortgagor had executed a creditor's deed, but the judgment creditors had not acceded to it :—Held, that the trustees of the deed did not represent them under the 15 & 16 Vict. c. 86, s. 42. *Ib.*

A puisne creditor by judgment, who is in possession under a grant in custodiam, is properly made a defendant to bill by prior mortgagee to foreclose, and cannot insist that the regular course to affect his possession is by applying to the court of exchequer for liberty to traverse the inquisition ; the form of the proceeding not varying the nature of the debt, which is still to be treated as a private debt to a subject, and the use of the king's name as form merely. *M'Gorney* v. *Croghan*, 1 Moll. 508.

**Whether Prior or Subsequent to Mortgage.**]—In a bill for a foreclosure and sale of mortgaged lands all the judgment creditors of the mortgagor are necessary parties, whether such judgments are prior or puisne to the plaintiff's demand, and whether they are a lien upon legal or equitable estates. This doctrine rests upon a perfectly valid foundation, whether referred to the general principle of courts of equity or to the effect of the stat. 3 & 4 Vict. c. 105, s. 22. *Rolleston* v. *Morton*, 1 Dr. & War. 171 ; 1 Con. & L. 252 ; 4 Ir. Eq. R. 149.

**Subsequent to Mortgage, but Prior to Further Charge.**]—Semble, a creditor by judgment, subsequent to a mortgage, but prior to a further loan advanced by the mortgagee under a borrowing clause, not noticed in the memorial of registry of the mortgage, is not a necessary party to a bill brought to foreclose such mortgage ; and, therefore, a bill brought by such a judgment creditor against the mortgagee, who had purchased under a decree for a sale, in a cause instituted to foreclose his own mortgage, and praying to have the account opened, was dismissed. *Purdon* v. *Gumbleton*, Wall. Lyn. 249.

**Conusees.**]—A judgment creditor, whose judgment was registered pursuant both to the Registry Actfor the West Riding of Yorkshire, 5 & 6 Anne, c. 18, and the 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgagee of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, but not under the West Riding Act :—Held, that those conusees were not necessary parties to the suit. *Johnson* v. *Holdsworth*, 1 Sim. (N.S.) 106 ; 20 L. J., Ch. 63 ; 15 Jur. 31.

**Sale instead of Foreclosure.**]—Quære, whether a judgment creditor is a necessary party to a bill filed by a mortgagee, where the practice of the court is to decree a sale instead of a foreclosure. *Gordon* v. *Horsfall*, 5 Moore, P. C. 393.

**Lease for Lives—Renewal—Creditors who have not Sued out Elegits.**]—If a lessee for lives

renewable for ever executes a mortgage, and judgments are recovered against him after the fall of all the lives named in the lease, and before he obtained a renewal, they will not attach on the mortgaged premises, if sold under a decree in a foreclosure cause. A subsequent renewal obtained by the mortgagor is in trust for the mortgagee, and the subsequent creditors on the equity of redemption are not necessary parties to a bill for a foreclosure and a sale, unless they had sued out elegits before the bill was filed. *Leland* v. *Hunt*, 1 Hog. 364.

**Before Issue of Execution.**]—Semble, that registered judgment creditors who have not issued execution are not necessary parties to a foreclosure suit. *Bailey, In re*, 38 L. J., Ch. 237; 20 L. T. 168; 17 W. R. 393.

In a foreclosure suit by mortgagees, judgment creditors who had not issued execution were made defendants:—Held, that they were unnecessary parties, and, having disclaimed all interest upon being served with a copy of the bill, they were dismissed with costs. *Cook* v. *Hart*, 41 L. J., Ch. 143; L. R. 12 Eq. 459; 24 L. T. 779; 19 W. R. 947.

**After Issue of Execution.**]—A., a registered judgment creditor, who had issued execution and registered, but never executed the same, held to be a proper party to a foreclosure suit instituted more than three months after registration of execution; and, after having disclaimed and received notice not to appear, was disallowed his costs of appearance. *Appleton* v. *Sturgis*, 10 W. R. 312.

### d. Mortgagee or his Heir.

**Prior Mortgagee.**]—A puisne mortgagee can sustain a bill of foreclosure against the mortgagor and mortgagees subsequent to himself, without making the prior mortgagee a party. *Richards* v. *Cooper*, 5 Beav. 304.

A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party. *Rose* v. *Page*, 2 Sim. 471; 29 R. R. 142.

An old mortgage is made to B. for 350*l.*, who, in 1705, makes an under-mortgage to C. for 300*l.* C. brings a bill to foreclose; B., the original mortgagee, or in case of his death, his representative, ought to be made a party. *Hobart* v. *Abbot*, 2 P. Wms. 643.

**Puisne Mortgagee.**]—In a suit by a prior mortgagee for foreclosure and sale, the heir of mortgagee of equity of redemption is not a necessary party. *Whitla* v. *Halliday*, 4 Dr. & War. 267. *S. C.*, nom. *Whittle* v. *Halliday*, 2 Con. & L. 430.

Puisne mortgagee not bound by an account taken in a foreclosure cause to which he was not a party. *Dick* v. *Butler*, 1 Moll. 42.

Second mortgagee, whose deed is registered, not made a party to bill by first mortgagee to foreclose and sell, is entitled to redeem the purchaser under the decree. *Ormsby* v. *Thorpe*, 2 Moll. 503.

**Mortgagee subsequent to Judgment.**]—Judgment creditor, prior to a mortgage, need not make the subsequent mortgagee party in order to postpone him. *Shepherd* v. *Gwinnet*, 3 Swanst. 151.

**Bill by Executor of Mortgagee.**]—The heir of the mortgagee, to whom the legal estate in the mortgaged premises has descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee. *Scott* v. *Nicoll*, 3 Russ. 476.

**Bill by Devisee.**]—Every devisee of a mortgaged estate, that brings a bill to redeem, need not make the heir-at-law a party. If the plaintiff claims to have the will established, it is necessary; if only a title under the will, it is not. *Lewis* v. *Nangle*, 2 Ves. 431.

A tenant for life, remainder to B. in fee; B. mortgaged his estate to C., who devised it to D.: D. need only foreclose against B., for the heir of C. had no interest, and need not be made a party. *Williams* v. *Day*, 2 Ch. Ca. 32.

**After Assignment.**]—*See* j. post, col. 1828.

### e. Mortgagor or his Heir.

**Generally.**]—The mortgagor or his heir should be a party to bill by mortgagee. *Howes* v. *Wadham*, Ridgw. 199.

**Bill by Second Mortgagee.**]—The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption. *Farmer* v. *Curtis*, 2 Sim. 466; 29 R. R. 140.

In a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heirs must be before the court; heir being abroad, the court cannot proceed. *Fell* v. *Brown*, 2 Bro. C. C. 276.

A second mortgagee, to redeem a prior mortgage, must make the heir of the mortgagor a party, though the second mortgage is only of part of the estates comprised in the first, and under a different title. *Palk* v. *Clinton* (*Lord*), 12 Ves. 48; 8 R. R. 283.

**Second Mortgagee contesting Mortgage.**]—Second mortgagee contesting by his bill the validity of the first mortgage, the mortgagor must be a party. *Thompson* v. *Baskervill*, 3 Ch. Rep. 215.

**Absent Mortgagor.**]—Although it is a principle not to foreclose an absent mortgagor, the reason of that depends mainly on the principle of foreclosure as contrasted with sale of a competent part. Lord Chancellor has no doubt that it can, especially where a descent has been cast, be effectually done in substance where the decree is for a sale of a competent part. *Gowan* v. *Tyghe*, 3 Moll. 113.

—— **Absent Heir.**]—It is a principle not to foreclose an absent mortgagor: but there is not in the case of absent heir any principle by which the court is precluded from selling a deceased debtor's real estate. *Leahy* v. *Dancer*, 3 Moll. 109.

**Mortgagor of Collateral Security.**]—To bill of foreclosure against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party. *Stokes* v. *Clendon*, 3 Swanst. 150; 19 R. R. 188.

**Bankrupt Mortgagor.**]—Though on bankruptcy of mortgagor there was no bargain and sale of estate to his assignees, yet bankrupt is not necessary party to bill of foreclosure. *Lloyd* v. *Lander*, 5 Madd. 282; 21 R. R. 292.

### f. Personal Representative.

**Of Mortgagor.**]—The personal representative of the mortgagor is a necessary party to a bill for the execution of a trust for sale by way of mortgage. *Christophers* v. *Sparke*, 2 J. & W. 229.

To a bill against the heir of the mortgagor to have payment or hold without redemption, the personal representatives of the mortgagor must be made a party. *Meeker* v. *Tanton*, 2 Ch. Ca. 29.

**Of Mortgagee.**]—Where the heir of the mortgagee brings a bill to compel the mortgagor to redeem or be foreclosed, the executor must be a party. *Freak* v. *Hearsey*, 1 Ch. Ca. 51; 2 Free. C. C. 180; Nelson, 93. *Clerkson* v. *Bowyer*, 2 Vern. 66.

On a bill against the heir of a mortgagee to redeem, the executor or administrator must be made parties. *Anon.*, 2 Free. C. C. 59.

**Mortgage of Freehold Lease.**]—Personal representative of mortgagee of freehold lease, sufficient defendant to bill to redeem. *Ryan* v. *Mangan*, 2 Moll. 521.

**Mortgage by Term.**]—Mortgage by tenant in fee by creating a term, the personal representative ought not to be a party to a bill of foreclosure. *Bradshaw* v. *Outram*, 13 Ves. 234; 9 R. R. 183.

**Joint Mortgagors.**]—A. and B. borrow money from a banking-house, in which A. is a partner, and deposit with the house, as a security, the title-deeds of some property bought by A. and B. jointly on a building speculation. A. dies, leaving an infant heir-at-law. To a suit by the surviving partners of A. in the banking-house against B. and the heir-at-law of A., to have the mortgaged property sold, and their debt paid out of the proceeds, the personal representative of A. is a necessary party. *Scholefield* v. *Heafield*, 7 Sim. 667; 5 L. J., Ch. 218.

**Two Mortgagees.**]—The representatives of one of two mortgagees were held necessary parties to a suit by the survivor, though it was alleged but not proved that it was a mortgage in trust, and that the representatives of deceased mortgagee had therefore no interest either in equity or in law. *Vickers* v. *Cowell*, 1 Beav. 529; 8 L. J., Ch. 371; 3 Jur. 864.

**Proceeding in Absence of.**]—A bill of foreclosure was filed by a sub-mortgagee; the mortgagee had died, and his representative was not known:—Held, that the court could not, under the 44th section of the Chancery Amendment Act, direct the suit to proceed in the absence of a representative of the mortgagee, against whose estate a decree was asked. *Bruiton* v. *Birch*, 22 L. J., Ch. 911.

In a foreclosure suit by a first incumbrancer, a decree was made, and afterwards a defendant, a subsequent mortgagee (who was one of eight persons standing in a precisely similar situation, and in respect of whose mortgages there was only one right of redemption given) died, and, there being a difficulty in obtaining representation to his estate, the court ordered that the suit should proceed without any person representing his estate. *Long* v. *Storie*, 23 L. J., Ch. 200; 2 Eq. R. 249; 2 W. R. 183.

**Of deceased Tenant for Life.**]—The personal representative of a deceased tenant for life of a mortgaged estate is not a necessary party to a bill by the mortgagee against the remainderman, although the bill pray payment of an arrear of interest which accrued during his lifetime. *Wynne* v. *Styan*, 2 Ph. 303.

A tenant for life and a tenant in tail joined in a mortgage to A., and afterwards in a sale to another party. The tenant for life died. A. filed a bill for foreclosure:—Held, that the representatives of the tenant for life were necessary parties. *Chalie* v. *Gwynne*, 6 L. J., Ch. 274.

**Of Vendor.**]—Bill brought to redeem against the defendant, who had notice of the plaintiff's title, but bought of W., who had no notice; the objection allowed for not bringing the representatives of W. before the court, or otherwise the defendant would be deprived of that defence. *Lowther* v. *Carlton*, 2 Atk. 139.

**Party Dying before Foreclosure absolute.**]—The defendant to a foreclosure action died insolvent before foreclosure absolute; there was no legal representative of his estate; an order was made in chambers appointing one of his next of kin to represent his estate for the purposes of the action. The court refused to make the foreclosure absolute in the absence of a properly constituted representative of the mortgagor. *Aylward* v. *Lewis*, [1891] 2 Ch. 81; 64 L. T. 250; 39 W. R. 552.

### g. Tenant for Life or Remainderman.

**Tenant for Life.**]—A. having a life estate in the remainders over in strict settlement, subject to a mortgage of the settled property for a term of 1,000 years, demised the property for a term of 200 years, if he should so long live. A purchaser of the term of 200 years filed a bill to redeem against the termor for 1,000 years, who was the first mortgagee of the estate:—Held, that A., the owner of the life estate, subject to the term of 200 years, was a necessary party. *Hunter* v. *Macklew*, 5 Hare, 238.

—— **Trustee being also.**]—In a suit for foreclosure or sale, the surviving trustee and executrix of the mortgagor, being also tenant for life of the property, sufficiently represents the persons interested in remainder. *Marriott* v. *Kirkham*, 3 Giff. 536; 31 L. J., Ch. 312; 8 Jur. (N.S.) 379; 6 L. T. 17; 10 W. R. 240.

—— **Representative of Mortgagor.**]—N., in 1790, entered into possession of lands as assignee of incumbrances and purchaser from A., B. and D., who were tenants for life of one-fourth each. A. died in 1819, and B. in 1836; the next remaindermen of their shares, who were tenants in tail thereof, filed a bill against the devisees of N. to redeem the premises:—Held, that the suit was imperfect for want of parties, inasmuch as the tenants for life, or personal representative of the mortgagor, was not before the court. *Browne* v. *Cork* (*Bishop*), 1 Dr. & Wal. 700.

**Death of, between Setting Down and Hearing.**]—A mortgagee of a tenant for life of equity of redemption filed a bill against the mortgagees of the fee and remaindermen for redemption or foreclosure. The tenant for life having died between setting down of the case and the hear-

ing, the bill was dismissed with costs. *Riley* v. *Croydon*, 2 Dr. & Sm. 293; 10 Jur. (N.S.) 1251; 11 L. T. 591; 13 W. R. 223.

**Executor of Mortgagor Tenant for Life, in Action by succeeding Tenant for Life.**]—A. being tenant for life of an estate, and the owner of a charge of 20,000*l.* thereon, mortgaged the 20,000*l.* to B. for 14,000*l.* He afterwards mortgaged it and other property to C. for 24,000*l.* A. died, and the succeeding tenant for life prayed a redemption against C., on payment of such a sum as was due on account of the 6,000*l.* (thus splitting the charge of 20,000*l.* into two portions):—Held, that both B. and the executors of A. were necessary parties to such a suit. *Kensington (Lord)* v. *Bouverie*, 16 Beav. 194.

**Tenant in Tail.**]—It is sufficient if the first tenant in tail is a party to a bill of foreclosure. *Reynoldson* v. *Perkins*, Amb. 564; Dick. 427.

Where mortgagee in fee has made an absolute conveyance, with several limitations, and remainders over, the first tenant in tail at least must be brought before the court. *Yates* v. *Hambly*, 2 Atk. 237.

A. made a mortgage and then made a marriage settlement of the equity of redemption, wherein he limited it to his wife, then to the issue of his body, remainder in tail to his brother; the mortgagee brought his bill against the mortgagor for a foreclosure, but he did not make the brother a party, yet he had a decree. The mortgagor afterwards died without issue, and the lands remained to the brother by the settlement, who brought his bill to redeem, which was dismissed. *Roscarrick* v. *Barton*, 1 Ch. Ca. 217, 220.

**Remaindermen—Proceeding in Absence of.**]—Mortgagor, on the marriage of his daughter, executed a settlement of the mortgaged property to the use, after the marriage, that his daughter should receive a rent-charge of 200*l.* a year for her life, and subject thereto to the use of trustees for a term of years, for further securing the rent-charge, and for raising 4,000*l.* for the children of the marriage, remainder to the use of the mortgagor in fee. There were several children of the marriage, who, with their father and mother, were resident out of the jurisdiction:—Held, that a suit of foreclosure could not proceed in their absence. *Anderson* v. *Stather*, 2 Coll. C. C. 209; 14 L. J., Ch. 377; 9 Jur. 806.

*See also* N. 7, ante, col. 1721.

### h. Trustee.

**For Mortgagee.**]—In bill to foreclose mortgage, trustee for mortgagee is a necessary party. *Wood* v. *Williams*, 4 Madd. 186; 20 R. R. 291.

**Devisee in Trust.**]—The devisee of the equity of redemption in trust for other persons is a necessary party to a foreclosure suit. *Scully* v. *Scully*, 3 Ir. Eq. R. 494.

Trustees of a will, whereby property is devised subject to mortgages, sufficiently represent the devisees. *Cockburn* v. *Aukett*, 3 W. R. 641.

**For Sale and Payment.**]—Trustees appointed to sell a reversionary interest in stock, and pay off a mortgage thereon and hold the surplus for the mortgagor, are not necessary parties to a bill of foreclosure brought by the mortgagee. *Slade* v. *Rigg*, 3 Hare, 35.

**Having agreed to Convey.**]—In a foreclosure suit a trustee, in whom was vested the legal estate in the mortgaged property, and who had agreed to convey it to the plaintiff when required, is a necessary party. *Hichens* v. *Kelly*, 2 Sm. & G. 264; 2 W. R. 441.

**Retired.**]—Where a marriage settlement contained the usual power to appoint new trustees, and one of the trustees relinquished his trust, and a memorandum to that effect was indorsed on the settlement, but no new trustee was appointed in his room, and, after his retirement, the remaining trustees lent out the trust-money on mortgage:—Held, that the retired trustee was a necessary party to a bill of foreclosure of the mortgaged estate. *Adams* v. *Paynter*, 1 Coll. C. C. 532; 14 L. J., Ch. 53; 8 Jur. 1063.

**Of Settlement.**]—A lessor having been evicted for nonpayment of rent, under the Ejectment Statutes in Ireland, an equitable mortgagee of his interest filed a bill for redemption against the landlord:—Held, that trustees of a settlement to whom the lease had been assigned, were not necessary parties to the suit. *Geraghty* v. *Malone*, 1 H. L. Cas. 81. Affirming, 3 Dr. & War. 239; 5 Ir. Eq. R. 549.

A tenant for life mortgaged under power the inheritance for 500*l.* and 1,000*l.*, and afterwards paid the first mortgage, and took an assignment to a trustee. After his death B. became entitled to the mortgages. C., the tenant in tail, being a minor, covenanted by marriage articles, in 1827, to convey the lands in trust to sell and pay off the debts then affecting them, and subject thereto for herself for life, remainder to her children, and a recovery was suffered on her majority. B. filed a bill, and obtained a report, finding, in 1835, that arrears of rent, and fines due in the life of A., and after, were paid off by loan on mortgage, and found this sum and the two mortgages, with interest on them all before the death of A. to the time of the report, to be due, and a sale was decreed to pay them. In 1840, B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution:—Held, that the trustee was a necessary party as representing the inheritance. *Magawley* v. *Brady*, 9 Ir. Eq. R. 59.

Two estates, A. and B., were subject to the same mortgage. The owner, on the marriage of his son, settled A. in strict settlement, and the trustees were empowered "from time to time, and when, as occasion should require," to sell any part of A. and pay off the mortgage, so as to exonerate B. The owner afterwards mortgaged B. to the plaintiff, but without any express mention of the exoneration clause. The plaintiff having filed a bill to enforce the exoneration clause, without making the trustees of the settlement parties, it was dismissed with costs. *Rooke* v. *Kensington (Lord)*, 21 Beav. 470.

The time for exercising the trust for sale would seem to be when the B. estate would be made liable to pay the charge on the A. estate. *Ib.*

**And Executor.**]—In a foreclosure action the trustee and executor of a mortgagor sufficiently represent the cestui que trust under the mortgagor's will, and therefore they are not necessary parties. *Booth and Kettlewell's Contract, In re*, 62 L. J., Ch. 40; 3 R. 93; 67 L. T. 550.

In a foreclosure action, the trustees and

executors of the will of a deceased mortgagor sufficiently represent the estate of the mortgagor for all the purposes of the action; and it is not necessary to bring the cestui que trust before the court. *Mitchell, In re, Wavell* v. *Mitchell*, 65 L. T. 851.

**Under Judicature Act.**]—Under Judicature Act, Ord. XVI. r. 7, trustees of an equity of redemption sufficiently represent their cestuis que trustent in a redemption suit, no direction to the contrary having been given by the court. *Jennings* v. *Jordan*, 51 L. J., Ch. 129; 6 App. Cas. 698; 45 L. T. 593; 30 W. R. 369—H. L. (E.) Affirming, 49 L. J., Ch. 209; 13 Ch. D. 639; 42 L. T. 169; 28 W. R. 549—C. A.

**Of Creditor Deed.**]—Trustees of a creditor deed held sufficiently to represent all the creditors in a suit to foreclose. *Morley* v. *Morley*, 25 Beav. 253.

A depositor by way of mortgage of a lease made a registered assignment, under the Bankruptcy Act, 1861, of all his estate and effects to trustees, in favour of his creditors. The trustees had not done any act to signify their acceptance of the lease. The mortgagee filed a bill for foreclosure or sale against the mortgagor, not making the trustees parties. Plea of the assignment allowed, with leave to amend. *Metropolitan Bank* v. *Offord*, 39 L. J., Ch. 820; L. R. 10 Eq. 398; 22 L. T. 699.

**For Scheduled Creditors.**]—A mortgagor having conveyed the equity of redemption together with other property, to a trustee in trust for scheduled creditors:—Held, in a foreclosure action, that the trustee sufficiently represented the creditors. *Doble* v. *Manley*, 54 L. J., Ch. 636; 28 Ch. D. 664; 52 L. T. 246; 33 W. R. 409.

Where E. and I., interested with W. in a residuary gift, mortgaged their interest as a security for a debt of W., and took a second mortgage of his interest as a security to them, W. afterwards assigned his interest to trustees for the benefit of scheduled creditors, and a bill was filed by E. and I. to redeem the mortgaged property:—Held, that the creditors scheduled were necessary parties, and not sufficiently represented by the surviving trustees alone, and that the defect was not supplied by a supplemental bill bringing in a few of the other creditors, to which latter bill the trustees were not parties, the trustees being themselves creditors, and one having a distinct mortgage of the equity of redemption. *Holland* v. *Baker*, 3 Hare, 68; 12 L. J., Ch. 486; 6 Jur. 1011; 7 Jur. 620.

**Proceeding after Service on, but without Notice to.**]—A decree for foreclosure was made against a cestui que trust, and the bill was taken pro confesso against his trustees. The decree was served on the trustee, but without the necessary notice. After the expiration of three years the court dispensed with service of the decree on the trustee altogether, and made it absolute against him. *Thurgood* v. *Cane*, 32 Beav. 156.

*See also next subdivision.*

### i. Cestui que Trust.

**As well as Trustee.**]—Bill of redemption against the trustee is not sufficient, the cestui que trust must be a party. *Whistler* v. *Webb*, Bunb. 53.

**Assent.**]—On the hearing of a foreclosure claim, it appeared that the equity of redemption was vested in trustees on certain trusts, and that the persons interested under the trust were not made parties. The court ordered that the persons so interested should be made parties, or that evidence should be given that they knew of the proceedings, and did not object. *Tudor* v. *Morris*, 1 Sm. & G. 503; 22 L. J., Ch. 1051; 1 W. R. 426.

**Trust to Sell.**]—Where equity of redemption was conveyed to trustees to sell, and with power to discharge purchasers by receipt, it does not dispense with necessity of making cestuis que trustent parties. *Calverley* v. *Phelp*, 6 Madd. 229.

**Of Chapel.**]—Trustees of a chapel, with the assent of the majority of the men subscribers, were authorised to mortgage or sell it. They mortgaged it for 600*l.*, with a power of sale. The mortgagee conveyed to S., who sold it to a company for 1,100*l.* The trustees filed a bill against S., insisting that he was a mortgagee, and not a purchaser, and offering to affirm the sale to the company, sought to recover the surplus purchase-money, after deducting the mortgage:—Held, that the men subscribers were necessary parties. *Minn* v. *Stant*, 15 Beav. 49; 20 L. J., Ch. 614; 15 Jur. 1095.

**Mortgage by Trustee not Adopted by.**]—Certain stock having been sold out by the trustees and invested in mortgage:—Held that the cestuis que trustent of the stock, not having been parties to nor adopted the mortgage, were not necessary parties to a suit for foreclosure. *Allen* v. *Knight*, 5 Hare, 272. Affirmed, 16 L. J., Ch. 370; 11 Jur. 527.

**Infant.**]—An equity of redemption was granted by deed to trustees, upon trust for certain parties, some of whom were infants. The mortgagee filed a bill for foreclosure against the trustees of the settlement, and the adult cestuis que trustent only as defendants. One of the latter died after the filing of the bill. The court, upon a motion for a decree of sale, made the decree in the absence of the infant cestuis que trustent and of the representative of the deceased defendant, upon an affidavit of the trustee of the settlement that it would be for the benefit of the infants, and ordered the proceeds to be paid into court. The costs of the trustee, as he would be a necessary party to reconvey, were ordered to be paid out of the mortgage debt. *Siffken* v. *Davis*, 1 Kay (App.) xxi.

**Legatee.**]—In a suit by devisee of mortgagor to redeem the mortgaged estate, where the defendant, the alleged mortgagee, claims an absolute title by virtue of the Statute of Limitations, legatees, whose legacies are under the will of the mortgagor, charged on the mortgaged premises, are necessary parties. *Batchelor* v. *Middleton*, 6 Hare, 78.

Devisee of real estate in trust to pay debts and legacies, and subject thereto the residue to one of the devisor's co-heirs, who was also residuary legatee. Mortgage by her, and (several years after) bill filed against mortgagor, and against devisee in trust to foreclose:—Held, on

exceptions to title by purchaser, under the decree to sell made in that cause, for all persons having proved charges prior to the mortgage, that the co-heirs who came in and proved their legacies charged on the lands were not necessary parties; that no account of testator's debts and legacies need be specifically directed, and that, the same person being residuary devisee and legatee, the account of the testator's personal estate was immaterial. *Magennis* v. *Fallon*, 2 Moll. 569.

—— **Residuary Mortgage Term.**]—To a bill for the redemption of a mortgage term, all the cestuis que trustent interested in the produce of the term as residuary legatees under the mortgagee's will are necessary parties, although they are numerous and the property small, and although the trustees have power to give a discharge to purchasers. *Osbourne* v. *Fallows*, 1 Russ. & M. 741. *S. C.*, 5 L. J. (o.s.) Ch. 29.

**Under Will.**]—A. B. mortgaged a leasehold property, and afterwards specifically bequeathed it to A. and B., on certain trusts for C., D. and E.:—Held, that C., D. and E. were proper parties to a bill to foreclose. *Coles* v. *Forrest*, 10 Beav. 552.

A mortgagor of copyhold estate devised all his real estates to two trustees, upon trust that they, or the survivor of them, or the heirs of such survivor, should sell the same; and he declared that their or his receipts should be sufficient discharges, and appointed them executors of his will. One of the trustees and executors renounced probate and disclaimed the trusts, and died in the lifetime of the other, who was admitted to the copyholds, and then died intestate. The representatives of the mortgagee filed a bill of foreclosure, making the heir of the surviving trustee the only defendant; but it was held, that the persons beneficially interested under the will of the mortgagor were necessary parties. *Chamberlain* v. *Thacker*, 18 L. J., Ch. 489; 14 Jur. 190.

**Under Settlement.**]—On a bill by a first mortgagee against the mortgagor and second mortgagee, for foreclosure, it appeared that the money advanced on the second mortgage had been settled:—Held, that the parties beneficially entitled were necessary parties to the suit. *Goldsmid* v. *Stonehewer*, 9 Hare (App.) xxxviii.; 22 L. J., Ch. 109; 17 Jur. 199; 1 W. R. 91.

**Under 15 & 16 Vict. c. 86, s. 42.**]—Decree for foreclosure, under the statute 15 & 16 Vict. c. 86, s. 42, r. 9, against the devisees in trust and executors of the mortgagor, being all the persons who had control over the property out of which the mortgage was to be satisfied, in the absence of the cestuis que trustent under the will of the mortgagor. *Sale* v. *Kitson*, 3 De G. M. & G. 119; 10 Hare (App.) 1; 22 L. J., Ch. 344; 17 Jur. 170.

The court refused to act on the 15 & 16 Vict. c. 86, s. 42, r. 9, dispensing with the parties beneficially interested, in a suit for foreclosure against the infant heir-at-law of the mortgagor, where the devisees in trust under his will had disclaimed, and no adult parties who would be in possession of funds to redeem were before the court as defendants. *Young* v. *Ward*, 10 Hare (App.) li.; *Id.* (App.) lviii.

Where, in a suit instituted to foreclose the equity of redemption of an estate vested in a trustee, in trust for four persons, who were not made parties to the suit, the court held that the proper course, notwithstanding r. 9 of the 15 & 16 Vict. c. 86, s. 42, was to make them parties. *Cropper* v. *Mellersh*, 24 L. J., Ch. 430; 1 Jur. (N.S.) 299; 3 Eq. R. 492; 3 W. R. 202.

Since the 15 & 16 Vict. c. 86, the trustees of a mortgage represent the cestuis que trustent sufficiently to protect the mortgagor; but where the surviving trustees, or the representatives of the trustees, alone are parties, the court requires the cestuis que trustent to be also represented, in order to secure the due application of the trust property. *Stansfield* v. *Hobson*, 16 Beav. 189.

**Ord. XVI. r. 8.**]—Foreclosure action by a first mortgagee against the mortgagor, and a second mortgagee, who had become bankrupt. The second mortgagee was a trustee of the money secured by his mortgage, for various persons:—Held, that, notwithstanding Ord. XVI. r. 8, the persons beneficially interested under the second mortgage were necessary parties to the action. *Francis* v. *Harrison*, 59 L. J., Ch. 248; 43 Ch. D. 183; 61 L. T. 667; 38 W. R. 329.

**Ord. XVI. r. 9.**]—In a foreclosure action an order had been made in chambers, under Ord. XVI. r. 9, authorising two of a large class of persons, all having the same interest in the equity of redemption, to defend in the action on behalf and for the benefit of the others:—Held, that a foreclosure order could not be made unless all the persons interested in the equity of redemption were parties to the action. *Griffith* v. *Pound*, 59 L. J., Ch. 522; 45 Ch. D. 553.

### j. After Assignment.

**Generally.**]—Mortgagee, having assigned the whole of his interest, need not be made a party to a redemption bill. *Norrish* v. *Marshall*, 5 Madd. 475.

**Without Mortgagor.**]—Heir of mortgagor need not bring original mortgagee before court where latter has assigned without mortgagor joining. *Hill* v. *Adams*, 1 Atk. 39.

**Witnessed by Mortgagor.**]—In this case the original mortgagee who had assigned, was made a defendant, the mortgagor not being a party to the deed; but being a witness to the deed, Master of the Rolls said, there should have been a direct charge that he knew the contents of the deed, and agreed thereto. *Jamieson* v. *English*, 2 Moll. 337.

**Transfer pendente lite.**]—The plaintiff, in a bill to redeem, transferred the mortgage property pendente lite:—Held, that the suit could not proceed in the absence of the transferee. *Johnson* v. *Thomas*, 11 Beav. 501.

### k. Transferee after Decree.

**Generally.**]—If a party to a foreclosure action has assigned his interest after decree, the assignee may be made a party to the action even after the order for foreclosure absolute. *Campbell* v. *Holyland*, 47 L. J., Ch. 145; 7 Ch. D. 166; 38 L. T. 128; 26 W. R. 109.

**15 & 16 Vict. c. 86.**]—After a decree, a mortgage of the property, the subject-matter of the suit, was created, and an order was made, upon

further consideration, the mortgagees not being made parties :—Held, that the 52nd section of the 15 & 16 Vict. c. 86, applied, and that a supplemental bill was not necessary. *Freeman* v. *Pennington*, 31 L. J., Ch. 216 ; 5 L. T. 514 ; 10 W. R. 184—L.JJ.

### 1. Other Cases.

**Two Estates.**]—A mortgagee of two estates filed a bill against the mortgagor and a second mortgagee of one, praying a foreclosure of that only, alleging that the mortgagor had sold the other to a purchaser without notice :—Held, that such a purchaser was a necessary party. *Payne* v. *Compton*, 2 Y. & C. 457.

Two estates being mortgaged together, on the death of the mortgagee, the equity of redemption of the one devolves on A., that of the other on B. B. is a necessary party to a bill by A. for redemption. *Cholmondeley* v. *Clinton*, 2 J. & W. 2 ; 22 R. R. 84. Affirmed, 4 Bligh, 1.

Whether a devisee and heir-at-law can join in a bill claiming an equity of redemption upon the allegation that, questions having arisen as to which of them was entitled to it, they had agreed to divide it between them, quære. *Id.* 135.

**Annuitants.**]—Annuitants prior to a mortgage need not be made parties to a suit by the mortgagee against the mortgagor for a sale, but the estate must be sold subject to the annuities. *Delabere* v. *Norwood*, 3 Swanst. 144, n.

A prior annuitant, or jointress, is not a necessary party to a bill of foreclosure. All prior incumbrancers, whose rights ought to be ascertained and provided for by the decree, are necessary parties to the cause. *Tuite* v. *Pallas*, 1 Hog. 261.

An annuitant is an unnecessary party to a bill of foreclosure by a mortgagee of lands subject to an annuitant. *Paynes* v. *Creagh*, 2 Ir. Eq. R. 190.

Annuitants, whose claims are subsequent to the plaintiffs, are necessary parties to a bill for a sale. Every incumbrancer, having a specific lien on lands, whose rights will be taken away and divested by the decree, ought to be a party to the cause. *Bodkin* v. *Fitzpatrick*, 1 Hog. 308.

**Surety.**]—A surety who covenants for payment of the mortgage money is not a necessary party to a foreclosure suit, if he has paid nothing. *Gedge* v. *Matson*, 25 Beav. 310.

**Tenant—Where Lease after Mortgage impeached.**]—If mortgagee desire to impeach a lease made after mortgage executed, he must make the tenant a party to the foreclosure suit. *Murtin* v. *Walker*, Sau. & Sc. 139.

**Incumbrancer prior to Creditor.**]—A prior incumbrancer may insist that he will not be made a party to a suit by a puisne creditor for any purpose but that of being redeemed. If he should do so, the estate must be sold, subject to his prior incumbrance. *Fisher* v. *Barry*, Beat. 143.

**Assignee of Bankrupt.**]—After issue joined in a foreclosure suit, the plaintiff discovered that, prior to the creation of his mortgage security, the defendant, the mortgagor, had become bankrupt, whereupon the court gave the plaintiff leave to amend his bill by making the assignees defendants, the bankrupt still being retained as a defendant on the record. *Hanson* v. *Preston*, 3 Y. & C. 229.

**Glebe Land—Patron.**]—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Wales Land Drainage and Inclosure Companies Act, and may charge his glebe land thereunder. To a foreclosure action under such a mortgage, the patron of the living is not a necessary party. *Goodden* v. *Coles*, 59 L. T. 309 ; 36 W. R. 828.

**Persons Permitted to Enter.**]—Where B. and C. were permitted by a mortgagee to enter upon the working of a mortgagor's mine, sell the mortgaged property, and receive the value, they were properly made parties in a suit to redeem. *Hood* v. *Easton*, 2 Giff. 692 ; 2 Jur. (N.S.) 729 ; 4 W. R. 575.

**Receiver.**]—In a suit in which the priorities of different incumbrances on an estate were determined, a receiver had been appointed. A. B., who claimed to be first incumbrancer, not having been made a party to that suit, filed a bill of his own to establish his right :—Held, that the receiver was not a necessary party, and but for the decision in *Lewis* v. *Zouche* (*Lord*) (2 Sim. 388) he would have been considered an improper party. *Smith* v. *Effingham* (*Earl*), 7 Beav. 357 ; 8 Jur. 479.

**Person having no Interest.**]—A mortgagee in fee died intestate ; his heiress-at-law was also his administratrix ; she, by will, devised all estates vested in her as mortgagee to two trustees, whom she also appointed executors, and by a codicil appointed the husband of her heiress-at-law "to be a trustee and executor of her will, jointly" with the two trustees named in the will, and died. The two trustees named in the will disclaimed the devise and renounced probate, but the husband proved. He and his wife filed their bill against the mortgagor, offering to reconvey and for a foreclosure. At the hearing, the mortgagor objected that the heiress-at-law had no interest, and was improperly made a co-plaintiff, and he asked the dismissal of the bill :—Held, that she had no interest, and that, though the objection would have prevailed if it had been made by demurrer, yet she was not so improper a party as that the court would entertain the objection at the hearing ; but the court allowed no additional costs occasioned by her being made plaintiff, or of evidence in support of her pedigree. *Pearce* v. *Watkins*, 5 De G. & Sm. 315 ; 16 Jur. 832.

### 2. Suits for Account.

**Where Mortgagee in Possession Assigns Over.**]—If a mortgagee in possession assign over, and the mortgagor prefer his bill, suggesting that the debt is fully paid, and for an account of the surplus, he must make the mortgagee and all the assignees parties ; but if the bill be brought for an account, and to pay what is due, he need not make the mortgagee a party. *Anon.*, 2 Free. C. C. 59.

**Assignor of Equitable Interest.**]—E. was entitled to one equal fourth part or share of and in one equal eighth part or share of the proceeds to arise from real and personal estates directed by a testator to be sold and converted. E. mortgaged his share to the plaintiff to secure 1,500*l.* and interest and further advances. The principal being unpaid, and the interest in arrear, the plaintiff filed a bill against the trustee, not

making the cestui que trust (the assignor) a party. The prayer of the bill was for an injunction, an account, and payment merely. The defendant demurred for want of parties, thereby admitting the statements in the bill:—Held, that the assignor was a necessary party, notwithstanding the sum was an equitable chose in action, and of ascertained amount. *Levinger* v. *Crombie*, 27 L. T. 537; 21 W. R. 37.

**Assignment without Priority of Mortgagor.**]—In an assignment of mortgage without the authority or privity of mortgagor, the last assignee only is necessary party to bill by mortgagor to account. *Chambers* v. *Goldwin*, 9 Ves. 269; 7 R. R. 181.

**Mortgagee of Tolls.**]—To a bill by a mortgagee of the tolls of a turnpike road, for the payment out of the tolls of money due to him for principal, and a long arrear of interest on his mortgage of the tolls, all the other mortgagees of the tolls are necessary parties. *Mellish* v. *Brooks*, 3 Beav. 22; 9 L. J., Ch. 362; 4 Jur. 739.

Under a local turnpike act, a mortgagee of the tolls, who took possession, was bound to pay the interest on all the mortgages pari passu, but the principal was only to be paid by means of a sinking fund. Under the general turnpike act, a mortgagee in possession was authorised to pay the principal as well as the interest. Some mortgagees took possession, and one of the trustees of the road filed a bill against them for an account:—Held, that the mortgagees, being interested in the question as to the payment of the principal moneys, were necessary parties to the suit. *Watts* v. *Eglington* (*Lord*), 15 L. J., Ch. 412.

**Supplemental Suit.**]—A decree for redemption and general account, &c., having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c., to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account. *Rylands* v. *Latouche*, 2 Bligh, 567.

**Account against Devisor without Devisee.**]—In a suit to redeem against the devisee of the mortgage, an account of the rents received by the devisor may be obtained without his being represented on the record. *Trulock* v. *Robey*, 15 Sim. 277.

## S. COSTS AND EXPENSES.

1. *Of Preparation of Mortgage*, 1832.
2. *Collateral*, 1833.
3. *Rights and Liabilities of Mortgagee*, 1837.
4. *Of Redemption*, 1849.
5. *Foreclosure*, 1851.
6. *Between several Incumbrancers*, 1854.
7. *Under Decree for Sale*, 1857.
8. *In Administration Suits*, 1859.
9. *Bankruptcy*, 1862.
10. *Disclaimer*, 1864.
11. *Of Transfer*, 1869.
12. *Assignment pendente lite*, 1869.
13. *Of Appeal*, 1870.
14. *Scale*, 1870.
15. *Taxation*, 1871.
16. *Under 7 Geo. 2, c. 20*, 1871.

### 1. OF PREPARATION OF MORTGAGE.

**Of Perusal.**]—Mortgagee's solicitor, at the time of the loan, perused the title deeds, and was paid the costs therefor by the mortgagor. After the decree for sale in the mortgage cause, the same solicitor prepared the abstract of title under the 138th general order, which, though deducing the title to the time of sale, did not contain any new deeds. The master having refused to allow the costs of perusing the deeds, the court refused to send back his taxation. *Scott* v. *King*, 7 Ir. Eq. R. 483.

**Counsel's Fee for Settling.**]—Where the court had ordered in a suit that money should be raised by mortgage, and the mortgage deed was submitted to counsel on behalf of the mortgagee, the fees for settling the deed were directed to be allowed by the officer in taxing the mortgagee's costs, the mortgagee having been ordered to have his costs, charges and expenses. *Nicholson* v. *Jeyes*, 22 L. J., Ch. 833; 1 W. R. 278.

**Of Deeds not forming Part of the Security.**]—A mortgagor cannot be charged with the expenses of preparing a deed of declaration of trust, from the mortgagee to a cestui que trust, who advanced the money to the mortgagor, as such deed forms no part of the security of the mortgage. *Martin* v. *Baxter*, 2 M. & P. 240; 5 Bing. 160; 6 L. J. (o.s.) C. P. 242.

**Of Action against Mortgagor by Third Party.**]—D., having given a cognovit for 357*l*., mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same. The mortgagee having levied execution, her right to the goods seized was disputed in actions at the suit of certain persons who claimed to be assignees of D. under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, D. not proving to be a bankrupt:—Held, that the mortgagee could not claim from D. the costs of this action, as costs or charges attending the judgment confessed by D. *Doe* d. *Holt* v. *Roe*, 6 Bing. 447; 4 M. & P. 177; 8 L. J. (o.s.) C. P. 147.

**When Loan goes off.**]—Where a negotiation for a mortgage goes off through the default of the mortgagor, the mortgagee's attorney cannot recover his costs from the mortgagor, in the absence of an express contract on the part of the latter to pay them. *Wilkinson* v. *Grant*, 18 C. B. 319; 25 L. J., C. P. 233.

Where, upon a negotiation for a loan, the borrower agreed, in case the loan went off, to pay the lender's reasonable costs:—Held, that this meant legal costs only, and did not include the commission which had been charged by the bankers, by reason of the lender withdrawing the money from the bank without notice. *Blakeley, In re*, 9 Jur. (N.S.) 1265; 8 L. T. 343; 11 W. R. 656. *S. C.*, nom. *Blakesley and Beswick, In re*, 32 Beav. 379.

When the negotiations for a mortgage are broken off owing to the proposed mortgagee being dissatisfied with the security upon investigation, the proposed mortgagor has no claim upon the proposed mortgagee for the costs attending the investigation; but, if the negotiations go off without such reason, the proposed mortgagee may

recover his costs reasonably incurred. *Carter* v. *Merrion*, 32 L. T. 663.

Where a treaty for a loan on mortgage goes off, the lender not being satisfied with the title, and there being no stipulation as to title, or as to costs in the event of the treaty going off, the proposed lender cannot recover the costs incidental to the investigation of the title. *Melbourne* v. *Cottrell*, 5 W. R. 884.

Where B., being desirous of raising a sum of money upon mortgage, employed an attorney for the purpose, who applied to A., an attorney, telling him at the same time the name of his principal, and A. agreed to advance the money on behalf of a client, but ultimately the negotiation failed from a defect of title:—Held, that A. could not maintain an action against B. for his fees, although it was proved to be the practice for the proposed borrower to pay the expenses of the proposed lender; the course being for the attorney of the latter to send his bill to the attorney of the former, who, if the bill was reasonable, recommended his client to pay it. *Rigley* v. *Daykin*, 2 Y. & J. 83; 31 R. R. 554. See *Grissell* v. *Robinson*, 3 Scott, 329; 3 Bing. (N.C.) 10; 5 L. J., C. P. 313; *Webb* v. *Rhodes*, Id. 732; 4 Scott, 497; 6 L. J., C. P. 212.

By a written agreement, preliminary to an intended mortgage, the plaintiff undertook to advance to the defendant a sum on the mortgage of certain named premises; the defendant was to deliver a complete abstract of title to the plaintiff's solicitor within a week after the date of the agreement, and to produce the title deeds necessary to verify the abstract, and deduce a marketable title within a month from such delivery. If the defendant did not do so at either period, the plaintiff was to have the option of considering the agreement void. It was then agreed that the defendant should forthwith pay the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts were delivered, but disclosed no title to some, and a defective title to other parts of the premises. The time for completing the title expired on the 24th of September, 1831, but the negotiations went on till 14th of May, 1832; the defendant had repeated notice between those dates that the plaintiff's money was lying idle, but he tried to amend his title till the latter day, when it remained defective, and the bargain was broken off:—Held, that the original contract remained in force, and that its terms were not sufficiently comprehensive to enable the plaintiff to recover interest, or more than the costs of investigating the title. *Sweetland* v. *Smith*, 3 Tyrw. 491; 1 C. & M. 585; 2 L. J., Ex. 190.

## 2. Collateral.

*a.* Protection of Estate or Security, 1833.
*b.* Of obtaining Administration, 1836.
*c.* Of obtaining Deeds, 1836.

### a. Protection of Estate or Security.

**Generally.**]—A mortgage deed provided that it should be a security, not only for the principal sums advanced, and interest, but also for the costs of preparing the deed, and for all costs which might be incurred by the mortgagee in selling the property, or in any actions or suits relating to it. The mortgagor filed a bill to redeem, and a decree was made directing an account of what was due to the defendant for principal and interest under the mortgage deed, and an account of sale moneys, rents and profits received by the defendant. In taking the accounts the defendant carried in a claim for costs incurred in legal proceedings relating to the property, which the chief clerk refused to entertain, and the defendant then appealed from the decree:—Held, by Selwyn, L.J., that the decree was right, for that all costs properly incurred in the actions might be claimed under it as just allowances; and by Giffard, L.J., that the costs might be claimed under the decree as principal moneys due under the deed. *Blackford* v. *Davis*, L. R. 4 Ch. 304; 20 L. T. 199; 17 W. R. 336.

**Of defending Mortgage.**]—Mortgagee having been at great charges to defend a suit at law, brought by the heir of the mortgagor, who endeavoured to defeat the mortgage by an entail, but could not prevail, upon a bill afterwards brought by the heir to redeem mortgage, allowed his full costs expended in that suit, and not tied down to the costs taxed. *Ramsden* v. *Langley*, 2 Vern. 536.

A mortgagee being requested by the mortgagor to defend the mortgaged premises, in an action which was instituted against them, and failing in said action, was, nevertheless, held entitled, as against puisne incumbrancers and mortgagees, to be paid the costs incurred in such action, in the same priority with his mortgage debt. *Barry* v. *Stawell*, 1 Dr. & Wal. 618.

Where a mortgagee has been put to expenses in defending the title to the estate, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate; but, if his title to the mortgage only is disputed, the costs of his defence should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred in or assisted the litigation. *Parker* v. *Watkins*, 1 Johns. 133.

**Of Ejectment.**] — The court, under special circumstances, and considering itself bound by the terms of previous decrees, declined to give a mortgagee her costs of an ejectment, brought to recover the mortgaged premises, in which she had, after much difficulty and opposition, recovered a verdict. *Horlock* v. *Smith*, 1 Coll. C. C. 298.

—— **Defending Action of Trespass.**]—Mortgagee, after the death of the mortgagor and the person supposed to be his heir, finds the mortgaged premises, which have been left vacant and out of repair, occupied by lodgers placed there by M., the owner of the adjoining house, who had entered by breaking through the party wall. Possession having been obtained by the mortgagee, M. enters with a band of men and recovers possession. The mortgagee brings ejectment, upon the advice of counsel, against M., and obtains a verdict. M. had previously brought an action of trespass against the mortgagee, in which he was nonsuited:—Held, that the mortgagee was entitled to receive the costs of the proceedings in ejectment out of the estate of the deceased mortgagor, but not the costs of defending the action of trespass. *Owen* v. *Crouch*, 5 W. R. 545.

**Of obtaining Stop-Order.**]—The mortgagee of a fund in court is entitled to the expense of

obtaining a stop-order on the fund in a case in which he is empowered by the mortgage deed to apply to the court for that purpose; but such expenses are not allowed by the taxing master under the common order to tax the costs of the mortgagee. *Waddilove* v. *Taylor*, 6 Hare, 307; 17 L. J., Ch. 408.

A fund having become distributable, a mortgagee, with notice that the parties entitled had presented a petition for payment out of court to the mortgagee and to themselves, having applied for a stop-order, was refused his costs of his application. *Hoole* v. *Roberts*, 12 Jur. 108.

**Of Suit against Purchaser for Specific Performance.**]—A mortgagee had a power of sale, and of retaining his costs, charges and expenses. He sold; but the purchaser resisted the completion, on the ground of misdescription. Being advised by counsel that the objection was untenable, he filed a bill for specific performance, which was dismissed with costs;—Held, upon a redemption, that he could not charge the costs of the suit. *Peers* v. *Ceeley*, 15 Beav. 208.

**Of Incumbrancers on Life Estate in Suit for Sale of Inheritance.**]—Incumbrancers on a life estate, who were necessary parties to a suit for the purpose of selling the inheritance to pay off charges prior to that life estate, are only entitled to their costs against that life estate, and not against the plaintiffs generally. *Ennis* v. *Brady*, 1 Dr. & Wal. 720.

**Of Inquiry to Assess Compensation on Purchase under Statutory Powers.**]—Mortgaged property, the subject of a foreclosure action, was purchased by a public body under their statutory powers, and the sum which had been assessed for compensation was paid into court:—Held, that the mortgagee was only entitled to the ordinary inquiry whether anything and what was due to him for any and what costs, charges and expenses properly incurred by him in respect of his mortgage security, and that he was not entitled to an express direction for the allowance of his extra costs (beyond those allowed on taxation between himself and the public body) of the inquiry to assess the compensation. *Rees* v. *Metropolitan Board of Works*, 49 L. J., Ch. 620; 14 Ch. D. 372; 42 L. T. 685; 28 W. R. 614.

**Practice—Inquiry directed as to Costs not of Suit.**]—In a foreclosure suit by a first mortgagee against subsequent incumbrancers and the mortgagor, the plaintiff alleged, and the mortgagor admitted, that the costs of an action on a covenant were properly incurred:—Held, that the decree for foreclosure would direct an inquiry as to costs not being costs of the suit. *Merriman* v. *Bonner*, 10 Jur. (N.S.) 534; 10 L. T. 88; 12 W. R. 461.

—— **Costs incurred after Decree and Accounts taken.**]—A decree for foreclosure being made, the mortgagee, after the accounts had been taken, incurred further costs in another proceeding:—Held, that he could not, by petition, obtain an order to add them to his security. *Barron* v. *Lancefield*, 17 Beav. 208.

*See also next subdivison.*

**b. Of obtaining Administration.**

**Of Citation of Next of Kin.**]—If a mortgagee of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mortgagor before the ecclesiastical court, in order to compel them to take out administration to the deceased, this court will not allow him the costs of the citation, unless he states his case for them on his bill. *Ward* v. *Barton*, 11 Sim. 534; 10 L. J., Ch. 163; 5 Jur. 405.

**Of Mortgagee as Creditor of Mortgagor.**]—On a bill by an heir to redeem, the mortgagee was allowed the costs of taking out administration as principal creditor of the mortgagor. *Ramsden* v. *Langley*, 2 Vern. 536.

**To Incumbrancer under Will of Mortgagor.**]—Mortgagee allowed costs of procuring administration to an incumbrancer, under will of mortgagor, as a necessary party to foreclosure. *Hunt* v. *Fownes*, 9 Ves. 70.

**By Mortgagor to Perfect the Title.**]—A mortgagor, who has taken out letters of administration which were necessary to perfect the title to the mortgaged property, is not therefore entitled to be paid out of the mortgaged property the expenses of so doing. *Saunders* v. *Dunman*, 47 L. J., Ch. 338; 7 Ch. D. 825; 38 L. T. 416; 26 W. R. 397.

**By Husband to Wife, after Mortgage of Wife's Reversionary Interest.**]—A husband and wife mortgaged a reversionary interest belonging to the wife. The husband afterwards executed a creditors' deed, by which any surplus which remained after payment of his creditors belonged to him. After the death of the wife the interest fell into possession; and the husband, at the request and cost of the trustees of the creditors' deed who expected a surplus, took out administration to his wife. On the death of the husband his administratrix incurred other expenses in perfecting her title to the mortgaged property:—Held, that the costs of taking out administration were only incident to and not a charge on the fund, and could not be paid out of it as against the mortgagee. *Ib.*

**c. Of obtaining Deeds.**

**By Mortgagor.**]—Three mortgages, on the estates of distinct mortgagors, were vested in the same trustees by one deed, which was prepared in the master's office, in a suit for executing the trust. Upon the application of one of the mortgagors for liberty to redeem and to have his mortgage deed delivered up to him:—Held, that he was entitled to have the deed on his executing to the trustees a covenant to produce it, and paying the costs of the application; and that the costs properly incurred in preparing and settling the covenant should be borne by the mortgagee's estate. *Capper* v. *Terrington*, 1 Coll. C. C. 103; 13 L. J., Ch. 239; 8 Jur. 140.

—— **Deeds in Custody of Court.**]—Where deeds relating to mortgaged property (the mortgage being absolute at law) come into the custody of a court of equity, by means and in

the course of a reasonable and proper administration of the mortgagee's estate, the costs of removing them out of court, upon the mortgage being paid off, must be borne by the mortgagor. *Burden* v. *Oldaker*, 1 Coll. C. C. 105; 13 L. J., Ch. 240; 8 Jur. 418.

—— **Mortgagee Declining to Assist.**]—A sum of money, part of a testator's estate, the subject of a suit, was advanced by the executors upon a mortgage security. The mortgagor had no notice of the suit. Subsequently, all papers, including the title deeds of the mortgaged property, relating to the testator's estate, were, under an order of the court, deposited in the master's office. The mortgagor, having paid off the mortgage money, requested the mortgagees to restore to him his title deeds, and, on their declining to take any steps to obtain an order for the delivery of them out of the master's office, presented a petition for that purpose:—Held, that the mortgagor was entitled to have his costs of the petition. *Reed* v. *Freer*, 13 L. J., Ch. 417; 8 Jur. 704.

3. Rights and Liabilities of Mortgagee.

*See also next sub-head*, col. 1849, foll.

*a.* In General, 1837.
*b.* Misconduct, 1838.
*c.* Resisting Redemption, 1840.
*d.* Paid or Overpaid, 1842.
*e.* After Tender, 1843.
*f.* Equitable Mortgagee, 1844.
*g.* Solicitor-Mortgagee, 1846.

### a. In General.

**Generally.**]—Right to principal and interest generally carries costs. *Gammon* v. *Stone*, 1 Ves. 339.

A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage money. *Ellison* v. *Wright*, 3 Russ. 458; 27 R. R. 108.

A mortgagee's reasonable costs have reference only to such rights as his mortgage title gives him. *Dryden* v. *Frost*, 3 Myl. & C. 670; 8 L. J., Ch. 235; 2 Jur. 1030.

Mortgagee, under circumstances, not allowed his costs. ——— v. *Trecothick*, 2 V. & B. 181; 13 R. R. 57.

**Fetter on Redemption.**]—As a mortgagee cannot charge his mortgagor with more than his principal, interest and costs, he is not entitled to charge the mortgagor with any sum payable for his, the mortgagee's, own benefit, such as professional or profit costs for the preparation of the mortgage deed, if he is a solicitor, or for the valuation of the property for the purpose of the mortgage, if he is a surveyor; nor, on the principle that a mortgagee cannot clog the equity of redemption with any by-agreement, can he contract with the mortgagor for any such payment. Per Kay, J., in *Field* v. *Hopkins*, 59 L. J., Ch. 174. Affirmed, 44 Ch. D. 524; 62 L. T. 774.

**Order for Personal Payment.**]—In the order for personal payment the costs will be limited to such costs only as would have been incurred if the action had been brought for payment only of the debt. *Farrer* v. *Lacy*, 55 L. J., Ch. 149; 31 Ch. D. 42; 53 L. T. 515; 34 W. R. 22—C. A.

**On Setting Aside for Undervalue.**]—Where a security is set aside on the ground of undervalue, costs are not given against the mortgagee; otherwise, where there has been misconduct. *Tottenham* v. *Green*, 32 L. J., Ch. 201.

**Satisfied Term.**]—A testator allowed a satisfied mortgage term to remain outstanding in the mortgagee, and he devised the estate to a trustee in such a manner as, in the opinion of the court, to entitle him to call for an assignment of the term without the concurrence of the parties beneficially entitled: the termor, under the advice of counsel, refused to assign without such concurrence, and a suit became necessary to compel him. The court, though of opinion that the termor was not entitled to insist on his objection, gave him his costs, charges and expenses. *Poole* v. *Pass*, 1 Beav. 600; 8 L. J., Ch. 325.

**Account.**]—Where a canal company borrowed money, by way of mortgage, and conveyed, by bargain and sale, the canal, works and the rates payable under the act, but without covenant to pay. On a bill filed for an account, no tender having been made of the principal and six years' interest, although the defendants were ready and willing so to do:—Held, that they were liable to costs. *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86.

—— **Amendment of Bill.**]—On a bill for an account against a bailiff, an issue was directed, in which defendant was found to be a mortgagee, and plaintiff amended his bill accordingly. The court, on motion before hearing, held defendant entitled to all the costs sustained by him up to the time of amendment, beyond what he would have been put to if the bill had been originally a bill for a foreclosure, such as the costs of the issue and of the application. *Smith* v. *Smith*, G. Cooper, 141.

### b. Misconduct.

**Generally.**]—Where a mortgagee and real creditor is brought before the court to have his security impeached, if the bill is dismissed, there is hardly an instance in which it is not with costs. Semble. *Tanner* v. *Ivie*, 2 Ves. 467.

A mortgagee is always considered as primâ facie entitled to costs, unless there be some circumstance of positive misconduct. *Anon.*, 2 Eq. Abr. 237. *Gammon* v. *Stone*, 1 Ves. 339.

Mortgagee, though entitled to costs in general, deprived of costs occasioned by improper conduct, and even compelled to pay costs. *Detillin* v. *Gale*, 7 Ves. 583; 6 R. R. 192.

Lord Eldon mentioned a case of *Shuttleworth* v. *Lowther*, in which a mortgagee was made to pay costs on the ground of a tender, and an appropriation of the money, which was paid into the bank, and refused. *Ib.*

Nothing short of misconduct can deprive a mortgagee of his costs in a redemption suit, and therefore where no misconduct is alleged and he is deprived of costs, an appeal lies without leave. *McDonnell* v. *McMahon*, 23 L. R., Ir. 283.

A mortgagee is always entitled to costs, unless there be positive misconduct on his part. *Loftus* v. *Swift*, 2 Sch. & Lef. 642.

**Fraud.**]—Defendant, by his fraudulent conduct, though considered as mortgagee in possession, deprived of his costs. *Morony* v. *O'Dea*, 1 Ball & B. 109.

Where a sale or mortgage is a fraud on prior incumbrancer, court will give costs against vendee or mortgagee, on setting aside the deeds. *Taylor* v. *Baker*, 5 Price, 306; 19 R. R. 625.

A case, nom. *Taylor* v. *Baker* (5 Price, 306), was cited in this case, in which defendant was a first mortgagee, plaintiff a second. Defendant took from the mortgagor an agreement for charging another sum on the premises. In his answer he denied notice of the second security, and, having got the legal estate, attempted to tack the subsequent advance to his mortgage. Plaintiff, however, proved notice upon him, and the court, for his fraudulently setting up the second agreement, made him pay the costs. *Harvey* v. *Tebbutt*, 1 J. & W. 197; 21 R. R. 145.

Upon a bill filed to set aside a mortgage security for fraud, circumstances of oppression and misconduct being proved against the mortgagee, it was held that, inasmuch as, if solvent, he would have been liable to pay part at least of the costs of the suit, being insolvent he was not entitled to receive costs. *Rider* v. *Jones*, 2 Y. & C. C. C. 329.

**Unjust Defence.**]—Mortgagee shall not onerate his pledge with costs, which he occasions by an unjust defence. *Mocatta* v. *Murgatroyd*, 1 P. Wms. 395.

**Where Unnecessary Parties.**]—Where a mortgagee files a bill against the mortgagor and other parties to have the benefit of a former suit, and makes persons parties to the suit who are unnecessary, and the bill is dismissed against them with costs, he is not entitled to charge those costs as between himself and the mortgagor. *Booth* v. *Creswicke*, 13 L. J., Ch. 217; 5 Jur. 763.

**Usurious Contract.**]—Where, on a bill for redemption, a party is brought before the court in the character of mortgagee, but has acquired his interest in the subject-matter of the suit by an usurious contract, he will not be allowed his costs. *Johnson* v. *Williamshurst*, 1 L. J. (O.S.) Ch. 112.

**Understating Sum due.**]—A mortgagee in possession sold under his power of sale, and retained surplus proceeds of sale. In an action against him for accounts he admitted that a sum was due from him, and paid such sum into court. On the taking of the accounts it appeared that a considerably larger sum was due:—Held, that he ought not to be allowed his costs of taking the accounts. *Charles* v. *Jones*, 56 L. J., Ch. 745; 25 Ch. D. 544; 56 L. T. 848; 35 W. R. 645.

**Neglect or Refusal to Render Account.**]—A mortgage to secure 85*l.*, with interest at 5*l.* per cent., provided for annual rests and the furnishing of accounts yearly; the assignee of the mortgagee having gone into possession, a suit for redemption was instituted against his executor in 1874, who by his answer alleged that at the filing of the bill, and thence to the time of putting in the answer, a sum of 121*l.* 5*s.* 8*d.* was due on foot of the mortgage; the accounts taken in the suit showed a sum of but 16*l.* 10*s.* 8*d.* due at the filing of the bill, and 5*l.* 13*s.* only due at the filing of the answer, inclusive of a sum allowed by consent for repairs: three months before the commencement of the suit the defendant was called upon in writing for an account, but he neglected to comply with the requisition:—Held, first, that, the plaintiff having failed to show that the mortgage debt was fully paid off, either at the filing of the bill or answer, the defendant should not be deprived of his costs except on the ground of misconduct; but, secondly, that the neglect to render an account when called on by the plaintiff to do so constituted such misconduct, and that he should accordingly abide his own costs of the suit. *Cassidy* v. *Sullivan*, 1 L. R., Ir. 313.

A mortgagee in possession who had neglected or refused to render an account upon the demand of the mortgagor was refused his costs up to the hearing. *Powell* v. *Trotter*, 1 Dr. & Sm. 388; 7 Jur. (N.S.) 206; 4 L. T. 45.

### c. Resisting Redemption.

**Generally.**]—Redemption of mortgage resisted and mortgagee ordered to pay costs. *Baker* v. *Wind*, 1 Ves. 160.

A general charge of fraud does not affect the rule as to payment of costs by a resisting mortgagee. *Hayward* v. *Kersey*, 14 L. T. 879; 14 W. R. 999.

On decreeing a redemption, the court refused costs on either side, for, though naturally the costs follow the redemption, the right to redeem had been disputed and it was a doubtful title. *Kirkham* v. *Smith*, 1 Ves. 258.

A second mortgagee obtained the costs of so much of a suit for redemption as had been incurred by the first mortgagees unsuccessfully disputing his rights to redeem. But the court, instead of ordering those costs to be paid to the second mortgagee personally, directed them to be set off in case of their redeeming. *Wheaton* v. *Graham*, 24 Beav. 483.

A mortgagee refused to allow his security to be redeemed by an assignee of the mortgagor, on the ground that a subsequent incumbrancer was desirous to redeem him:—Held, that this was a ground for making him pay the costs of the suit for redemption. *Tomlinson* v. *Gregg*, 15 W. R. 51.

Mortgagee on bill to redeem insisted that heir-at-law was living. Master, on reference, reported him dead. Exceptions were twice taken thereto, and issue directed, by which he was also found to be dead. Mortgagee not to pay costs of issue, as it was not vexatious, so long as court thought it necessary to direct issue. *Wilson* v. *Metcalfe*, 3 Madd. 45; 18 R. R. 193.

**On Ground of Decree Collusively Obtained.**]—Mortgagee resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, decreed to pay so much of the costs as was occasioned by his resistance. *Harvey* v. *Tebbutt*, 1 J. & W. 197; 21 R. R. 145.

**Irrelevant Defence.**]—Semble, in a redemption suit, the mortgagee will be ordered to pay the costs occasioned by a defence, in which he fails, not connected with his title as mortgagee.

*Roberts* v. *Williams*, 11 L. J., Ch. 65; 5 Jur. 1057.

**Improper Defence.**]—In a suit to redeem against a mortgagee in possession, the defendant, in his answer, set up an unfounded claim to the equity of redemption, and denied that the mortgage had been satisfied, although a balance was due from him when he filed his answer. The court ordered him to pay the costs occasioned by his claim and the costs of the suit subsequent to the filing of his answer, and also interest on the balances in his hands since the time when the mortgage was satisfied. *Montgomery* v. *Calland*, 14 Sim. 79; 8 Jur. 436.

**Disputing Security.**]—B., a second mortgagee, filed a bill for redemption and foreclosure against F., who held the first and third mortgages on the property. F., by his answer, disputed B.'s security by denying the consideration, and filed a cross bill for foreclosure impeaching that security. By the decree made in both suits, F.'s bill was dismissed with costs, so far as it sought to set aside B.'s security, and F. was ordered to pay the costs of the first suit, "so far as the same have been increased by the answer of F. impeaching the validity of the security of B." The master held that the costs incurred by B. in proving the consideration, and consequent thereon, were the increase of costs in the first suit which F. was to pay, and that the expense of the hearing must be apportioned according to the number of folios, and that the costs of the second suit must be apportioned. He allowed the costs of three counsel in the second suit on account of the complexity of the case. *Beghie* v. *Fenwick*, *Fenwick* v. *Beghie*, L. R. 6 Ch. 869; 25 L. T. 441; 20 W. R. 67.

Held, also, that so much of B.'s bill as was directed to anticipating the objection taken by F.'s answer ought to be dealt with as occasioned by the objection taken in the answer, and that in the other suit regard ought to have been had in taxation to the circumstance that the complexity which justified the allowance of three counsel was owing to B.'s security being impeached. *Ib.*

**Insisting on Mortgage as Absolute.**]—A mortgagee insisted on an assignment of a lease as absolute, when it appeared in evidence it was intended to be a mortgage only. Per cur., it would be going too far to make the assignee pay the costs; but he certainly has forfeited his own costs. *Francklyn* v. *Fern*, Barnard. 30.

Where, on a bill for redemption, defendant had insisted on deeds, which were intended only to be mortgages, as absolute conveyances, he was ordered to pay plaintiff's costs. *England* v. *Codrington*, 1 Eden, 174.

**Mortgagor to pay Costs of Redemption, although increased by Resistance of Mortgagee.**]—A mortgagor was entitled to a decree for redemption on the usual terms of paying principal, interest, and costs of suit, considering that a great part of the costs had been occasioned by charges of an injurious kind against the mortgagee, which had, on amendment, been struck out of the bill, and although the costs had been increased by the mortgagee resisting that right to redeem. *Cowdry* v. *Day*, 1 Giff. 316; 29 L. J., Ch. 39; 5 Jur. (N.S.) 1200; 1 L. T. 88; 8 W. R. 55.

### d. Paid or Overpaid.

**Where Nothing due to Mortgagee.**]—Where on a bill for redemption nothing is found due to the mortgagee, he must pay the costs of the suit. *Barlow* v. *Gains*, *Morris* v. *Islip*, 23 Beav. 244.

Decree against a mortgagee in possession, with costs, a tender having been made before suit, and it having been found, upon taking the accounts with annual rests (which was the point in the cause), that nothing was at that time due to the mortgagee. *Wilson* v. *Cluer*, 4 Beav. 214.

Semble, if a mortgagee contrive to hold the land after he is satisfied by perception of profits, the mortgagor coming to redeem will be entitled to costs instead of paying them. *Woodroft* v. *Soys*, Beam. Costs, 43, n.

Pending a foreclosure suit, the mortgagee was fully paid; he, however, made further claims and brought the cause to a hearing. His claim appearing unfounded he was ordered to pay all the subsequent costs. *Gregg* v. *Slater*, 22 Beav. 314; 25 L. J., Ch. 440; 2 Jur. (N.S.) 246; 4 W. R. 381.

An equity of redemption being subject to a trust for sale, the mortgagee, with some of the cestuis que trustent of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed:—Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage, and the accounts and inquiries concerning it. *Binnington* v. *Harwood*, Turn. & R. 477.

Where a prior decree had ordered the costs of a defendant mortgagee to be taxed, he will be entitled to his costs, though it appears at the hearing, on further directions, that his debt was paid off before the commencement of the suit, and that he had set up an improper defence. *Wilson* v. *Metcalf*, 1 Russ. 530; 25 R. R. 128.

**Where Balance due to Mortgagor.**]—In a redemption suit against a mortgagee in possession, a balance was found to have been due to the mortgagor at the time of the institution of the suit; the mortgagee must pay the costs of the suit. *O'Neil* v. *Innes*, 15 Ir. Ch. R. 527.

The tenant for life of property subject to a mortgage filed a bill against the mortgagee in possession, and others, to redeem the property. The decree made gave her a right to redeem, and also directed an inquiry whether any past rents were due to her from the mortgagee in possession in respect of her life estate, and declared that for what (if anything) should be so found due to her she was entitled to a charge on the property. After the decree she died without having redeemed. The suit was revived by her personal representatives, and the inquiry was prosecuted, and the chief clerk found that 285*l.* was due to the deceased plaintiff in respect of her life estate:—Held, that her representatives were entitled to the costs of the suit. *Powley* v. *Colyer*, 16 W. R. 114.

**Where Mortgagee Overpaid.**]—Mortgagee in possession is in general entitled to his costs

incurred in that character, but is charged with costs occasioned by his conduct when overpaid. *Archdeacon* v. *Bowes*, M'Cle. 149, 167; 13 Price, 353; 28 R. R. 685.

Costs of a redemption suit instituted by a puisne incumbrancer against a mortgagee in possession, given to the mortgagee up to the filing of his answer, and against him afterwards, he having been, before answer, overpaid the sum due to him at the filing of the bill; the balance being against him, and his conduct being against conscience. *Snagg* v. *Frizell*, 3 Jo. & Lat. 383. *S. C.*, nom. *Snagg* v. *Frith*, 9 Ir. Eq. R. 285.

Bill to redeem; decree referring it to master to take account, and tax costs, &c. The report finds mortgagee overpaid; it is too late to object to his having his costs. *Gilbert* v. *Golding*, 2 Anst. 442.

Usual decree for redemption and account, against mortgagee in possession, who had been overpaid; but, there being no reservation in the decree as to costs, and the redemption being decreed on payment of principal, interest, and costs, defendant was declared entitled to his costs. *Trimleston* v. *Hamill*, 1 Ball & B. 377, 386; 12 R. R. 38.

Where tenant by elegit has received rents and profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. *Owen* v. *Griffith*, Amb. 520; 1 Ves. 249.

A mortgagee, who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been at the date of the suit overpaid as mortgagee, will not only not be allowed his costs of suit, but may have costs given against him. *National Bank of Australasia* v. *United Hand-in-Hand, &c. Co.*, 4 App. Cas. 391; 40 L. T. 697; 27 W. R. 889—P. C.

*See also* 4, c, infra, col. 1850.

### e. After Tender.

**Generally.**]—Tender must be very express and formal to prevent costs. *Gammon* v. *Stone*, 1 Ves. 339.

Where a mortgagor makes an unconditional tender to the mortgagee of a sum, and the mortgagee refuses to accept it, he does so at his own peril; and, if the amount tendered was all that was due, the mortgagee must bear the costs of a subsequent suit for redemption. *Harmer* v. *Priestley*, 16 Beav. 569; 22 L. J., Ch. 1041.

**In Redemption.**]—Where a mortgagor, before filing a bill for redemption, makes a tender to the mortgagee, and the mortgagee refuses such tender, if it should turn out that not more than the sum so tendered is due, the mortgagee will have to pay the costs of the suit for redemption, and a direction to that effect may be inserted in the decree made on the hearing. *Hoskyn* v. *Sincock*, 34 L. J., Ch. 435; 11 Jur. (N.S.) 477; 12 L. T. 262; 13 W. R. 487.

A redemption suit. An incumbrancer, to whom a sum greater than the balance found due to him had been tendered before the bill was filed, ordered to pay the costs. *Roberts* v. *Williams*, 4 Hare, 129.

**In Foreclosure.**]—Costs of plaintiff after tender in foreclosure suit. *Thomas* v. *Parker*, 7 Jur. 844. And see *Shuttleworth* v. *Lowther*, cited in *Detillin* v. *Gale*, 7 Ves. 583; 6 R. R. 192.

After a bill of foreclosure filed by the assignee of a mortgagee, a tender of what was due to the mortgagee, with costs up to that time, deprives the assignee of subsequent costs. *Williams* v. *Sorrell*, 4 Ves. 389.

First mortgagee, after the usual notice given him by the second mortgagee to redeem, files a bill of foreclosure at the end of the term mentioned in the notice; the second mortgagee tenders the mortgage money and costs to the first mortgagee, which the latter declines to accept:—Held, under all the circumstances of the case, that the first mortgagee was not entitled to the costs of the suit after the tender. *Smith* v. *Green*, 1 Coll. C. C. 555.

**Before Bill.**]—The mortgagor having, before bill filed, tendered principal and interest, and a sum of money for expenses, no costs were given on either side up to the hearing, and future costs were reserved. *Broad* v. *Selfe*, 9 Jur. (N.S.) 885; 11 W. R. 1036.

**After Action Brought.**]—After action brought by mortgagee (a solicitor) against mortgagor for his bill of costs on effecting the mortgage, and 35*l.* taken out of court in that action by mortgagee in satisfaction of his demand, and after second action brought between the same parties to recover the mortgage money and costs in that action, taxed at 19*l.* 16*s.* 4*d.*, mortgagor tendered to mortgagee principal and interest, said sum of 19*l.* 16*s.* 4*d.*, and 10*l.* for any other costs and expenses that might be due; mortgagee, however, refused to reconvey, because the bill of costs, the subject of the first action, had not been satisfied, and the taxed costs of the second action were only costs as between party and party. Upon a bill filed by mortgagor against mortgagee to compel a reconveyance:—Held, that the mortgagee must pay the costs of the suit. *Morley* v. *Bridges*, 2 Coll. C. C. 621; 11 Jur. 706.

—— **Administration.**]—Motion to dismiss a bill, filed by a mortgagee on behalf of himself and all other creditors to administer the estate of an intestate, on payment of the debt and interest. The defendants had tendered (by letter) all that was due immediately after the bill was filed, and claimed costs subsequently to the tender:—Held, that the defendants must pay all the costs after, as well as before, the tender. *Wainwright* v. *Sewell*, 11 W. R. 560. And see *Holden* v. *Kynaston*, 2 Beav. 204.

### f. Equitable Mortgagee.

**Sale.**]—Equitable mortgagee must pay the costs of his petition for sale. *Warry, Ex parte*, 19 Ves. 472.

Equitable mortgagee, praying sale of mortgaged estate, pays costs of petition and of assignees' appearance to it, not out of produce of mortgaged estate, but personally; but, if assignees oppose petition on frivolous or mistaken grounds, they pay costs occasioned by such opposition. *Horne, Ex parte*, 1 Madd. 622.

Equitable mortgagee is not entitled to costs on application for sale of pledge, &c., though it is owing to bankrupt that no regular mortgage was made. *Anon.*, 2 Madd. 281.

—— **Bidding at.**]—Where an equitable mortgagee applies for leave to bid at the sale of

mortgaged premises, the practice is for him to pay the costs of the application. *Robinson, Ex parte*, Mont. & M'Ar. 261.

Costs come out of estate where equitable mortgagee applies for leave to bid, and also for sale; secus, if merely for leave to bid. *Berkeley, Ex parte, Deacon, In re*, 4 Deac. & C. 572.

**Action at Law.**] — An equitable mortgagee who applies for a sale will not be allowed the costs of an action at law brought for the mortgage money. *Fletcher, Ex parte*, Mont. 454.

Where an equitable mortgagee at first commenced an action against the personal representative, on a bond given as a collateral security, and abandoned it on the plea of plene administravit, and filed a bill for sale of the estate:—Held, not entitled to the costs of the action at law. *Lewis* v. *John*, 9 Sim. 366; C. P. Cooper, 8; 7 L. J., Ch. 242.

**Unsuccessful Defence of Action at Law.**]—An equitable mortgagee is not entitled to have out of the estate his costs of an unsuccessful attempt to defend an action at law for recovery of the mortgaged premises. *Dryden* v. *Frost*, 3 Myl. & C. 670; 8 L. J., Ch. 235; 2 Jur. 1030.

**Resisting Claim to Lien.**]—Where, in a suit by an equitable incumbrancer for foreclosure, the plaintiff unsuccessfully contested a right of lien claimed by the mortgagor's solicitors upon deeds relating to the mortgaged premises:—Held, that the costs incurred by the solicitors in establishing their lien were to be paid by the plaintiff, who was to be allowed to add them to his mortgage debt. *Pelly* v. *Wathen*, 7 Hare, 351; 18 L. J., Ch. 281; 14 Jur. 9.

**Extent in Aid.**]—Equitable mortgagee is not entitled to costs of defending an extent in aid. *Stephens, Ex parte* and *In re*, 2 Mont. & Ayr. 31.

**6 Geo. 4, c. 16, s. 75.**]—A copy of a petition by a landlord, under 6 Geo. 4, c. 16, s. 75, was served upon an equitable mortgagee of the lease:—Held, that he was entitled to have his costs of appearing on the petition paid him by the petitioner. *Banbury, Ex parte, Wegg, In re*, 7 Jur. 660.

**7 Geo. 2, c. 20.**]—A decree for sale upon an equitable mortgage not being within the stat. 7 Geo. 2, c. 20, in such a case the court will exercise its general jurisdiction as to costs. *Aberdeen* v. *Chitty*, 3 Y. & C. 382; 8 L. J., Ex. Eq. 30.

**Memorandum.**]—Upon a bill filed to enforce an equitable mortgage by deposit, without memorandum, costs will be given to the plaintiff as against the personal representatives of the mortgagor. *Connell* v. *Hardie*, 3 Y. & C. 582.

In equity an equitable mortgagee, though the mortgage be without memorandum, will be allowed his costs as against the assignees of the insolvent mortgagor. *Reg.* v. *Chambers*, 4 Y. & C. 54.

Equitable mortgagee by deposit of deeds, with a writing expressing the terms of the deposit, is entitled, on a petition in bankruptcy for a sale, to have his costs out of the produce of mortgaged premises. Secus, if no such writing. *Trew, Ex parte*, 3 Madd. 372. S. P., *Brightens, Ex parte*, Buck. 148; 1 Swanst. 3. See also *Harris, Ex parte*, cited 3 Madd. 372. *Sikes, Ex parte*, Buck. 349.

On a petition for the sale of mortgaged premises by an equitable mortgagee, under a written agreement for a mortgage, the petitioner is entitled to costs. *Brightens, Ex parte*, 1 Swanst. 3; Buck. 148.

A memorandum in writing, drawn up entirely by the clerk of an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. *Emmerton, Ex parte, Kingsford, In re*, 3 Deac. & C. 654.

**Action to recover Debt—Correspondence—Investigating Title—Preparing Mortgage.**]—In an action to foreclose a mortgage by deposit of title deeds, accompanied by a memorandum by which the mortgagor agreed to execute a legal mortgage of his estate and interest at the request of the mortgagee, the taxing-master disallowed the following charges in the mortgagee's bill of costs: (1) Costs of an action in the queen's bench division for recovery of the debt; (2) Costs of correspondence with a surety who had given a promissory note for part of the debt; (3) Costs of investigating the mortgagor's title; (4) Costs of preparing a legal mortgage which the mortgagor refused to execute; (5) Costs of correspondence with the mortgagor as to the legal mortgage:—Held, that heads (1) and (2) must be allowed, but that the taxing-master was right in disallowing (3), (4) and (5). But held, on appeal, that a mortgagee is entitled to be allowed in account the costs of all proceedings reasonably taken by him to enforce his rights under the mortgage contract, including proceedings to obtain the mortgage money or any part thereof, either from the mortgagor, or from a surety, or out of the estate, and that therefore heads (2), (4), and (5) must be allowed. That (1) would ordinarily be a proper charge, but in the present case it could not be allowed, as it was excluded by the special terms of the order directing taxation, and that (3) could not be allowed, as an investigation of the title was not necessary for the purpose of preparing the legal mortgage, but that the mortgagees must be allowed all expenses properly incurred with reference to the preparation of the legal mortgage, which would include the expense of such inspection of the title deeds as was necessary for preparing it. *Ellison* v. *Wright* (3 Russ. 458; 27 R. R. 108) preferred to *Lewis* v. *John* (9 Sim. 366). *National Provincial Bank of England* v. *Games*, 55 L. J., Ch. 576; 31 Ch. D. 582; 54 L. T. 696; 34 W. R. 600—C. A.

### g. Solicitor-Mortgagee.

**Profit Costs—Costs Out of Pocket.**]—A mortgagee who is a solicitor, and who acts in person in proceedings relating to the mortgage security, is not entitled, in the absence of express contract, to recover profit costs from the mortgagor, but will be limited to costs out of pocket. *Sclater* v. *Cottam* (5 W. R. 744) and *Roberts, In re* (43 Ch. D. 52), approved; *London Scottish Benefit Society* v. *Chorley* (13 Q. B. D. 872) explained. *Lichorish, Ex parte, Wallis, In re*, 59 L. J., Q. B. 500; 25 Q. B. D. 176; 62 L. T. 674; 38 W. R. 482; 7 Morrell, 148—C. A.

A solicitor who advances money to a client on mortgage is not entitled to charge the mortgagor profit costs for the preparation of the mortgage. *Roberts, In re, Evans, Ex parte*, or *Evans* v. *Roberts*, 59 L. J., Ch. 25; 43 Ch. D. 52; 62 L. T. 33; 38 W. R. 225.

The costs of preparing a mortgage deed claimed by a firm of solicitors (one of whom was the mortgagee) are not mortgagee's costs; they are not covered by the security, and will not prevent the mortgagor from obtaining a reconveyance of the estate, or give the mortgagee any lien upon the title deeds. *Gregg* v. *Slater*, 22 Beav. 314; 25 L. J., Ch. 440; 2 Jur. (N.S.) 246; 4 W. R. 381. And see *Bastard* v. *Clarke*, 7 Ves. 489.

**Assent of Client—Subsequent Question.**]—Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the court directed the master to examine the bill, with a view to ascertain the reasonableness of the charges, without entering into evidence, as to whether the business charged for had been actually done. *Wragg* v. *Denham*, 2 Y. & C. 117; 6 L. J., Ex. Eq. 38.

**Covenant to pay "Every Sum of Money which may become owing by Mortgagor to Mortgagee"—Profit Costs—Clogging Equity of Redemption—Reopening Settled Accounts.**]—Where a solicitor was mortgagee of his client's life estate, and also acted as her agent for collecting, receiving and paying her income; and where the mortgage deed contained a covenant for payment by the mortgagor of the sum advanced with interest, and also for payment of "every other sum of money which may hereafter be advanced or paid by the mortgagee to or on account of, or become owing to the mortgagee by, the mortgagor"; and the solicitor-mortgagee had from time to time furnished accounts to the mortgagor, in which he had debited her with certain items of profit costs, including those of preparing the indentures of mortgage and further charge, duly delivering in each case bills of costs which had been approved in writing by the mortgagor:—Held (i.) that, in the absence of special contract, the solicitor-mortgagee was not entitled to charge profit costs for work done, either as solicitor in connection with the mortgage (including the preparation of the indentures) or as agent in connection with the management of the mortgagor's income; (ii.) that the covenant for payment contained in the mortgage did not cover such charges, and, even if it did do so, would be void as clogging the equity of redemption; and (iii.) that, in the absence of sufficient evidence to show that the solicitor-mortgagee fully explained to the mortgagor her legal rights with respect to these charges being made at all, the court would grant to the mortgagor or her representatives leave to surcharge and falsify the settled accounts so far as they related to such profit costs and charges. *Eyre* v. *Wynn-Mackenzie*, 63 L. J., Ch. 239; [1894] 1 Ch. 218; 8 R. 53; 69 L. T. 823; 42 W. R. 220.

**Redemption Suit.**]—A mortgagee who is a solicitor, and acts for himself in an action for the redemption of the mortgage, is only entitled to out-of-pocket expenses, not to any remuneration for his personal trouble. *Stone* v. *Lickorish*, 60 L. J., Ch. 289; [1891] 2 Ch. 363; 64 L. T. 79; 39 W. R. 331.

**Time for raising Objection.**]—The court will entertain an objection to the allowance of profit costs to a solicitor-mortgagee under such circumstances, although the objection was taken for the first time before the taxing-master, and not at the hearing of the action. *Ib.*

Quære, whether a solicitor-mortgagee who acts for himself in a redemption suit is entitled to costs beyond those actually out of pocket. *Price* v. *M'Beth*, 33 L. J., Ch. 460; 10 Jur. (N.S.) 579; 10 L. T. 521; 12 W. R. 818.

The proper stage of the suit at which to raise the question is at the hearing; and a decree having been made in a redemption suit, containing no special direction as to costs, and ordering the usual account to be taken of what was due to the mortgagees for principal and interest, and for their costs of the suit to be taxed by the master:—Held, that the master had properly allowed the mortgagees, who were solicitors, and had acted for themselves in the suit, their profit costs. *Ib.*

**Defending Title.**]—Where a mortgagee acts as his own solicitor in a suit in defence of his own title, he will be allowed, as against a second mortgagee, his costs out of pocket, but no other costs. *Sclater* v. *Cottam*, 3 Jur. (N.S.) 630; 5 W. R. 744.

**Partner of Solicitor-Mortgagee.**]—The partner of a solicitor-mortgagee is entitled to receive from the mortgagor the share of the profit costs of transactions relating to the mortgage that he would have received under the terms of the articles of partnership:—Semble, that, if partners in a firm of solicitors agree that the mortgagee partner is not to share in such profit costs, the usual costs will be allowed in full against the mortgagor. *Doody, In re, Fisher* v. *Doody*, and *Hibbert* v. *Lloyd*, 62 L. J., Ch. 14; [1893] 1 Ch. 129; 2 R. 166, n.; 67 L. T. 650; 41 W. R. 49.

A solicitor-mortgagee is not entitled as against the mortgagor to charge profit costs in respect of business relating to the mortgage transacted by the solicitor acting for himself and a co-mortgagee, or by a firm of solicitors of which he is a partner. *Cradock* v. *Piper* (1 Mac. & G. 664) distinguished; *Donaldson, In re* (27 Ch. D. 544) overruled. *S. C.*, in C. A. *Ib.*

**Co-Mortgagees.**]—Where one of a body of mortgagees is a solicitor and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. If in such a case the mortgagor, in applying for an order to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation. *Donaldson, In re*, 54 L. J., Ch. 151; 27 Ch. D. 544; 51 L. T. 622.

A mortgage was vested in two trustees of a settlement, upon the trusts thereof. One of the trustees, who was a solicitor, acted professionally in the matter of a petition on behalf of his co-trustee and himself for sale of the mortgaged premises:—Held, that the rule in *Cradock* v. *Piper* (1 Mac. & G. 664) applied, and that the trustee-solicitor's costs of the proceedings were entitled to rank on the final schedule of incumbrances in priority to the mortgage. *Smith's Estate, In re*, [1894] 1 Ir. R. 60.

**Where Administration Order Made.**]—Where a mortgagee, who was also solicitor of a testator and executrix, instituted a suit, in which a

common administration decree was made, he is entitled to be paid his principal and interest out of a fund in court, but not his costs, those being costs of an administration and not a mortgagee's suit. *Walton* v. *Stanton*, 10 W. R. 570.

Where a mortgagee, who was also solicitor to an executrix, filed a bill, in which a common administration decree was made, and the next of kin subsequently had the conduct of the cause, by reason of the plaintiff's peculiar position, they must stand pari passu with him as to costs, both before and after the conduct of the cause is taken away from him, and he is not liable to pay the costs of an administration summons taken out by them, though without notice of his suit. *Ib.*

### 4. Of Redemption.

*See also* 3, supra, col. 1837 foll.

*a.* Liability of Mortgagor, 1849.
*b.* Where Two Estates, 1850.
*c.* Overclaim by Mortgagee, 1850.

#### a. Liability of Mortgagor.

**General Rule.**]—In a redemption suit, the plaintiff, as a general rule, must pay the costs of all necessary parties; therefore, where a question arose between two defendants, as to which of them was entitled to the sum brought into court by the plaintiff, and the cause stood over from day to day to have that question argued:—Held, that refreshing fees to the defendants' counsel were part of the costs in the cause, to be paid by the plaintiff; a creditor also held entitled, though paid off in course of suit. *Wynne* v. *Brady*, 5 Ir. Eq. R. 239.

A purchaser of property collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase-money, is not entitled to insist on having the property reconveyed to him free of incumbrance before he pays the sum so secured by mortgage; and if he file a bill to have the estate reconveyed to him, and a declaration of court as to persons entitled to receive the money where there are two sets of claimants, he will be considered as merely a mortgagor filing bill to redeem, and must pay all costs, although he has paid the money into court. *Drew* v. *Harman*, 5 Price, 319.

**To pay Costs of Trustee and Cestui que trust.**]—On a bill to redeem, costs were allowed to the assignees in trust of the mortgage, and to the cestuis que trustent also. *Wetherell* v. *Collins*, 3 Madd. 255; 18 R. R. 229.

**Default of Redemption on Day appointed—Reference.**]—If on a bill to redeem, the usual decree and reference are made, and a day appointed to redeem, if the mortgagor does not redeem on the day, the court will dismiss the bill with costs to be taxed, considering the reference as a subsequent proceeding beyond the bill and answer. Semble. *Newsham* v. *Gray*, 2 Atk. 286.

**Cross Cause in Foreclosure.**]—On a bill to foreclose, the court refused to order defendant, in case he redeemed, to pay the costs of a cross cause which he had brought to redeem, and which was still depending, because the court could take no notice that there was such a cause depending. *Anon.*, Moseley, 45.

**Vexatious Conduct.**]—Costs of a redemption suit against a mortgagee in possession given to him up to answer, and against him for the rest of the suit, when the sum due at the filing of the bill was only 10*l.*, and the balance afterwards was against him, and his conduct vexatious. *Snagg* v. *Frith*, 9 Ir. Eq. R. 285; 3 Jo. & Lat. 383.

**Debt due when Bill filed.**]—In a suit for redemption a mortgagee is entitled to his costs, if it is found that anything was due to him at the filing of the bill, although the accounts were directed to be taken against him with annual rests. *Barlow* v. *Gains*, *Morris* v. *Islip*, 23 Beav. 244.

#### b. Where Two Estates.

**Redemption of One allowed—Costs of Mortgagee.**]—A plaintiff suing in formâ pauperis brought his bill to redeem two estates, but was held to be entitled to redeem one estate only, and the mortgagee was allowed to add his costs of the suit in respect of both estates to the principal and interest due to him on the security of the redeemable estate. *Batchelor* v. *Middleton*, 6 Hare, 86.

**Conveyancing Act, 1881.**]—Since the commencement of the Conveyancing Act, 1881, separate mortgages were made of distinct estates by the same mortgagor. The mortgagee having brought a foreclosure action:—Held, that the mortgagor could not redeem either estate without paying all the costs of the action. *Clapham* v. *Andrews*, 53 L. J., Ch. 792; 27 Ch. D. 679; 51 L. T. 86; 33 W. R. 395.

When a mortgagee brings an action to foreclose two mortgages of two distinct estates, but which mortgages are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned ratably between the two estates. *Clapham* v. *Andrews* (27 Ch. D. 679) overruled. *De Caux* v. *Skipper*, 31 Ch. D. 635; 54 L. T. 481; 34 W. R. 402—C. A.

#### c. Overclaim by Mortgagee.

*See also* 3, *d.* supra, col. 1842.

**Generally.**]—A mortgagee will not be deprived of his costs in a redemption suit because he has overstated the amount due to him. *Cotterell* v. *Stratton*, 42 L. J., Ch. 417; L. R. 8 Ch. 295; 28 L. T. 218; 21 W. R. 234.

**Bonâ fide Overclaim.**]—A mortgagee cannot be deprived of costs merely because he claims bonâ fide something more than the court holds him entitled to. *Watts, In re, Smith* v. *Watts*, 52 L. J., Ch. 209; 22 Ch. D. 1; 28 L. T. 167; 31 W. R. 262—C. A.

**Vexatious Conduct.**]—An overstatement on the part of mortgagees in possession of a colliery as to the balance represented by them as remaining due on their mortgage, and their refusal to furnish accounts to the mortgagors except on being paid the expenses of so doing:—Held, not such vexatious conduct as to deprive them of their costs of a redemption suit. *Norton* v. *Cooper*, 5 De G. M. & G. 728; 2 W. R. 659.

### 5. Foreclosure.

#### a. In General.

**Generally.**]—Semble, in a foreclosure action the costs of the mortgagee, as between solicitor and client, are payable by the mortgagor. *Griffith, Jones & Co., In re*, 53 L. J., Ch. 303; 50 L. T. 434; 32 W. R. 350—C. A.

See a dict. in *Howard* v. *Queen's Trustees* (2 Mod. 173), that if a mortgagor be foreclosed, he pays no costs. *Anon.*, Moseley, 45.

**Bill or Claim.**]—A mortgagee held not to be chargeable with the increased costs occasioned by his proceeding for foreclosure by bill and not by claim. *Holford* v. *Yate*, 10 Hare (App.) 1.

**Proof after Foreclosure.**]—A mortgagee, after foreclosure and attempted sale, admitted to prove in an administration suit on giving up the property, but not allowed costs of foreclosure. *Haynes* v. *Haynes*, 3 Jur. (N.S.) 504.

**Untenable Defence.**]—In a foreclosure suit, the mortgagor, who raises an untenable defence, will be personally liable to pay the costs occasioned thereby. *Guardian Assurance Co.* v. *Avonmore* (*Lord*), Ir. R. 7 Eq. 496.

**Sub-mortgage and Foreclosure after Forfeiture.**]—A mortgagee, after his mortgage is forfeited, executes several sub-mortgages, and files a bill of foreclosure, making the sub-mortgagees defendants:—Held, that he was entitled to the costs of the sub-mortgagees against the estate. *Smith* v. *Chichester*, 4 Ir. Eq. R. 580; 1 Con. & L. 486; 2 Dr. & War. 393.

**Costs of Foreclosure included in Decree against Assets.**]—The bill was filed to foreclose a mortgage: after decree to foreclose, it appeared the mortgagor had no title. Plaintiff then proceeded against his assets upon the collateral security. Upon the final hearing of this cause, the lord chancellor held plaintiff entitled to include the costs of the foreclosure cause in the decree against mortgagor's assets. *Baron* v. *Bennett*, 2 Moll. 459.

**Whether out of Estate or out of Purchase Money.**]—At the time of the sale, the lands were subject to a mortgage. The purchaser retained the purchase-money for payment of incumbrances affecting the estate. The mortgagee afterwards filed a bill against the assignee of the vendee, to foreclose and sell. That suit was compromised by the mortgagee going into possession:—Held, that the mortgagee's costs in that suit were to be paid with his demand out of the estate, and not out of the purchase-money. *Croly* v. *Callaghan*, 5 Ir. Eq. R. 25.

**Improper Action.**]—A mortgagee, after filing a foreclosure bill, unsuccessfully moving for a receiver, and rendering himself liable to the costs of the motion, died, and his executors, without reviving the suit, filed a new bill for foreclosure of the same estate:—Held, that, the defendants, not by plea to a new bill insisting upon the former suit, but claiming by their answers the benefit of the objection, as if they had pleaded it, the court would not refuse the decree in the second suit, or stay the proceedings therein until the former costs should be paid; that the court, not approving of the course taken by the plaintiffs, would give them no costs of the second suit, unless they submitted to pay the costs to which the mortgagee was liable in the first suit. *Long* v. *Storie*, 9 Hare, 542; 21 L. J., Ch. 521; 16 Jur. 349.

**Withdrawing Claim for Payment.**]—A mortgagee issued a writ asking for the usual order for foreclosure, and moved for the appointment of a receiver, and on the motion being heard a receiver was appointed. A statement of claim was delivered, but, the mortgagor having become bankrupt, the plaintiff withdrew his claim for payment:—Held, that the plaintiff should have proceeded by originating summons. The court made the usual foreclosure order, but directed the taxing-master to allow such costs as the plaintiff would have been entitled to if he had proceeded by originating summons and no more. *Barr* v. *Harding*, 58 L. T. 74; 36 W. R. 216.

On a motion for judgment in default of defence in a foreclosure action, a mortgagee asked for an order for an account to be taken, and for payment, and the usual foreclosure judgment; the mortgagee, however, being in possession, and having therefore to account on the footing of wilful default, did not show what he might have received but for his wilful default. The court, therefore, gave him the order for an account to be taken, and the usual foreclosure judgment, but made no order for payment. The defendant then said that the plaintiff had abandoned his claim for payment, and therefore ought to have proceeded by summons, and not by action, and was entitled under the foreclosure order to no more costs than if he had applied by summons:—Held, that as the plaintiff had not abandoned his claim for personal payment, but had pressed it, he was entitled to his costs. The court refused to allow the case to go into the general paper for argument as to the question of costs. *Brooking* v. *Skewis*, 58 L. T. 73; 36 W. R. 215.

**Costs creating Lien.**]—Lord Manners held, on a bill of foreclosure and decree in mortgagor's lifetime, the costs gave a lien on the property mortgaged; not a mere personal demand gone by his death. *Netterville* v. *Bennett*, 2 Moll. 457.

**Interest on Taxed Costs.**]—A mortgagee is not entitled, in carrying in his accounts under a foreclosure judgment, to charge interest on his taxed costs unless they are directed to be added to his security, and then they carry interest from the date of the taxing-master's certificate, and not from the date of judgment. *Eardley* v. *Knight*, 58 L. J., Ch. 622; 41 Ch. D. 537; 60 L. T. 780; 37 W. R. 704.

*Lippard* v. *Ricketts* (L. R. 14 Eq. 291) considered. *Ib.*

**Tacking.**]—An assignee of a mortgage cannot tack to his debts in a foreclosure suit by him costs incurred by his defence to a cross-bill impeaching the mortgage and which was dismissed with costs. *Darcey* v. *Callan*, 1 Jones, 614.

#### b. Other Defendants to Foreclosure Suits.

**Costs of Guardian of Infant Defendants.**]—Where, in a foreclosure suit, the solicitor to the suitor's fund was, upon the application of the plaintiff, under the 28th Order of October, 1842, appointed guardian to some of the defendants, who were infants, the court held that the plaintiffs must pay the costs of the guardian, and add

them to his own, even where the security is inadequate. *Harris* v. *Hamlyn*, 3 De G. & Sm. 470 ; 18 L. J., Ch. 403 ; 14 Jur. 55.

**Executor of Insolvent Mortgagor.**]—The executor of an insolvent mortgagor is not entitled to his costs against the plaintiff in the ordinary suit for a foreclosure and sale. *Grace* v. *Mountmorris* (*Lord*), 2 Dr. & War. 432.

**Executor of Legatee of Mortgagee.**]—In a suit to foreclose a mortgage, after the death of the mortgagee, it appeared that the mortgagee had bequeathed the mortgage debt in different portions to several persons, and amongst those 2,000*l.* had been bequeathed to A. and B., and the survivor of them, his executors, &c. ; the personal representative of the survivor had been made a defendant, and 2,000*l.* was reported due to him :—Held, that he was entitled to be paid his costs according to the priority of his demand, notwithstanding that the general rule of the court in foreclosure suits was to allow only one set of costs against the inheritance. *Cane* v. *Brownrigg*, 2 Ir. Eq. R. 413.

**Assignee of Insolvent Mortgagor.**] — The assignee of an insolvent mortgagor was made a party to a suit to foreclose the mortgage, and died in the progress of it ; there was no property of the mortgagor, except the mortgaged premises ; and the plaintiff, in order to induce a creditor of the mortgagor to become his assignee, undertook to pay him his costs in the suit :—Held, that the plaintiff was entitled to those costs as part of his own costs. *Maxwell* v. *Smyth*, Jon. & C. 72.

A mortgagee had been in possession. She transferred the whole of her interest, and afterwards became insolvent. Her assignees were made defendants to a bill of foreclosure :—Held, that their costs ought not to be charged on the mortgaged estate, but on the plaintiff. *Coles* v. *Forrest*, 10 Beav. 552.

**Trustee of Mortgagee.**]—Where a trustee for a mortgagee is made a defendant to a foreclosure suit, the plaintiff must pay his costs and add them to his own. *Brown* v. *Lockhart*, 10 Sim. 426 ; 9 L. J., Ch. 167 ; 4 Jur. 167.

The costs of a motion to advance a cause, under the 4th Order of May, 1839, ordered to be paid by the plaintiff. *Ib.*

**Mortgagor's Trustee to bar Dower.**]—Mortgagor's trustee to bar dower not entitled, as against the mortgagee, to his costs of a suit brought to foreclose the mortgage. *Horrocks* v. *Ledsam*, 2 Coll. C. C. 208.

**Trustee of Mortgagee's Settlement.**]—A sum due on mortgage was settled on a marriage. The husband afterwards obtained a decree of foreclosure in a suit in which the mortgagor and the trustee of the settlement were defendants. The trustee's costs were ordered to be paid by the plaintiff and added to the mortgage debt. *Bartle* v. *Wilkin*, 8 Sim. 238.

**Heir of Mortgagee.**]—Bill of foreclosure by devisee of a mortgagee, against the heir and executor of the mortgagor, the mortgagee's heir being also made a party, to have the will established against him. Plaintiff must pay the heir his costs, and he would not be entitled to have them over from the estate, the heir being a necessary party, by reason of the mortgagee's disposition of his property. *Skipp* v. *Wyatt*, 1 Cox, 353.

**Annuitant.**]—If the mortgagee of lands, subject to an annuity, file a bill of foreclosure, and make the annuitant a party, the bill will be dismissed with costs as to the annuitant. *Paynes* v. *Creagh*, 2 Ir. Eq. R. 190.

**Sub-mortgagees.**] — A mortgagee, after the time for payment of the mortgage money has elapsed, executes several sub-mortgages, and then files a bill of foreclosure and sale, making the sub-mortgagors defendants :—Held, that the sub-mortgagees were entitled to their costs against the plaintiff. *Smith* v. *Chichester*, 2 Dr. & War. 393 ; 1 Con. & L. 486 ; 4 Ir. Eq. R. 580.

**Custodee—Trustee—Cestui que trust.**]—Costs of custodees in possession, made defendants to bill of foreclosure but afterwards struck out, the custodiams being dissolved on application to the court of exchequer, decreed out of the fund reluctantly. Also the costs of a party, whose lease of the mortgaged lands subsequent to the mortgage was impeached by the bill, on grounds removable by diligent inquiry ; and of trustees and cestui que trust answering separately, trustee being out of the jurisdiction. *Nicollson* v. *Falkiner*, 1 Moll. 555.

6. Between Several Incumbrancers.

**Generally.**]—Lord chancellor stated the order of payment of costs of bill by a subsequent mortgagee should be—prior mortgagees' costs, with their principal and interest seriatim, then plaintiff's costs, with his principal and interest, and then the costs of the defendant entitled to costs, but not to be paid by plaintiff, for that might prejudice plaintiff if a deficient fund ; mortgagor's costs not to be paid out of the produce of the sale until all the creditors are satisfied. *Ellis* v. *Molley*, 1 Moll. 536.

**Out of Fund.**]—The costs of incumbrancers upon a fund charged upon an estate, are to be borne, not by the estate but by the fund. —— v. *Henry*, 3 Ir. Eq. R. 493.

—— **Where One Sues for All.**]—When a puisne incumbrancer sues for and recovers a fund for the benefit of all, his costs are paid, in the first instance, out of the fund recovered. *Wright* v. *Kirby*, 23 Beav. 463 ; 3 Jur. (N.S.) 851 ; 5 W. R. 391.

—— **Costs of Others added to Securities.**]—An estate was greatly incumbered. The first charge was an annuity ; and, in default of payment, the annuitant had power to sell and invest the produce in the purchase of a similar annuity. The grantor reserved a power of repurchase. The annuitant having sold the estate, the fifth incumbrancer filed a bill to repurchase the annuity, and distribute the produce :—Held, that the plaintiff's costs were the first charge on the fund, and that the costs of the other incumbrancers must be added to their securities. *Ib.*

**Out of Fund, according to Priority.**]—Incumbrancers are entitled to their costs out of the fund, according to their respective priorities, and not against the plaintiff in the first instance. *Hall* v. *Hill*, 3 Dr. & War. 59 ; 2 Con. & L. 135 ; 5 Ir. Eq. R. 11.

The rule that the fund, not the plaintiff, is to pay the costs, only applies to formal parties, not to prior incumbrancers. As to them, it is a redemption bill; and, if the costs are not paid within the usual time, in such cases the bill as to them must be dismissed. *Jackson* v. *Curtis*, 2 Moll. 466.

In an incumbrancer's suit in Ireland it was held that, according to the practice of the courts in that country, the plaintiffs were only entitled to their costs according to the priority of their demand. *Peyton* v. *M'Dermott*, 1 Dr. & Wal. 198.

Under a bill by a second incumbrancer, a receiver being appointed, and the first incumbrancer taking the benefit of the suit, the costs are to be paid in the first instance before the demand of the first incumbrancer. *White* v. *Peterborough* (*Bishop*), Jacob, 402.

**Conflicting Claims of Priority.**]—The costs incurred in respect of conflicting claims of priority of lien or charge, in a suit for redemption and foreclosure by a puisne mortgagee, ordered to be paid by the parties who failed in such claim respectively, the plaintiff adding to his mortgage debt the costs paid by him in respect of such claim as he had failed in establishing,—the questions having arisen from the acts or conduct of the mortgagor. *Pelly* v. *Wathen*, 7 Hare, 372. Affirmed, 1 De G. M. & G. 16; 21 L. J., Ch. 105; 16 Jur. 47.

**Costs of Foreclosure, in Redemption, Suit.**]—The second mortgagee brings a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor:—Held, the costs which the first mortgagee has been put to shall not be taxed as in case of an adversary's suit, but he shall be allowed all his costs and charges, as is done in case of a solicitor who lays out money for his client, and the profits of the mortgaged premises shall be first applied to pay off those costs before they go to sink the principal. *Lomax* v. *Hide*, 2 Vern. 185.

A puisne creditor filed a bill to redeem a prior creditor by mortgage, and for a sale, offering by his bill to pay the prior creditor what should appear due to him. The prior creditor was proceeding to foreclose the mortgage. By his answer he accepted the offer of the plaintiff, and upon the hearing insisted that the fund was deficient and that the plaintiff should by the decree undertake to redeem him:—Held, that the plaintiff was only bound to undertake to pay him the additional costs and expenses he might be put to by the plaintiff's suit. *Att.-Gen.* v. *Redmond*, 2 Jones, 254.

**Plaintiff having Two Incumbrances.**]—In a suit for an account, foreclosure and sale, by the plaintiff having two incumbrances upon the estate, he is not entitled to all his costs of suit in priority with his elder incumbrance, but shall be decreed his costs of suit in priority with that incumbrance, save so far as they are occasioned by his puisne incumbrance. And the costs so occasioned he shall be decreed to have in priority with the puisne incumbrance. *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

**Mortgagee to pay Costs.**]—Under circumstances, the court compelled one of several mortgagees to pay costs, and refused another the costs of a suit to redeem. *Cliff* v. *Wadsworth*, 2 Y. & C. C. C. 598; 7 Jur. 1008.

**In Suit to ascertain Priorities.**]—In suits by mortgagees to ascertain priorities upon an estate, or upon a fund produced by it, after the proper costs of the plaintiff are paid, the costs of the other incumbrancers are added to their securities, and paid in the order of their priorities. *Ford* v. *Chesterfield* (*Earl*), 21 Beav. 426.

**Mortgages Pendente lite.**]—A suit was instituted to ascertain the rights of the plaintiff and others to certain property; the plaintiff, pending the suit, made three mortgages of his share to different persons, who were brought before the court by supplemental bill. A decree was made declaring the plaintiff entitled to one-fifth of the estate, and directing the costs to be paid as between party and party out of the aggregate fund. The first mortgagee now presented a petition for payment of his principal, interest and costs. The plaintiff claimed the extra costs as a prior charge; this was resisted by the second mortgagee:—Held, that the plaintiff was not entitled to the extra costs, but that the second mortgagee was entitled to take the fund, leaving the plaintiff's costs in that respect unpaid. *Smith* v. *Plummer*, 18 L. J., Ch. 456.

**Foreclosure and Sale—Mortgagee Claims to be Redeemed.**]—A puisne mortgagee filed a bill for a foreclosure and sale against a prior mortgagee in possession. By the report made pursuant to the decree to account, it appeared doubtful whether the mortgaged premises would, upon a sale, produce sufficient to pay off the prior mortgagee and his costs of suit. Upon the final hearing, the prior mortgagee, for the first time, insisted upon being redeemed:—Held, that the time of making the claim only affected the costs of the suit; and that either the bill should be dismissed without costs, or, if the plaintiff elected to take a decree for a sale, he should secure to the prior mortgagee the full amount of his debt and costs of suit. *Rotheram* v. *Webb*, 4 Ir. Eq. R. 52.

In this case, the security was given by recognizance conditioned for the payment of any difference between the produce of the sale and of the sum decreed due on the foot of the prior mortgage for principal, interest and costs. *Ib.*

**Practice.**]—In a suit for foreclosure and redemption by one of several successive mortgagees, upon motion by a subsequent incumbrancer, the bill was ordered to be dismissed with costs against all the other defendants, without prejudice to any other suit, upon payment, by the defendant moving, of a certain sum of money into court on or before a certain day, such money to be invested and accumulated. The plaintiff to pay the taxed costs of all the other defendants, and to hand them over from the defendant moving, who was ordered to pay to the plaintiff and other defendants their costs of this application; and, the defendant moving, by his counsel, undertaking to indemnify the plaintiff against any proceedings which might be taken in the meantime by any party for redeeming the plaintiff's securities, a reference was directed to ascertain what was due to the plaintiff for principal and interest; and the taxing-master was ordered to tax his costs and those of the mortgagees other than the defendant moving, who, as well as the plaintiff, were to have liberty to apply. *Jones* v. *Tinney*, 1 Kay (App.) xlv.

*See also next sub-division.*

7. UNDER DECREE FOR SALE.

**Generally.**]—A sale under a decree, unless made upon particular terms, does not vary the right as to costs, which each mortgagee would have had if the proceeding had been by foreclosure; accordingly, successive mortgagees were allowed their costs out of the funds produced by the sale, according to the priority of their several securities. *Barnes* v. *Racster*, 1 Y. & C. C. C. 401; 11 L. J., Ch. 228; 6 Jur. 595.

A first mortgagee in fee with power of sale filed his bill against the mortgagor and all subsequent claimants, for a sale under the power. The property produced less than the amount of the first mortgage:—Held, that the subsequent incumbrancers were nevertheless entitled to their costs out of the produce. *Alston* v. *Parker*, 5 L. J., Ch. 3.

**Deeds Lost.**]—A first incumbrancer having a power of sale, but having lost the title deeds, institutes a suit to have the estate sold: the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to the plaintiff. *Wontner* v. *Wright*, 2 Sim. 543; 29 R. R. 166.

**Consent.**]—A mortgagee, with a power of sale, obtained an order for sale, with consent of the subsequent mortgagees. Though the produce of the sale was insufficient to pay the first mortgage, it was held that the second mortgagees were entitled to the costs of the suit, out of the money in court. *Cooke* v. *Brown*, 4 Y. & C. 227; 9 L. J., Ex. Eq. 41. S. P., *Kenebel* v. *Scrafton*, 13 Ves. 370.

Legal mortgagees, having filed a bill for foreclosure only, amended their bill by stating that they had, with the defendants' consent, contracted to sell the property, and prayed that the purchase might be carried out under the sanction of the court. By a consent decree, the court ordered the sale to be carried out. The purchase-money being sufficient only to pay the principal and interest with a small balance over:—Held, that the plaintiffs were entitled to their costs of suit so far as the fund would go, before the defendants were paid any costs. *Cook* v. *Hart*, 41 L. J., Ch. 143; L. R. 12 Eq. 459; 24 L. T. 779; 19 W. R. 947.

A mortgagee of estates, on which the incumbrances were numerous and of a complicated nature, filed a bill for foreclosure and redemption, and by consent the estate was sold:—Held, that the costs of sale ought not to be paid, in the first place, out of the general fund, but that the money arising from the sale of each separately encumbered estate ought to be treated in the same manner as the estate itself would have been, and that the mortgagees ought to be paid their principal, interest and costs according to their respective priorities. *Wild* or *Lee* v. *Lockhart*, 10 Beav. 320; 16 L. J., Ch. 519.

Where, by consent of a mortgagee, property is sold by the court free from the mortgage security:—Semble, that the costs of other parties of the sale ought not to be paid out of the proceeds of sale in priority to the mortgage debt. *Mackinlay, In re, Ward* v. *Mackinlay*, 2 De G. J. & S. 358. *S. C.*, 34 L. J., Ch. 52; 10 Jur. (N.S.) 1063; 11 L. T. 326; 13 W. R. 65.

A first mortgagee filed a bill against the mortgagor and subsequent mortgagees, for a foreclosure, but at the hearing he consented to a sale. The proceeds being insufficient to pay the plaintiff his principal and interest, the court refused to give the defendants their costs, and directed the whole fund to be transferred to the plaintiff. *Upperton* v. *Harrison*, 7 Sim. 444.

**Costs of Concurrence of Puisne Mortgagee.**]—When at the instance of a mortgagee a decree is made for sale of the mortgaged property, and a puisne mortgagee concurs in a conveyance to a purchaser under the decree, such puisne incumbrancer is not entitled to any costs in respect of such concurrence unless the prior incumbrancer has been paid in full. *Wonham* v. *Machin*, 39 L. J., Ch. 789; L. R. 10 Eq. 447; 23 L. T. 479; 18 W. R. 1098.

**Mortgagor joining.**]—Where a mortgagor only joined in the sale of lands, the bill being for that end, he shall not pay costs. *Anon.*, 2 Eq. Abr. 237.

**Mortgagee joining.**]—Where lands subject to a mortgage had been sold under a decree, in a creditor's suit, the mortgagee joining in a conveyance of the lands freed from his mortgagee:—Held, that he was entitled to have the expenses of the actual sale, but no more, borne out of the proceeds of the sale, the costs and expenses being left to be defrayed out of the general assets. *Berry* v. *Hebblethwaite*, 4 K. & J. 80.

**Prior abortive Sale.**]—The money paid into court by a second mortgagee in order to obtain an order for sale under 15 & 16 Vict. c. 86, s. 48, is applicable to indemnify the first mortgagee for his costs in an abortive attempt to sell. *Corsellis* v. *Patman*, L. R. 4 Eq. 156; 16 L. T. 446; 15 W. R. 828.

W. was mortgagee of freehold hereditaments, and, by deposit of deed, of leasehold premises. The mortgagor died in 1837, having by his will bequeathed all his interest in the leasehold premises to E., and devised the freehold hereditaments to L., subject to the payment of the mortgage debt, and appointed E., L. and two other persons executors of the will. W.'s representative (the plaintiff) entered into possession of the freehold hereditaments, and, having on two occasions subsequently failed in his attempts to sell them, he filed a bill against the legatee, devisee and executors, seeking a foreclosure, or a sale of the property. At the hearing of the cause in 1854 the usual accounts were ordered, and a sale of the property was directed, and both the freeholds and leaseholds were sold under the direction of the court, but the proceeds of sale were insufficient to pay the debt found by the chief clerk to be due to the plaintiff. At the hearing, on further consideration, the court held that the four defendants were entitled to be paid their costs (one set as between solicitor and client) out of the fund realised by the sale of the property. *Macrae* v. *Ellerton*, 27 L. J., Ch. 777; 4 Jur. (N.S.) 967; 6 W. R. 851.

**Declining Inquiry.**]—A mortgagee of a 1,000 years' term filed a bill for foreclosure. At the hearing, by arrangement, a decree was made for the sale of the fee. It produced a little more than sufficient to pay the mortgage. The defendant declining an inquiry as to the value of the reversion in fee:—Held, that the plaintiff's costs had priority over those of the defendant. *Cutfield* v. *Richards*, 26 Beav. 241.

**Refusing Decree.**]—If a plaintiff mortgagee, praying by bill foreclosure of the mortgaged estates, and, in the alternative, a decree for sale thereof, with a direction for payment out of the proceeds of such sale of certain moneys advanced by him at the request of the defendants to pay debts, but not forming any part of the mortgage security, refuses to accept a decree for sale, the court will direct him to pay any additional costs occasioned, to certain of the defendants claiming charges on the estates subsequent to the plaintiff's security, by the allegation and prayer introduced into the bill, relating to such advances by the plaintiff and not forming part of the mortgage security. *Phillips* v. *Davies*, 12 L. J., Ch. 232.

**Equitable Mortgagee.**]—Where an equitable mortgagee by deposit institutes a suit merely to realise his security, and not for the administration of the general estate of the deceased mortgagor, and, a sale of the mortgaged property having been directed, the proceeds of the sale prove insufficient to satisfy both, the mortgagee is entitled to the payment of his debt, interest and costs before the payment of the costs of suit of a defendant, infant heir of the mortgagor; but the heir was allowed the costs of the vesting order under the Trustee Act of 1850. *Wade* v. *Ward*, 4 Drew. 602; 29 L. J., Ch. 42; 7 W. R. 542.

**Judgment Creditor.**]—In 1817 the defendant confessed a judgment; and in 1821 he mortgaged his estate as an additional security for the sum due on the judgment. The mortgagee filed a bill and obtained a decree for a foreclosure and sale, no incumbrances being proved under the decree to account. The purchaser under that decree having objected to the title, on the ground of the existence of judgments prior to the mortgage, the mortgagee called on the judgment creditors, by notice, to prove their demands under the decree, or that he would file a supplemental bill against them, and seek to charge them with the costs. Several creditors proved accordingly; and the fund was insufficient for payment of the demands proved:—Held, that the plaintiff was not entitled to the costs of the suit up to the final decree in the priority of his judgment. *Cooke* v. *Campbell*, 4 Ir. Eq. R. 431.

Semble, that, as the conusor of the judgment was alive, he would have been entitled to the costs of the suit in the priority of his judgment, had the judgment creditors voluntarily come in under the decree, and sought to have the benefit of it. *Ib.*

*See also next Sub-division.*

### 8. In Administration Suits.

**Generally.**]—Generally, the costs of a mortgagee are added to his security; under whatever rank or order the security stands, his costs are united to it, and form part of it; but, if he institute a suit for the administration of a deceased mortgagor, his costs are those of a plaintiff in an ordinary administration suit. *Wright* v. *Kirby*, 23 Beav. 463; 3 Jur. (N.S.) 851.

So far as administration proceedings are necessary to enable mortgagees to realise their security, mortgagees will be entitled to add to their security their administration costs in the action so far as they relate to their security, and be paid the same in priority to the administration costs of the mortgagor's executor. *Banks, In re, Daws* v. *Banks*, 75 L. T. 387; 45 W. R. 206.

In a simple administration suit instituted by a legal mortgagee, the balance of the proceeds of the mortgaged property will be applied in payment of the costs of suit of the personal representative in priority to the mortgagee's costs of realising the security. *Spensley, In re, Harrison* v. *Spensley*, 42 L. J., Ch. 21; L. R. 15 Eq. 16; 27 L. T. 600; 21 W. R. 95.

Where a mortgagee, instead of simply filing a bill to enforce his securities, institutes or adopts a suit for a general administration, and the estate proves deficient, the costs of the suit are to be paid, in the first instance, out of the estate. *Armstrong* v. *Storer*, 14 Beav. 535.

A mortgagee, filing a bill for the benefit of himself and the other creditors of the deceased, is entitled to payment of his mortgage-money out of the mortgaged estate before payment of the costs of suit. *Aldridge* v. *Westbrook*, 5 Beav. 188.

In a suit by legal mortgagees of real estate for sale of the mortgaged property, and for the general administration of the mortgagor's estate, the proceeds of the mortgaged property will be applied in payment to the mortgagees of their principal, interest and costs, in priority to the payment to devisees or executors, who had been made parties, of their costs of the suit. *Pinchard* v. *Fellows*, 43 L. J., Ch. 227; L. R. 17 Eq. 421; 29 L. T. 882; 22 W. R. 612.

In an administration suit by a simple contract creditor (whose debt was also secured by an equitable mortgage, which proved insufficient), the assets of the testator, being insufficient for payment of his debts and the costs of the suit, were applied (subject to a retainer by the executors of any debt due to them from the testator) in payment of the costs; first, of the executors (as between solicitor and client); secondly, of the plaintiff; thirdly, of the other defendants (devisees of the mortgaged estate); and, fourthly, of the debts, including any balance due to the plaintiff. *Tipping* v. *Power*, 1 Hare, 405; 11 L. J., Ch. 257; 6 Jur. 434.

In a creditors' suit, a puisne incumbrancer, who is a necessary party, and against whom a decree is made, but who, from the frame of the suit, cannot have relief under the decree, is not entitled to his costs against the plaintiff; the plaintiff to have them over with his demand out of the estate. *Joyce* v. *De Moleyns*, 3 Jo. & Lat. 698; 9 Ir. Eq. R. 576.

The dictum of the Master of the Rolls in *Croker* v. *Copley* (2 Moll. 471) denied to be law. *Ib.*

**Sale.**]—A defendant to a creditors' suit, being made a party as mortgagee with power of sale, and also as claiming to be entitled to two other mortgages on the estate, which were set aside, sold under his power, and received the purchase-money. Stuart, V.-C., then made an order in chambers, directing an account of the purchase-money, and of what was due to the defendant for principal, interest and costs, as mortgagee, other than the costs of the suit; and, after deducting such principal, interest and costs out of the moneys in his hands, payment of the balance to the plaintiffs:—Held, that the order was right, and that the defendant had no right to retain generally the costs of suit. *Wickenden* v. *Rayson*, 25 L. J., Ch. 641; 4 W. R. 443—L. C.

**Consenting to Sale.**]—In an administration suit, property was ordered to be sold free from a mortgage, with the consent of a mortgagee, and the money to arise from the sale was directed

to be paid in the first place to the mortgagee :—Held, that the cost of the other parties to the suit incurred in the sale ought not to be deducted from the sum paid to the mortgagee. *Ward* v. *Mackinlay*, 2 De G. J. & S. 358 ; 34 L. J., Ch. 52 ; 10 Jur. (N.S.) 1063 ; 11 L. T. 326 ; 13 W. R. 65.

The rule that a mortgagee consenting to a sale in a cause must submit to have the actual costs of sale paid out of the proceeds of that sale, questioned. *Ib.*

The mortgagee or incumbrancer, consenting to a sale of the mortgaged premises in an administration suit, does not thereby waive his right to be paid his principal, interest and costs, out of the moneys produced by the sale, in priority to the costs of the plaintiffs in the cause. *Hepworth* v. *Heslop*, 3 Hare, 484 ; 9 Jur. 796.

In a creditors' suit for administration, the property of the deceased was sold in lots, some of which were subject to a mortgage. The mortgagee, who had not proved as an ordinary creditor, and was returned in the chief clerk's certificate only as an incumbrancer, knew that the property was to be sold, and gave assistance in reference to title, &c. The lots subject to the mortgage did not realise sufficient to pay the amount due to the mortgagee, and the remainder of the assets was insufficient to pay the costs of suit, including those of the sale :—Held, that no part of the costs of the sale should be borne by the proceeds realised thereby. *Hilliard* v. *Moriarty*, [1894] 1 Ir. R. 316.

In a creditors' administration action the ordinary rule is that a mortgagee does not, by consenting to a sale of the premises mortgaged to him by the deceased, undertake to pay the costs of the sale in the event of there being a deficiency. *Ib.*

In a creditors' suit, a mortgagee consented to a sale, and the produce, which was insufficient to pay the mortgage, was paid into court :—Held, that the parties to the suit were not entitled to any costs of a petition presented by the mortgagee for payment out of the court of the fund to him. *Carr* v. *Henderson*, 11 Beav. 415 ; 18 L. J., Ch. 39.

**Proceedings by Leave of Court.**]—Where there were several successive mortgages created under a power in a will, and the plaintiff, having purchased the equity of redemption, files a bill for the general administration of the testator's estate, to which the first mortgagee is made a party, and does not object thereto, and in the course of such suit a receiver is appointed, and also some proceedings are by leave of the court taken for the protection of the estate against a hostile suit, the expense of which proceedings is directed to be paid in the first instance by the receiver out of the funds in his hands, without reference to the question out of what fund or by whom they shall ultimately be borne :—Held, that, though the estate ultimately turned out deficient, the costs of the litigation so directed were not to be paid in preference to the claim of the first mortgagee ; and the receiver was discharged. *Langton* v. *Langton*, 8 De G. M. & G. 30 ; 24 L. J., Ch. 625 ; 1 Jur. (N.S.) 1078 ; 3 Eq. R. 394 ; 3 W. R. 222.

**Taxation—Several Incumbrances upon One Share.**]—There being three sets of incumbrancers upon the share of one person entitled to a share under a will, in a suit for the administration of the same will, the three incumbrancers will only be allowed one set of costs ; but, each incumbrancer standing first upon some portion of the hereditaments included in the mortgagor's share, it was directed that the taxed costs should be divided between them equally. *Carter* v. *Carter*, 3 K. & J. 618 ; 27 L. J., Ch. 74 ; 4 Jur. (N.S.) 63.

**Accounts and Inquiries—Several Suits.**]—A decree was made in several mortgagees' and annuitants' suits, directing accounts and inquiries and appointing a receiver, and authorising him, as the judge should direct, to keep down the interest on the incumbrances and pay the annuities ; the costs of the several plaintiffs to be added to their securities. *Tyute* v. *Hodge*, 2 J. & H. 692.

—— **Prior Suit.**]—Prior incumbrancer coming in, in a subsequent creditors' suit, entitled in taking the account to be allowed the costs of the suit theretofore instituted by him for recovery of his demand, so far as incurred by him, he undertaking to discontinue further proceedings. *Farrer* v. *Brereton*, 2 Moll. 93.

**Proceeding on Bond.**]—A mortgagee proceeding on his bond against the personal estate :—Held, not entitled to the costs of the action as against the devisees. *Lewis* v. *John*, C. P. Cooper, 8 ; 9 Sim. 366 ; 7 L. J., Ch. 242.

**Legacy charged on Land—Suit to raise—Costs of Mortgagee of Devisee of Land.**]—Where legacy is charged on land, and price of land is insufficient to pay legacy, a mortgagee of devisee of lands shall not be allowed his costs in a suit against him and devisee, for raising and payment of the legacy. *Shackleton* v. *Shackleton*, 2 Sim. & S. 242 ; 3 L. J. (O.S.) Ch. 141.

**Bill by Administrator against Intestate's Solicitor—Mortgagee.**]—A bill was filed by an administrator against the solicitor of the intestate who claimed a mortgage on his estate and against others for administration, and to ascertain the mortgage. The solicitor claimed 1,492*l.*, but his mortgage debt was ascertained to be 924*l.* only. The assets consisted nearly wholly of the produce of the mortgaged estate :—Held, that the costs of the suit were first payable out of that fund. *White* v. *Gudgeon*, 30 Beav. 545.

**Mortgage by Administratrix—Costs of Mortgagee in Suit.**]—An administratrix borrowed money for the repairs of a leasehold house, and secured the repayment by a mortgage of the shares of herself and another party in the beneficial interest. The mortgagee was made a party to a suit for the administration of the estate :—Held, that his costs could not be paid out of the estate. *Scurrah* v. *Scurrah*, 2 W. R. 53.

9. BANKRUPTCY.

**Generally.**]—See, as to costs of assignee of bankrupt, *Lahey* v. *Bell*, 5 Ir. Eq. R. 108.

Defendant, assignee of bankrupt :— Held, under the circumstances of the case, not entitled to receive costs, though not liable to pay costs. *Edwards* v. *Jones*, 1 Coll. C. C. 247 ; 13 L. J., Ch. 371 ; 8 Jur. 416.

**Costs of Assignee of Mortgagor.**]—Where a suit for foreclosure was instituted by first mortgagees against the assignees of the mortgagor, who was a bankrupt, and second mortgagees, and the assignees, by their answer, stated that



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there were no assets, and consented to a foreclosure, but claimed their costs:—Held, that they were not entitled to their costs. *Grant* v. *Allen*, 3 Jur. 840.

In a creditors' suit against the administrator of an intestate, and against the assignees of the administrator, who afterwards became bankrupt, no costs of the suit were given to either the bankrupt or his assignees:—Held, also, that the assignees were not entitled to the costs of a petition which had been served on them by an equitable mortgagee, not a party to the suit, praying payment to him out of court of moneys arising from the sale of the mortgaged estate which were not sufficient to pay the principal and interest moneys, and to the sale of which he had consented. *Carr* v. *Henderson*, 11 Beav. 415; 18 L. J., Ch. 39.

**Official Assignee—Creditors' Assignee.**]—The official assignee and the creditor's assignee of a bankrupt, who are necessary parties to a suit for foreclosure in respect of their interest in the equity of redemption of premises of which the bankrupt was the mortgagor, and which are an insufficient security for the amount of the mortgages thereon, are not entitled to their costs of the suit from the plaintiff. *Cash* v. *Belcher*, 1 Hare, 310; 11 L. J., Ch. 196; 6 Jur. 190.

**Provisional Assignee.**] — The provisional assignee of the insolvent court, made a defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs as the insolvent debtor himself would have been. *Appleby* v. *Duke*, 1 Hare, 303. Affirmed, 1 Ph. 272; 13 L. J., Ch. 9; 7 Jur. 985.

—— **In Foreclosure.**] — The provisional assignee of a bankrupt mortgagor is not entitled to his costs against the mortgagee, the plaintiff in a foreclosure suit. *Hughes* v. *Kelly*, 2 Con. & L. 223; 3 Dr. & War. 482. And see *S. C.*, 5 Ir. Eq. R. 286. S. P., *Appleby* v. *Duke*, 1 Ph. 272; 13 L. J., Ch. 9; 7 Jur. 985. Affirming 1 Hare, 303.

The statute 1 & 2 Vict. c. 110, s. 68, does not make it the duty of a mortgagee, as against the provisional assignee of an insolvent mortgagor, to obtain an order from the commissioners of the insolvent debtors court for a conveyance of the equity of redemption; and an offer by the provisional assignee to facilitate the proceedings in such an application does not entitle him to his costs in a suit subsequently instituted against him for foreclosure. *Grigg* v. *Sturgis*, 5 Hare, 93; 10 Jur. 133.

In a foreclosure suit, to which the provisional assignee of the insolvent debtors court is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the plaintiff, who will add them, along with his own costs, to the sum due on the mortgage. *Peake* v. *Gibbon*, 2 Russ. & M. 354; Tam. 505; 9 L. J. (o.s.) Ch. 168. S. P., *Boswell* v. *Tucker*, 1 Beav. 493, and *Sproule* v. *Oates*, 2 Ir. Eq. R. 323.

In a foreclosure suit, the mortgagor having been discharged under the insolvent debtors act, and the provisional assignee being a defendant, the court refused to order the plaintiff to pay and add to his demand the costs of the provisional assignee, as such defendant. *Betham* v. *Mitchell*, 5 Ir. Eq. R. 218.

—— **On Bill to set aside Mortgage.**]—The provisional assignee, under the insolvent debtors act, was made a defendant to a bill of which the object was to set aside a mortgage security, taken by the insolvent from the plaintiff:—Held, under the circumstances of the case, that the assignee was not entitled to receive the costs of the suit from the plaintiff. *Rider* v. *Jones*, 2 Y. & C. C. C. 329.

**Costs of Mortgagee.**]—Semble, a mortgagee is entitled to the costs of a foreclosure suit, prosecuted by him after a notice from the assignee of the mortgagor, a bankrupt, requiring him to proceed to sell the mortgaged premises, under the general order in bankruptcy in 1832. *Burnard* v. *Sadleir*, 4 Ir. Eq. R. 61.

Held, that the mortgagee was entitled to the costs of the suit, the notice from the assignee not offering to pay him the costs incurred up to the time of service on him. *Ib.*

Where a mortgagee unnecessarily files a bill for foreclosure subsequently to the bankruptcy of the mortgagor, he will not get more costs than he would have got by proceeding in the matter of the bankruptcy. *Hogan* v. *Baird*, 4 Dr. & War. 296.

Where, after bill of foreclosure filed, plaintiff becomes insolvent, costs of assignee, afterwards made defendant, must be paid by plaintiff: he cannot throw them on mortgagor. *Horam* v. *Woolonghan*, Beat. 1.

The assignee of an insolvent mortgagor was made a party to a suit to foreclose the mortgage, and died in the progress of it; there was no property of the mortgagor, except the mortgaged premises; and the plaintiff, in order to induce a creditor of the mortgagor to become his assignee, undertook to pay him his costs in the suit:—Held, that the plaintiff was entitled to those costs as part of his own costs of suit. *Maxwell* v. *Smyth*, Jon. & C. 72. S. P., *Maxwell* v. *Scanlan*, 1 Ir. Eq. R. 277, n.

**Equitable Mortgagee.**]—In equity an equitable mortgagee, though the mortgage be without a written memorandum, will be allowed his costs as against the assignees of the mortgagor, who had taken the benefit of the insolvent act. *Reg.* v. *Chambers*, 4 Y. & C. 54.

*See also next Sub-division.*

### 10. Disclaimer.

**Generally.**]—The defendants in a foreclosure suit, properly disclaiming, are entitled to their costs. *Silcock* v. *Roynon*, 2 Y. & C. C. C. 376; 7 Jur. 548.

A defendant to a foreclosure action, who was originally properly made a party, is entitled to his costs incurred subsequently to his making a proper offer to disclaim. *Green* v. *Foster*, 52 L. J., Ch. 470; 22 Ch. D. 566; 48 L. T. 411; 31 W. R. 285.

In a suit for foreclosure a party interested in the equity of redemption disclaimed, and stated he did not, and never did, claim any interest. The bill being brought to a hearing:—Held, he was not entitled to his costs. *Buchanan* v. *Greenway*, 11 Beav. 58.

In a suit for foreclosure, the assignees of a mortgagor disclaimed and offered to dismiss without costs. The plaintiffs having brought them to a hearing, were ordered to pay their costs subsequently to the disclaimer. *Davis* v. *Whitmore*, 28 Beav. 617; 6 Jur. (N.S.) 880; 8 W. R. 596.

Where after a bill filed, but before service of a copy of the bill, a defendant undertakes to appear, and disclaims, he is entitled to his costs. *Ward* v. *Shakeshaft*, 8 W. R. 335.

Where an assignee of a mortgagor is made a defendant to a suit, and undertakes to appear, but before appearance disclaims, but is still continued on the records and puts in his answer, he is entitled to his costs. *Ib.*

**Rules as to.**]—Rules as to the right of a disclaiming defendant to costs in foreclosure suits. If a disclaiming defendant shews that he never had and never claimed any interest, or, having an interest, that he had disclaimed or offered to disclaim before the institution of the suit, he is entitled to his costs. But if, having an interest, he neither disclaims, nor offers to disclaim till he puts in his disclaimer, he is not entitled. These rules prevail, though the plaintiff never applied to the defendant to disclaim prior to the institution of the suit. In a foreclosure suit by second mortgagee, a subsequent judgment creditor, by his answer, disclaimed all interest, and stated that he had never been applied to by the plaintiff to disclaim, previously to the filing of the bill; but he did not add that, if he had been so applied to, he would have disclaimed, or that he had never claimed an interest:—Held, that he was not entitled to his costs from the plaintiff. Where, in consequence of a replication being filed, a disclaiming defendant is compelled to go into evidence in support of his answer, the plaintiff must pay his costs, but not otherwise. *Ford* v. *Chesterfield* (*Earl*), 16 Beav. 516; 22 L. J., Ch. 630; 1 W. R. 217.

In suits for redemption to entitle a defendant, who has never claimed an interest, to his costs, he is not bound to shew that he has disclaimed, or given notice to that effect, before he was made a defendant to the suit. *Bellamy* v. *Brickenden*, 4 K. & J. 670.

A devisee of mortgaged estates, in a suit for redemption, disclaimed after the suit had been revived against him, denying that he ever had or claimed any interest:—Held, that he was entitled to costs, notwithstanding persons who had acted as his solicitors in other matters, on being applied to by plaintiff before he was made a defendant, to know whether he claimed an interest, had neglected to return any answer to such application. *Ib.*

The rules laid down in *Ford* v. *Chesterfield* (*Earl*) (16 Beav. 520), as to costs of disclaiming defendants in suits for foreclosure or redemption, approved. *Ib.*

**By Second Mortgagee.**]—In a foreclosure suit by the first mortgagee against a second mortgagee and the mortgagor, the second mortgagee disclaimed, and was brought to the hearing of the cause by the plaintiff:—Held, that the plaintiff was bound to pay the disclaiming party his costs, and was entitled to add them to the mortgage debt. *Dalton* v. *Lambert*, 15 L. J., Ch. 208.

Where, on a bill of foreclosure by a first mortgagee against a second mortgagee and the mortgagor, the second mortgagee by his answer disclaimed, yet the plaintiff brought the second mortgagee to the hearing, no costs were given to the second mortgagee on the decree against him, upon the preponderance of modern decisions, though formerly the practice was to give such disclaiming second mortgagee defendant his costs, the plaintiff adding such costs to his own. *Ohrly* v. *Jenkins*, 1 De G. & Sm. 543; 17 L. J., Ch. 22; 11 Jur. 1001.

In a foreclosure suit by a first mortgagee against the mortgagor and puisne incumbrancers, the plaintiff alleged that application had been made to the defendants to pay the debt, interests and costs, but that they had refused so to do. The second mortgagees, by their answer and disclaimer, alleged that no application had been made to them, but that had they been applied to, they would have released and discharged all interest. On the suit being brought to a hearing:—Held, they were entitled to their costs. *Gurney* v. *Jackson*, 1 Sm. & G. 97; 22 L. J., Ch. 417; 17 Jur. 204; 1 W. R. 91.

Foreclosure bill against mortgagor and second mortgagee. After bill filed the second mortgagee stated that he had been paid off, and offered to disclaim at the plaintiff's cost. This was refused, and the second mortgagee filed a disclaimer:—Held, that he was entitled to his costs. *Day* v. *Gudgen*, 45 L. J., Ch. 263; 2 Ch. D. 209; 24 W. R. 425.

—— **Appearing after Disclaimer.**]—A first mortgagee brought an action for foreclosure against the mortgagor and a number of subsequent incumbrancers, of whom G. was one. G. put in a defence disclaiming all interest and consenting to be dismissed without costs. It was admitted that G. had had an interest, and was properly made a party to the action. The plaintiff, instead of obtaining the common order to dismiss, served G. with notice of motion for judgment for a foreclosure decree against him. G. appeared at the hearing:—Held, that it was unnecessary for him to appear, and he was not entitled to his costs. *Lewin* v. *Jones*, 53 L. J., Ch. 1011; 51 L. T. 59. S. P., *Clarke* v. *Toleman*, 42 L. J., Ch. 23; 27 L. T. 599; 21 W. R. 66. Also *Land* v. *Wood*, 1 L. J. (o.s.) Ch. 89.

**By Assignee of Insolvent Mortgagor.**]—The assignee of an insolvent mortgagor, who by his answer to a bill of foreclosure disclaimed, and before the bill was filed had consented to join in conveying the estate to the mortgagor, and had distributed the insolvent's estate among the creditors, was ordered at the hearing to be paid his costs of the suit by the plaintiff. *Thompson* v. *Kendall*, 9 Sim. 397; 9 L. J., Ch. 318; 4 Jur. 551.

Assignees of an insolvent mortgagor are not entitled to the costs of a suit for foreclosure, though they, by their answer, disclaim, and say that if they had been applied to they would have released the equity of redemption. *Collins* v. *Shirley*, 1 Russ. & M. 638.

So the assignees of a bankrupt mortgagor. *Ford* v. *White*, 16 Beav. 120.

In a suit for foreclosure, the assignees of the mortgagor disclaimed and offered to be dismissed without costs:—Held, that, as he had not disclaimed before suit, he must bear his own costs. *Clarke* v. *Toleman*, 21 W. R. 66.

—— **Sub-mortgagor.**]—The assignee in insolvency of a sub-mortgagor disclaimed:—Held, that he was not entitled to his costs. *Staffurth* v. *Pott*, 2 De G. & Sm. 571.

**By Provisional Assignee of Mortgagor.**]—In a suit by a second mortgagee, to foreclose and redeem, certain defendants, including the provisional assignee of the insolvent mortgagor, disclaimed. They were, however, brought to a

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hearing, and, it then appearing that there was insufficient to pay the first mortgage, the plaintiff declined taking the account. The bill was dismissed as against the disclaiming defendants, without costs, and the first mortgagee, alone, was held entitled to his costs. *Gibson* v. *Nicol*, 9 Beav. 403 ; 15 L. J., Ch. 195 ; 10 Jur. 419.

A mortgagor having taken the benefit of the insolvent act, the provisional assignee was made a defendant in a suit to foreclosure. He put in an answer claiming no interest in the premises : —Held, that the plaintiff ought to pay him his costs, and add them to his debt. *Woodward* v. *Haddon*, 4 Sim. 606 ; 1 L. J., Ch. 106.

In a foreclosure suit against an insolvent mortgagor, and the provisional assignee of the Insolvent Court who claims no interest, the plaintiff must pay the costs of the assignee, and add them to his debt. *Wearing* v. *Count*, 6 Sim. 439.

**By Official Assignee.**]—An official assignee, who is made a defendant to a foreclosure suit, is not entitled to have his costs from the plaintiff, even though by his answer he claimed no interest except as assignee, and disclaimed at the hearing, and has no assets of the bankrupt's estate in his hands. *Clark* v. *Wilmot*, 13 L. J., Ch. 10. Reversing 1 Y. & C. C. C. 53.

In a foreclosure suit the official assignee of the mortgagor, having been made a party to the suit and served with the bill and interrogatories, wrote to say that he claimed no interest whatever in the subject-matter of the suit, and that, if an answer was insisted upon, he should apply for costs against the plaintiff. The interrogatories not having been withdrawn, the official assignee put in an answer and disclaimer, and applied at the hearing for his costs :—Held, that, as he had not been content simply to disclaim, but had put in an answer and appeared for the purpose of claiming his costs, he was not entitled to any costs. *Maxwell* v. *Wightwick*, L. R. 2 Eq. 210 ; 15 W. R. 304.

**By Creditors.**]—Where a creditor defendant puts in an answer, and subsequently by affidavit disclaims, he is not entitled to his costs. *Ward* v. *Shakeshaft*, 8 W. R. 335.

**By Judgment Creditors.**]—Where a judgment creditor is made a defendant to a suit and is aware of the fact, and disclaims by answer, he is not entitled to his costs. *Ib.*

Other judgment creditors were made defendants, who, after issuing execution, had assigned away all their interests before bill filed, and disclaimed by their answer :—Held, that they were entitled to their costs. *Cork (Earl)* v. *Russell*, 41 L. J., Ch. 226 ; L. R. 13 Eq. 210 ; 26 L. T. 230 ; 20 W. R. 164.

In a suit instituted for the redemption of prior and the foreclosure of subsequent incumbrances, creditors by judgment and by deposit of title deeds, who had parted with their interest in the securities before they were made parties to the suit, put in their respective answers, disclaiming all interest in the estates mortgaged :—Held, that they were entitled not only to the general costs of the suit, but also to the costs of the evidence which one of them had gone into in support of the statements in his answer, which had been replied to. *Hurst* v. *Hurst*, 22 L. J., Ch. 546 ; 1 W. R. 105.

In a foreclosure suit by mortgagees, judgment creditors, who had not issued execution, were made defendants :—Held, that they were unnecessary parties, and, having disclaimed all interest upon being served with copy of the bill, they were dismissed with costs. *Cook* v. *Hart*, 41 L. J., Ch. 143 ; L. R. 12 Eq. 459 ; 24 L. T. 779 ; 19 W. R. 947.

C., a judgment creditor of a mortgagor, was made a defendant in a foreclosure suit, and he then wrote, stating that he did not claim any interest in the property, and that he was willing to consent to be dismissed without costs. The plaintiff refused, and required an answer, and C. disclaimed by his answer. On motion of the plaintiff to dismiss without costs, the court ordered the bill to be dismissed without costs, except those properly incurred since the filing of the answer. *Gowing* v. *Mowbray*, 9 Jur. (N.S.) 844 ; 8 L. T. 531 ; 11 W. R. 851.

**By Satisfied Mortgagee.**]—A defendant, who had been a mortgagee of the equity of redemption of the property, disclaimed by his answer, stating that his mortgage had been satisfied before the bill was filed, and that, if any application had been made to him before making him a party, he would then have disclaimed :—Held, that he was entitled to his costs. *Hiorns* v. *Holtom*, 16 Beav. 259 ; 16 Jur. 1077.

**By Assignee of Tenant for Life.**]—In a foreclosure suit, brought by mortgagees, amongst other parties the assignees of a tenant for life who had executed the mortgage deed, the assignees, by their answer, stated that before, and since, the filing of the bill they had offered to the plaintiffs to disclaim by deed, and they disclaimed by their answer :—Held, that the assignees were entitled to their costs. *Lock* v. *Lomas*, 15 Jur. 162.

**By Trustee whose Title is Rescinded—Neglect to give Notice.**]—In 1870, certain chambers in Gray's Inn were, by deed, assigned for the residue of a term of years to A. in trust for B. In 1871 B. mortgaged his interest in the chambers to the plaintiff, who gave notice of her mortgage to A. A.'s name was never substituted for that of the assignor in the books of the society, and, by an order of pension made in 1873, a previous order, permitting the assignment to A., was rescinded. A. gave no notice of this latter order to the plaintiff. To a foreclosure bill filed in 1874, by the plaintiff, A. put in an answer and disclaimer, and claimed to be dismissed with costs :—Held, that A., as he had given the plaintiff no notice of the order of pension made in 1873, was not entitled to any costs. *Slipper* v. *Gough*, 36 L. T. 92.

**By necessary Party.**] — A first mortgagee having notice that A., a second mortgagee, had agreed, for valuable consideration, to transfer his mortgage to B., but had not executed a transfer, made A. a defendant to a foreclosure suit. Before appearing, and again immediately after appearing, A. told the plaintiff that he had no interest in the property, and offered to disclaim, and, being served with interrogatories, he put in an answer and disclaimer. Afterwards he executed a transfer of his mortgage to B., and the plaintiff then offered to dismiss the bill against him without costs :—Held, that A., until he executed the transfer, was a necessary party, and that he was not entitled to his costs. *Roberts* v. *Hughes*, L. R. 6 Eq. 20.

**By Trustee refusing to act.**]—A trustee put in a disclaimer to a bill of foreclosure, and set out a

correspondence to shew that he had always refused to act:—Held, entitled to the whole costs, for plaintiff might have shewn by the bill that a single disclaimer was sufficient. *Benbow* v. *Davies*, 11 Beav. 369.

**By Annuitants.**]—A testator charged all his real estate, with certain annuities, to two of his daughters. The plaintiffs became entitled, by the events which had happened, to three fourth parts of this real estate; other parties were entitled to the remaining fourth part. The testator had not directed any apportionment of his estate, and the annuities were consequently charged upon the entirety. The bill prayed a partition of the hereditaments devised. The daughters were made parties to the cause:—Held, that the daughters were not bound to disclaim, and were entitled to their costs of suit. *Hixon* v. *Eastwood*, 17 L. T. 489.

**By refusing Devisee.**]—A mortgaged estate was devised to A. B., who, however, did not accept the devise, or claim any benefit under the will. In a suit by the mortgagee to foreclose, A. B. was made a defendant, and he disclaimed:—Held, that A. B. was entitled to his costs, to be paid by the plaintiff. *Higgins* v. *Frankis*, 20 L. J., Ch. 16; 15 Jur. 277.

**Form.**]—The proper form of a disclaimer, to entitle the defendant to costs against the plaintiff, is a disclaimer of all right and interest, legal and equitable; and that the defendant does not and never did claim; therefore, where, in a foreclosure suit, a defendant states in her answer simply that she "disclaims" all right and interest, and the plaintiff afterwards discovers that such defendant has, in fact, no interest, and amends his bill so as to shew that fact:—Held, that the defendant is not entitled, on the bill being dismissed as against her, to have it dismissed with costs. *Vale* v. *Meredith*, 18 Jur. 992.

### 11. Of Transfer.

**By Mortgagee without Mortgagor.**]—When the interest of a mortgage is regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer of the mortgage, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him. *Radcliffe, In re*, 22 Beav. 201; 2 Jur. (N.S.) 387.

**Of Fruitless Journey.**]—A solicitor, acting for a third mortgagee, negotiated for a transfer of the first mortgage, and had proceeded so far as to send the drafts. He took a journey into the country to complete the matter, which proved fruitless; and having previously received an intimation that the second mortgagee had already obtained a transfer of the first mortgage, the costs of the journey were, on taxation, disallowed, on the ground that, after that intimation, he ought to have obtained his client's sanction before incurring the expense. *Price, In re*, 9 Beav. 234.

### 12. Assignment Pendente Lite.

**Of Assignee of Mortgagor.**]—The assignee of the mortgagor's interest, pendente lite, may be allowed to attend the master under a reference in a foreclosure suit, upon payment of the costs of the application and of all costs occasioned by such attendance. *Whitehurst* v. *Bonest*, 9 L. J., Ex. Eq. 43.

**Of Assignee of Mortgagee.**]—Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill which is necessary to bring the assignee of the mortgagee before the court. *Barry* v. *Wrey*, 3 Russ. 465; 27 R. R. 111.

The plaintiff in a foreclosure suit having after decree assigned his interest, the assignee must pay the costs of an order to revive under the 15 & 16 Vict. c. 86, s. 52. *James* v. *Harding*, 24 L. J., Ch. 749; 3 W. R. 474.

A mortgagee filed a bill of foreclosure, and pending the suit transferred the mortgage to A. B., who transferred it to C. D.:—Held, that the extra costs thus occasioned were not to be charged against the mortgagor. *Coles* v. *Forrest*, 10 Beav. 552.

Pending a suit by a first mortgagee to foreclose, the plaintiff obtained a transfer from the second mortgagee:—Held, that the costs occasioned were chargeable against the estate. *Ib.*

Although, generally, an incumbrancer, who assigns or mortgages his charge, after decree, must pay the additional expenses thereby occasioned, yet, where the incumbrancer was tenant for life of the estates, who had paid off charges upon it, and it appeared that he had delayed enforcing his claim for the benefit of the family, the court ordered the additional costs occasioned by his assigning his interest to be paid out of the estate. *Selby* v. *Selby*, 2 Jur. 106.

### 13. Of Appeal.

**By Mortgagee.**]—When a mortgagee appeals, and the decision is reversed, he will be allowed to add his costs of appeal to his mortgage charge. *Addison* v. *Cox*, 42 L. J., Ch. 291; L. R. 8 Ch. 76; 28 L. T. 45; 21 W. R. 180.

—— **Overstating Charge.**]—Appeal from a decree disallowing costs of redemption suit to mortgagees, who had overstated the balance due on their mortgage, and refused to furnish accounts to mortgagors except on payment of expenses of so doing:—Held, that the mortgagees were entitled to have their costs of appeal. *Norton* v. *Cooper*, 5 De G. M. & G. 728; 2 W. R. 659.

Where, in a redemption suit, mortgagees had overstated the amount due to them but, it was held, there was nothing in their conduct which would deprive them of the right to add their costs of the suit to their security:—Held, also, that in such a case an appeal as to costs might be maintained; and that the costs of the appeal might be included in the costs of the suit. *Cotterell* v. *Stratton*, 42 L. J., Ch. 417; L. R. 8 Ch. 295; 28 L. T. 218; 21 W. R. 234.

### 14. Scale.

**Sum under £1,000.**]—In a suit to redeem a mortgage, when the amount due at the time of filing the bill is under 1,000*l.*, notwithstanding that the mortgage was made to secure a larger amount, the defendant's costs must be taxed on the lower scale. *Cotterell* v. *Stratton*, L. R. 17 Eq. 543.

**County Court.**]—In an action to foreclose a mortgage for 65*l.* 18*s.* 10*d.*, where both plaintiff and defendant lived at the same place:—Held, that the plaintiff was entitled only to such costs as he would have obtained in the county court. *Simons* v. *McAdam* (L. R. 6 Eq. 324) followed

*Crozier* v. *Dowsett*, 55 L. J., Ch. 210; 31 Ch. D. 67; 53 L. T. 592; 34 W. R. 267.

15. TAXATION.

**At Instance of Mortgagor.**]—The bill of costs of a mortgagee's solicitor, for business done in relation to the mortgage, and the sale of the mortgaged estate, is taxable at the instance of the mortgagor, under the 6 & 7 Vict. c. 73, though no part of the business may have been transacted in any court of law or equity. *Lees, In re*, 5 Beav. 410; 13 L. J., Ch. 151.

The taxation of the bill of a mortgagee's solicitor, at the instance of the mortgagor, takes place as between the solicitor and the mortgagee, his client. *Harrison, In re*, 10 Beav. 57; 16 L. J., Ch. 170; 11 Jur. 197. S. P., *Wells, In re*, 8 Beav. 416; 14 L. J., Ch. 215; 9 Jur. 820.

**Where Mortgagee Solicitor.**]—A., a solicitor, being one of three mortgagees, arranged with another solicitor, B., to "act as his agent" in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. 100*l.* as his share of the profits. After this, on the application of second incumbrancers, the bill was taxed:—Held, that the taxing-master was right in taxing it on the principle of solicitor and agent, for the agreement between A. and B. was valid, though it enured to the benefit of the mortgagees; and that the bill was properly taxable at the instance of the second incumbrancers, as between them and B. *Taylor, In re*, 18 Beav. 165; 23 L. J., Ch. 857; 18 Jur. 666; 2 W. R. 249.

A decree in a redemption suit directed that solicitors, who were mortgagees, and who acted for themselves, should be allowed their principal, interest and costs, and the master allowed full costs. A motion for an order to review the taxation on the ground that the costs out of pocket only ought to have been allowed was refused, but without costs, there having been no objection to the form of the decree at the hearing. *Price* v. *M'Beth*, 33 L. J., Ch. 460; 10 Jur. (N.S.) 579; 10 L. T. 521; 12 W. R. 818.

**Redemption of First Mortgagee after Foreclosure.**]—The second mortgagee brings a bill to redeem the first mortgagee, who had been put to a great charge in foreclosing the mortgagor:—Held, the costs which the first mortgagee has been put to shall not be taxed as in case of an adversary's suit, but he shall be allowed all his costs and charges as is done in case of a solicitor who lays out money for his client, and the profits of the mortgaged premises shall be first applied to pay off those costs before they go to sink the principal. *Lomax* v. *Hide*, 2 Vern. 185.

**As to Taxation generally.**]—*See* COSTS—SOLICITOR.

16. UNDER 7 GEO. 2, C. 20.

**How Taxable.**]—In taxing costs under 7 Geo. 2, c. 20, in an ejectment by a mortgagee for the recovery of the mortgaged premises, costs are to be allowed as between party and party, and not as between attorney and client. *Doe* d. *Capps* v. *Capps*, 5 D. P. C. 634; 3 Bing. (N.C.) 768; 4 Scott, 468; 3 Hodges, 136; 6 L. J., C. P. 237; 1 Jur. 357.

A. L.

## MORTMAIN.

*See* CHARITY.

## MORTUARY.

*See* ECCLESIASTICAL LAW.

## MOTION.

*See* PRACTICE.

## MUNICIPAL CORPORATION.

*See* CORPORATION.

**Elections.**]—*See* ELECTION LAW.

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**Copyright in.**]—*See* COPYRIGHT.

**Licence for.**]—*See* DISORDERLY HOUSE.

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## MUTUAL CREDIT.

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## MUTUAL WILL.

*See* WILL.

END OF VOLUME IX.

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